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SUPREME COURT OF NORTH CAROLINA

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OF
NORTH CAROLINA

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	Karen Eady-Williams	Charlotte
	Donnie Hoover[3]	Charlotte
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	George Bell	Charlotte
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	Kimberly Best[4]	Charlotte
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	Jesse B. Caldwell, IV	Gastonia
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28	Alan Z. Thornburg	Asheville
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William Z. Wood, Jr.	Lewisville

[1]Retired 31 December 2021. [2]Became Senior Resident Judge 1 January 2022. [3]Retired 30 November 2021. [4]Appointed 7 December 2021. [5]Appointed 10 December 2021. [6]Sworn in 10 January 2022. [7]Appointed 18 May 2021. [8]Appointed 1 April 2021. [9]Appointed 16 August 2021.

DISTRICT COURT DIVISION

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	Lindsey L. McKee	Wilmington
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Larry J. Wilson[45]	Shelby

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Charles M. Vincent	Greenville

[1]Resigned 9 April 2021. [2]Sworn in 2 September 2021. [3]Sworn in 1 January 2021. [4]Sworn in 30 April 2021. [5]Retired 31 October 2021. [6]Became Chief District Court Judge 1 November 2021. [7]Resigned 31 December 2021. [8]Retired 31 May 2021. [9]Sworn in 16 December 2021. [10]Became Chief District Court Judge 1 August 2021. [11]Sworn in 12 February 2021. [12]Sworn in 28 May 2021. [13]Retired 5 January 2022. [14]Retired 31 August 2021. [15]Sworn in 24 November 2021. [16]Sworn in 14 April 2021. [17]Sworn in 14 April 2021. [18]Resigned 31 August 2021. [19]Sworn in 1 January 2022. [20]Resigned 31 March 2021. [21]Sworn in 16 July 2021. [22]Sworn in 9 April 2021. [23]Died 21 November 2021. [24]Resigned 31 December 2018. [25]Resigned 21 December 2016. [26]Resigned 31 December 2019. [27]Became Chief District Court Judge 1 November 2021. [28]Became Chief District Court Judge 11 August 2021. [29]Retired 31 July 2021. [30]Became Chief District Court Judge 1 August 2021. [31]Sworn in 30 September 2020. [32]Sworn in 17 December 2021. [33]Sworn in 3 December 2021. [34]Sworn in 2 June 2021. [35]Sworn in 18 June 2021. [36]Resigned 6 December 2021. [37]Resigned 10 December 2021. [38]Resigned 31 December 2020. [39]Sworn in 14 June 2021. [40]Sworn in 8 January 2021. [41]Resigned 31 December 2021. [42]Sworn in 27 May 2021. [43]Sworn in 1 June 2021. [44]Retired 2 July 2021. [45]Sworn in 17 March 2021. [46]Resigned 10 January 2022. [47]Appointed 2 April 2021. [48]Appointed 2 February 2021. [49]Appointed 24 December 2019. [50]Appointed 1 June 2019. [51]Resigned 22 February 2021. [52]Sworn in 9 February 2021. [53]Sworn in 17 May 2021. [54]Resigned 26 January 2021.

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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).

CROSS-REFERENCE TABLE

Case	N.C. Reports citation	Universal parallel citation
In re M.J.M.	378 N.C. 477	2021-NCSC-100
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Peyton Michelle Coleman ..... Wilmington
Barbara Chennell Coleman ..... Charlotte
Mireya Colin ..... Henderson
Tarra Kathryn Collins ..... Greensboro
Ryan Michael Collins ..... Cary
Bria Cameron Colon ..... Pikeville
Alton Eugene Combs III ..... Kinston
Summer Loren Combs ..... Fayetteville
Kyle Compton ..... Raleigh
Victoria Charlene Corey ..... Greensboro
Courtney Caylyn Cornelius ..... Boone
Hunter David Cornelius ..... Raleigh
Kathryn E. Cox ..... Charlotte
Shelley Brown Cridlin ..... Fletcher
Tyler Jeremey Crima ..... Wilmington
Brittany Lane Crimmins ..... Winston-Salem
Alyson Crosbie ..... Bradenton, FL
Jacqueline Childers Crutcher ..... Raleigh
Kelsey Cullinan Reed ..... San Antonio, TX
Katheryn Marie Currie ..... Charlotte
Morgan Clara Cutright ..... Cary
Tahlia Cypress ..... Raleigh
DeLisa Levette Daniels ..... Greensboro
Taylor Morgan Dant ..... Woodbridge, VA
Rebecca Marie Dattilo ..... Chesapeake, VA
Timothy Devin Daugherty ..... Greensboro
Suzannah Kay Davidson ..... Raleigh
Samuel Jacob Davis ..... Durham
Lauren Elizabeth Davis ..... Cary
Nathaniel Davis ..... Sapphire
Stewart Addison Day ..... Winston-Salem
Johnell Bryce Daye III ..... Wendell
Jordan Timms DeJaco ..... Charlotte
Ania Gabriella DeJoy ..... Raleigh
Christopher Jason deLambert ..... Sanford

Gabrielle Marie DeLeon ..... Charlotte
Emily Nicole Deliz ..... Port Orchard, WA
Laura Ashleigh Della Badia ..... Raleigh
Tyler Demery ..... Raleigh
Andrew Ryan Denoff ..... Greensboro
Peyton Linley Derrow ..... Youngsville
Jonathan Teal Dickerson ..... Durham
Robert Charles DiDomenico III ..... Chapel Hill
Taryn Fay DiPalma ..... Durham
Taylor Lynn Distefano ..... Williamsburg, VA
Amanda Gray Dixon ..... Raleigh
Vincent Anthony Doa II ..... Charlotte
Jenna Christine Donald ..... Raleigh
Ryan Thomas Dovel ..... Winston-Salem
John Joseph Dowling III ..... Huntersville
Ethan Wesley Draper ..... Charlotte
Darrett David Drayton Jr. ..... Fort Mill, SC
Clark R. Drummond ..... Raleigh
Samantha Dudley ..... Mint Hill
Jacob Dumas ..... Winston-Salem
Allison Hopkins Dunlap ..... Kernersville
Morgan Rae Dunn ..... Dunn
Allison McKenzie Dunsford ..... Huntersville
Kjirsten C. Durand-Johnson ..... Greensboro
Craig Lawrence Dye ..... Snow Camp
Alexander Izaak Earnhardt ..... Providence, RI
Anthony Bradley Eben III ..... Asheville
Davis Alexander Eblen ..... Jackson, TN
McKenzie Blaine Ehrhardt ..... District of Columbia
David Holding Eil ..... Chapel Hill
Oumayma El Hamzaoui ..... Raleigh
Hannah R. Eller ..... Chapel Hill
Alayna Marie-Poole Elmore ..... Chapel Hill
Gerald Ryan Elmore ..... Raleigh
Amro Elsayed ..... Winston-Salem
Cherif Elsheikh ..... Long Beach, CA
Kaity Y. Emerson ..... Charlotte
Benny U. Enemchukwu ..... Montverde, FL
Claudette Jaleh Bakhtiar Ericson ..... Davidson
Matthew Cameron Esterline ..... Rocky Mount
Brian Peter Ettari ..... Pensacola, FL
Julia James Eurey ..... Lincolnton
John Robert Evans ..... Raleigh
John William Everett Jr. ..... Duck
James Oliver Fankhauser ..... Charlotte
Chandler Jay Farris ..... Waxhaw
Benjamin P. Farris ..... Wilson
Lilian Lee Faulconer ..... Smithfield
Megan Feltham ..... Fort Mill, SC
Brooke Alexandria Felts ..... Laurel Springs

Antigone Evangelos Feredinos ..... Greensboro
James Harold Ferguson III ..... New Bern
Jonathan Stephen Fernandez ..... Burnsville
Michael John Fiori ..... Reidsville
Patricia Adelie Fishback ..... Sanford
Darrilyn S. Fisher ..... Raeford
Ambar Fleites ..... Raleigh
Sara Flessner ..... Castle Hayne
Christopher Edmond Flurry ..... Morrisville
Dakota Anne Foard ..... Durham
Kathleen M. Foshee ..... Charlotte
Sarah Jean Foster ..... Concord
Alexander Shane Fowler ..... Durham
Joshua C. Fowler ..... Belmont
Ashley Nicole Fox ..... Arden
Kalpana Patel Fraley ..... Lumberton
Christine Marie Francoeur ..... Sarasota, FL
Danielle Marion French ..... Mount Pleasant, SC
Louis Fristensky ..... Waynesville
Danielle Marie Fuhrman ..... Riverdale, MD
John C. Fuller ..... Charlotte
Shane Aaron Fuller ..... Coral Springs, FL
Vadim Furmanov ..... Durham
Aaliyah Gadsden ..... Chicago, IL
Sabrina Andrea Gamero ..... Pineville
Mallory Hart Gantt ..... Seneca, SC
Julissa F. Garcia ..... Durham
Henry Justin Gargan ..... Asheville
Tukesia Michelle Garner ..... Charlotte
Jessany Emileigh Garrett ..... Charlotte
William Crowder Gaskins Jr. ..... Lewes, DE
Jack Gavigan ..... High Point
Katherine Leah Georger ..... Chapel Hill
Joseph Elliott Gerber ..... Durham
Sarah Ghannam ..... Charlotte
Matthew Giangrosso ..... Asheville
Lexis Apollos Gibson ..... Atlanta, GA
Anna Shuford Phillips Gillespie ..... Bullock
Teresa Glascoe ..... Humble, TX
Maya Michelle Glaspie ..... Fayetteville
Elizabeth Anne Glass ..... Alexandria, VA
Andrew Emerson Glaze ..... Raleigh
Kenya Glover ..... Fayetteville
Grace Leighanna Glover ..... Raleigh
Raquel Alejandra Gonzalez Padron ..... Raleigh
Zachary Israel Gorelick ..... Durham
Yeekoyah Khursie Gorgor ..... Ellenwood, GA
Clayton D. Goris ..... Raleigh
Lindsay Paige Gorman ..... Raleigh
Christopher Wallace Graham ..... Mebane

Lawrence Dale Graham Jr. ..... Raleigh
Eboni Graham ..... Winston-Salem
John Matthew Grahl ..... Winston-Salem
Cara Lee Gray ..... Raleigh
Benjamin Martin Gregory ..... Saxapahaw
April Michelle Gregory ..... Burlington
Joseph Michael Gribaudo ..... Durham
Matthew Bryan Grice ..... Rocky Mount
Victoria Elizabeth Grieshammer ..... Stow, OH
Laurena Carolyn Julie Grissett ..... Morrisville
Evan Alexander Grosskurth ..... Chapel Hill
Alexis Janell Grossman ..... High Point
Emily Lynn Guarascio ..... Greensboro
Mia Salerno Guglielmi ..... Cornelius
Chen Lyu Guo ..... Cary
Marina Vicenta Gutierrez ..... Wendell
Madison Nicole Guttry ..... Greensboro
Trevor Schaal Guyton ..... Raleigh
Ethan Eric Haddon ..... Winston-Salem
Kathryn Cho Hagerman ..... Charlotte
Sierra Lynn Hagg ..... Rutherfordton
Shaun M. Haines ..... Weddington
Donald Lee Haley III ..... Charlotte
Nicholas David Hall ..... Durham
Louis John Hallow III ..... Greenville
Rashaad Bryon Hamilton ..... Chapel Hill
Victoria Lyons Hanafin ..... Raleigh
Matthew Campbell Hansen ..... Asheville
Kelly Lynn Hanson ..... Columbia, SC
Collin Bryce Hardee ..... Apex
Eli Nash Hardin ..... Shelby
Ashton Lee Harrell II ..... Raleigh
Alisha Brianna Harris ..... Greensboro
Rachel L. Harris ..... Greenville, SC
Julia Mary Harris ..... Stem
William Kohake Harris ..... Charlotte
Emily Elizabeth Harrison ..... Raleigh
Madeline Elise Harrison ..... Lincolnton
Rachel Hart ..... Virginia Beach, VA
Thomas R. Harvey III ..... Wilmington
Mary-Kathryn P. Hawes ..... Valdese
LaTonya Burroughs Hayes ..... Stone Mountain, GA
Wilson Whitford Hayman ..... Raleigh
Haley Jo Haynes ..... Wilmington
Peyton Hedrick ..... Claremont
Connor Hees ..... Atlanta, GA
Hannah Nicole Hein ..... Raleigh
Heather Merie Helmendach ..... Charlotte
Coltrane Cannon Milholen Henderson ..... Raleigh
Tai Cierra Simone Chisholm Hensley ..... Clemmons

Cynthia Elizabeth Hernandez ..... Greensboro
Jason Hessel ..... Huntersville
James Logan Heuser ..... Chesapeake, VA
Myron Tayloe Hill III ..... Raleigh
Alexander Riston Hill ..... Winston-Salem
Alyssa Brooke Hiltbold ..... Durham
Joshua Robert Hinson ..... Charlotte
Athina Athanasia Hinson-Boyte ..... Fayetteville
Ian Matthew Hobbs ..... Charlotte
Raven Hoff ..... Lancaster, SC
Andrea Hoffer ..... Charlotte
Sarah Katherine Hoffman ..... Chapel Hill
Serenity Porschenae Hogan ..... Raleigh
Jack Everett Holbrook ..... Kernersville
Abigail Josie Holt ..... Raleigh
Hunter Roberson Holtzclaw ..... Raleigh
Abbie Nicole Hornberger ..... Arden
Rachel Davis Horton ..... Durham
Brianna L. Hourihan ..... Charlotte
Guadalupe Vianey Howell ..... Fuquay-Varina
Rebecca Barraclough Howell ..... Chapel Hill
Clifford Eliot Howie ..... Winston-Salem
Christopher Yovan Hsu ..... Matthews
Abbey Hudson ..... Cary
Austin David Hughey ..... Camp Hill, PA
Holden Michael Hughley ..... Mebane
Lawrence Barrell Hundley IV ..... Charlotte
Tristan Hunkin ..... Indian Land, SC
Anna Claire Huntley ..... Hendersonville
Hunter Elizabeth Hurst ..... Columbus, GA
Zachary Bryce Hutchinson ..... Charlotte
Vanessa Elizeth Iglesias ..... Sanford
Crystal Shawndavia Ingram ..... Durham
Michelle H. Iqbal ..... Charlotte
Megan Anne Isserman ..... Cary
Sarah Izzell ..... Raleigh
Samantha Christine Jackson ..... Leland
Roak Kevin James ..... Charlotte
Rachel Eleanor James ..... Charlotte
Stephanie Jankie ..... Winston-Salem
Samantha Leigh Jayne ..... Chapel Hill
Matthew James Jensen ..... Mountain View, CA
Victoria Mae Jimenez ..... Charlotte
Kimberly Ann Jinorio Swanson ..... Durham
Lauren Ashley Johnson ..... Fort Wayne, IN
Garrett Johnson ..... Marietta, GA
Michael Ryan Johnston ..... Richmond, VA
Amber Baye Jones ..... Highland Falls, NY
Micah Lewis Jones ..... Durham
Matthew Jones ..... Raleigh

Laura Mackay Jordan ..... Raleigh
Matthew John Jordan ..... Raleigh
Jeffrey Ephron Joseph ..... Charlotte
Mark Kaisoglus ..... Hendersonville
Steffany Kamenga ..... Fredericksburg, VA
Zachary Ruben Kaplan ..... Durham
Alexander Stefan Katz ..... Charlotte
Joseph Martin Kaye ..... Pinecrest, FL
Alexander Goto Keith ..... Raleigh
Joeanna-Margaret Kelly ..... Carthage
Danielle Kemmling ..... Huntersville
Morgan Elizabeth Kendall ..... Polkton
Trevor Thomas Kennedy ..... Salt Lake City, UT
Kevin Kenney ..... Wilmington
Elizabeth Rita Kenny ..... Morrisville
Trent Sydnor Kerns Jr. ..... Richmond, VA
Heather M. Kindley ..... Thomasville
Connor Kirol ..... Johns Island, SC
Desiree Lynn Klemm-Kafel ..... St. Louis, MO
Stephanie Marie Kley ..... Charlotte
Rachel Allison Klink ..... Matthews
Je'vonne Knox ..... Greensboro
Sherilyn Victoria Knox ..... Winterville
Daniel James Knudsen ..... Monroe
Matthew Hunter Koehl ..... Nebo
Sarah Elizabeth Koelling ..... Raleigh
Becks Kolins ..... Durham
Kaylee Ann Kone ..... Hickory
Timothy John Kopczynski ..... Stephens City, VA
Jason John Turpin Kornblatt ..... Mooresville
Sarah Elizabeth Koucheki ..... Durham
Kristen Rebecca Kovach ..... Matthews
Alexis Victoria Kovolenko-Vassillion ..... Fayetteville
Aiesha Krause-Lee ..... Durham
Ryan Christopher Kuchinski ..... Apex
Clare Frances Kurdys ..... Morrisville
Emma Templeman Kutteh ..... Durham
Joseph Allan Kyzer ..... Smithfield
Sierra Jade La Gala ..... New Hill
Madeline Labovitz ..... Charlotte
Leah Lynn Lagoudis ..... Hubert
Brooke Taylor LaMachio ..... Raleigh
Cannon Elder Lane ..... High Point
Tania Xiomara Laporte-Reveron ..... Carolina, PR
Maximo Travis Larkin ..... Raleigh
Tianna R. Larson ..... Charlotte
Benjamin Stokes Lassiter ..... Greenville
Savannah Elaine Lavender ..... Cary
Sarah Jacqueline Pui Lai Laws ..... Durham
Allison Caroline Layton ..... Jamestown

Tyrone M. Leader Sr. ..... Concord
Clifford Mitchell Leagan ..... Mount Airy
Daniel Leake II ..... Charlotte
Mary Caitlin Lee ..... Raleigh
Lena Chun Lee ..... Charlotte
Corey Neil Lengyel ..... Myrtle Beach, SC
Jason M. Lerman ..... Winston-Salem
Morgan Lewis ..... Winston-Salem
Ariana Alexis Lewis ..... Raleigh
Andrea Maria Liberatore ..... Cramerton
Brianna Light ..... Charlotte
Mary Amelia Ligon ..... Charlotte
Dana Michelle Lingenfelser ..... Wilmington
Christopher Michael Linton ..... Winston-Salem
Mario Liranzo ..... Charlotte
Micole Lynnelle Little ..... Knightdale
Courtney Nicole Lockamy ..... Raleigh
Courtney Beckworth Lockerman ..... Linwood
Anna Killoran Long ..... Raleigh
Andrew Peter Lopiano ..... Lexington, KY
Timothy Nelson Lorick ..... Columbia, SC
Olivia Anne Lowery ..... Raleigh
Meghan Lucas ..... Charlotte
Carson Alexandra Ludwig ..... Niles, MI
Caleb Tyler Lueck ..... Cary
Caleb Joshua Mabe ..... Wilmington
Morgan Marie Maccherone ..... Durham
Patrick Cameron Macher ..... Richmond, VA
Joshua Michael MacNamara ..... Raleigh
Michael Ian Maddox ..... Hendersonville
Liana Sasha Madison ..... Cary
Michael Magaha ..... Anderson, SC
Michael George Majewski ..... Asheville
Stefan Maletic ..... Raleigh
Ananya Mallavarapu ..... Matthews
Emily Elizabeth Mann ..... Charlotte
Jessica Constance Mantekas ..... Raleigh
Michelle Marchand ..... Memphis, TN
Adele Rebecca Marchant ..... Cornelius
Marisa Elena Mariencheck ..... Charlotte
Caroline Martin ..... Durham
Gray Buchanan Martin ..... Asheville
Alyson Marie Martin ..... Charlotte
Christopher Lambert Martineau ..... Greensboro
McKenzie Grace Massarelli ..... Raleigh
Anthony Thomas Masters ..... Advance
Shayna Matheny ..... Clover, SC
Megan Elizabeth Mathews ..... Clayton
Emily Danielle Mattern ..... Cary
Katherine Elizabeth Mayes ..... Charlotte

Brandon Ben Mayes ..... Chapel Hill
Jennifer Lynn Maynard ..... Charlotte
Jessica Anne Maynard ..... Plano, TX
Catherine Elizabeth McCabe ..... Newport
Kia Seraka McCormick ..... Raleigh
Katelynn McCoy ..... Knightdale
Mason David McCullough ..... Sunset Beach
Kayla Nicole McDaniel ..... Charlotte
Ericka McDaniel ..... Greensboro
William Hotrick McDougal III ..... Apex
Cierra Danai McEachern ..... Pittsboro
Samantha Page McHone ..... Mount Airy
Sarah Elizabeth McIntyre ..... Browns Summit
Sean McKenna ..... Valrico, FL
Edward Leary McKenzie ..... Dillon, SC
Sydney Elizabeth McKinney ..... Charlotte
Vincent McKinney ..... Greensboro
Harold Brent McKnight Jr. ..... Durham
Jon Carlton McLamb ..... Angier
Jeffrey Ross McLaughlin ..... Durham
Chrishon Anthony McManus ..... Winston-Salem
Laurie Ann McNaught Briggs ..... Charlotte
Morgan Lea McNeil ..... Raleigh
Julia Simpson Meister ..... Durham
Rachel Ward Melton ..... Edenton
Christian Luis Mendez ..... Monroe
Adam Michael Meredith ..... Indianapolis, IN
Alyson Renee Merlin ..... Johns Creek, GA
Ryan Michael Michalko ..... Chapel Hill
Cole Alexander Middleton ..... Winston-Salem
Hayley Christine Milczakowski ..... District of Columbia
Kathleen Leah Miller ..... Raeford
Adam Michael Miller ..... Durham
Brittani Montez Miller ..... Greensboro
Alden Rebecca Minick ..... Valdosta, GA
Catherine Earl Mitchell ..... Durham
Sonia Marcela Molina ..... Charlotte
Alexandria Kristina Montgomery ..... Charlotte
Benjamin Bunker Moore ..... Matthews
McNair Ballou Moore ..... Raleigh
Quinton C. Morgan ..... Rose Hill
Ronald Eric Morin II ..... Raleigh
Halee Anika Morris ..... Wilmington
Samuel Tatum Morris ..... Raleigh
Allison Margaret Morris ..... Raleigh
Mallory A. Morris ..... Durham
Marissa Fiona Mugan ..... Raleigh
Amy Mull ..... Raleigh
Amanda Claire Murphy ..... Raleigh
Alyssa Michelle Mursch ..... Scranton, PA

Virginia Scott Mutter ..... Raleigh
Kelsey Myers ..... Durham
Mackenzie Catherine Myers ..... Cary
Lee Harrison Nanney ..... Raleigh
William Emmad Nazal ..... Huntersville
Angel Bowser Neal ..... McLeansville
Reatter Estella Neal ..... Bunn
Talicia Cheree' Neal ..... Raleigh
Erin Patricia Neely ..... Concord
Mara Bird Nelson ..... Cherokee
Lucas Nevola ..... Durham
Henry David Niblock Jr. ..... Winston-Salem
Roslyn Yvette Nixon ..... Wilson
Joseph Evan Nogay ..... Charlotte
Simone Anderson Noonan ..... Charlotte
Brian P. North ..... Concord
Kerri Nottingham ..... Myrtle Beach, SC
Jane Francis Nowell ..... Raleigh
William Parks Noyes ..... Charlotte
Meaghan O'Connor ..... Raleigh
Chelsi Celest Odom ..... Durham
Trevor Riley O'Hara ..... Charlotte
Tolulope Hannah Olaniyan ..... Durham
Melissa Ollison ..... Raeford
Polycarp Odhiambo Omollo ..... Fuquay-Varina
Katherine Cinny Orndoff ..... Raleigh
Liana Dolores Orta ..... Apex
Sidney Page Overby ..... Greenville
Allyson Owens ..... Raleigh
Ashley Wray Owens ..... Wilmington
Justin Matthew Pack ..... Matthews
McCathern Marie Painter ..... Greensboro
Alexander Jeffrey Palme ..... Mebane
Iva Panayotova ..... Greensboro
Lydia Catherine Parker ..... Chapel Hill
Caroline Virginia Parrish ..... Smithfield
Benjamin Sanders Parsons ..... Sylva
Anna Marie Parsons ..... Willow Spring
Kriya R. Patel ..... Sellersburg, IN
Vivek Patel ..... Waxhaw
Priti Marolia Patel ..... Elgin, SC
William James Patterson ..... Raleigh
Brandon Charles Paul ..... Lexington
Joseph Ryan Paxton ..... Waxhaw
Jonathan Payne ..... Raleigh
Alyssa C. Pearce ..... Morrisville
Dane William Peddicord ..... Raleigh
Taylor Lyn Peed ..... Winston-Salem
Manning Tucker Peeler ..... Raleigh
Grant Thomas Pendergraft ..... Cary

Maya Gabriella Pendergrass ..... New York, NY
James Rivers Pennacchia ..... Charlotte
Dwayne John Pennant ..... Charlotte
Kristin Elizabeth Pennock ..... Holly Springs
Kayla Delaine Perry ..... Pittsboro
Megan S. Pfuntner ..... Fleming Island, FL
Diane M. Philips ..... Richmond, VA
Clancy Helen Theresa Phillips ..... Greensboro
Joseph Michael Piligian ..... District of Columbia
Kairah Renee Pippenger ..... Charlotte
Sophie R. Plott ..... Concord
Sydney Claire Plummer ..... Thomasville
Katherine Podvorec ..... Pittsburgh, PA
Anna Savoir Pollock ..... Fort Mill, SC
Rachel Marie Pomeroy ..... Greensboro
Elisabeth K. Pomeroy ..... Charlotte
Charles Milton Ponder IV ..... Shreveport, LA
Logan Keith Ponder ..... Fairview
Jared A. Pone ..... Morrisville
Brittnee Lee Pool Gillett ..... Mooresville
Salvatore Popolillo III ..... Greensboro
Danielle Melissa Potter ..... Charlottesville, VA
Travis James Poulos ..... Boone
India Prather ..... Charlotte
Alexander Ray Pratte ..... Dallas, TX
Eileen R. Prescott ..... Clemmons
Andrew Caleb Prevatte ..... Charlotte
John Christopher Price ..... Sims
Alexandra Adele Price ..... Salem, SC
Leigh-Frances Prince ..... Mooresville
Lauren Nicole Privette ..... Flat Rock
William McLaurin Pugh ..... Raleigh
Cher Marana Lilles Quibang ..... Greensboro
Dillon M. Quinn ..... Greensboro
Alec Kristopher Quint ..... Charlotte
Stephanie Elaine Raborn ..... Winston-Salem
Mary Claire Ragan ..... Virginia Beach, VA
Cecilia Gitanjali Rambarat ..... Chapel Hill
Alejandro Ramirez ..... Coral Gables, FL
Brian Alexander Ramos ..... Winston-Salem
Angela F. Ray ..... Newport
Mary Elizabeth Dato Reed ..... Durham
John Wesley Reese III ..... Kernersville
Christian Reese ..... Charlotte
Samantha Leigh Reeves ..... Oak Ridge
George Duncan Regan Jr. ..... Fayetteville
Gina Greene Regan ..... Wesley Chapel, FL
Caroline Hampton Reinwald ..... Durham
Joshua Edward Renz ..... Chapel Hill
Rebecca Lynn Rheney ..... Raleigh

Justin Lamar Richardson ..... Mechanicsville, VA
Erika Nicole Richmond ..... Greenville
Isaac Paul Ridgeway ..... Raleigh
Julia Logan Rigsbee ..... Louisburg
Lucas Riley ..... Myrtle Beach, SC
Alyssa Rose Riley ..... Sanford
Evan Sparks Ringel ..... Hillsborough
William Jones Rivers IV ..... Winston-Salem
Paxton Sara Rizzo ..... Fayetteville
Shane Bryce Roberts ..... Greensboro
Kendra Diane Roberts ..... Charlotte
Rachel Fallon Robertson ..... Charlotte
Casey Taylor Robinson ..... Greensboro
Malindi Robinson ..... Pittsboro
Kermit W. Robinson ..... Kernersville
Taylor Brooke Rodney ..... Wilmington
Alicen Marie Rodolph ..... Fayetteville
Adam Joseph Rodrigues ..... Raleigh
Maria Ignacia Rodriguez Kmec ..... Waxhaw
Lindsey Turner Rogers-Seitz ..... Morrisville
Camila Mariel Rohena Maldonado ..... Charlotte
Nicholas Christopher Rohner ..... Durham
Jarrett Stephen Roman ..... Anderson, SC
Kathryn J. Romo ..... Greensboro
Madison Root ..... Asheville
Braden Charles Rose ..... Mooresville
Travis Jerome Rothschild ..... Durham
Kenneth James Rousselo ..... Lynchburg, VA
Matthew J. Ruby ..... Charlotte
James Alfred Rumley Jr. ..... Taylorsville
Aaliyah Janai Russell ..... Greensboro
Alexandra Brianne Russell ..... Alexandria, VA
Kaytlin Ruzicka ..... Knightdale
Paul Sacksteder ..... Charlotte
Christopher Wilson Sanborn ..... Summit, NJ
Lexus Tiel Sanders ..... Raleigh
Robyn Nicole Sanders ..... Cary
Edgar Emilio Santiago II ..... Winston-Salem
Emily Austin Satterfield ..... Surf City
Spencer Norman Scheidt ..... Asheville
Jon Anthony Schlotterback ..... Charlotte
Tracey Lee Schneider ..... Holly Springs
Christopher Ryan Schroeder ..... Jensen Beach, FL
Troy Eugene Schultingkemper ..... Raleigh
Andrea Maria Schwehr ..... Wake Forest
Gregory Ian Seaborne ..... Charlotte
Claire Suzanne Sears ..... Charlotte
Stacy Revels Sereno ..... Raleigh
Alexander Joseph Serkes ..... Raleigh
Monica Layne Sessoms ..... Raleigh

Alicia Evenstar Sessoms ..... Asheville
Morgan Lee Sexton ..... Charlotte
Charles Isaiah Sexton ..... Charlotte
Adella Grace Shaffer ..... Smithfield
Shivani Shah ..... Cary
Kaitlyn Rebecca Sharman Reducindo ..... Fayetteville
Deborah H. Shartle ..... Cary
Shaefer Allen Shepard ..... Waxhaw
Carli Melissa Sherman ..... Charlotte
Skyler David Shields ..... Winston-Salem
Kevin Siebs ..... Charlotte
Robert Gray Simmons ..... Kinston
Kalyn Nichelle Simmons ..... Whitsett
Thain Douglas Simon ..... Charlotte
Colin Michael Simon ..... Raleigh
Rishi Singh ..... Sugar Land, TX
Savannah Marie Singletary ..... Raleigh
Jasmine M. Singleton ..... Candler
Harris Samuel Sinsley ..... Columbia, SC
Heidi Rose Sinsley ..... Matthews
Austin Katherine Smith Sistrunk ..... Wilmington
Rebecca Skahen ..... Raleigh
Ross McNeill Slaughter ..... Philadelphia, PA
Brandon Patrick Smith ..... Hollywood, FL
Christopher Grant Smith ..... McLeansville
Clinton Jarrett Smith ..... Austin, TX
Evan Michael Smith ..... South Charleston, WV
Alexandria Danielle Smith ..... Greensboro
Willis Smith III ..... Raleigh
Samantha Nicole Smith ..... Thomasville
Elizabeth Catherine Smith ..... Durham
Karyl Smith ..... Danville, VA
Olivia Bridges Smith ..... Salisbury
Jennifer D. Snider ..... Raleigh
Elizabeth Marguerite Snow ..... Raleigh
Kimberly Snyder ..... Youngsville
Samuel Preston Spalding ..... Raleigh
Kristen Marie Speight ..... Rockingham
Corinne Nicole Spencer ..... Charlotte
Kevin Patrick Spilman Kelly ..... Port Orange, FL
Kyle C. Stark ..... Raleigh
Rachel Mae Starnes ..... Greensboro
Joshua Robert Steedly ..... Raleigh
Christopher Stephens ..... Nebo
Isabelle Rose Holland Stevens ..... Durham
Wesley Alan Stewart ..... Raleigh
Robert Jeremy Stewart ..... Garner
Garret Benjamin Stone ..... Winston-Salem
Savannah Jane Story ..... Raleigh
Victoria Lynn Stout ..... Greensboro

Madalyn M. Strahl ..... Raleigh
Aulie Hawes Strickland ..... Raleigh
Macy Brianne Stutts ..... Midland
Katrina Renee Sumner ..... Spring Grove, PA
William Daniel Swain ..... Cary
Morgan Swink ..... Albemarle
Sarah Sykes ..... Columbia, SC
Andrew Paul Tabeling ..... Durham
Rachel Tackman ..... Oak Island
John Stephen Tagert ..... Charlotte
Jonathan Taggart ..... Raleigh
Evan Austin Tarver ..... Lexington, KY
Matthew Kenneth Taylor ..... Charlotte
Haleigh Renae Teegarden ..... Cheraw, SC
Calleesha Andre'a Teel ..... Winston-Salem
Jordan Elizabeth Terry ..... Mebane
Marissa Lynique Thomas ..... Durham
Callie Shannon Thomas ..... Durham
Christin Q. Thompson ..... Murrieta, CA
Emily Ann Thompson ..... Winston-Salem
Sara Beth Throckmorton ..... Cary
Owen Christopher Tinari ..... Charlotte
Emilia Todd ..... Lake Mary, FL
Timothy Nathaniel Tomczak ..... Raleigh
Dale That Ton ..... Raleigh
Zachary Richard Tooman ..... Columbia, MO
Anthony Torossian ..... Encino, CA
Robert Taylor Townes ..... Carrboro
James Anderson Tran ..... Matthews
Jeffrey Lee Traversino ..... Wake Forest
Sarah Mackenzie Traynor ..... Cowpens, SC
Clayton Randolph Trice ..... Raleigh
Ethan Andrew Trice ..... Hendersonville
Nicole Susanne Tronolone ..... Fayetteville
Stephen Baxter Trull ..... Fuquay-Varina
Matthew Michael Turk ..... Charlotte
Anita Catherine Turlington ..... Clayton
Stephanie Lynette Turner ..... Huntersville
Alex Timothy Turner ..... Taylorsville
Alexandria Paige Tuttle ..... Raleigh
Ravyn Annette Tyndall ..... Raleigh
Sarah Elizabeth Tyrey ..... Raleigh
Brittney Nicole Tysinger ..... Charlotte
Matthew Joseph Tyson ..... Charlotte
Anastasia Isabel Urian ..... Los Angeles, CA
Brianne Lee Van Apeldoorn ..... New Bern
Laura Vanevic ..... Raleigh
Merriwether Caroline Vaughan ..... Charlotte
Alexandriana Venters ..... Charlotte
Sarah Vera del Carpio ..... Clayton

Victoria Vidi ..... Lakewood Ranch, FL
Connor Ross Villas ..... Clayton
Aaron Walck ..... Orefield, PA
Katherine Ann Walker ..... Mount Pleasant, SC
Savannah Dale Wallace ..... Charlotte
Martha Elizabeth Wallace ..... Cornelius
Timothy Harold Wallace ..... Cornelius
Thomas Edmund Walls ..... Chapel Hill
Kyle Walsh ..... Waxhaw
Daniel H. Walsh ..... Greensboro
Sean Noah Walsh ..... Raleigh
Natalie Marie Walters ..... Winston-Salem
Joshua James Warner ..... Charlotte
Alexa Christian Warner ..... Charlotte
Benjamin Scott Warren ..... Asheboro
Iritha Jasmine Washington ..... Holly Springs
Steven Wax ..... Denver
Erin Leigh Weatherman ..... Durham
Carly Stoltzfus Weaver ..... Greensboro
Andre Xavier Webb ..... Durham
Dylan Nathan Wecht ..... Pittsburgh, PA
Katarina Weessies ..... Cary
Tamara Short Weightman ..... Wake Forest
Sean Benjamin Weiner ..... Charlotte
Hannah Weiss ..... Charlotte
Lena Catherine Welch ..... Raleigh
Kayla Dominique Weldon ..... Holly Springs
Karen Felicia Wellington ..... Wilson
Shelby Elizabeth Wellmon ..... Thomasville
John-Thomas Wells ..... Raleigh
Katherine Anne Wempe ..... Austin, TX
Taran Alexander Wessells ..... Williamsburg, VA
James Weldon Whalen ..... Sanford
Ann Elizabeth Wheat ..... Charlotte
Caleb Alan Wheeler ..... Lincolnton
Emmett James Whelan ..... Charlotte
Charles Gordon White ..... Durham
Tyler Simmons Whittenberg ..... Durham
Tanis Kathryn Whittington ..... Hampstead
Kelly Nicole Wilburn ..... Germantown, MD
Danielle Brooke Wilburn Allen ..... Haw River
Adam James Wilcox ..... Nebo
Ashlee C. Wiley ..... Greensboro
Matthew Colton Williams ..... North Wilkesboro
Regina Arianna Williams ..... Charlotte
Brittney Antoinette Williams ..... Charlotte
Pamela L. Williams ..... Charlotte
Chloe Ann Williams ..... Winston-Salem
Karsin Alise Williard ..... Raleigh
Dylan Willis ..... Raleigh

Chelsey Leigh Wilson ..... Benson
Lauren Ashley Wilson ..... Coatesville, PA
Nathan Ward Wilson ..... Cary
Megan Donese Wilson-Bost ..... Odenton, MD
Yvette Ceandreas Wiltshire ..... Charlotte
Jessica Lynn Winebrenner ..... Raleigh
Hunter Blake Winstead ..... Raleigh
Dynasty Christine Winters ..... Apex
Janet Burke Witchger ..... Durham
Brock C. Wolf ..... Charlotte
Jacob Willoughby Wood ..... Charlotte
Austin Blake Wood ..... Leesburg, VA
Abigail Louise Wood ..... Greenville, SC
Zachary Hunter Woolweaver ..... Morrisville
Madison Rone Woschkolup ..... Indian Land, SC
Matthew Donald Wright ..... Durham
Jamison Michael Wynn ..... Chapel Hill
Qizhen Xiao ..... Concord
Laura Elizabeth Yanka ..... Kernersville
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CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

IN THE MATTER OF B.S.

No. 322A20

Filed 18 June 2021

Termination of Parental Rights—effective assistance of counsel—failure to advise—steps to establish paternity—findings not challenged—meritless

In an appeal from an order terminating respondent-father's parental rights to his child in which respondent did not challenge the findings or conclusion regarding the ground of failure to establish paternity (N.C.G.S. § 7B-1111(a)(5)), the Supreme Court rejected respondent's argument alleging that he received ineffective assistance of counsel due to his counsel's failure to advise him on or assist him with establishing paternity. Respondent's professed ignorance of his legal duty as a parent to establish paternity did not excuse his failure to fulfill that duty, and therefore respondent failed to demonstrate that there was a reasonable probability that, absent counsel's alleged failure to advise him regarding that duty, a different result would have been reached at the hearing.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from an order entered on 16 March 2020 by Judge Monica Bousman in District Court, Wake County. This matter was calendared for argument in the Supreme Court on 22 April 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 Boyce Wells for petitioner-appellee Wake County Human Services.

Michelle FormyDuval Lynch for appellee Guardian ad Litem.

Garron T. Michael for respondent-appellant father.

BARRINGER, Justice.

¶ 1 Respondent appeals from the order terminating his parental rights to his minor child B.S. (Bailey).[1] The trial court found that grounds existed to terminate respondent's parental rights pursuant to N.C.G.S. § 7B-1111(a)(1), (2), and (5) and that termination was in Bailey's best interests. Respondent has not challenged on appeal the trial court's conclusion that the ground for termination pursuant to N.C.G.S. § 7B-1111(a)(5) existed or that termination was in Bailey's best interests. Respondent instead contends that this Court should reverse the trial court's order as to this ground for termination of respondent's parental rights because he received ineffective assistance of counsel. As we conclude that respondent has not carried his burden to show ineffective assistance of counsel, we affirm the trial court's order terminating the parental rights of respondent to Bailey.

I. Background

¶ 2 Wake County Human Services (WCHS) became involved with Bailey at the time of her birth when Bailey and her mother tested positive for cocaine. Bailey's mother was also homeless and suffering from mental health issues which required hospitalization.

¶ 3 On 18 July 2018, WCHS filed a petition alleging that Bailey and her two half-siblings were neglected juveniles.[2] Respondent and Bailey's mother subsequently consented to the entry of an order adjudicating Bailey a neglected juvenile, which was entered on 16 October 2018. In this consent order on adjudication and disposition, the trial court ordered respondent to submit to genetic marker testing and to establish legal paternity if found to be the biological father of Bailey. At the time, respondent was incarcerated and denied knowing Bailey's mother and being Bailey's biological father. Nevertheless, on 15 January

1. The pseudonym "Bailey" is used throughout this opinion to protect the identity of the juvenile and for ease of reading.

2. This appeal does not involve Bailey's half-siblings or her mother.

2019, respondent was determined to be the biological father of Bailey after respondent submitted to genetic marker testing. Respondent continued to deny that he was the biological father of Bailey until a social worker sent him a copy of the genetic marker report in late January 2019.

¶ 4 After respondent was released from incarceration, WCHS filed a motion for termination of the parental rights of Bailey's mother, respondent, and the known or unknown fathers of Bailey's two half-siblings. WCHS alleged that grounds existed to terminate respondent's parental rights pursuant to N.C.G.S. § 7B-1111(a)(1), (2), and (5). The termination-of-parental-rights hearing was conducted over four days in November 2019 and January and February 2020. On 16 March 2020, the trial court entered an order terminating respondent's parental rights. The trial court concluded that WCHS had proven all three alleged grounds for termination, *see* N.C.G.S. § 7B-1111(a)(1), (2), (5), and that termination of respondent's parental rights was in Bailey's best interests. The trial court's findings of fact included that:

> [Respondent] was served with a copy of the petition filed July 18, 2018 which contained the name of the child and her date of birth. He had access to paper, envelopes, and stamps while he was incarcerated. He corresponded via U.S. Mail with both the social worker and his attorney in this case. He had the means to file an affidavit of paternity with [WCHS]. The same attorney has been appointed to represent him in this case and also in cases involving two other children. In a termination of parental rights order filed for two of [respondent]'s other children on August 7, 2019, finding of fact #31 indicates that [respondent] filed an affidavit of parentage for another of his children. In orders filed on October 16, 2018, February 1, 2019, and July 24, 2019 the [c]ourt ordered . . . [respondent] to establish "legal paternity" if genetic marker testing showed him to be the biological father of the child. While N.C.G.S. §[ ]7B-1111(a)(5) does not require that an unwed father have actual notice that a ground exist[s] for termination of parental rights unless paternity and/or legitimation is established prior to the filing of a termination of . . . parental rights action, [respondent] was on "notice" that he was to establish legal paternity beginning with the disposition order

> filed October 16, 2018. He had "notice" that he could have sired a child when he had a sexual encounter with [Bailey's mother]. He further knew by late January 2019 that genetic marker testing showed him to be the biological father of [Bailey] which was more than six months before the motion to terminate his parental rights was filed.

¶ 5 Respondent appealed.

¶ 6 On appeal, respondent challenges several findings of fact as not supported by competent evidence and the trial court's conclusion that grounds existed for termination pursuant to N.C.G.S. § 7B-1111(a)(1) and (2). However, respondent has neither challenged the trial court's conclusion that the ground for termination pursuant to N.C.G.S. § 7B-1111(a)(5) had been established nor challenged any findings of fact supporting this conclusion. Thus, it is undisputed that respondent failed to establish legal paternity as required by the trial court's order and failed to do any of the acts specified in N.C.G.S. § 7B-1111(a)(5)(a)–(e).

¶ 7 Subsection 7B-1111(a)(5) provides that a trial court may terminate parental rights upon a finding that:

> The father of a juvenile born out of wedlock has not, prior to the filing of a petition or motion to terminate parental rights, done any of the following:
>
> a. Filed an affidavit of paternity in a central registry maintained by the Department of Health and Human Services. The petitioner or movant shall inquire of the Department of Health and Human Services as to whether such an affidavit has been so filed and the Department's certified reply shall be submitted to and considered by the court.
>
> b. Legitimated the juvenile pursuant to provisions of G.S. 49-10, G.S. 49-12.1, or filed a petition for this specific purpose.
>
> c. Legitimated the juvenile by marriage to the mother of the juvenile.
>
> d. Provided substantial financial support or consistent care with respect to the juvenile and mother.

e. Established paternity through G.S. 49-14, 110-132, 130A-101, 130A-118, or other judicial proceeding.

N.C.G.S. § 7B-1111(a)(5) (2019).

¶ 8 Respondent, however, argues for the first time on appeal that his appointed trial counsel was ineffective. Respondent contends that because he received ineffective assistance of counsel, this Court should reverse the portion of the trial court's order concluding that the ground set forth in N.C.G.S. § 7B-1111(a)(5) existed to terminate his parental rights.

II. Ineffective Assistance of Counsel Claim

¶ 9 As "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), and respondent has not challenged the conclusion or findings of fact supporting the trial court's conclusion that the ground set forth in N.C.G.S. § 7B-1111(a)(5) existed to terminate his parental rights, we must affirm the trial court's order terminating respondent's parental rights if respondent has not shown that he received ineffective assistance of counsel. The Juvenile Code provides that "[i]n cases where the juvenile petition alleges that a juvenile is abused, neglected, or dependent," N.C.G.S. § 7B-602(a) (2019), and "[w]hen a petition [for termination of parental rights] is filed," the 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) (2019). When addressing a contention by a respondent that he or she received ineffective assistance of counsel, this Court has explained that:

> Parents have a right to counsel in all proceedings dedicated to the termination of parental rights. Counsel necessarily must provide effective assistance, as the alternative would render any statutory right to counsel potentially meaningless. To prevail on a claim of ineffective assistance of counsel, respondent must show that counsel's performance was deficient and the deficiency was so serious as to deprive him of a fair hearing. To make the latter showing, the respondent must prove that there is a reasonable probability that, but for counsel's errors, there would have been a different result in the proceedings.

In re G.G.M., 2021-NCSC-25, ¶ 35 (cleaned up).

¶ 10 Respondent's argument in his brief to this Court is as follows:

> Although the trial court ordered him to "establish legal paternity" in three separate orders dating back to 16 October 2018, no action was ever undertaken by [respondent] to do so. Nothing contained in the record on appeal or within the transcript of the termination hearing indicate appointed counsel ever advised or informed [respondent] of how or why he needed to "establish legal paternity" as [the] court ordered. Nothing in the record indicates that appointed counsel sent or provided an affidavit of paternity to [respondent] prior to the motion to terminate parental rights being filed. Instead, appointed counsel argued during its closing on grounds that WCHS failed to make reasonable efforts to achieve reunification by assisting [respondent] in executing an affidavit of paternity.
>
> Appointed counsel's failure to advise, inform or assist [respondent] with filing an affidavit of paternity, or otherwise legally establish paternity as [the] court ordered in the underlying juvenile case fell below an objective standard [of] reasonableness. Specifically, the trial court formally ordered [respondent] to establish legal paternity over nine months before the motion to terminate parental rights was filed on 2 August 2019. Moreover [respondent] was transported to Wake [C]ounty on both 7 May 2019 and 24 June 2019 for scheduled hearings affording appointed counsel face to face access to [respondent] despite his incarceration. Had appointed counsel properly informed, advised, or assisted [respondent] in establishing legal paternity, a single filing would have precluded the trial court from terminating his parental rights pursuant to N.C.[G.S.] § 7B-1111(a)(5) (2019).

¶ 11 WCHS and the guardian ad litem contend that respondent has failed to show he received ineffective assistance of counsel and that respondent has not shown that had counsel assisted with establishing paternity that there is a reasonable probability there would have been a different outcome in the proceeding.

¶ 12 We agree that respondent has not met his burden to establish ineffective assistance of counsel. This State's jurisprudence has "recog-

nized that there could be no law if knowledge of it was the test of its application" and has not permitted a respondent's purported absence of knowledge of his or her parental duties to protect the respondent from the termination of his or her parental rights. *In re Wright*, 64 N.C. App. 135, 139 (1983); *see also In re S.E.*, 373 N.C. 360, 366 (2020) (quoting *In re Wright* in a parenthetical); *In re T.D.P.*, 164 N.C. App. 287, 289 (2004) (quoting *In re Wright* in a parenthetical), *aff'd per curiam*, 359 N.C. 405 (2005). Thus, when addressing a claim of ineffective assistance of counsel for failing to advise the respondent of what he needed to do to regain custody of a juvenile child, this Court has recognized that ignorance of an inherent duty of a parent to their child does not excuse a parent's failure to fulfill this duty, and as a result, any alleged failure by counsel to advise concerning these inherent duties cannot be prejudicial. *In re J.M.*, 2021-NCSC-48, ¶¶ 35–36.

¶ 13 Based on the foregoing, our examination of the record, and the undisputed factual findings, we conclude that there is no reasonable probability that any of the alleged omissions by respondent's counsel affected the outcome of the termination-of-parental-rights hearing. *See State v. Braswell*, 312 N.C. 553, 563 (1985) ("[I]f a reviewing court can determine at the outset that there is no reasonable probability that in the absence of counsel's alleged errors the result of the proceeding would have been different, then the court need not determine whether counsel's performance was actually deficient."). Respondent's argument of ineffective assistance of counsel is without merit.

III. Conclusion

¶ 14 Because respondent has not challenged on appeal the trial court's conclusion that the ground for termination pursuant to N.C.G.S. § 7B-1111(a)(5) existed or that termination was in Bailey's best interests and because we conclude that respondent's claim of ineffective assistance of counsel is without merit, we affirm the trial court's order terminating respondent's parental rights.

AFFIRMED.

IN RE E.S.

[378 N.C. 8, 2021-NCSC-72]

IN THE MATTER OF E.S. AND E.S.S.

No. 20A20

Filed 18 June 2021

1. Termination of Parental Rights—best interests of the child—statutory factors—child's consent to adoption—bond with mother

The trial court did not abuse its discretion by determining that termination of a mother's parental rights was in her fifteen-year-old daughter's best interests. The trial court was not required to consider the daughter's consent to adoption under N.C.G.S. § 48-3-601(1) (requiring minors over twelve years old to consent to adoption) when entering its disposition pursuant to N.C.G.S. § 7B-1110. Further, in considering the statutory factors under section 7B-1110(a), the trial court properly considered the bond between the mother and her daughter and was not required to make written findings about that factor because the evidence on the issue was uncontested.

2. Termination of Parental Rights—best interests of the child—potential relative placement—dispositional findings

The trial court did not abuse its discretion by determining that termination of a father's parental rights was in his daughter's best interests where, one month before the termination hearing, the father requested that the department of social services consider his third cousin as a potential placement for the child. Although the court was not required to consider the availability of relative placement when making its best interests determination, the court's dispositional findings—including that the proposed placement was not appropriate and that the daughter already had a strong bond with her foster parents—showed that the court adequately considered all critical circumstances regarding the daughter's placement.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from orders entered on 3 December 2019 by Judge Hal G. Harrison in District Court, Watauga County. This matter was calendared for argument in the Supreme Court on 22 April 2021 but determined on the record and briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

IN RE E.S.

[378 N.C. 8, 2021-NCSC-72]

Chelsea Bell Garrett for petitioner-appellee Watauga County Department of Social Services.

Michelle FormyDuval Lynch for appellee Guardian ad Litem.

David A. Perez for respondent-appellant father.

Leslie Rawls for respondent-appellant mother.

BARRINGER, Justice.

¶ 1 Respondent-mother is the biological mother of E.S. (Elyse) and E.S.S. (Elizabeth),[1] and respondent-father is the biological father of Elizabeth. Respondent-mother appeals from the trial court's order finding that it was in Elyse's best interests to terminate her parental rights. Although respondent-mother filed a notice of appeal as to Elizabeth, respondent-mother has abandoned all arguments relating to the trial court's termination of her parental rights as to Elizabeth and the trial court's best interests determination for Elizabeth because respondent-mother did not present or discuss any issues regarding Elizabeth in her brief. *See* N.C. R. App. P. 28(a). Respondent-father appeals from the trial court's order finding that it was in Elizabeth's best interests to terminate his parental rights. Since we conclude that the trial court did not abuse its discretion in its best interests determination as to Elyse and Elizabeth, respectively, we affirm the trial court's orders.

I. Facts

¶ 2 In December 2017, respondent-mother gave birth to twin girls, Elizabeth and Ida. At birth, both Elizabeth and Ida tested positive for methadone. Prior to giving birth, respondent-mother tested positive for methamphetamine, methadone, and acetaminophen. The twins were suffering from withdrawal and were transferred to the pediatric unit before being released to respondents. Ida later passed away on 18 February 2018 from unknown causes.

¶ 3 Respondent-father did not live with respondent-mother and Elizabeth but stayed at a nearby hospitality house. A social worker with the Watauga County Department of Social Services (DSS) stated that

1. Pseudonyms are used to protect the juveniles' identities and for ease of reading. A pseudonym will also be used to protect the identity of Elizabeth's twin, Ida, who passed away as an infant.

respondent-father was incapable of providing care for Elizabeth on his own and that he did not have the proper living situation to do so.

¶ 4 Respondent-mother subsequently tested positive for methamphetamine on 4 February, 2 March, and 7 March 2018. Respondent-mother's older child, Elyse[2] (born on 7 May 2004), was also residing with respondent-mother during this time. After receiving a report of respondent-mother's substance abuse and respondent-father's lack of stable housing, DSS filed juvenile petitions on 15 March 2018 alleging that Elyse and Elizabeth were neglected and dependent juveniles and obtained nonsecure custody of the children.

¶ 5 In an order entered 31 May 2018, the trial court adjudicated the children as dependent juveniles based on stipulations acknowledged by respondents. In a separate disposition order filed on 15 June 2018 and amended on 3 July 2018, the trial court set the permanent plan for Elyse and Elizabeth as reunification with a concurrent plan of guardianship. Respondents entered into case plans that required them to complete treatment at a substance abuse recovery center, attend parenting classes, attend visitation regularly, submit to drug screens, and maintain safe housing, among other requirements. Respondent-mother was also required to participate in grief counseling with a licensed provider to learn healthy coping skills and maintain stability.

¶ 6 In a permanency-planning order entered on 17 January 2019, the trial court continued the permanent plan of reunification with a concurrent plan of guardianship for Elyse and Elizabeth. The trial court found that respondent-mother had made minimal progress on her case plan and was not cooperating with DSS or the guardian ad litem (GAL) program. The trial court suspended respondent-mother's visitation with the children until she provided a release of information to the substance abuse recovery center, which would allow DSS to "follow up on her treatment progress." The trial court also required her to submit at least two clean drug screens to DSS prior to any visitation. Regarding respondent-father, the trial court found that he was making adequate progress on his case plan and permitted DSS to increase his visitation with Elizabeth.

¶ 7 After a permanency-planning hearing held on 15 February 2019, the trial court found that respondents were not making adequate progress on their case plans and so changed the permanent plan for Elyse to adoption with a concurrent plan of guardianship and changed the permanent plan for Elizabeth to guardianship with a concurrent plan of

2. Elyse's biological father is deceased.

adoption. Respondent-mother had not visited Elyse and Elizabeth since September 2018 because she failed to submit clean drug screens, and respondent-father had not visited Elizabeth since January 2019 because he refused to participate in drug screens. The trial court also found that respondent-father had not maintained stable housing and that he admitted to using methamphetamine as recently as two days before the permanency-planning hearing.

¶ 8 The trial court held another permanency-planning hearing on 11 April 2019 and found that respondents had made little to no progress on their case plans and that the conditions that led to the removal of Elyse and Elizabeth from the home still existed. The trial court maintained the permanent and concurrent plans for Elyse and Elizabeth.

¶ 9 On 8 May 2019, DSS filed motions to terminate respondent-mother's parental rights to Elyse and Elizabeth and respondent-father's parental rights to Elizabeth pursuant to N.C.G.S. § 7B-1111(a)(1), (6), and (7). After the termination-of-parental-rights hearing held on 26 and 27 September 2019, the trial court found that grounds existed to terminate respondents' parental rights pursuant to N.C.G.S. § 7B-1111(a)(1) and (6) and that termination of respondents' parental rights was in Elyse's and Elizabeth's best interests pursuant to N.C.G.S. § 7B-1110(a).[3] Accordingly, the trial court terminated respondent-mother's parental rights to Elyse and Elizabeth and respondent-father's parental rights to Elizabeth. Respondents appealed.

¶ 10 On appeal, respondents do not challenge the trial court's grounds for termination but instead argue that the trial court abused its discretion in concluding that it was in Elyse's and Elizabeth's best interests to terminate respondents' parental rights. Respondent-mother only challenges the trial court's best interests determination as to Elyse.

II. Applicable Law

¶ 11 The termination of parental rights is a two-stage process consisting of an adjudicatory stage and a dispositional stage. *See* N.C.G.S. §§ 7B-1109 to -1110 (2019). If, during the adjudicatory stage, the trial court finds grounds to terminate parental rights under N.C.G.S. § 7B-1111(a), the trial court proceeds to the dispositional stage where it

3. In an order entered on 1 October 2019, the trial court also amended the order from the 11 April 2019 permanency-planning hearing to correct the permanent plan for Elizabeth, which had been inadvertently reversed. The trial court corrected the permanent plan for Elizabeth to properly reflect adoption as the permanent plan with a concurrent plan of guardianship.

must "determine whether terminating the parent's rights is in the juvenile's best interest" after considering the following criteria:

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

N.C.G.S. § 7B-1110(a). The trial court must "make written findings regarding the [aforementioned criteria] that are relevant." *Id.* "A factor is relevant if there is conflicting evidence concerning the factor, such that it is placed in issue by virtue of the evidence presented before the district court." *In re C.J.C.*, 374 N.C. 42, 48 (2020) (cleaned up) (quoting *In re A.R.A.*, 373 N.C. 190, 199 (2019)). "We review the trial court's dispositional findings of fact to determine whether they are supported by competent evidence." *In re J.J.B.*, 374 N.C. 787, 793 (2020).

¶ 12 "The trial court's assessment of a juvenile's best interests at the dispositional stage is reviewed solely for abuse of discretion." *In re A.U.D.*, 373 N.C. 3, 6 (2019). "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 (2015) (alteration in original) (quoting *State v. Hennis*, 323 N.C. 279, 285 (1988)).

III. Respondent-mother's Appeal

¶ 13 **[1]** Respondent-mother only challenges the trial court's dispositional determination for her oldest child, Elyse. Respondent-mother argues that the trial court abused its discretion in determining that termination of her parental rights was in Elyse's best interests. We disagree.

¶ 14 Respondent-mother first argues that the trial court failed to comply with the statutory mandate of N.C.G.S. § 7B-1110(a) because it did not "expressly consider" and receive evidence regarding whether Elyse consented to adoption. Since Elyse was fifteen years old at the time of

the termination hearing and N.C.G.S. § 48-3-601(1) requires minors over twelve years old to consent to adoption, respondent-mother contends that N.C.G.S. § 7B-1110(a)(1)–(3) and (6) "required the court to consider the need for her consent to any adoption" because Elyse's refusal to give consent would create a barrier that would diminish the likelihood of her adoption. Respondent-mother also challenges the portion of finding of fact 11 stating that termination of respondent-mother's parental rights was the "only barrier" to achieving the permanent plan of adoption because N.C.G.S. § 48-3-601 requires Elyse's consent for adoption.

¶ 15 The controlling statute for termination-of-parental-rights proceedings does not expressly require a trial court to consider a child's consent to adoption in making its dispositional decision. N.C.G.S. § 7B-1110(a). In fact, N.C.G.S. § 48-3-601(1) is found in an entirely separate chapter of the General Statutes of North Carolina, which concerns adoption. The trial court in the dispositional stage of a termination-of-parental-rights hearing is charged with "determin[ing] whether *terminating the parent's rights* is in the juvenile's best interest." N.C.G.S. § 7B-1110(a) (emphasis added). Testimony concerning Elyse's interest in adoption may be admissible evidence during the dispositional stage and considered by the trial court. However, the dispositional determination by a trial court that terminating the parent's rights is in the juvenile's best interests is not an abuse of discretion merely because a child over the age of twelve indicates a lack of interest in adoption. *See In re M.A.*, 374 N.C. 865, 879–80 (2020) (affirming the trial court's best interest determination after holding that while a child's consent to adoption is relevant to a trial court's best interests determination, it is not controlling and that findings and conclusions concerning likelihood of consent to adoption were not required); *In re M.M.*, 200 N.C. App. 248, 258 (2009) ("Further, nothing within [N.C.G.S. § 7B-1110] requires that termination lead to adoption in order for termination to be in a child's best interests."), *disc. review denied*, 364 N.C. 241 (2010). Notably, there was no testimony or evidence that Elyse had no interest or would not consent to adoption. Therefore, we reject respondent-mother's argument that the trial court should have expressly considered Elyse's consent to adoption and respondent-mother's challenge to finding of fact 11.[4]

4. Respondent-mother also argues that the GAL provided Elyse with incorrect information regarding the educational benefits of adoption, and therefore, respondent-mother asserts that to the extent Elyse consented to adoption, it could not have been knowing and voluntary. Since we have rejected respondent-mother's argument that the trial court should have expressly considered Elyse's consent to an adoption, we reject respondent-mother's argument that Elyse's consent to an adoption could not have been knowing and voluntary for the same reasons.

¶ 16 Respondent-mother next argues that the trial court abused its discretion in determining that termination of her parental rights was in Elyse's best interests because it failed to consider Elyse's bond with respondent-mother and whether Elyse consented to adoption. Respondent-mother argues that "it does not appear the court considered Elyse's bond with [respondent-]mother" because "[t]he record is replete with references to their love and connection and to . . . Elyse's wish to return to her mother." The uncontested evidence does demonstrate that Elyse loves respondent-mother and has a bond with her. As such, the trial court was not required to make a finding on this issue. *See In re E.F.*, 375 N.C. 88, 91 (2020) ("Although the trial court must 'consider' each of the statutory factors . . . we have construed [N.C.G.S. § 7B-1110(a)] to require written findings only as to those factors for which there is conflicting evidence." (quoting N.C.G.S. § 7B-1110(a))).

¶ 17 Additionally, "the bond between parent and child is just one of the factors to be considered under N.C.G.S. § 7B-1110(a), and the trial court is permitted to give greater weight to other factors." *In re Z.L.W.*, 372 N.C. 432, 437 (2019). In this case, the GAL testified that while Elyse wished the situation with respondent-mother to be different, Elyse wanted to remain with her foster parents. The trial court also found that Elyse had not seen respondent-mother in nearly twelve months due to respondent-mother's noncompliance with the trial court's orders. Therefore, we reject respondent-mother's argument.

¶ 18 The trial court was not required to consider Elyse's consent to adoption for its dispositional conclusion pursuant to N.C.G.S. § 7B-1110, nor was the trial court required to make findings as to Elyse's bond with respondent-mother when it was uncontested. Therefore, the trial court did not abuse its discretion in concluding that it was in Elyse's best interests to terminate respondent-mother's parental rights, and we affirm the trial court's orders.

¶ 19 Respondent-mother has abandoned any challenges to the trial court's termination of her parental rights as to Elizabeth and to the trial court's best interests determination concerning Elizabeth because respondent-mother did not present or discuss any arguments in her brief. *See* N.C. R. App. P. 28(a).

IV. Respondent-father's Appeal

¶ 20 **[2]** Respondent-father argues that the trial court abused its discretion in its best interests determination as to Elizabeth because it failed to make "necessary and proper" findings of fact regarding a possible rela-

tive placement as required by *In re S.D.C.*, 373 N.C. 285, 290 (2020). We disagree.

¶ 21 One month prior to the termination hearing, respondent-father submitted to DSS a request that his third cousin be a potential placement for Elizabeth. The investigation was still pending at the time of the termination hearing. In the termination order, the trial court found that

> b. [Elizabeth] is currently in an adoptive placement and is very bonded to the foster parents and her adoptive siblings. She has been in this placement all but approximately five months of her 18 months in DSS custody.
>
> c. [Elizabeth] has not seen [respondent-mother] since the fall of 2018 or [respondent-father] for at least six (6) months.
>
> d. The proposed kinship placement suggested by [respondent-father] would not be appropriate as [Elizabeth] has been with her foster family for most of her life and [respondent-father] just suggested this kinship placement last month. Additionally, the potential kinship provider expressed reservations to the GAL regarding [respondent-father] possibly interfering and causing problems.

¶ 22 The dispositional findings show that the trial court considered the relative placement and made findings of fact sufficient to allow this Court to review the trial court's dispositional determination for abuse of discretion. We therefore reject respondent-father's argument that the trial court abused its discretion by concluding that termination was in the best interests of Elizabeth. "[T]he trial court is not required to make findings of fact on all the evidence presented, nor state every option it considered." *In re J.A.A.*, 175 N.C. App. 66, 75 (2005). The trial court is also not "expressly directed to consider the availability of a relative placement in the course of deciding a termination of parental rights proceeding." *In re S.D.C.*, 373 N.C. at 290.

¶ 23 In *In re S.D.C.*, this Court recognized that a trial court "may treat the availability of a relative placement as a 'relevant consideration' in determining whether termination of a parent's parental rights is in the child's best interests" and indicated that when determined to be a relevant consideration, "the trial court *should make* findings of fact addressing '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.' " *Id.* (emphasis added) (quoting *In re A.U.D.*, 373 N.C. at 12). When there is no evidence presented at the termination hearing tending to show that a potential relative is available for the juvenile, the trial court need not consider or make findings on the matter. *In re S.D.C.*, 373 N.C. at 291. Furthermore, the dispositional findings demonstrate that the trial court adequately considered the "critical circumstances" regarding Elizabeth's placement.

¶ 24 Since this Court concludes that the trial court's decision on this matter was not so manifestly unsupported by reason as to constitute an abuse of discretion, we affirm the trial court's order terminating respondent-father's parental rights to Elizabeth.

V. Conclusion

¶ 25 In summary, we conclude that the trial court did not abuse its discretion in determining that termination of respondent-mother's parental rights was in Elyse's best interests and that termination of respondent-father's parental rights was in Elizabeth's best interests. Respondent-mother abandoned any and all challenges to the trial court's order terminating her parental rights to Elizabeth and the trial court's best interests determination as to Elizabeth. Accordingly, we affirm the trial court's orders terminating respondents' parental rights.

AFFIRMED.

IN RE I.J.W.

[378 N.C. 17, 2021-NCSC-73]

IN THE MATTER OF I.J.W.

No. 347A20

Filed 18 June 2021

Termination of Parental Rights—grounds for termination—willful abandonment—sufficiency of findings—relevant six-month period

The trial court's order terminating respondent-father's parental rights on the grounds of willful abandonment was affirmed where the unchallenged findings of fact showed that for over a year prior to the filing of the motion to terminate respondent had not visited the child, he refused to work his case plan or take any of the steps required to reunite with the child, and he did not make any effort to maintain a parental bond with the child. Respondent's attempts to comply with the case plan after the filing of the petition did not bar an ultimate finding of willful abandonment because they did not occur during the determinative period for adjudicating willful abandonment—the six consecutive months preceding the filing of the petition.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from an order entered on 9 April 2020 by Judge Mark L. Killian in District Court, Burke County. This matter was calendared for argument in the Supreme Court on 22 April 2021 but determined on the record and briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

Mona E. Leipold for petitioner-appellee Burke County Department of Social Services.

Christopher S. Edwards for appellee Guardian ad Litem.

Leslie Rawls for respondent-appellant father.

EARLS, Justice.

¶ 1 Respondent, the biological father of minor child I.J.W. (Ian)[1], appeals from the trial court's order terminating his parental rights. Unchallenged

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

findings of fact based on clear and convincing evidence in the record support the trial court's conclusion that respondent willfully abandoned Ian. Therefore, we affirm the trial court's adjudication that there are grounds pursuant to N.C.G.S. § 7B-1111(a)(7) to terminate respondent's parental rights as to Ian.

1. Factual Background

¶ 2 On 6 December 2017, the Burke County Department of Social Services (DSS) obtained nonsecure custody of Ian and filed a petition alleging him to be a neglected and dependent juvenile.[2] According to the petition, on 24 February 2017, DSS received a Child Protective Services ("CPS") report stating that the mother left Ian in a car while she was in a courthouse and he had a seizure. In addition, the mother was using methamphetamines while Ian was in her care, and respondent was aware of the mother's drug use. On 2 March 2017 DSS received the results of Ian's drug screen, showing that he tested positive for methamphetamines. On 27 February 2017 Respondent signed a safety assessment agreeing to be Ian's primary caregiver.

¶ 3 In its subsequent Adjudication/Disposition Order entered 1 March 2018, the trial court found as fact that respondent obtained a domestic violence protective order in effect from 24 March 2017 to 23 March 2018, based on findings that the mother struck Ian leaving marks on two occasions, was using methamphetamines in Ian's presence, and used heroin while being his primary caretaker. The protective order barred contact between respondent and Ian's mother, and required that the maternal grandmother supervise any and all contact between Ian and his mother.

¶ 4 The trial court further found that notwithstanding these restrictions, on 27 November 2017 a DSS social worker met with respondent at his home, where the mother was also living. Respondent admitted to the social worker that the home did not have electricity, heat, or running water and admitted that he and the mother had recently used methamphetamines. Despite respondent's statements that he understood the terms of the protective order, he still did not comply. On 4 December 2017 the social worker completed a home visit and observed Ian to have a bruise on his cheek which the mother explained was caused by a fall while he was playing with her. That day the mother agreed to leave the home and to abide by the terms of the protective order. On 5 December 2017 the social worker made an unannounced visit and again found the mother to

2. DSS filed an amended petition on 12 December 2017 including the results from the parents' 4 and 5 December 2017 drug tests.

be in the home with Ian present. The mother was arrested for violating the trial court's protective order. That same day respondent tested positive for methamphetamines and THC metabolite.

¶ 5 A hearing on the juvenile petition was held on 30 January 2018. On 1 March 2018, the trial court entered an order adjudicating Ian to be a neglected and dependent juvenile based on factual stipulations made by the parents. The trial court ordered respondent to comply with an out-of-home family services agreement in which he was required to obtain a substance abuse assessment and follow all recommendations; submit to random drug screens; attend parenting classes and demonstrate skills learned; obtain a parenting capacity evaluation and follow all recommendations; obtain a psychological assessment and follow all recommendations; obtain a domestic violence offender assessment and follow all recommendations; obtain and maintain stable, appropriate, and independent housing; and obtain and maintain legal, stable, and verifiable income. Respondent was allowed one hour of supervised visitation per week to be supervised by DSS.

¶ 6 Following a 1 March 2018 permanency-planning hearing, the trial court entered an order on 12 April 2018 setting the permanent plan for Ian as reunification with a secondary plan of adoption. Respondent was ordered to comply with the components of his case plan and was allowed two hours of supervised visits every other week.

¶ 7 Respondent initially made progress on his case plan. He completed his substance abuse assessment and began group therapy, completed parenting classes at One Love, completed his psychological assessment on 12 February 2018 which recommended he attend individual counseling, and obtained transportation. Respondent also obtained housing, but it was deemed inappropriate for a minor child.

¶ 8 In a permanency-planning order entered 3 August 2018, the trial court changed the permanent plan to adoption with a secondary plan of reunification. The trial court found that respondent was not making reasonable progress toward reunification and was not actively participating in his case plan. Specifically, the trial court found that respondent had not begun individual counseling, had tested positive for marijuana on 9 May 2018, and maintained that it was age-appropriate to "whip" Ian for discipline. The court also found that on 18 May 2018, DSS ended respondent's visit with Ian early due to respondent's aggressive behavior and derogatory comments toward the social worker. Respondent became irate, left the building, and threw grass and mud at DSS's door. Respondent did not have any further communication with DSS after

that visit. The trial court suspended respondent's visitation and ordered that respondent complete an anger management program as part of his case plan.

¶ 9 Although respondent was ordered to complete an anger management program on 19 July 2018 and ongoing visitation was conditioned upon the father completing the program, he failed to do so. There is nothing in the record to suggest that the trial court's finding of fact that respondent refused to participate in an anger management program is wrong and respondent does not contest it. Moreover, respondent did not return to court to request that his visitation otherwise be reinstated. He was aware of what he needed to do to reinstate visitation with Ian and did nothing. Respondent had not visited Ian since 18 May 2018. The trial court found that respondent withheld his love and affection from Ian by not seeking to re-establish visitation and by failing to send cards, gifts or letters.

¶ 10 Essentially, after the 18 May 2018 incident, respondent was unwilling to work with DSS. From May 2018 until DSS filed the motion to terminate parental rights almost a year and a half later on 18 October 2019, respondent ceased all engagement with DSS and case plan objectives. He would disengage with social workers when they called, he refused to provide his address, and did not attempt to work any aspect of his case plan.

¶ 11 The trial court entered a permanency planning order on 14 February 2019 placing the child with his maternal grandmother who recently had her foster care license reinstated. The court found that Ian had been having visits with his maternal grandmother, and they had bonded.

¶ 12 On 18 October 2019, DSS filed a motion to terminate respondent's parental rights to Ian.[3] DSS alleged that five grounds existed to terminate respondent's parental rights: (1) neglect, (2) willful failure to make reasonable progress to correct the conditions that led to Ian's removal from the home, (3) willful failure to pay a reasonable portion of the cost of Ian's care, (4) dependency, and (5) willful abandonment. N.C.G.S. § 7B-1111(a)(1)–(3), (6)–(7) (2019). On 6 December 2019, respondent filed an answer in which he admitted the ground of willful failure to pay under N.C.G.S. § 7B-1111(a)(3) but denied the remaining alleged grounds.

¶ 13 Following hearings held 30 January, 31 January and 27 February 2020, the trial court entered an order on 9 April 2020 terminating

3. The mother relinquished her parental rights to Ian on 6 May 2019.

respondent's parental rights. The trial court concluded that all five grounds alleged in the termination motion existed and that termination of respondent's parental rights was in Ian's best interests.[4] Accordingly, the trial court terminated respondent's parental rights to Ian. Respondent appealed.

2. Legal Analysis

¶ 14 Respondent argues generally 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 (2020) (citing N.C.G.S. §§ 7B-1109, -1110 (2019)). "At the adjudicatory stage, the petitioner bears the burden of proving by 'clear, cogent, and convincing evidence' the existence of one or more grounds for termination under section 7B-1111(a) of the General Statutes." *In re A.U.D.*, 373 N.C. 3, 5–6 (2019) (quoting N.C.G.S. § 7B-1109(f) (2017)). We review a trial court's adjudication of grounds to terminate parental rights "to determine whether the findings are supported by clear, cogent and convincing evidence and the findings support the conclusions of law." *In re E.H.P.*, 372 N.C. 388, 392 (2019) (quoting *In re Montgomery*, 311 N.C. 101, 111 (1984)). "The trial court's conclusions of law are reviewable de novo on appeal." *In re C.B.C.*, 373 N.C. 16, 19 (2019).

¶ 15 Although the trial court determined that five grounds exist to terminate respondent's parental rights, it is well settled that a "finding by the trial court that any one of the grounds for termination enumerated in N.C.G.S. § 7B-1111(a) exists is sufficient to support a termination order." *In re B.O.A.*, 372 N.C. 372, 380 (2019). While the termination order is comprehensive, the clearest ground on the facts of this case and therefore the place we start is that of willful abandonment.

¶ 16 The court must determine that the parent abandoned his child "for at least [the] six consecutive months" before the motion to terminate parental rights was filed. N.C.G.S. § 7B-1111(a)(7). The trial court made numerous findings of fact supported by clear and convincing evidence in the record establishing that respondent father willfully abandoned Ian during the relevant six-month period from 18 April 2019 to 18 October

4. Although the trial court found and concluded that grounds existed by clear and convincing evidence pursuant to N.C.G.S. § 7B-1111(a)(2) to terminate respondent's parental rights, the "Order on Adjudication" portion of the termination order does not list N.C.G.S. § 7B-1111(a)(2) as a ground. The parties seem to agree in their briefs, however, that N.C.G.S. § 7B-1111 (a)(2) was a ground on which the court terminated parental rights.

2019. When the motion to terminate respondent's rights was filed, respondent had not visited Ian in more than a year. Moreover, during that year he refused to work his case plan—failing to take any of the steps required to reunite with Ian. Indeed, during the relevant period he did not make any effort to maintain any sort of parental bond with Ian.

¶ 17 As the trial court found, respondent demonstrated that this was willful behavior on his part to the extent that once the motion for termination of parental rights was filed in October of 2019, he began to "complete a flurry of services from October 2019 through January 2020." Based on the evidence before it, the trial court concluded that respondent's post-petition behavior demonstrated that he previously had the ability to engage in services but chose not to. However, his later actions do not bar an ultimate finding of willful abandonment because the statute explicitly prescribes the relevant time period for evaluating whether a child has been willfully abandoned and none of respondent's activities in compliance with his case plan, including completing a substance abuse assessment, substance abuse classes and a domestic violence assessment, occurred during the relevant period. *See In re E.B.*, 375 N.C. 310, 318 (2020) ("[A]lthough the trial court may consider a parent's conduct outside the six-month window in evaluating a parent's credibility and intentions, the determinative period for adjudicating willful abandonment is the six consecutive months preceding the filing of the petition."). Respondent has not contested any of these findings of fact and therefore they are binding on appeal. *See In re T.N.H.*, 372 N.C. 403, 407 (2019) ("Findings of fact not challenged by respondent are deemed supported by competent evidence and are binding on appeal."). Taken together, the trial court's factual findings in this case support the conclusion that respondent willfully abandoned Ian for more than six consecutive months preceding the filing of the petition.

¶ 18 Because the ground of willful abandonment is sufficient to support the trial court's order of termination, we need not address respondent's arguments as to the other grounds. Respondent does not challenge the trial court's best interests determination. Accordingly, we affirm the trial court's order terminating respondent's parental rights.

AFFIRMED.

IN RE J.E.E.R.

[378 N.C. 23, 2021-NCSC-74]

IN THE MATTER OF J.E.E.R.

No. 344A20

Filed 18 June 2021

Termination of Parental Rights—grounds for termination—failure to pay reasonable portion of cost of care—no contribution

The termination of respondent-father's parental rights for failure to pay a reasonable portion of the cost of care for the juvenile was affirmed where the trial court found that respondent was employed and earned between $200 and $800 per week but did not provide any financial support for the child during the six months prior to the filing of the petition and the findings were supported by clear, cogent, and convincing evidence.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from an order entered on 16 March 2020 by Judge William B. Davis in District Court, Guilford County. This matter was calendared for argument in the Supreme Court on 22 April 2021 but determined on the record and briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

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

Ward and Smith, P.A., by Mary V. Cavanagh for appellee Guardian ad litem.

Robert W. Ewing for respondent-appellant father.

BARRINGER, Justice.

¶ 1 Respondent, the biological father of J.E.E.R. (Jane),[1] appeals from the trial court's order terminating his parental rights pursuant to N.C.G.S. § 7B-1111(a)(2)–(3), and (7) (2019). Since we find that the trial court's findings of fact supporting its termination of respondent's parental rights pursuant to N.C.G.S. § 7B-1111(a)(3) are supported by clear, cogent, and convincing evidence, we affirm.

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

I. Factual and Procedural Background

¶ 2 Jane was born in 2006. On 8 May 2017, Guilford County Department of Health and Human Services (DHHS) obtained nonsecure custody of Jane and her three siblings[2] and filed a petition alleging Jane to be an abused and neglected juvenile. At that time, DHHS did not have knowledge of respondent's location or contact information. DHHS's petition alleged that on 3 May 2017, it received a report of physical abuse after Jane's brother arrived at school with black eyes and swelling on the left side of his face. After each sibling was interviewed, Jane's brother and sister disclosed that they sustained injuries from their mother and stepfather. Jane denied being physically disciplined during the current school year "but disclosed that she has had marks in the past from being physically disciplined." Jane reported that her mother and stepfather disciplined the children using their hands and objects, such as a toy ukulele and extension cords.

¶ 3 Subsequently, DHHS located respondent in New York. Respondent is listed as the father on Jane's birth certificate. On 27 June 2017, respondent submitted to genetic paternity testing that determined he was Jane's biological father. In an order entered 4 August 2017, the trial court adjudicated Jane to be a neglected juvenile. The trial court ordered respondent to cooperate with an Interstate Compact on the Placement of Children (ICPC) home study, enter a case plan, and cooperate with DHHS.[3] The trial court authorized DHHS to allow supervised telephone calls between respondent and Jane for a minimum of one hour per week.

¶ 4 Following a permanency-planning hearing on 25 October 2017, the trial court found that respondent had spoken with Jane by telephone, supervised by her foster parents. Although respondent had been in contact with a DHHS social worker and was cooperative he had not yet entered into a case plan. Respondent reported to a social worker and the trial court that he was planning on moving in with his sister in New York and wanted a home study completed on his sister's home. The trial court set the permanent plan for Jane as reunification with respondent, with a concurrent plan of adoption. The trial court continued to allow supervised telephone calls between respondent and Jane.

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2. Jane's siblings are not the subjects of this appeal.

3. The result of respondent's genetic paternity testing was pending at the time of the adjudication hearing. The trial court's order that respondent cooperate with an ICPC home study, enter into a case plan, and cooperate with DHHS was contingent upon confirmation of respondent's paternity.

¶ 5 Subsequently, the New York Office of Children & Family Services, through an ICPC request, completed a home study of respondent's sister's apartment. By a report dated 1 May 2018, the New York Office of Children & Family Services disapproved of the placement in respondent's sister's home. On 24 May 2018, respondent contacted DHHS and requested that a home study be completed on his mother's home. The home study on his mother's home was conducted and denied.

¶ 6 In a permanency-planning hearing on 1 August 2018, the trial court found that respondent was not working towards reunification. Respondent had been hostile with a DHHS social worker, and in December 2017, requested that the social worker no longer contact him. On 6 March 2018, respondent contacted a social worker and stated that he wanted Jane to call him the following day, Jane's birthday. Jane called respondent as requested, but respondent did not answer. Jane left a voice mail, but he never returned her phone call. The trial court further found that a DHHS social worker sent respondent a proposed case plan on 31 May 2018 and asked respondent to contact the social worker if he wished to enter into the plan. Despite acknowledging receipt of the proposed case plan on 6 June 2018, respondent did not enter into a case plan with DHHS. The trial court concluded that DHHS should cease reunification efforts with respondent and changed the permanent plan to adoption with a concurrent plan of guardianship. DHHS was ordered to proceed with filing for termination of parental rights within sixty days of the entry of the order.

¶ 7 On 3 October 2018, DHHS filed a petition to terminate respondent's parental rights to Jane. DHHS alleged grounds for termination pursuant to N.C.G.S. § 7B-1111(a)(1)–(3) and (7). Following a hearing on 1 October 2019, at which respondent did not appear, the trial court entered an order on 31 October 2019 concluding that grounds existed to terminate respondent's parental rights in Jane pursuant to N.C.G.S. § 7B-1111(a)(1)–(3) and (7). The trial court then determined that it was in Jane's best interests that respondent's parental rights be terminated, and it terminated his parental rights. *See* N.C.G.S. § 7B-1110(a) (2019).

¶ 8 On 11 October 2019, respondent filed a "Motion to Re-Appoint Counsel, Motion to Re-Open the Evidence, and Motion for a New Trial." The trial court entered an order on 27 January 2020 granting respondent's motion for a new trial because of concerns that respondent lacked proper notice of the first hearing and without objection from any party. The 31 October 2019 order terminating respondent's parental rights was "stricken and set aside."

¶ 9 Following a termination-of-parental-rights hearing on 18 February 2020, which respondent was present for and participated in, the trial court entered an order on 16 March 2020 concluding that grounds existed to terminate respondent's parental rights pursuant to N.C.G.S. § 7B-1111(a)(2)–(3), and (7) and determining that it was in Jane's best interests that respondent's parental rights be terminated. *See* N.C.G.S. § 7B-1110(a). Respondent appealed.

II. Standard of Review

¶ 10 Our Juvenile Code provides for a two-step process for the termination of parental rights—an adjudicatory stage and a dispositional stage. N.C.G.S. §§ 7B-1109, -1110 (2019). At the adjudicatory stage, the petitioner bears the burden of proving by clear, cogent, and convincing evidence the existence of one or more grounds for termination under 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).

¶ 11 We review a trial court's adjudication under N.C.G.S. § 7B-1111 "to determine whether the findings are supported by clear, cogent and convincing evidence and the findings support the conclusions of law." *In re Montgomery*, 311 N.C. 101, 111 (1984). "The trial court's conclusions of law are reviewable de novo on appeal." *In re C.B.C.*, 373 N.C. 16, 19 (2019). Unchallenged findings are deemed to be supported by the evidence and are binding on appeal. *In re Z.L.W.*, 372 N.C. 432, 437 (2019).

III. Analysis

¶ 12 On appeal, respondent challenges the trial court's determination that grounds existed to terminate his parental rights. Specifically, respondent argues that the findings of fact supporting the trial court's grounds for termination pursuant to N.C.G.S. § 7B-1111(a)(3), and (7) were not supported by clear, cogent, and convincing evidence. Respondent also argues that because the trial court found that respondent had not neglected Jane pursuant to N.C.G.S. § 7B-1111(a)(1), the trial court was precluded from terminating his parental rights pursuant to N.C.G.S. § 7B-1111(a)(2).

A. Termination of Respondent's Parental Rights Pursuant to N.C.G.S. § 7B-1111(a)(3)

¶ 13 N.C.G.S. § 7B-1111(a)(3) states, in relevant part:

> (a) The court may terminate the parental rights upon a finding of one or more of the following:
>
> . . . .
>
> (3) The juvenile has been placed in the custody of a county department of social services . . . and the parent has for a continuous period of six months immediately preceding the filing of the petition or motion willfully failed to pay a reasonable portion of the cost of care for the juvenile although physically and financially able to do so.

¶ 14 The " 'cost of care' refers to the amount it costs the Department of Social Services to care for the child, namely, foster care." *In re Montgomery*, 311 N.C. at 113. "A parent is required to pay that portion of the cost of foster care for the child that is fair, just and equitable based upon the parent's ability or means to pay. . . . The requirement applies irrespective of the parent's wealth or poverty." *In re Clark*, 303 N.C. 592, 604 (1981).

¶ 15 The trial court made the following findings of fact, in pertinent part, to support its termination of respondent's parental rights pursuant to N.C.G.S. § 7B-1111(a)(3):

> 2. [Jane] has been in the legal and physical custody of [DHHS] a consolidated county human services agency, pursuant to Court Order continuously since May 8, 2017.
>
> . . . .
>
> 5. The Petition to Terminate Parental Rights in this matter was filed on October 3, 2018. . . . The six-month period applicable to the (a)(3) and (a)(7) claim is April 3, 2018 through October 3, 2018.
>
> . . . .
>
> [10]b. Income – [Respondent] was to obtain and maintain suitable employment and provide proof of income. [Respondent] indicated that he was employed at A&J Grocery at the beginning of

> 2018 until approximately the fall/winter of 2019. [Respondent] indicated that this employer did not provide paystubs, and that he was being paid under the table four to five days per week, at a payment of approximately $200.00 to $300.00 per week. In the winter of 2018 until the present, [respondent] indicates by his own testimony that he is employed with Postmates delivery service. He schedules his own hours and brings home anywhere between $300.00 to $800.00 per week by direct deposit to his pre-paid card. He also indicated that he has some additional entrepreneurial activities but has given no indication of whether those resulted in any income, and if so, what amounts. As of today's hearing [respondent] has not provided any proof of income. . . .
>
> . . . .
>
> 17. . . .
>
> a. [DHHS] has incurred cost in connection with the care of [Jane] on a continuous basis in the six months preceding the filing of this Petition, namely from April 2018 through October 2018 amounting to $6,158.46.
>
> b. [Respondent] has not provided any type or amount of financial support for [Jane] within the six months immediately preceding the filing of this Petition though he stated to [DHHS] he was working. He agreed to provide verification of his income but has failed to do so.
>
> c. [Respondent] has never provided any documentation verifying he is unable to work due to a disability and agreed to provide proof of income. [Respondent] has reported that he is employed and has been since 2018. This demonstrates that [respondent] has sufficient resources to pay some amount greater than zero.

¶ 16 Respondent does not dispute the trial court's finding of fact that he "has not provided any type or amount of financial support for [Jane] within the six months immediately preceding the filing of this Petition though he stated to [DHHS] he was working." Rather, he argues the trial

court's finding of fact that respondent had sufficient resources to pay some amount of financial support greater than zero is not supported by the evidence. Specifically, respondent contends the trial court erred in determining that he had the ability to pay for Jane's cost of care because he was unable to support himself on the income he was receiving.

¶ 17 Here, the relevant six-month time period was 3 April 2018 to 3 October 2018. Respondent testified that he was employed at A&J Grocery from the beginning of 2018 until "[s]omewhere in the fall, going into winter" of 2018 and made between $200.00 and $700.00 per week. At the end of 2018 "going into [20]19," he began working at Postmates delivery service, earning between $300.00 and $800.00 per week. He also testified that he was never unemployed between the job at A&J Grocery and Postmates. Therefore, the trial court's findings that respondent was employed during the relevant time period with some income is supported by clear, cogent, and convincing evidence. *See*, *e.g.*, *In re T.D.P.*, 164 N.C. App. 287, 290 (2004) (holding there was clear and convincing evidence the respondent had an ability to pay an amount greater than zero where he was earning $0.40 to $1.00 per day while incarcerated), *aff'd*, 359 N.C. 405 (2005).

¶ 18 As this Court held in *In re J.A.E.W.*, 375 N.C. 112, 118 (2020), where the trial court finds that the respondent has made no contributions to the juvenile's care for the period of six months immediately preceding the filing of the petition and that the respondent had income during this period, the trial court properly terminates respondent's rights based on N.C.G.S. § 7B-1111(a)(3) for willful failure to pay a reasonable portion of the costs of care for the juvenile although physically and financially able to do so. Therefore, the trial court properly terminated respondent's parental rights in Jane pursuant to N.C.G.S. § 7B-1111(a)(3).

IV. Conclusion

¶ 19 Since only one ground is necessary to support a termination of parental rights, we decline to address respondent's arguments challenging the trial court's finding that grounds existed to terminate his parental rights under N.C.G.S. § 7B-1111(a)(2) and (7). *See* N.C.G.S. § 7B-1111(a). Respondent does not challenge the trial court's determination that it was in Jane's best interests to terminate his parental rights. Accordingly, we affirm the trial court's order.

AFFIRMED.

IN RE M.S.

[378 N.C. 30, 2021-NCSC-75]

IN THE MATTER OF M.S., W.S., E.S.

No. 343A20

Filed 18 June 2021

1. Termination of Parental Rights—no-merit brief—termination on multiple grounds—competent evidence and proper legal grounds

The termination of respondent-mother's parental rights based on neglect, willful failure to make reasonable progress, and being incapable of providing proper care and supervision of the children was affirmed where the mother's counsel filed a no-merit brief and the termination order was supported by competent evidence and based on proper legal grounds.

2. Termination of Parental Rights—grounds for termination—willful failure to make reasonable progress—failure to enter into a case plan

The trial court did not err by determining that grounds existed to terminate the parental rights of the father of the two oldest children based on a willful failure to make reasonable progress where the unchallenged findings showed that he did not enter into a case plan with DSS to establish the goals he needed to achieve prior to reunification—despite several opportunities to do so—and that he was not incarcerated for nine of the twenty months the children were in DSS custody.

3. Termination of Parental Rights—grounds for termination—failure to make reasonable progress—nexus between case plan and conditions that led to removal

The trial court's order terminating respondent-father's parental rights to the youngest child based on failure to make reasonable progress was supported by unchallenged findings, which showed that respondent-father failed to complete parenting classes, tested positive for controlled substances and refused at least four drug screenings, and was not incarcerated for seven months while his child was in DSS custody. Although respondent argued that he did make reasonable progress where the only condition relating to him that led to the child's removal—that his paternity had not been established—had since been corrected, there was a sufficient nexus between the substance abuse and mental health components of respondent's case plan and the conditions that led to the child's

removal from the home, because the child had been removed from respondent-mother's care based on neglect caused by exposure to substance abuse.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from orders entered on 2 April 2020 by Judge Marion Boone in District Court, Stokes County. This matter was calendared for argument in the Supreme Court on 22 April 2021 but determined on the record and briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

Jennifer Oakley Michaud for petitioner-appellee Stokes County Department of Social Services.

James N. Freeman Jr. for appellee Guardian ad Litem.

Anné C. Wright for respondent-appellant mother.

Christopher M. Watford for respondent-appellant father of M.S. and W.S.

Edward Eldred for respondent-appellant father of E.S.

BERGER, Justice.

¶ 1 Respondent-mother appeals from the trial court's orders terminating her parental rights to M.S. (Molly), W.S. (Will), and E.S. (Ella).[1] Counsel for respondent-mother has filed a no-merit brief under Rule 3.1(e) of the North Carolina Rules of Appellate Procedure. We conclude the issues identified by counsel as arguably supporting the appeal are meritless and, therefore, affirm the trial court's orders as to respondent-mother.

¶ 2 Respondent-father Cameron appeals from the trial court's orders terminating his parental rights to Molly and Will. Respondent-father Miles appeals from the trial court's orders terminating his parental rights to Ella. We conclude that the trial court made sufficient findings of fact, supported by clear, cogent, and convincing evidence, to support its conclusion to terminate both respondent-fathers' parental rights under N.C.G.S. § 7B-1111(a)(2); therefore, we affirm the trial court's orders as to both respondent-fathers.

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

I. Background

¶ 3 On July 5, 2018, the Stokes County Department of Social Services (DSS) received a report alleging that respondent-mother, respondent-father Cameron, Molly, and Will were overnight guests at a home when officers with the King Police Department responded to a report of drug use. After obtaining a search warrant, officers found evidence of drug use, including methamphetamine and marijuana; drug paraphernalia, including hypodermic needles; and an unsecured, loaded gun, all of which were accessible to the children. Respondent-mother denied seeing any drugs or drug paraphernalia in the home and denied intravenous drug use; however, an officer noted that she appeared to have fresh track marks on her arms and hands. The children were then placed with a temporary safety provider that same day.

¶ 4 On July 6, 2018, respondent-mother was arrested and charged with possession of heroin, possession of drug paraphernalia, and child abuse. These charges were later dismissed. Respondent-father Cameron was also arrested and charged with a felony probation violation and resisting a public officer. Both parents refused to submit to a drug screen requested by DSS.

¶ 5 On July 13, 2018, DSS filed juvenile petitions alleging that Molly and Will were neglected juveniles due to the children living in an environment injurious to their welfare, and DSS obtained nonsecure custody of the children the same day.

¶ 6 On July 24, 2018, respondent-mother entered into an Out of Home Family Services Agreement Case Plan with DSS.

¶ 7 On August 20, 2018, respondent-mother gave birth to Ella. Both respondent-mother and Ella tested negative for controlled substances at the hospital; however, on August 27, 2018, a test of Ella's umbilical cord came back positive for Suboxone.

¶ 8 On August 22, 2018, DSS received a report of substance abuse and an injurious environment, which alleged that respondent-mother did not have a home to take Ella to following their discharge from the hospital. Respondent-mother obtained a placement at The Shepherd's House in Mount Airy. On August 28, 2018, respondent-mother and Ella were discharged from the hospital and moved to The Shepherd's House.

¶ 9 On September 13, 2018, DSS reported that respondent-mother had made no progress on most of the requirements of her case plan, except she "has had clean drug screens since the children were placed in [the] custody of DSS." In addition, respondent-mother was participat-

ing in parenting classes, which was in compliance with her case plan, while living at The Shepherd's House. On or about October 4, 2018, respondent-mother's progress stalled. She admitted to taking Suboxone on several occasions, and DSS learned respondent-mother was spending significant time with respondent-father Cameron, though she refused to provide his contact information to DSS. On October 5, 2018, DSS filed a juvenile petition alleging Ella was neglected due to her living in an environment injurious to her welfare. DSS obtained nonsecure custody of Ella that same day.

¶ 10 On September 13, 2018, an adjudication hearing was held for Molly and Will. Respondent-mother consented that Molly and Will were neglected juveniles based on the allegations contained in the July 13, 2018 juvenile petitions. Respondent-father Cameron did not attend the hearing. On October 29, 2018, the trial court entered an order adjudicating Molly and Will to be neglected juveniles. In an order entered after a subsequent disposition hearing, the trial court set the primary permanent plan as reunification, with a concurrent plan of guardianship with a court-approved individual. Respondent-mother was ordered to comply with her case plan and was allowed two hours of supervised visitation per week. Respondent-father Cameron was ordered to enter into a case plan and cooperate with DNA paternity testing. He was denied visitation "due to his lack of contact with DSS and engagement with the case." Subsequent DNA testing established respondent-father Cameron to be the father of Molly and Will.

¶ 11 At a December 6, 2018, adjudication hearing, respondent-mother consented that Ella was a neglected juvenile based on the allegations contained in the October 5, 2018 juvenile petition. Respondent-father Miles had been determined to be Ella's biological father through DNA testing, and he was present at the hearing. On January 16, 2019, the trial court entered an order adjudicating Ella to be a neglected juvenile. In the accompanying disposition order, the trial court set the primary permanent plan as reunification, with a concurrent plan of guardianship with a court-approved individual. Respondent-mother was ordered to comply with her case plan and was allowed two hours of supervised visitation per week with Ella as well as two additional hours per week during respondent-mother's visitations with Molly and Will. Respondent-father Miles was ordered to enter into a case plan and was allowed two hours of supervised visitation per week.

¶ 12 Subsequent reports compiled by DSS and the guardian ad litem reflect the lack of progress made by any of the parents. Respondent-mother reported continued use of unprescribed Suboxone, marijuana, and

methamphetamines, resulting in several positive drug screens. She also refused at least three requested drug screens. While she reported to the social worker that she had completed various assessments as required by her case plan, she did not comply with any of the recommendations from the assessments. She also refused to cooperate when told not to use inappropriate language, not to bring inappropriate food, not to discuss the facts of the case with and in front of the children, and not to tell them they would be coming home after the next hearing.

¶ 13 Respondent-father Cameron was incarcerated at the Franklin Correctional Center in November 2018 and was released on May 1, 2019. He requested visitation with Molly and Will, though he only attended two out of five possible scheduled visits. He never entered into a case plan with DSS. He did not stay in consistent contact with DSS after being released from custody and did not provide DSS with his contact information. On July 1, 2019, respondent-father Cameron was arrested and was in custody in the Surry County Jail with multiple pending felony drug charges.

¶ 14 On December 12, 2018, respondent-father Miles entered into a case plan and was attending visitations with Ella until he was incarcerated on April 10, 2019. He was released on May 27, 2019, but he was rearrested three days later and confined in the Stokes County Jail. Prior to his incarceration, he was not engaged with DSS and did not make any progress towards his case plan. While he still needed to complete parenting classes and mental health and substance abuse assessments, DSS noted that he was not able to satisfy those requirements of his case plan while he was in jail. Subsequent testimony from a DSS social worker established that respondent-father Miles had access to resources to assist with the completion of his case plan while incarcerated, but he had only availed himself of GED classes and not Narcotics Anonymous meetings, parenting classes, or cognitive behavioral intervention.

¶ 15 On September 10, 2019, the primary permanent plan for all of the children was changed to adoption, with a concurrent plan of reunification, as a result of the lack of progress by each of the parents. On November 7, 2019, DSS filed motions to terminate the parental rights of all three parents. The motions alleged there were grounds to terminate each parent's parental rights to their respective children pursuant to N.C.G.S. § 7B-1111(a)(1), (2), and (6).

¶ 16 Following a hearing, the trial court entered orders on April 2, 2020, in which it determined grounds existed to terminate the parental rights of all parents for the grounds alleged in the motions. The trial court also de-

termined it was in the children's best interests that respondent-parents' rights be terminated. Respondent-parents appeal.

II. Respondent-Mother's No-Merit Appeal

¶ 17 **[1]** Respondent-mother's counsel filed a no-merit brief pursuant to Rule 3.1(e) of the North Carolina Rules of Appellate Procedure. Counsel has advised respondent-mother of her right to file a pro se brief on her own behalf with this Court and has provided respondent-mother with the documents necessary to do so. Respondent-mother has not submitted any written arguments.

¶ 18 Respondent-mother's counsel identified three issues that could arguably support an appeal but stated why she believed each of these issues lacked merit. We independently review these issues contained in respondent-mother's no-merit brief filed pursuant to Rule 3.1(e). *In re L.E.M.*, 372 N.C. 396, 402, 831 S.E.2d 341, 345 (2019). Based upon our careful review of the issues identified in the no-merit brief, we are satisfied that the trial court's April 2, 2020 orders were supported by competent evidence and based on proper legal grounds. Accordingly, we affirm the trial court's orders terminating respondent-mother's parental rights.

III. Respondent-Fathers' Appeals

¶ 19 Both respondent-fathers argue that the trial court erred by concluding that grounds existed to terminate their parental rights in their respective children.

¶ 20 A termination of parental rights proceeding consists of an adjudicatory stage and a dispositional stage. N.C.G.S. §§ 7B-1109, 7B-1110 (2019); *In re Montgomery*, 311 N.C. 101, 110, 316 S.E.2d 246, 252 (1984). At the adjudicatory stage, the petitioner bears the burden of proving by "clear, cogent, and convincing evidence" the existence of one or more grounds for termination under N.C.G.S. § 7B-1111(a). N.C.G.S. § 7B-1109(f). We review a trial court's adjudication that grounds exist to terminate parental rights to determine "whether the trial court's findings of fact are supported by clear, cogent, and convincing evidence and whether those findings support the trial court's conclusions of law." *In re B.O.A.*, 372 N.C. 372, 379, 831 S.E.2d 305, 310 (2019). Findings of fact that are supported by clear, cogent, and convincing evidence are "deemed conclusive even if the record contains evidence that would support a contrary finding." *Id.* Unchallenged findings of fact are binding on appeal. *In re D.W.P.*, 373 N.C. 327, 330, 838 S.E.2d 396, 400 (2020).

¶ 21 Here, both respondent-fathers' parental rights were terminated under N.C.G.S. § 7B-1111(a)(1), (2), and (6). "However, an adjudication

of any single ground for terminating a parent's rights under N.C.G.S. § 7B-1111(a) will suffice to support a termination order." *In re J.S.*, 374 N.C. 811, 815, 845 S.E.2d 66, 71 (2020). Therefore, we will only review respondent-fathers' challenges to termination pursuant to N.C.G.S. § 7B-1111(a)(2) and will not review either of the respondent-fathers' challenges to grounds for termination pursuant to N.C.G.S. § 7B-1111(a)(1)or (6).

¶ 22 Pursuant to N.C.G.S. § 7B-1111(a)(2), a trial court may terminate parental rights if "[t]he parent has willfully left the juvenile in foster care or placement outside the home for more than 12 months without showing to the satisfaction of the court that reasonable progress under the circumstances has been made in correcting those conditions which led to the removal of the juvenile." N.C.G.S. § 7B-1111(a)(2) (2019). Because Molly and Will were in the custody of DSS for approximately twenty months prior to the termination hearing, and Ella for approximately seventeen months, we address each of respondent-fathers' arguments below and conclude that neither respondent-father made a sufficient showing that he made reasonable progress under the circumstances to correct the conditions which led to the children's removal.

A. Respondent-Father Cameron

¶ 23 **[2]** Respondent-father Cameron argues the trial court failed to establish both that he willfully left Molly and Will in foster care and that he failed to make reasonable progress under the circumstances. We disagree.

¶ 24 "[A] finding that a parent acted 'willfully' for purposes of N.C.G.S. § 7B-1111(a)(2) 'does not require a showing of fault by the parent.' " *In re J.S.*, 374 N.C. at 815, 845 S.E.2d at 71 (quoting *In re Oghenekevebe*, 123 N.C. App. 434, 439, 473 S.E.2d 393, 398 (1996)). "Willfulness is established when the respondent had the ability to show reasonable progress, but was unwilling to make the effort." *In re S.M.*, 375 N.C. 673, 685, 850 S.E.2d 292, 303 (2020) (quoting *In re McMillon*, 143 N.C. App. 402, 410, 546 S.E.2d 169, 175, *disc. review denied*, 354 N.C. 218, 554 S.E.2d 341 (2001)).

¶ 25 Here, respondent-father Cameron never entered into a case plan with DSS. Had he done so, the goals he needed to achieve prior to reunification would have included: (1) to demonstrate appropriate parenting skills; (2) "to effectively manage mental health symptoms, including treatment for substance abuse"; (3) "to address the child[ren]'s basic needs with income security"; and (4) "[t]o obtain and maintain safe and stable housing[and] transportation." There is no indication respondent-father Cameron took any steps toward remediating the conditions which led

to the removal of Molly and Will, namely their exposure to an unsafe environment due to the substance abuse occurring in the home. In fact, respondent-father Cameron's most recent incarceration stemmed from several felony drug charges.

¶ 26 Moreover, respondent-father Cameron does not challenge finding of fact 23—that he never entered into a case plan; findings of fact 26 and 30—that he was not incarcerated for nine of the approximate twenty months Molly and Will were in DSS custody, including the first four months after they were removed from the home; finding of fact 27—that he requested one visit following his release from jail in May 2019 but failed to contact DSS after the visit concerning its request to set up a meeting to establish a case plan; and finding of fact 29—that after his incarceration in February 2020, he wrote a letter to DSS indicating that he would "do things once he went to prison." These unchallenged findings support the trial court's conclusion that respondent-father Cameron "willfully left [Molly and Will] in foster care . . . for more than 12 months without showing" reasonable progress to correct the conditions that led to their removal.

¶ 27 "[A] trial court has ample authority to determine that a parent's 'extremely limited progress' in correcting the conditions leading to removal adequately supports a determination that a parent's parental rights in a particular child are subject to termination pursuant to N.C.G.S. § 7B-1111(a)(2)[.]" *In re B.O.A.*, 372 N.C. at 385, 831 S.E.2d at 314. In this case, respondent-father Cameron cannot point to even "extremely limited progress" as he failed to even take the first step, entering into a case plan, even though he was presented with several opportunities to do so. Accordingly, we conclude the trial court did not err in determining grounds existed to terminate respondent-father Cameron's parental rights under N.C.G.S. § 7B-1111(a)(2).

B. Respondent-Father Miles

¶ 28 **[3]** Respondent-father Miles argues the only condition relating to him that led to Ella's removal from the home was that his paternity was not established at the time of removal. Thus, he argues that after his paternity was established by a DNA test, he fulfilled the reasonable progress standard by correcting the only condition that led to Ella's removal from his custody. We disagree.

> [A]s long as a particular case plan provision addresses an issue that, directly or indirectly, contributed to causing the juvenile's removal from the parental home, the extent to which a parent has reasonably

> complied with that case plan provision is, at minimum, relevant to the determination of whether that parent's parental rights in his or her child are subject to termination for failure to make reasonable progress pursuant to N.C.G.S. § 7B-1111(a)(2).

In re B.O.A., 372 N.C. at 385, 831 S.E.2d at 314.

¶ 29 In *In re B.O.A.*, the child was placed into DSS custody as a result of a domestic violence incident and an unexplained bruise on the child's arm. *Id.* at 385–86, 831 S.E.2d at 314. Throughout subsequent orders, starting with the initial adjudication order, the trial court identified "a complex series of interrelated factors [that] contributed to causing the conditions that led to [the child's] removal from [the respondent's] home." *Id.* at 386, 831 S.E.2d at 315. The respondent was receiving treatment for anxiety and depression, had a previous diagnosis of post-traumatic stress disorder, and was receiving treatment for substance abuse. *Id.* This Court acknowledged that post-traumatic stress disorder can result from domestic violence and untreated mental health disorders and substance abuse can make an individual more susceptible to domestic violence; therefore, "the history shown in the[ ] reports and orders reveals the existence of a sufficient nexus between the conditions that led to [the child's] removal from [the respondent's] home and the provisions of the court-ordered case plan relating to [the respondent's] mental health issues, substance abuse treatment, and medication management problems." *Id.* at 386–87, 831 S.E.2d at 315.

¶ 30 Similarly, the respondent in *In re C.J.* argued that the only condition that led to her child's removal was her "potential lengthy incarceration in Mississippi," which she argued was remedied at the time of the termination hearing. *In re C.J.*, 373 N.C. 260, 262–63, 837 S.E.2d 859, 861 (2020). However, the record revealed the respondent's pending criminal charges were for drug-trafficking and stolen weapons; she had an open case in another state involving allegations that she used the child to obtain prescription medication; she had a history of involvement with Child Protective Services in Mississippi related to allegations of inappropriate care, sexual abuse, exposure of a child to illegal substances, and inappropriate discipline; and her demeanor at hearings led the trial court to believe she may have been under the influence of substances and suffering from a mental health condition. *Id.* at 263, 837 S.E.2d at 861. This Court determined that "[t]hese findings establish[ed] the required nexus between the components of [the respondent's] court-approved case plan"— which required her to complete an assessment and follow all recommended treatment for sub-

stance abuse issues, submit to requested drug screens, and obtain and maintain stable employment and housing —"and the overall conditions that led to [the child's] removal." *Id.*

¶ 31 In this case, Ella was taken into DSS custody due to allegations of neglect stemming, in part, from concerns about her exposure to substance abuse. While respondent-father Miles may not have been involved in the removal of Ella from respondent-mother's care, the conditions that led to Ella's removal were appropriately considered by the trial court in addressing the requirements present in respondent-father Miles's case plan. *See In re B.O.A.*, 372 N.C. at 381, 831 S.E.2d at 311–12 ("According to N.C.G.S. § 7B-904(d1)(3), a trial judge has the authority to require the parent of a juvenile who has been adjudicated to be abused, neglected, or dependent to take appropriate steps to remedy conditions in the home that led to or contributed to the juvenile's adjudication or to the court's decision to remove custody of the juvenile from the parent, guardian, custodian, or caretaker." (cleaned up) (quoting N.C.G.S. § 7B-904(d1)(3) (2017))).

¶ 32 Respondent-father Miles's case plan required him to (1) complete parenting classes, (2) complete substance abuse and mental health assessments and follow all recommendations, (3) obtain secure income, and (4) obtain and maintain safe and stable housing and transportation. Respondent-father Miles does not challenge any of the trial court's findings of fact, which establish that he (1) failed to complete parenting classes; (2) failed to obtain the appropriate assessments; (3) tested positive for marijuana, methamphetamines, and amphetamines; and (4) refused at least four requested drug screens. The trial court also made unchallenged findings that respondent-father Miles was incarcerated several times while Ella was in DSS custody, that he was not incarcerated for seven months while Ella was in DSS custody, and that he failed to complete any programs while incarcerated that would show progress toward the completion of his case plan.

¶ 33 In fact, respondent-father Miles's unmanaged issues with substance abuse presents a sufficient nexus between the conditions that led to Ella's removal and the substance abuse and mental health components of his case plan. *See In re B.O.A.*, 372 N.C. at 387, 831 S.E.2d at 315. Moreover, the requirements related to income and housing may also relate to the issues involving respondent-father Miles's untreated substance abuse. *See id.* Accordingly, the trial court's unchallenged findings support its conclusion that respondent-father Miles failed to make reasonable progress to correct the conditions that led to Ella's

removal. Therefore, we conclude the trial court did not err in determining grounds existed to terminate respondent-father Miles's parental rights under N.C.G.S. § 7B-1111(a)(2).

IV. Conclusion

¶ 34 We conclude respondent-mother failed to present any arguments of merit on appeal. Additionally, we conclude the trial court's findings of fact support its conclusion that grounds existed to terminate the parental rights of both respondent-father Cameron and respondent-father Miles under N.C.G.S § 7B-1111(a)(2). Given that the existence of a single ground for termination suffices to support the termination of a parent's parental rights in a child, *see In re A.R.A.*, 373 N.C. 190, 194, 835 S.E.2d 417, 421 (2019), we need not review either of respondent-fathers' challenges to the grounds for termination pursuant to N.C.G.S. § 7B-1111(a)(1) and (6). As neither respondent-father has challenged the trial court's best interest determination, we affirm the trial court's termination orders.

AFFIRMED.

IN THE MATTER OF M.S.E. AND K.A.E.

No. 192A20

Filed 18 June 2021

1. Termination of Parental Rights—competency of parent—guardian ad litem—Rule 17—abuse of discretion analysis

In a termination of parental rights matter, the trial court did not abuse its discretion by failing to sua sponte conduct a competency hearing to determine whether respondent-mother needed a Rule 17 guardian ad litem. Although respondent's psychological evaluation recommended various types of assistance after stating that respondent had borderline intellectual functioning, the evaluation also noted several positive attributes of respondent including her resourcefulness. Further, the trial court had ample opportunity to observe respondent at multiple hearings, including during respondent's testimony, and respondent exhibited appropriate judgment prior to the hearings when she told the social services agency that she did not feel ready to take her children back and asked that they remain in their relative placement.

2. Termination of Parental Rights—adjudication—findings of fact—sufficiency of evidence

The adjudicatory findings of fact in an order terminating respondent-mother's parental rights to her two children (based on neglect and willful failure to make reasonable progress) were supported by clear, cogent, and convincing evidence regarding respondent's failure to take advantage of multiple opportunities to engage in services for her substance abuse and mental health issues, her lack of progress in various treatment programs, and the effect of her behavior on her son's mental health.

3. Termination of Parental Rights—grounds for termination—neglect—likelihood of future neglect

The trial court properly terminated respondent-mother's parental rights on the ground of neglect where its findings of fact, which were either unchallenged or supported by clear, cogent, and convincing evidence, supported the court's conclusion that there was a likelihood of future neglect of respondent's two children if they were returned to her care, based on respondent's lack of progress in addressing her ongoing substance abuse, mental health issues, and parenting skills, and her inability to acknowledge her role in her son's mental health struggles.

4. Termination of Parental Rights—best interests of the child—dispositional findings of fact—abuse of discretion analysis

The trial court did not abuse its discretion by determining that termination of respondent-mother's rights to her children was in their best interests where the court's findings addressed the statutory factors in N.C.G.S. § 7B-1110(a) and were supported by competent evidence or reasonable inferences from that evidence, including findings that the bond between respondent and her daughter had lessened over time, and that respondent's behavior played a part in her son's mental health issues. The trial court was not required to make findings regarding every dispositional alternative it considered, and its findings demonstrated a reasoned decision.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from order entered on 9 March 2020 by Judge Monica M. Bousman in District Court, Wake County. This matter was calendared in the Supreme Court on 22 April 2021 but determined on the record and briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

IN RE M.S.E.

[378 N.C. 40, 2021-NCSC-76]

Mary Boyce Wells for petitioner-appellee Wake County Human Services.

R. Bruce Thompson II for appellee Guardian ad Litem.

Kathleen M. Joyce for respondent-appellant mother.

EARLS, Justice.

¶ 1 Respondent appeals from an order terminating her parental rights in her children, M.S.E. (Mary) and K.A.E. (Kevin).[1] We affirm.

I. Background

¶ 2 Kevin was born in August 2010, and Mary was born in May 2017. On 8 May 2018, Wake County Human Services (WCHS) filed a juvenile petition alleging that Kevin and Mary were neglected juveniles. The petition alleged that on 9 December 2017, WCHS received a report that respondent, Kevin, Mary, and respondent's ten-year-old son[2], Gary, had been expelled from the Salvation Army homeless shelter based on respondent's failed drug screens. Respondent took the children briefly to a hotel but ran out of money. Kevin and Mary were placed in a safety placement with respondent's cousin, and Gary was placed with his father. Respondent had a history of homelessness and transiency, repeatedly placing her children with relatives for extended periods of time due to housing and income instability. She acknowledged daily use of marijuana since the age of fourteen and use of cocaine after 2014. Respondent had been diagnosed with depression, post-traumatic stress disorder, and anxiety.

¶ 3 The petition further alleged that while respondent agreed to participate in substance abuse and mental health treatment, she failed to do so. The Salvation Army connected respondent-mother with North Carolina Recovery Services for Substance Abuse Intensive Outpatient (SAIOP) treatment, but she did not attend any of the scheduled appointments. She also failed to appear for appointments with WCHS for In-Home Services. On 13 March 2018, respondent experienced a mental health crisis and went to Holly Hill Hospital for evaluation. She was not admitted but was recommended to immediately schedule an appointment with an outpatient therapist, a psychiatrist, and a SAIOP program. She did not follow

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

2. Respondent's ten-year-old son is not a subject of this appeal.

any of the recommendations. On 14 March 2018, she went to Healing Transitions, a residential substance abuse treatment program, but she left after five days. By this time, Kevin and Mary had been in their safety placement for four months, and respondent had only visited them on three occasions.

¶ 4 Following hearings on 15 June 2018 and 9 July 2018, the trial court entered an order on 4 September 2018 adjudicating Kevin and Mary to be neglected juveniles and continuing custody with WCHS. On 6 August 2018, Kevin was transferred to a therapeutic foster home after it was determined that he required a higher level of care than his safety placement could provide. The trial court conducted a review hearing on 1 October 2018, and entered an order on 23 October 2018 finding that respondent had failed to comply with any drug screen requests since the hair screen specifically ordered at the conclusion of the dispositional hearing. She admitted to ongoing, regular use of marijuana approximately three times per week, and the result of a hair sample screen was positive for marijuana and cocaine. The trial court also found that returning Kevin and Mary to the home would be contrary to their health and safety. The primary permanent plan was set as reunification, with a secondary plan of adoption.

¶ 5 Following a review hearing on 25 March 2019, the trial court entered an order on 22 April 2019 finding that respondent continued to use marijuana and had only complied with one of five drug screens requested by WCHS since the prior review hearing. Respondent reported use of cocaine on 22 February 2019. She had participated in five of sixteen possible parenting coaching sessions, and the sessions she did attend were productive, resulting in "noticeable improvements" in her interactions with the children. On 23 May 2019, Mary was transferred to a foster home after her safety placement could no longer care for her.

¶ 6 On 30 September 2019, WCHS filed a motion to terminate respondent's parental rights in Kevin and Mary. WCHS alleged: (1) respondent had neglected the children, and it was probable there would be a repetition of neglect if they were returned to her care, *see* N.C.G.S. § 7B-1111(a)(1) (2019): (2) respondent had willfully left the children in foster care for more than twelve months without showing reasonable progress under the circumstances to correct the conditions that led to their removal, *see* N.C.G.S. § 7B-1111(a)(2); and (3) the children had been placed in WCHS custody and respondent had for a continuous period of six months next proceeding the filing of the motion willfully failed to pay a reasonable portion of the cost of care for the children although physically and financially able to do so, *see* N.C.G.S. § 7B-1111(a)(3).

¶ 7 The motion to terminate respondent's parental rights came on for hearing on 16 and 29 January 2020. On 9 March 2020, the trial court entered an order concluding that grounds existed to terminate respondent's parental rights in Kevin and Mary pursuant to N.C.G.S. § 7B-1111(a)(1)–(2). The trial court determined it was in Kevin and Mary's best interests that respondent's parental rights be terminated, and the court terminated her parental rights.[3] *See* N.C.G.S. § 7B-1110(a). Respondent appeals.

II. Analysis

A. Rule 17 Guardian *ad Litem*

¶ 8 **[1]** Respondent's first argument on appeal is that the trial court abused its discretion by failing to, sua sponte, conduct an inquiry into whether she should be appointed a guardian ad litem (GAL) under Rule 17 of the North Carolina Rules of Civil Procedure to assist her during the termination hearing. She contends that once the trial court learned the results of a psychological evaluation she underwent in December 2019, it had a duty to inquire into her competency.

¶ 9 Section 7B-1101.1(c) of the North Carolina General Statutes permits the trial court "[o]n motion of any party or on the court's own motion" to appoint a GAL for a parent who is incompetent in accordance with N.C.G.S. § 1A-1, Rule 17. N.C.G.S. § 7B-1101.1(c). An "incompetent adult" is defined as one "who lacks sufficient capacity to manage the adult's own affairs or to make or communicate important decisions concerning the adult's person, family, or property whether the lack of capacity is due to mental illness, intellectual disability, epilepsy, cerebral palsy, autism, inebriety, senility, disease, injury, or similar cause or condition." N.C.G.S. § 35A-1101(7) (2019).

¶ 10 "A trial judge has a duty to properly inquire into the competency of a litigant in a civil trial or proceeding when circumstances are brought to the judge's attention [that] raise a substantial question as to whether the litigant is *non compos mentis*." *In re T.L.H.*, 368 N.C. 101, 106–07 (2015) (alterations in original) (quoting *In re J.A.A.*, 175 N.C. App. 66, 72 (2005)). "A trial court's decision concerning whether to conduct an inquiry into a parent's competency" and "[a] trial court's decision concerning whether to appoint a parental [GAL] based on the parent's incompetence" are both reviewed on appeal for abuse of discretion. *Id.* at 107. "An '[a]buse of discretion results where the court's ruling is manifestly

3. The trial court also terminated the parental rights of Kevin and Mary's fathers, but they are not parties to this appeal.

unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision.' " *Id.* (alteration in original) (quoting *State v. Hennis*, 323 N.C. 279, 285 (1988)). Further, the abuse of discretion standard is appropriate here because the evaluation of an individual's competence "involves much more than an examination of the manner in which the individual in question has been diagnosed by mental health professionals." *In re T.L.H.*, 368 N.C. at 108. Also important are factors such as the individual's behavior in the courtroom, how clearly they express themselves, whether they appear to understand what is going on, and whether they can assist counsel. *Id.*, at 108–09.

¶ 11 Here, respondent relies heavily on the testimony of a WCHS social worker who testified at the termination hearing. The social worker testified that on 4 December 2019, respondent completed a psychological assessment with Dr. Robert Aiello. Dr. Aiello determined respondent had borderline intellectual functioning. The social worker testified that Dr. Aiello recommended a parenting education program which focused on individuals with some cognitive impairments, "delivering the information on more of a functional level for the parents." Dr. Aiello further recommended that respondent identify a consistent support person who could provide her with "direction and guidance" with complex decisions regarding the needs and welfare of her children and with "daily living and important decision-making"; that if respondent was awarded disability, she would require a payee to assure proper use of funds; and that WCHS personnel and professional parties working with respondent review written documents with her to assure understanding of the information being presented.

¶ 12 Respondent argues that the results of Dr. Aiello's assessment and his recommendations indicate she needed the assistance of a Rule 17 GAL. Respondent also contends that there was other evidence to suggest she might be legally incompetent: she needed assistance from vocational rehabilitation, she believed she needed a disability instructor due to her learning comprehension disability in order to pass the General Educational Development Test, and a WCHS social worker noted in a March 2019 permanency planning hearing report that respondent "does not understand why this case was initiated or continues, and does not understand why she needs to pursue services."

¶ 13 After careful review of the record, we believe the record contains "an appreciable amount of evidence tending to show that [respondent was] not incompetent" at the time of the termination hearing. *In re T.L.H.*, 368 N.C. at 108–09. First, the WCHS social worker testified to some "assets" noted by Dr. Aiello in his assessment of respondent. Dr.

Aiello's assessment noted that respondent acknowledged her history of homelessness, "made statements indicating she understands her children need a safe and stable living environment[,]" and had established "some supportive relationships with others." Dr. Aiello observed that respondent was "resourceful and resilient and should be able to address her problems if she remains motivated to do so."

¶ 14 Second, the record indicates that respondent exercised appropriate judgment when she informed the Child and Family Team of WCHS on 30 April 2018 that she did not feel ready to take the children back due to her unstable housing and lack of employment, requesting that they remain in her cousin's home. *See In re T.L.H.*, 368 N.C. at 109 (noting that the respondent had exercised "proper judgment" in allowing the petitioner to take custody of respondent's child shortly after his birth based upon concerns about the safety of her home).

¶ 15 Third, the trial court's view of respondent's competency is supported by the fact that she attended all hearings related to this matter. Her presence gave the trial court ample opportunity to observe and evaluate respondent's capacity to understand the nature of the proceedings. *See In re Q.B.*, 375 N.C. 826, 834 (2020) (stating that the respondent's attendance at all hearings related to the matter supported her competency and "gave the trial court a sufficient opportunity to continue to observe her capacity to understand the nature of the proceedings").

¶ 16 Fourth, respondent testified at the termination hearing on 29 January 2020, and her testimony showed that she understood the questions addressed to her and had the ability to respond in a clear and cogent manner. Her courtroom conduct and responses provided no reason to believe that she did not understand the nature of the proceedings. For instance, respondent's testimony suggested that she understood the reasons why Kevin and Mary were removed from her care. *See id.*, 375 N.C. at 834 (stating that the respondent's testimony at the termination hearing demonstrated that "she understood the nature of the proceedings and her role in them as well as her ability to assist her attorney in support of her case"); *see also In re T.L.H.*, 368 N.C. at 109 (stating that the respondent's testimony at the permanency planning hearing was "cogent and gave no indication that she failed to understand the nature of the proceedings in which she was participating or the consequences of the decisions that she was being called to make"). Based on the evidence in the record, respondent has failed to demonstrate that the trial court abused its discretion by failing to, sua sponte, conduct an inquiry into whether she should be appointed a Rule 17 GAL.

B. Grounds for Termination

¶ 17 **[2]** Respondent next argues that the trial court erred by concluding that grounds existed to terminate her parental rights in Kevin and Mary. "Our Juvenile Code provides for a two-step process for termination of parental rights proceedings consisting of an adjudicatory stage and a dispositional stage." *In re Z.A.M.*, 374 N.C. 88, 94 (2020) (citing N.C.G.S. §§ 7B-1109, -1110 (2019)). "At the adjudicatory stage, the petitioner bears the burden of proving by 'clear, cogent, and convincing evidence' the existence of one or more grounds for termination under section 7B-1111(a) of the General Statutes." *In re A.U.D.*, 373 N.C. 3, 5–6 (2019) (quoting N.C.G.S. § 7B-1109(f) (2019)). We review a trial court's adjudication of grounds to terminate parental rights "to determine whether the findings are supported by clear, cogent and convincing evidence and the findings support the conclusions of law." *In re E.H.P.*, 372 N.C. 388, 392 (2019) (quoting *In re Montgomery*, 311 N.C. 101, 111 (1984)). "A trial court's finding of fact that is supported by clear, cogent, and convincing evidence is deemed conclusive even if the record contains evidence that would support a contrary finding." *In re B.O.A.*, 372 N.C. 372, 379 (2019). Unchallenged findings are deemed to be supported by the evidence and are binding on appeal. *In re Z.L.W.*, 372 N.C. 432, 437 (2019). "The trial court's conclusions of law are reviewable de novo on appeal." *In re C.B.C.*, 373 N.C. 16, 19 (2019).

¶ 18 Here, the trial court determined that grounds existed to terminate respondent's parental rights based on neglect and willfully leaving the children in foster care for more than twelve months without making reasonable progress to correct the conditions that led to their removal. N.C.G.S. § 7B-1111(a)(1)–(2) (2019). We begin our analysis by determining whether grounds existed to terminate respondent's parental rights on the basis of neglect pursuant to N.C.G.S. § 7B-1111(a)(1).

¶ 19 A trial court may terminate parental rights if it concludes the parent has neglected the juvenile within the meaning of N.C.G.S. § 7B-101. N.C.G.S. § 7B-1111(a)(1) (2019). A neglected juvenile is defined, in pertinent part, as a juvenile

> whose parent, guardian, custodian, or caretaker does not provide proper care, supervision, or discipline; or who has been abandoned; . . . or who lives in an environment injurious to the juvenile's welfare[.]

N.C.G.S. § 7B-101(15) (2019).

¶ 20 In certain circumstances, the trial court may terminate a parent's rights based on neglect that is currently occurring at the time of the termination hearing. *See, e.g.*, *In re K.C.T.*, 375 N.C. 592, 559–600 (2020) ("[T]his Court has recognized that the neglect ground can support termination . . . if a parent is presently neglecting their child by abandonment."). However, for other forms of neglect, the fact that "a child has not been in the custody of the parent for a significant period of time prior to the termination hearing" would make "requiring the petitioner in such circumstances to show that the child is currently neglected by the parent . . . impossible." *In re N.D.A.*, 373 N.C. 71, 80 (2019). In this situation, "evidence of neglect by a parent prior to losing custody of a child— including an adjudication of such neglect— is admissible in subsequent proceedings to terminate parental rights[,]" but "[t]he trial court must also consider any evidence of changed conditions in light of the evidence of prior neglect and the probability of a repetition of neglect." *In re Ballard*, 311 N.C. 708, 715 (1984). After weighing this evidence, the court may find the neglect ground if it concludes the evidence demonstrates "a likelihood of future neglect by the parent." *In re R.L.D.*, 375 N.C. 838, 841 (2020). Thus, even in the absence of current neglect, the trial court may adjudicate neglect as a ground for termination based upon its consideration of any evidence of past neglect and its determination that there is a likelihood of future neglect if the child is returned to the parent. *Id.* at 841 & n.3. "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 (2020) (quoting *In re M.J.S.M.*, 257 N.C. App. 633, 637 (2018)).

¶ 21 In the present case, the trial court found in its termination order that Kevin and Mary had been in WCHS custody since 8 May 2018 and that the circumstances that caused them to be in foster care were: respondent's chronic substance abuse; chronic homelessness of respondent and the children, due in part to respondent's substance abuse; untreated mental health needs of respondent and Kevin; and undetermined paternity of the children. The children were adjudicated neglected on 4 September 2018. Respondent was ordered to: have supervised visitation with the children a minimum of one hour per week; fully participate in a PEP assessment and comply with recommendations; complete a substance abuse assessment and comply with recommendations; demonstrate skills and lessons learned in parenting education in her interactions with the children and professionals involved in the case, and in respondent's life choices; refrain from the use of illegal and impairing substances and submit to random urine and hair sample drug screens; comply with services and recommendations by vocational rehabilitation; follow up with

recommended medical care for herself; refrain from criminal activity, and comply with requirements related to pending charges or convictions; obtain and maintain safe, stable housing suitable for herself and the children; obtain and maintain stable, legal income sufficient to support herself and her children; and maintain regular contact with the assigned WCHS social worker.

¶ 22 The trial court found that respondent had failed to take advantage of opportunities to engage in services since the filing of the juvenile petition. Although she complied with the interview portion of a substance abuse assessment with WCHS on 31 May 2018, she failed to comply with the drug screen required to complete the assessment. Based on the interview, respondent was diagnosed with marijuana use disorder (moderate) and cocaine use disorder (in remission) and was recommended to submit to random drug screens. In the Fall of 2018, respondent completed another assessment at North Carolina Recovery Support Services (NC Recovery), but she did not follow through with services at that program. On 4 April 2019, respondent participated in a reassessment of her substance abuse and was diagnosed with cannabis use disorder (moderate, in remission) and cocaine use disorder (mild, in remission). While it was recommended that she participate in substance abuse, mental health, and medical services at Fellowship Health, she failed to participate in any services at Fellowship Health.

¶ 23 Also in April 2019, respondent participated in a comprehensive clinical assessment at Southlight. It was recommended she participate in SAIOP, but she only attended one session and discontinued participation. In August 2019, respondent was again referred to NC Recovery for substance abuse and mental health services, but she did not comply with the recommendations of the program. She failed to demonstrate that she made progress in her mental health and substance abuse treatment. Since July 2018, respondent had been asked to complete twenty-four drug screens, but only completed seven. Four of the seven screens were positive for marijuana, and one was positive for cocaine. She continued to miss drug screens as recently as 31 December 2019.

¶ 24 The trial court further found that respondent missed three appointments with the PEP. After the third missed appointment, the PEP provider was no longer willing to provide an evaluation to respondent, and respondent was ordered to participate in a psychological evaluation in lieu of the PEP. She did not complete the psychological evaluation until December 2019 and missed her appointments for the interpretive session with the psychologist. Respondent eventually completed the one-on-one parenting education after two unsuccessful attempts.

However, she demonstrated that she did not understand the needs of her children, including the impact her words have on them. Despite being repeatedly instructed to refrain from telling the children they would be coming "home," she continued to tell them they were coming home for her own benefit. Her comments about the children coming to live with her were "closely correlated" with Kevin engaging in self-destructive behavior. Respondent was dismissive of Kevin's mental health needs. She participated in one therapy session with Kevin and never contacted the therapist again. Finally, the court found that respondent had obtained appropriate housing in May 2019.

¶ 25 Respondent challenges multiple findings of fact made by the trial court. First, she challenges portions of findings of fact 16, 22, and 31 as not being supported by clear and convincing evidence. These findings provide as follows:

> 16. [Respondent] has had multiple opportunities to engage in services since the filing of the juvenile petition, but she did not take advantage of those opportunities.
>
> . . . .
>
> 22. In August 2019, [respondent] was again referred to NC Recovery for substance abuse and mental health services, but she did not comply with the recommendations of that program, including skipping an appointment on December 20, 2019 for a psychiatric evaluation. The psychiatric evaluation could have determined her need for medication, which could have reduced her feeling the need to self-medicate with marijuana and other substances. She did not call to cancel or reschedule the treatment.
>
> . . . .
>
> 31. [Respondent] has not demonstrated that she has made progress in her mental health and substance abuse treatment.

Specifically, respondent challenges the portions of the foregoing findings which provide she "did not take advantage" of opportunities to engage in services, "did not comply with the recommendations" of NC Recovery, and "has not demonstrated that she has made progress in her mental health and substance abuse treatment."

¶ 26 Unchallenged finding of fact 19, supported by testimony from a WCHS social worker, establishes that in the fall of 2018, respondent completed an assessment with NC Recovery but failed to follow through with any services. A WCHS social worker also testified that respondent was referred to Southlight in early 2019. Respondent completed an assessment, and it was recommended she complete SAIOP. Instead of participating in SAIOP, respondent "opted to elect for a lower level of care" choosing to engage in a weekly relapse prevention group and monthly individual therapy. She had one visit on 12 March 2019 and did not engage in any further services at Southlight. Unchallenged finding of fact 20, which is also supported by testimony from a WCHS social worker, demonstrates that on 4 April 2019, respondent participated in a substance abuse assessment, and it was recommended she participate in substance abuse, mental health, and medical services at Fellowship Health. However, she did not engage in any services at Fellowship Health. The social worker further testified that respondent re-engaged with NC Recovery in August 2019, and she was assigned a therapist to have outpatient therapy. While she had been "more engaged" in the service than she had been in the past and was more consistent with her outpatient therapy, respondent missed a psychiatric evaluation on 20 December 2019 and had not rescheduled it at the time of the termination hearing. Based on the foregoing unchallenged findings and evidence, there was clear, cogent, and convincing evidence to support the trial court's findings that respondent failed to take advantage of multiple opportunities to engage in services, she did not comply with the recommendations made by NC Recovery, and she did not make reasonable progress in her mental health and substance abuse treatment.

¶ 27 Respondent also challenges finding of fact 23, which provides as follows:

> 23. [Respondent] was prescribed Zoloft by the Wake Med high risk pregnancy clinic to address symptoms of depression. [Respondent-mother] is not compliant with that prescription, citing concern that the medication could harm the baby she delivered in November 2019, in spite of it being prescribed by professionals who were treating her for the pregnancy. [Respondent] did not have concern that continued use of marijuana would harm the baby.

She argues that the trial court erred by faulting her for not taking her Zoloft prescription when there was no record evidence to show she had active symptoms of depression at the time. However, clear and

convincing evidence supports this finding and establishes respondent's symptoms of depression at the time. Respondent testified that the high-risk pregnancy clinic placed her on Zoloft based on her history of depression. She admitted that during her pregnancy, she "dealt with depression at times." In addition, a WCHS social worker testified that in August 2019, respondent was prescribed Zoloft by a physician at WakeMed Hospital because she had "endorsed some depressive symptoms."

¶ 28 Respondent further challenges finding of fact 21, which states:

> 21. [Respondent] participated in a Comprehensive Clinical Assessment (CCA) at Southlight in April 2019, which recommended that she participate in Substance Abuse Intensive Out-Patient (SAIOP) treatment. [Respondent] was noted to smell of marijuana when she arrived for the assessment; following a break during the assessment, [respondent-mother] returned with an even stronger odor of marijuana than when she first arrived. She attended one session of SAIOP, and discontinued participation. [Respondent] claims that the program facilitator told her that the program is not available for those who only use marijuana. The Court takes judicial notice that Southlight provides services to participants sentenced to drug treatment court, which includes users of only marijuana. Additionally, it is disingenuous for the mother to claim that she uses only marijuana. While marijuana might be her substance of choice, she tested positive for marijuana and cocaine when she took the drug screen to complete the CCA at Southlight, as well as other of the few other screens she completed.

Respondent argues that the trial court erred by taking judicial notice that Southlight provides services to drug treatment court participants who use only marijuana.

¶ 29 "[G]enerally a judge or court may take judicial notice of a fact which is either so notoriously true as not to be the subject of reasonable dispute or is capable of demonstration by readily accessible sources of indisputable accuracy." *West v. G. D. Reddick, Inc.*, 302 N.C. 201, 203 (1981). This Court has 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). Under these principles and based on the record before us, we are unable to say that the

matter of whether Southlight provides services to participants of drug treatment court who use only marijuana is a proper subject of judicial notice. Nevertheless, we conclude the trial court's unsupported finding is not prejudicial in light of the remaining, unchallenged portions of finding of fact 21 which establish that respondent tested positive for marijuana *and* cocaine when she took the drug screen to complete the CCA at Southlight. *See Tripp v. Tripp*, 17 N.C. App. 64, 67 (1972) (holding that although the trial court took improper judicial notice of an attorney's special competence and skill, that decision did "not detract from the other facts found"). Thus, her explanation that she discontinued participation in SAIOP treatment because the program was not available for users of only marijuana is unavailing because she demonstrably used cocaine as well.

¶ 30 Respondent also challenges findings of fact 24 and 26 which provide as follows:

> 24. [Respondent] missed three appointments with the Parent Evaluation Program (PEP), for an evaluation that would have been used to determine the services best suited to assist her in reunification. After the third missed appointment, the PEP provider was no longer willing to provide an evaluation to [respondent]. It was then ordered that [respondent] participate in a psychological evaluation in lieu of the PEP. [Respondent] did not complete the psychological evaluation until December 2019; she missed her appointment for the interpretive session with the psychologist, which would have helped her understand what was recommended and why.
>
> . . . .
>
> 26. [Respondent] did eventually complete 1:1 parenting education after two attempts. During the first opportunity to participate in these sessions, [respondent] attended seven of 25 possible sessions. [Respondent] was discharged from the program after multiple cancellations and no-shows for appointments. Another referral was made in September 2019 for [respondent] to resume 1:1 parenting education sessions; [respondent] attended four sessions, and cancelled six sessions, including one for the week of the first date of this hearing. Had the psychological

> evaluation been completed by [respondent] in a timely manner, then the sessions could have been tailored to more specifically meet [respondent's] needs.

Respondent contends that the trial court "blames" her for not completing her psychological evaluation in a timely manner but fails to acknowledge delays on the part of WCHS, respondent's attendance at an evaluation with Dr. Aiello three weeks after giving birth, respondent's engagement in weekly parenting coaching while caring for a newborn, and the reason she missed her interpretive session with Dr. Aiello—because she could not get to the office on time by bus.

¶ 31 We note that the "trial court need not make a finding as to every fact which arises from the evidence; rather, the court need only find those facts which are material to the resolution of the dispute." *Witherow v. Witherow*, 99 N.C. App. 61, 63 (1990), *aff'd per curiam*, 328 N.C. 324 (1991). Here, the trial court found the facts that were material to resolution of this case. Furthermore, there was clear, cogent, and convincing evidence to support findings of fact 24 and 26. A WCHS social worker testified that after respondent missed multiple appointments for the PEP assessment, the PEP provider decided that it would no longer provide respondent an assessment. In lieu of a PEP assessment, WCHS recommended a psychological assessment, and respondent completed the psychological assessment with Dr. Aiello on 4 December 2019. However, respondent missed the interpretive session with Dr. Aiello that was scheduled for 9 January 2020. A WCHS senior practitioner and parenting coach also testified that respondent was referred in November 2018 for one-on-one parent coaching sessions, but respondent only completed seven sessions. Respondent was terminated from the program due to ongoing cancellations and no-shows. A second referral occurred in September 2019, and respondent attended four sessions and canceled or rescheduled six sessions.

¶ 32 Respondent next contends that the trial court's findings of fact 27, 29, 30, and 34 focus on Kevin's mental health problems, but that the trial court's "narrow focus" on her as the source of Kevin's problems is not supported by the record. The challenged findings provide as follows:

> 27. [Respondent] has demonstrated that she does not understand the needs of her children, including the impact her words can have on them. [Respondent] was repeatedly instructed to not say anything to the children about them coming "home". She states that she would continue to tell them that they were

coming home in order to give them hope. In reality, she made these statements for her own benefit. Her comments about the children coming to live with her were closely related to [Kevin] engaging in self-destructive behavior that, on at least two occasions, resulted in him requiring hospitalization for mental health treatment to prevent him from harming himself. Most recently, in December 2019, she gave [Kevin] [the] impression that he might return to her care at the next scheduled review hearing in March 2020. Soon after that, he became so out of control that he tried to wrap a seatbelt around his neck to suffocate himself. This resulted in a nine day hospitalization to get him stabilized. He was previously hospitalized at Holly Hill due to his grabbing knives and wanting to hurt himself.

. . . .

29. [Kevin] is relatively stable when he is unaware of court hearings or is not told anything that would indicate or imply that he is returning to his mother's care.

30. [Respondent] is dismissive of [Kevin's] mental health needs, and believes that his behavior is due only to his wanting to return home. To the contrary, his behavior, and the timing thereof, indicates that he is frightened to return to her care.

. . . .

34. [Respondent] participated in one therapy session with [Kevin]. [Kevin] began the session feeling nervous, and became increasingly "closed off" as it progressed. He indicated to the therapist that he was afraid he would get in trouble if he said what he wanted to say. At the conclusion of that session, the next appointment was scheduled with [respondent's] input, and she indicated that she would attend. [Respondent] did not attend that appointment, which hurt and disappointed [Kevin]. She never contacted the therapist again. The relationship required much more than one session to address [Kevin's] anxiety about being reunified with his mother.

¶ 33 At the termination hearing, a WCHS social worker testified that there were concerns respondent was giving the children false hope about being reunited with her. The social worker discussed these concerns with respondent, explaining that respondent's comments to the children about them coming "home" negatively impacted Kevin's emotional well-being. Respondent acknowledged that while she could not "guarantee" the children would be coming home, she would continue to tell them they were coming "home" in order to "instill hope" in them. The WCHS social worker further testified that respondent's comments created "distress" for Kevin which manifested in self-harm and destructive behaviors, such as breaking doors, kicking furniture, and pulling down rods in the closet. Most recently, respondent told Kevin that he would be coming "home" in March 2020, and thereafter, Kevin attempted to wrap a seatbelt around his neck and had to be hospitalized. Based on the testimony of the WCHS social worker, the trial court reasonably inferred that respondent's comments were "closely correlated" to Kevin's self-destructive behavior. *See In re D.L.W.*, 368 N.C. 835, 843 (2016) (stating that it is the trial judge's duty to consider all the evidence, pass upon the credibility of the witnesses, and determine the reasonable inferences to be drawn therefrom). These challenged findings of fact are supported by clear, cogent, and convincing evidence in the record.

¶ 34 Respondent also argues that the trial court's findings regarding Kevin's mental health issues are insufficient because the trial court failed to make findings about a gap in Kevin's therapy between May and September 2019 and failed to address whether her intellectual disability impacted her understanding of Kevin's needs. However, as stated above, the trial court is not required to make a finding of every fact that arises from the evidence. *See Witherow*, 99 N.C. App. at 63.

¶ 35 Respondent further contends that there was no evidence to support the finding that respondent offered the children the hope of coming home for her own benefit. However, a WCHS social worker testified that respondent refused to stop telling her children they were coming home, despite warnings of its negative effects on Kevin, because "she believes that she can get her kids back one day. So she's gonna just keep saying it." Thus, it was reasonable for the trial court to determine that respondent continued to make these remarks for her own benefit, where she was fully advised that making such statements was not beneficial for the children and, in fact, had been very detrimental to them. *See In re D.L.W.*, 368 N.C. at 843 (trial judge has the responsibility to determine the credibility and weight of testimony as well as "the reasonable inferences to be drawn therefrom.").

¶ 36 Respondent also argues that in finding of fact 34, the trial court detailed a March 2019 therapy session respondent attended with Kevin and erroneously found that the next appointment was scheduled with her input, and she indicated she would attend. Kevin's therapist testified that in March 2019, respondent joined Kevin in therapy, and she left that session "with the next appointment time." Respondent indicated to the therapist that she "wasn't sure if she'd be able to make it, but she was gonna do her best to try." Thus, we disregard the portion of finding of fact 34 providing that "the next appointment was scheduled with [respondent's] input, and she indicated that she would attend." *See In re N.G.*, 374 N.C. 891, 901 (2020) (disregarding findings of fact not supported by clear, cogent, and convincing evidence).

¶ 37 **[3]** Next, respondent argues that the trial court's challenged findings of fact and uncontested findings are insufficient to support its conclusion that her parental rights were subject to termination based on neglect. Respondent does not challenge the children's prior adjudication of neglect. Rather, she contends that the evidence does not support the trial court's determination that there was a likelihood of future neglect if the children were returned to her care.

¶ 38 Here, the trial court concluded that:

> 54. There are facts sufficient to warrant a determination that grounds exist for the termination of parental rights, said grounds as follows:
>
> . . . .
>
> c. The parents neglected the children within the meaning of N.C.G.S. § 7B-101(15), and it is probable that there would be a repetition of neglect if the children were returned to the care of the parents.

¶ 39 In support of this conclusion, the trial court made numerous findings concerning the lack of progress respondent made toward satisfying the requirements of her case plan. The findings are either unchallenged, and therefore binding on appeal, or supported by clear, cogent, and convincing evidence as previously discussed. In unchallenged finding of fact 13, the trial court identified the steps that respondent was required to complete in order to achieve reunification. Among these requirements were that respondent participate in a PEP assessment and comply with all recommendations, fully complete a substance abuse assessment and comply with all recommendations, demonstrate skills and lessons

learned in parenting education in her interactions with the children, refrain from the use of illegal and impairing substances, submit to random drug screens, follow up with recommended medical care for herself, and obtain and maintain safe and stable housing suitable for herself and her children.

¶ 40 The trial court's findings establish that although respondent was able to obtain safe, appropriate housing in May 2019, her progress in other aspects of her case plan was inadequate. Although she had multiple opportunities to engage in services, respondent did not take advantage of such opportunities and failed to demonstrate progress in addressing her mental health and substance abuse issues. In May 2018, respondent completed the interview portion of a substance abuse assessment, but she did not comply with the drug screen required to complete that assessment. She then tested positive for cocaine and marijuana in July 2018. In the fall of 2018, she completed another substance abuse assessment at NC Recovery, but did not complete any services. In April 2019, respondent participated in a substance abuse reassessment and was recommended for substance abuse, mental health, and medical services at Fellowship Health, but she failed to comply with those recommendations. Also in April 2019, she participated in a CCA at Southlight and was recommended to participated in SAIOP treatment. However, she only attended one session of SAIOP. She was again referred to NC Recovery for substance abuse and mental health services but did not comply with the recommendations of that program. In addition, respondent was prescribed Zoloft to address symptoms of depression, but was not compliant with that prescription.

¶ 41 The trial court's findings show that the PEP provider was no longer willing to provide an evaluation to respondent after she missed three appointments. In lieu of a PEP assessment, respondent completed a psychological evaluation, but did not complete the psychological evaluation until December 2019, shortly before the termination hearing. Even after completing the evaluation, she missed the interpretive session with the psychologist, which would have helped her understand the recommendations made. After two unsuccessful attempts, respondent completed one-on-one parenting education. Yet, she demonstrated that she did not understand the needs of her children. Despite being instructed to discontinue telling them they were coming "home" because Kevin's self-destructive behavior was closely correlated with her comments, she continued to make these comments. In addition, Kevin was relatively stable when he was unaware of court hearings and not told anything that would indicate he would be returning to respondent's care. However, re-

spondent was dismissive of Kevin's mental health needs, believing that his behavior was due to his desire to return home.

¶ 42 The trial court's findings also show that since July 2018, respondent had been asked to complete twenty-four drug screens but only completed seven. Four of the screens were positive for marijuana, and one was positive for cocaine. She continued to miss drug screens, one as recently as 31 December 2019, just weeks before the termination hearing.

¶ 43 Based on the foregoing, we conclude the trial court's findings of fact support its conclusion that respondent neglected the children, and it was probable that there would be a repetition of neglect if they were returned to her care. Because the existence of a single ground for termination suffices to support the termination of a parent's parental rights in a child, *see In re A.R.A.*, 373 N.C. 190, 194 (2019), we need not address whether the trial court erred in terminating respondent's parental rights pursuant to N.C.G.S. § 7B-1111(a)(2).

C. Best Interests

¶ 44 **[4]** Respondent challenges several dispositional findings of fact and contends that the trial court abused its discretion in determining that it was in Kevin and Mary's best interests that respondent's parental rights be terminated. We conclude that the trial court did not abuse its discretion in determining that terminating respondent's parental rights was in the best interests of the children.

¶ 45 In determining whether termination of parental rights is in the best interests of a juvenile:

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

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

(6) Any relevant consideration.

N.C.G.S. § 7B-1110(a) (2019). We review the trial court's dispositional findings of fact to determine whether they are supported by competent evidence. *In re K.N.K.*, 374 N.C. 50, 57 (2020). Unchallenged dispositional findings are binding on appeal. *In re Z.L.W.*, 372 N.C. at 437. A trial court's best interests determination "is reviewed solely for abuse of discretion." *In re A.U.D.*, 373 N.C. at 6 (citing *In re D.L.W.*, 368 N.C. at 842).

¶ 46 In the instant case, the trial court made the following findings concerning the factors set forth in N.C.G.S. § 7B-1110(a):

1. The child, [Mary], is a two year old female[.]

2. The child, [Kevin], is a nine year old male[.]

. . . .

56. The primary plan for the children is adoption. Termination of parental rights aids in accomplishing that plan.

57. [Mary] does not have any special needs at this time.

58. [Kevin] has special needs related to treatment of his mental health issues. Many of these issues can be traced to his experiences prior to the filing of the juvenile petition, and the more significant mental health events he has experienced since coming into foster care have occurred due to statements of his mother. He currently receives intensive in-home therapy, and is prescribed Lexapro to treat his symptoms of depression and anxiety.

59. [Kevin's] mental health needs do not pose a barrier to his being successfully adopted.

60. Both the children are currently placed in prospective adoptive homes. Although they are placed separately, the prospective adoptive families are closely connected, and are part of the same church and social communities. The children currently have at least weekly contact with each other, and based on the regular activities of the prospective adoptive

families, it is anticipated that this regular contact will continue.

61. [Mary] was placed in her current foster home in May 2019. She has formed a strong, positive bond with the prospective adoptive parents, and has been integrated into their family. [Mary] is noted to be more vocal, playful, and confident since moving to this home.

62. When [Mary] first came into foster care, she had a strong attachment to her mother. While the attachment continues, it has eroded due to the passage of time. [Mary] does recognize her mother, and goes to her willingly at visits. At this time, she does not know her mother was her caregiver or provider.

. . . .

64. [Kevin] has been placed in his current foster home since August 2018. He refers to the foster parents as "mom" and "dad," and is noted to be playful and comfortable with them. [Kevin] and the foster parents regularly exchange hugs and other shows of affection. [Kevin] feels safe and loved in this home.

65. [Kevin's] foster parents are undeterred by his occasional mental health crises, and have demonstrated extraordinary commitment to him during these periods. [Kevin] required hospitalization to address his mental health, and received his treatment at Carolina Dunes, located approximately two hours away from his foster home. [Kevin] was at Carolina Dunes for nine days. At least one of his foster parents drove to and from Carolina Dunes every night during the hospitalization to visit with [Kevin].

66. Both of the children would be adoptable by other families, should an unforeseen issue impeded [sic] the current placements. [Kevin] is recognized to be loveable, outgoing, and gregarious child. [Mary] is an easy-going, happy little girl.

67. [Kevin] continues to have a strong bond with his mother, and is very affectionate with her. However, the bond is not healthy for [Kevin]. He is conflicted

> about his situation because he does not want to hurt his mother. [Kevin] worries for his mother's safety and well-being; he has expressed concern that she will again be homeless.
>
> . . . .
>
> 69. The prospective adoptive parents of both children have indicated their willingness to maintain a relationship between the children and [respondent].
>
> 70. The conduct of the [respondent-]parents has been such as to demonstrate that they will not promote the healthy and orderly, physical and emotional well being of the children.
>
> 71. The [respondent-]parents have acted inconsistently with their Constitutionally-protected parental status.
>
> 72. The minor children are in need of a permanent plan of care at the earliest possible age which can be obtained only by the severing of the relationship between the children and their parents by termination of the parental rights of the parents.
>
> 73. It is in the best interests of the children that the parental rights of the [respondent-]parents be terminated.

¶ 47 First, respondent contends that in finding of fact 58, the trial court erroneously attributes Kevin's mental illness to respondent's statements and ignores the evidence of his complex mental health issues. We first note that the trial court did not attribute the entirety of Kevin's mental health issues to the statements of respondent. Instead, the trial court found that "the more significant mental health events" Kevin had experienced since coming into foster care occurred as a result of respondent's statements. This finding is supported by the WCHS social worker's testimony. The social worker testified that "a lot of increased escalation" from Kevin was observed after respondent informed Kevin that there was a possibility he would be coming "home" prior to a 25 March 2019 hearing. There was a "behavioral pattern when those false promises were communicated to him [by respondent], that it caused [Kevin] to act out." The social worker testified that based on the "misinformation" provided by respondent, Kevin had a "very reactive" type of relationship with respondent and would have "mental health flare-ups" when he

is "let down." Thus, the challenged portion of finding of fact 58 is supported by competent evidence.

¶ 48 Respondent also challenges the portion of finding of fact 62 stating that Mary's attachment to respondent had "eroded" due to the passage of time. The WCHS social worker testified that at the beginning of the case, Mary had a strong attachment to respondent and would "bawl her eyes out" for hours when she had to separate from respondent after visitations ended. He testified that "now, [Mary] knows who her mother is, and when she comes to visits, you know, she goes straight to her. . . . [T]here is a very evident bond there between the two." Although this testimony indicates that Mary continued to have a bond with respondent, it was reasonable for the trial court to infer from the testimony in this case that their bond had lessened over time, and this finding is not in error.

¶ 49 Next, respondent contends that the portion of finding of fact 67 stating that Kevin's bond with respondent "is not healthy" for Kevin is contradicted by the court's finding of fact 69 which gives a positive characterization of the adoptive parents' "willingness to maintain a relationship between the children and [respondent]." She argues that the court's findings "do not explain why, if the bond with [respondent] is not healthy for Kevin, it is in his best interest to continue a relationship with her after his adoption." However, respondent reads too much into finding of fact 69. The trial court did not find that continuing a relationship with respondent was necessarily in Kevin's best interests. It merely observed that Kevin's prospective adoptive parents noted their willingness to maintain a relationship between Kevin and respondent.

¶ 50 Respondent further contends that although the trial court determined, in finding of fact 72 and conclusion of law 3, that the children needed a permanent plan and that it could only be accomplished by terminating her parental rights, it failed to make findings on dispositional alternatives the court considered. She also challenges the trial court's finding of fact 73 and conclusion of law 4, arguing that the court's findings do not show how termination of her parental rights was in her children's best interests.

¶ 51 Initially, we note that N.C.G.S. § 7B-1110(a) does not require the trial court to make written findings regarding any dispositional alternatives it considered. Here, the trial court's findings demonstrate that it considered the dispositional factors set forth in N.C.G.S. § 7B-1110(a) and "performed a reasoned analysis weighing those factors." *In re Z.A.M.*, 374 N.C. at 101. The trial court found that termination of respondent's parental rights would aid in the accomplishment of the primary plan of

adoption, Mary had formed a "strong, positive" bond with her prospective adoptive parents, Kevin was playful and comfortable in his foster home and felt safe and loved, and both Kevin and Mary would be adoptable by other families should an unforeseen issue impede their current placements. In addition, the trial court found that Kevin did not have a healthy bond with respondent and that the passage of time had eroded Mary's attachment to respondent. The trial court made sufficient dispositional findings and properly analyzed them. Therefore, we hold that the trial court did not abuse its discretion in concluding that termination was in Kevin and Mary's best interests. We affirm the trial court's order terminating respondent's parental rights in Kevin and Mary.

AFFIRMED.

IN THE MATTER OF T.A.M., K.R.M.

No. 276A20

Filed 18 June 2021

1. Termination of Parental Rights—parental right to counsel—motion to withdraw—lack of contact—granted in parent's absence

In a termination of parental rights proceeding, the trial court did not abuse its discretion by allowing respondent-father's appointed counsel to withdraw from representation at a hearing in which respondent failed to appear. Respondent had been advised multiple times by the court of his responsibility to maintain contact with his attorney, the department of social services made diligent efforts to locate respondent, respondent appeared to actively avoid being found or receiving communications, he failed to appear at several hearings, and counsel related to the court that she spoke to respondent and he did not object to her motion.

2. Termination of Parental Rights—best interests of the child—dispositional findings—sufficiency of evidence—weighing of factors

The trial court did not abuse its discretion by determining that termination of respondent-mother's parental rights, and not other dispositional alternatives, was in the best interests of respondent's children where the court's findings of fact—including the poor bond

between respondent and her children and the negative impact of respondent's visits on the children—were supported by competent evidence and showed the court properly addressed and weighed the various dispositional factors contained in N.C.G.S. § 7B-1110(a).

Justice ERVIN concurring in part and dissenting in part.

Justices HUDSON and EARLS join in this opinion concurring in part and dissenting in part.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from orders entered on 9 March 2020 by Judge Susan M. Dotson-Smith in District Court, Buncombe County. This matter was calendared for argument in the Supreme Court on 19 March 2021 but was determined on the record and briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

Hanna Frost Honeycutt for petitioner-appellee Buncombe County Department of Social Services; and William A. Blancato for respondent-appellee Guardian ad Litem.

Edward Eldred for respondent-appellant father.

Peter Wood for respondent-appellant mother.

BARRINGER, Justice.

¶ 1 Respondent-mother Lauren S. and respondent-father Wesley M. appeal from orders entered by the trial court terminating their parental rights in their minor children T.A.M. and K.R.M.[1] Respondent-father challenges the trial court's decision to grant his appointed counsel's motion to withdraw whereas respondent-mother challenges the trial court's determination that it was in Tam and Kam's best interests to terminate her parental rights. Since we conclude that the trial court did not abuse its discretion in any issue raised by the parents' appeals, we affirm the trial court's termination-of-parental-rights orders.

1. T.A.M. and K.R.M. will be referred to throughout the remainder of this opinion as "Tam" and "Kam," which are pseudonyms that are used to protect the identities of the juveniles and for ease of reading.

I. Factual Background

¶ 2 On 15 August 2016, the Buncombe County Department of Social Services (DSS) received a pair of child protective services (CPS) reports alleging that respondent-mother had just given birth to Tam, that she had been using drugs during her pregnancy, and that she had been homeless and living in her automobile immediately prior to giving birth. In addition, the reports alleged that both parents had a history of substance abuse and domestic violence and had recently been arrested on drug-related charges. On 17 August 2016, DSS received another CPS report that restated the allegations contained in the prior report and asserted that respondent-mother suffered from untreated mental health problems, that respondent-father was consuming illegal substances, and that respondent-mother had previously lost custody of another child as the result of substance abuse problems.

¶ 3 A social worker assigned to investigate these reports learned from the staff of the hospital at which respondent-mother gave birth to Tam that respondent-mother had tested positive for THC and unprescribed Oxycodone, and that Tam's cord toxicology screen had been positive for the presence of marijuana and opiates. In addition, the hospital staff told the social worker that respondent-mother tested positive for methamphetamine in June 2016. Respondent-mother admitted that she had been smoking marijuana during her pregnancy, that she suffered from mental health problems, and that she was diagnosed with borderline personality disorder. However, respondent-mother denied that she had consumed other unlawful substances or had been involved in incidents of domestic violence with respondent-father.

¶ 4 Respondent-father, on the other hand, denied all the allegations that had been made in the CPS reports. Finally, the social worker interviewed another social worker who had worked with the parents at an earlier time. The previous social worker confirmed that she had seen bruises that respondent-father inflicted upon respondent-mother on more than one occasion; that neither parent satisfied the requirements set out in their case plans, which required them to complete substance abuse treatment, mental health treatment, and domestic violence classes; and that respondent-mother acknowledged a history of domestic violence that respondent-father perpetrated against her.

¶ 5 After Tam was placed in a safety care placement, the parents agreed to comply with a safety plan, which required them to participate in supervised visitation; obtain substance abuse treatment; have no contact with each other in Tam's presence; and consent to follow-up medical

care, the assistance of a home health nurse, and the provision of pediatric care for Tam. In addition, respondent-father agreed to complete an anger management program.

¶ 6 According to a substance abuse assessment that respondent-mother obtained, respondent-mother had a severe substance abuse problem, with the assessing agency recommending that respondent-mother participate in therapy due to her "lack of desire or capacity to get clean." The assessing agency also recommended that respondent-mother undergo intensive outpatient therapy and participate in parenting education and domestic violence classes. Furthermore, the assessing agency concluded that respondent-mother had significant mental health problems that hindered her ability to care for a child and diagnosed respondent-mother as being bipolar and suffering from borderline personality disorder, severe opiate use disorder, and moderate cannabis use disorder.

¶ 7 After the completion of this assessment, respondent-mother agreed to enter into a family services agreement pursuant to which she was required to comply with the recommendations made by the assessing agency, to refrain from consuming any medications not prescribed for her, to attend weekly Narcotics Anonymous meetings, and to submit to random drug screens. Similarly, respondent-father agreed to enter into a family services agreement, which required him to attend substance abuse classes, refrain from consuming unlawful substances, submit to random drug screens, complete a batterer's intervention program, and attend anger management classes. After entering into these family services agreements, respondent-mother was arrested on drug-related charges while respondent-father admitted that he had consumed marijuana and failed to start participating in the batterer's intervention program. As a result, DSS filed a petition alleging that Tam was a neglected juvenile on 22 September 2016.[2]

¶ 8 After an adjudicatory hearing held on 18 November 2016, the trial court entered an order on 5 January 2017 finding that Tam was a neglected juvenile based upon the parents' stipulation as to the accuracy of the allegations contained in the juvenile petition. In view of the parents' further stipulation to the continuance of this case for disposition until a later time, the trial court entered an interim disposition order. This order provided that, while the parents retained custody of Tam, Tam would continue to reside in her safety placement and both parents would be awarded supervised visitation with her.

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2. As a result of the fact that Tam was living in a safety placement, DSS did not take her into nonsecure custody.

¶ 9 Following an initial dispositional hearing held on 31 January 2017, the trial court entered an order on 20 February 2017 in which it found as a fact that (1) the parents failed to submit to required drug screens on 19 December 2016; (2) the parents continued to deny that their relationship was characterized by domestic violence and minimized the extent to which domestic violence had occurred between them; and (3) the parents continued to reside with each other and lacked sufficiently stable housing to permit them to assume responsibility for providing care for Tam. Moreover, the trial court found that respondent-mother (1) had been arrested on the basis of outstanding warrants on 22 November 2016, and (2) had yet to complete a psychiatric evaluation or participate in medication management, although she had attended substance abuse treatment group sessions.

¶ 10 The trial court further found that respondent-father was completing some aspects of his case plan, such as complying with the terms of his probation, but the trial court also found that he had not been attending his substance abuse group, he was not participating in individual therapy, and he had not yet obtained a medical evaluation. As a result, and with the parents' consent, the trial court placed Tam in DSS custody, provided for supervised visitation between the parents and Tam, and ordered the parents to comply with the provisions of their case plans. After a permanency planning review hearing held on 6 December 2017, the trial court entered an order on 8 January 2018 establishing reunification as the primary permanent plan for Tam, with a secondary permanent plan of custody.

¶ 11 On 12 January 2018, DSS received a CPS report indicating that respondent-mother had recently given birth to Kam. According to the report, respondent-mother admitted to having used marijuana while she was pregnant with Kam and tested positive for the presence of marijuana in September and December 2017. In addition, the report indicated that respondent-father tested positive for the presence of methamphetamine, cocaine, and marijuana in June 2017. A social worker assigned to investigate the report confirmed the validity of these allegations, with respondent-father having admitted that he had continued to use marijuana and had smoked marijuana on the day prior to his conversation with the investigating social worker.

¶ 12 On 16 January 2018, DSS filed a petition alleging that Kam was a neglected juvenile in which DSS recited the allegations set out in the earlier petition relating to Tam, the history of DSS's efforts to work with the parents, and the information contained in the most recent CPS report. In addition, DSS alleged that the respondent-parents had threatened to sue

DSS and that, after learning that Kam would not be discharged to their care, their "behaviors continued to escalate," with respondent-mother having "grabbed" Kam, necessitating the assistance of hospital security personnel. Based upon the same concerns, DSS obtained the entry of an order allowing DSS to take Kam into nonsecure custody.

¶ 13 On 30 January 2018, the trial court held a permanency planning and review hearing regarding Tam. In an order entered on 22 February 2018, the trial court found that the conditions that had led to Tam's removal from the parents' custody continued to exist and that a return to their home would be contrary to Tam's health and safety. In light of that determination, the trial court changed Tam's secondary permanent plan to adoption while leaving reunification as Tam's primary permanent plan.

¶ 14 An adjudicatory hearing relating to the juvenile petition concerning Kam was held on 16 March 2018. After the parents stipulated to the validity of the allegations in the DSS petitions, the trial court entered an order on 2 April 2018 determining that Kam was a neglected juvenile. Since the parents consented to a continuance of the required dispositional hearing, the trial court entered an interim disposition order providing that Kam would remain in the custody of DSS; that the parents would continue to have supervised visitation; and that the parents should continue to submit to random drug screens, attend counseling, and complete the other services that had been recommended for them.

¶ 15 On 6 June 2018, permanency planning and review hearings were held with respect to both juveniles. In orders entered on 23 July 2018, the trial court noted that the parents had maintained sobriety and sanctioned unsupervised visitation between the parents and Tam and Kam. In addition, the trial court established a primary permanent plan for Kam of reunification with a secondary permanent plan of adoption. In orders entered on 24 September 2018, however, the trial court suspended the parents' unsupervised visitation with the children and made their visitation supervised after the parents failed to satisfy the requirements of their case plans, such as inconsistencies in their attendance at various therapeutic activities and their eviction from their home.

¶ 16 On 24 January 2019, the trial court entered permanency planning and review orders for both juveniles after a hearing held on 9 January 2019. In that order, the trial court found that the parents had been "doing well with their case plans and visitation with [Tam and Kam] until October 2018 when [DSS] learned of continued substance abuse issues and domestic violence between the respondent parents." Furthermore, the trial court found that respondent-mother was not currently engaged

in treatment or therapy of any kind and that respondent-father was not consistently engaged to satisfy the requirements of his case plan. Finally, the trial court noted that DSS had reported that respondent-mother had threatened DSS employees and that DSS was no longer comfortable supervising parental visits with the children except during normal business hours, when law enforcement assistance would be available. As a result, the trial court entered orders changing the permanent plans for both Tam and Kam to a primary plan of adoption, with a secondary permanent plan of guardianship and a tertiary permanent plan of reunification.

¶ 17 On 26 February 2019, DSS filed petitions in which it sought to terminate the parental rights of both parents pursuant to N.C.G.S. § 7B-1111(a)(1), (2), and (3). As a result of the fact that respondent-father's whereabouts were unknown at the time that the termination petitions were filed, DSS served him by publication. On 15 May 2019, respondent-father's attorney moved to withdraw from his representation of respondent-father in light of respondent-father's failure to maintain contact with her. The trial court granted the attorney's motion to withdraw at a continuance hearing held on 22 May 2019 and by an order entered on 7 June 2019. On 4 October 2019, respondent-father appeared before the trial court and the same counsel was re-appointed to represent him. On 22 January 2020, respondent-father's counsel filed another withdrawal motion predicated upon respondent-father's failure to maintain contact with his attorney coupled with the attorney's lack of knowledge concerning respondent-father's wishes and her resulting inability to properly represent respondent-father at the termination hearing.

¶ 18 The DSS termination petitions were heard on 30 and 31 January 2020. On 9 March 2020, the trial court entered orders determining that respondent-mother's parental rights in the children were subject to termination pursuant to N.C.G.S. § 7B-1111(a)(1) and (2). Respondent-father's parental rights were subject to termination pursuant to N.C.G.S. § 7B-1111(a)(1), (2), and (3). In addition, the trial court concluded that the termination of the parents' parental rights would be in the children's best interests. As a result, the trial court terminated both parents' parental rights in the children. The parents appealed to this Court from the trial court's termination orders.

II. Substantive Legal Issues

A. Respondent-Father's Appeal

¶ 19 **[1]** In his sole challenge to the trial court's termination orders, respondent-father argues that the trial court erred by allowing his coun-

sel to withdraw from representing him at the termination hearing. After a careful review of the record, we conclude that the trial court did not abuse its discretion in granting respondent-father's appointed counsel's motion to withdraw.

¶ 20 A trial court's decision to grant or deny an attorney's motion to withdraw is reviewed on appeal for an abuse of discretion. *See Benton v. Mintz*, 97 N.C. App. 583, 587 (1990). "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 (2015) (alteration in original) (quoting *State v. Hennis*, 323 N.C. 279, 285 (1988)); *see also White v. White*, 312 N.C. 770, 777 (1985) ("A ruling committed to a trial court's discretion is to be accorded great deference and will be upset only upon a showing that it was so arbitrary that it could not have been the result of a reasoned decision."). Thus, when appellate courts review for abuse of discretion, the inquiry is whether the ruling is unreachable by a reasoned decision, *see White*, 312 N.C. at 777, which necessarily requires appellate courts to consider broadly the circumstances which may render the ruling justifiable, *see In re K.M.W.*, 376 N.C. 195, 217 (2020) (Morgan, J., dissenting) (recognizing that a trial court's assessment of a motion to withdraw, even when involving a statutory right to counsel in a termination of parental rights proceeding, should not be reviewed "in a vacuum," but should include the "circumstances *surrounding* the termination of parental rights hearing.").

¶ 21 Here, the trial court allowed respondent-father numerous opportunities to participate in the termination-of-parental-rights proceedings, protected respondent-father's statutory right to appointed counsel, and acted well within its discretion to grant respondent-father's attorney's motion to withdraw.

¶ 22 The trial court first advised respondent-father of his responsibility to attend all trial court hearings and maintain communication with his court appointed attorney at the first appearance hearing on DSS's juvenile petition of neglect for Tam held on 11 October 2016.[3] Furthermore, the trial court advised respondent-father that if he failed to attend trial

3. Again, in an order entered on 23 February 2018, the trial court documented that on 16 January 2018 at the first appearance hearing on DSS's nonsecure custody order for Kam, it had advised respondent-father a second time that it was "his responsibility to maintain contact with his appointed attorney and . . . to attend all [trial c]ourt hearings." The trial court also advised respondent-father that if he did not maintain communication with his attorney or attend all trial court hearings, his attorney may "be permitted to withdraw . . . and the case may proceed without him being represented by an attorney."

court hearings or failed to maintain communication with his attorney, his attorney "may ask and be permitted to withdraw as his attorney of record, and the case may proceed without him being represented by an attorney."

¶ 23 Following DSS's filing of the termination-of-parental-rights petition on 26 February 2019, DSS made diligent efforts to locate respondent-father. In DSS's affidavit of due diligence filed on 27 February 2019, DSS stated that it had made unsuccessful efforts to locate respondent-father at four previous addresses, that DSS had spoken with respondent-father and he stated that he could not provide his current whereabouts, that respondent-father did not answer any of DSS's phone calls, that respondent-father was "actively attempting to conceal his residence from [DSS]," that respondent-father indicated that he did not want to receive mail, and that respondent-father's whereabouts could not be ascertained. Respondent-father then failed to appear at the first appearance hearing on the termination-of-parental-rights petition held on 19 March 2019. The trial court found as a fact that respondent-father's whereabouts were still unknown despite diligent efforts by DSS to locate him and ordered DSS to perfect service via publication pursuant to N.C.G.S. § 1-75.10(2), which DSS did on 8 May 2019. Sensitive to respondent-father's statutory right to counsel, the trial court also ordered that respondent-father's appointed-attorney from DSS's juvenile neglect proceeding remain as the provisional court appointed attorney. *See* N.C.G.S. § 7B-602(a) (2019).

¶ 24 Shortly thereafter, respondent-father's appointed attorney filed a motion to withdraw as counsel on 15 May 2019. In her motion to withdraw, respondent-father's attorney stated that she could no longer represent him due to his failure to maintain contact and indicated that the trial court only appointed her as provisional counsel for the termination-of-parental-rights action because respondent-father had not appeared at the first appearance hearing. *See* N.C.G.S. § 7B-1101.1(a)(1). At the continuance hearing for the termination-of-parental-rights petition held on 22 May 2019, the trial court granted respondent-father's attorney's motion to withdraw. Respondent-father was not present. After respondent-father's counsel was permitted to withdraw, respondent-father missed the subsequent continuance hearing for the termination-of-parental-rights petition held on 20 August 2019.

¶ 25 The trial court again appointed counsel for respondent-father when he appeared at the 4 October 2019 continuance hearing for the termination-of-parental-rights petition, the same attorney who had previously represented respondent-father, but who had been granted leave to

withdraw as counsel only five months earlier due to respondent-father's failure to maintain contact. The trial court advised respondent-father for a third time that it was "his responsibility to maintain contact with his appointed attorney and . . . to attend all [trial c]ourt hearings" and that if he failed to communicate or attend all trial court hearings, his attorney "may ask and be permitted to withdraw as his attorney of record, and the case may proceed without him being represented by an attorney."

¶ 26 On 22 January 2020, respondent-father's appointed counsel again filed a motion to withdraw as counsel stating that due to respondent-father's failure to communicate, she was unable to know respondent-father's wishes and represent him. Respondent-father's appointed counsel made a good faith effort to serve the motion on respondent-father, notwithstanding his actively attempting to conceal his residence and his statement to DSS that he did not want to receive mail. A notice of hearing was also filed with the motion, attempting to give respondent-father notice that the motion to withdraw would be heard 30 January 2020 at 9:00 a.m.

¶ 27 Respondent-father then failed to appear at the termination-of-parental-rights hearing held on 30 and 31 January 2020. As a pre-hearing matter on 30 January 2020, the trial court addressed the motion to withdraw filed by respondent-father's attorney, engaging in a colloquy with respondent-father's attorney. Counsel for respondent-father informed the trial court that she had spoken to respondent-father that day and informed respondent-father that if he did not appear at the termination-of-parental-rights hearing, she "would need to withdraw and the case would proceed in his absence." The attorney also stated that respondent-father did not object to his attorney's withdrawal as counsel. The trial court then granted respondent-father's attorney's motion to withdraw.

¶ 28 In relying on *K.M.W.*, the dissent asserts that the majority does not acknowledge that the trial court's discretion only comes into play when the parent has been provided adequate notice of counsel's intent to seek leave of court to withdraw and the trial court has adequately inquired into the basis for counsel's withdrawal motion. 376 N.C. at 211. The dissent erroneously assumes that these circumstances do not exist in this case when in fact they do, as evidenced by the information on the record in the colloquy on the day of the termination-of-parental-rights hearing, wherein the respondent-father's counsel voluntarily provided a thorough explanation of the circumstances to the trial court and responded to the trial court's sufficient inquiries.

¶ 29 Thus, the trial court acted well within its discretion when it granted respondent-father's appointed attorney's second motion to withdraw.

The trial court advised respondent-father on three separate occasions that it was his responsibility to maintain contact with his attorney and attend all trial court hearings. The trial court ensured respondent-father was served by publication even though he concealed his whereabouts from DSS. Despite respondent-father's whereabouts being unknown, the trial court ordered respondent-father's appointed attorney from DSS's juvenile neglect proceeding to remain as his provisional court appointed attorney. The trial court reappointed counsel when respondent-father appeared at the 4 October 2019 continuance hearing, despite his absence from the first appearance hearing on the termination-of-parental-rights petition. The trial court also granted both of respondent-father's motions to continue.

¶ 30 The dissent contends that the majority ignores the principle of *stare decisis* in its view of *K.M.W.* by adopting the *K.M.W.* dissent's perspective. However, such cases as these are fact-specific and hence dependent on the unique facts of any given case. Respondent-father's conduct is distinguishable in the present case from respondent's conduct in *K.M.W.* and, when coupled with the respective counsel's execution of their responsibilities and the respective trial courts' responses to the unique circumstances, the two cases and their respective outcomes are appropriately distinguishable as well. For example, in *K.M.W.*, the respondent did appear at the termination-of-parental-rights hearing, thereby giving the trial court the opportunity to observe the statutory requirements of N.C.G.S. § 7B-1101.1(a1) (2019), and thus determine if respondent knowingly and voluntarily *waived* her statutory right to counsel. 376 N.C. at 201–02, 210. Here, respondent-father made no apparent effort to observe the trial court's advisements to attend hearings, admitted he did not want to receive mail from DSS or other interested parties, and verbally consented to his attorney's *withdrawal* as counsel. Therefore, we decline to extend *K.M.W.* to the facts before us.

¶ 31 If the holding of *K.M.W.* controlled this case, the result would cause further burdens on our already overburdened trial courts by imposing additional and unnecessary procedures regarding termination-of-parental-rights hearings. A parent, by repeatedly failing to communicate with appointed counsel, by failing to attend numerous hearings, and by admittedly avoiding receiving mail and other communications from DSS and other interested parties, could successfully manipulate the judicial system to seriously delay the termination of parental rights proceeding. Under *K.M.W.*, the trial court would be required to halt a termination-of-parental-rights hearing, track down a parent, ensure the motion to withdraw was properly served and inquire into the efforts made by counsel

to contact the parent, all before allowing counsel to withdraw from representation. 376 N.C. at 210–11. And under these facts, trial courts would be obliged to re-appoint counsel for it all to begin again. These extensive and burdensome processes would impair judicial efficiency and drain already scarce judicial resources, while thwarting the over-arching North Carolina policy to find permanency for the juvenile at the earliest possible age. *See* N.C.G.S. § 7B-1100(2).

¶ 32 The trial court's actions respected the sanctity of respondent-father's statutory right to counsel, giving respondent-father every reasonable opportunity to participate in the termination-of-parental-rights proceeding and to be represented by appointed counsel. The trial court ensured that respondent-father had knowledge of his responsibility to communicate with counsel to enable him to retain representation. All the while, the trial court reasonably balanced and honored the purpose and policy of this State to promote finding permanency for the juvenile at the earliest possible age and to put the best interest of the juvenile first where there is a conflict with those of a parent. *See* N.C.G.S. § 7B-1100(2)–(3) (2019). Therefore, we conclude that the trial court did not abuse its discretion when it granted respondent-father's attorney's motion to withdraw.

B. Respondent-Mother's Appeal

¶ 33 **[2]** Respondent-mother argues that the trial court abused its discretion by determining that terminating her parental rights would be in the children's best interests. A careful review of the record satisfies us that respondent-mother's argument lacks merit.

¶ 34 The termination of parental rights is a two-stage process consisting of an adjudicatory stage and a dispositional stage. *See* N.C.G.S. §§ 7B-1109 to -1110 (2019). If, during the adjudicatory stage, the trial court finds grounds to terminate parental rights under N.C.G.S. § 7B-1111(a), the trial court proceeds to the dispositional stage where it must "determine whether terminating the parent's rights is in the juvenile's best interest" after considering the following criteria:

(1) The age of the juvenile.

(2) The likelihood of adoption of the juvenile.

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

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

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

(6) Any relevant consideration.

N.C.G.S. § 7B-1110(a).

¶ 35 "We review the trial court's dispositional findings of fact to determine whether they are supported by competent evidence." *In re J.J.B.*, 374 N.C. 787, 793 (2020). "The trial court's assessment of a juvenile's best interests at the dispositional stage is reviewed solely for abuse of discretion." *In re A.U.D.*, 373 N.C. 3, 6 (2019). "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. at 107 (alteration in original) (quoting *State v. Hennis*, 323 N.C. 279, 285 (1988)).

¶ 36 Respondent-mother challenges the following dispositional findings of fact:

> 9. The minor child[ren][4] ha[ve] little bond with the respondent mother.
>
> . . . .
>
> 11. The respondent mother's relationship with the minor child[ren] is similar to that of a babysitter or family friend.
>
> 12. Respondent mother has failed to address her mental health needs and that impacts her visits. Respondent mother has been unable to be on time consistently to visitation.
>
> 13. Respondent mother has been unable to control her emotions at times during visitation requiring redirection.
>
> . . . .
>
> 15. The children are manifesting behaviors after visitation which show a negative impact of visitation

4. "Minor child" is amended to read "minor children" since the trial court entered separate termination-of-parental-rights orders as to Tam and Kam and respondent-mother challenges the same findings of fact in each order. The findings of fact use the same language in each of the termination orders.

> upon them, including nightmares and aggressive behavior [by Tam].
>
> . . . .
>
> 17. Exposure of the minor child[ren] to respondent parents[’] continued relapses would not be in the best interest[s] of the minor child[ren].

¶ 37 As an initial matter, respondent-mother argues that several of the trial court’s dispositional findings lack sufficient record support. First, respondent-mother argues that the record fails to support Finding of Fact Nos. 9 and 11. However, Finding of Fact Nos. 9 and 11 are supported by the testimony of a foster care social worker, who described the bond between respondent-mother and the juveniles as follows:

> They know their mom. Her visits have been more consistent. It is not a bond like they have with the foster parents. They do recognize mom. When they visit with mom they, you know, she does engage with them; they engage with her, but there are times that the kids will lean more towards the visitation coach or whoever is supervising that visit for assistance, like maybe with a diaper change or if they want a specific toy or something like that, they often will go to the visitation coach for those rather than mom.

¶ 38 In addition, the social worker agreed that the relationship between respondent-mother and the juveniles was more like that between a child and a friend or other relative than like that between a child and his or her parent. Finally, the guardian ad litem’s report, which was admitted into evidence at the termination hearing, described the bond between respondent-mother and the juveniles as “nonexistent.” As a result, we hold that the record contains ample support for Finding of Fact Nos. 9 and 11.

¶ 39 Secondly, respondent-mother contends that the visitation logs that were introduced into evidence at the termination hearing fail to support the trial court’s statement in Finding of Fact No. 12. Since the visitation logs reflect that respondent-mother was unable to attend certain scheduled visits and arrived late on numerous occasions, we hold that respondent-mother’s challenge to Finding of Fact No. 12 lacks merit.

¶ 40 Thirdly, respondent-mother argues that the visitation logs, which reflect that the visitation coach gave her “high marks on her interactions with Kam and Tam,” conflict with Finding of Fact No. 13. However, the

Visitation Observation Form relating to the 18 January 2019 visit reflects that, after respondent-mother spoke about "issues with work and family," the visitation coach had to redirect respondent-mother's attention to the juveniles and to ask respondent-mother to interact appropriately and positively with the children. According to the visitation coach, respondent-mother "seemed more focused on what was going on in her life" and "continued to talk about her own stressful situations during [the] visit," leading the visitation coach to urge respondent-mother "not to talk about her own issues."

¶ 41 Similarly, the visitation coach noted on 17 May 2019 that, while respondent-mother was "responsive and playful" at some points during the visit, at other times respondent-mother "became angry and depressed" and stated, "I just wish I would die, I just don't want to be here anymore." The visitation coach stated that, rather than engaging respondent-mother about her concerns, she asked respondent-mother to focus upon the needs of the children. As a result, Finding of Fact No. 13, is supported by competent evidence.

¶ 42 Respondent-mother also argues that the record does not support the trial court's Finding of Fact No. 15. The record is replete, however, with evidence supporting this component of the trial court's findings. As an initial matter, we note that the guardian ad litem stated in her report that Tam "has always been very clingy after visitation, then she started becoming angry. She would kick, bite, and hit after coming home. Now she comes home afraid, wanting to be held and having nightmares." In addition, the foster care social worker testified that, following their visits with the parents, "[t]he kids have been known to bang their head against the wall" and display "tantrum kind of behaviors." As a result, the record contains ample support for the challenged portion of Finding of Fact No. 15.

¶ 43 Furthermore, respondent-mother argues that the trial court's Finding of Fact No. 17 lacks sufficient support in the record. Once again, we disagree with respondent-mother's contention. The children came into DSS care due, at least in part, to respondent-mother's substance abuse. In support of its termination of respondent-mother's parental rights, the trial court found that respondent-mother had continued to use unlawful controlled substances such as methamphetamine, cocaine, and marijuana, while the children were in foster care. In addition, as we have previously noted, the record contains ample evidence tending to show that the children engaged in troubling behaviors following their visits with respondent-mother. Thus, we conclude the trial court did not err in making the challenged portion of Finding of Fact No. 17.

¶ 44 Next, respondent-mother contends that she had a strong bond with the children and that, even though that bond was not parental in nature, the trial court erred by effectively requiring her to have such a bond with the children as a precondition for avoiding the termination of her parental rights. According to respondent-mother, the trial court's decision to criticize her bond with the children as not "being parental enough was disingenuous" given that she had few opportunities to act in a parental manner during her visits with the children. Respondent-mother claims that she "should not be penalized for separation from her children when evaluating parental skills" because she "did not have a reasonable opportunity to be [parental with the juveniles]." We are not persuaded by this argument.

¶ 45 The initial defect in respondent-mother's argument is that, as we have already noted, the trial court found, with proper evidentiary support, that respondent-mother had "little bond" with the juveniles. Moreover, we agree with DSS and the guardian ad litem that respondent-mother's limited opportunity to play a parental role in the children's lives while they were in foster care stemmed, at least in part, from her own relapses into substance abuse, the fact that she was often late for visits, and her inability to control her emotions during those visits. For these and other reasons, we cannot agree with respondent-mother's contention that she bore no responsibility for the lack of bond with her children. Finally, the record fails to support respondent-mother's claim that the trial court required her to show that she had a "parental bond" with the children as a precondition for avoiding the termination of her parental rights. As a result, we hold that the trial court did not commit any error of law in evaluating the nature and extent of respondent-mother's bond with the children as required by N.C.G.S. § 7B-1110(a)(4).[5]

¶ 46 Next, respondent-mother contends that the trial court erred by failing to consider other dispositional alternatives, such as guardianship or placement with a relative or some other suitable person. We addressed a similar argument in *In re Z.L.W.*, 372 N.C. 432, 438 (2019), in which the respondent-father argued that, "given the strong bond between him and" his children, "the trial court should have considered other dispositional alternatives, such as granting guardianship or custody to the foster family, thereby leaving a legal avenue by which [the children] could maintain a relationship with their father." In rejecting this argument, we stated that:

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5. As an aside, we reiterate our prior determination that "the bond between parent and child is just one of the factors to be considered under N.C.G.S. § 7B-1110(a), and the trial court is permitted to give greater weight to other factors." *In re Z.L.W.*, 372 N.C. 432, 437 (2019).

> [w]hile the stated policy of the Juvenile Code is to prevent "the unnecessary or inappropriate separation of juveniles from their parents," N.C.G.S. § 7B-100(4) (2017), we note that "the best interests of the juvenile are of paramount consideration by the court and . . . when it is not in the juvenile's best interest to be returned home, the juvenile will be placed in a *safe, permanent home within a reasonable amount of time*," *id.* § 7B-100(5) (2017) (emphasis added); *see also In re Montgomery*, 311 N.C. at 109 (emphasizing that "the fundamental principle underlying North Carolina's approach to controversies involving child neglect and custody [is] that the best interest of the child is the polar star").

Id. at 438 (alteration in original). Consequently, we held the trial court did not abuse its discretion by determining that termination, rather than guardianship or custody with a foster family, would be in the children's best interests. *Id.*

¶ 47 Similarly, in this case, the trial court's findings of fact demonstrate that it considered the dispositional factors set forth in N.C.G.S. § 7B-1110(a) and "performed a reasoned analysis weighing those factors." *In re Z.A.M.*, 374 N.C. 88, 101 (2020). As a result, "[b]ecause the trial court made sufficient dispositional findings and performed the proper analysis of the dispositional factors," *id.*, we conclude the trial court did not abuse its discretion by concluding that termination, rather than guardianship or custody, would be in Tam's and Kam's best interests.

¶ 48 Finally, respondent-mother argues that the trial court abused its discretion by terminating her parental rights because, while returning custody of the juveniles to her would not be in their best interests, allowing them to maintain a relationship through continued visitation was in the juveniles' best interests. Respondent-mother again cites the bond she had with the juveniles and claims they enjoyed their visits. However, the trial court found in unchallenged Findings of Fact Nos. 18, 19, and 20 that the children's permanent plan included adoption, that the likelihood that they would be adopted was high, and that terminating respondent-mother's parental rights was necessary to accomplish the permanent plan for the children. In addition, we have already concluded that the trial court's dispositional findings regarding her visitation and lack of a parental bond with the juveniles was supported by competent evidence. As a result, we hold that respondent-mother's final argument lacks merit and that the trial court did not abuse its discretion in deter-

mining that terminating respondent-mother's parental rights was in the children's best interests.

III. Conclusion

¶ 49 Thus, for the reasons set forth above, we hold that the trial court did not abuse its discretion in granting respondent-father's counsel's motion to withdraw and the trial court did not abuse its discretion by determining that the termination of respondent-mother's parental rights was in the children's best interests. Accordingly, the trial court's termination-of-parental-rights orders are affirmed.

AFFIRMED.

Justice ERVIN, concurring, in part, and dissenting, in part.

¶ 50 Although I concur with my colleagues' determination that the trial court's decision to terminate respondent-mother's parental rights should be affirmed, I am unable to agree with their decision to uphold the termination of respondent-father's parental rights and respectfully dissent from their decision to do so. Simply put, after carefully reviewing the record in light of recent, and clearly controlling, precedent from this Court, I feel compelled to conclude that the trial court erred by allowing respondent-father's trial counsel to withdraw from her representation of respondent-father without ensuring that proper notice had been provided to respondent-father and without conducting a sufficient inquiry into either the reasons for the requested withdrawal or the extent to which respondent-father understood the implications of his counsel's request. As a result, I concur in the Court's decision, in part, and dissent from that decision, in part.

¶ 51 At the outset of the termination hearing which occurred on 30 and 31 January 2020, the following proceedings occurred:

> [DSS ATTORNEY]: Mr. Sheriff, if you could call out [respondent-father].
>
> THE COURT: Sheriff, if you would please call out [respondent-father].
>
> (Bailiff called out [respondent-father] to appear in court.)
>
> THE COURT: Thank you. He does not appear present. You'd like to rest on your Motion To Withdraw?

[FATHER'S COUNSEL]: Your Honor, I would like to tell the Court so it will be -- and I probably, if Your Honor can sign that order, but I want to draft a more comprehensive order that includes the findings of fact of what's happened today. I spoke to him. I explained that if he wasn't here at 2:00 p.m. I would need to withdraw and the case would proceed in his absence.

THE COURT: So you spoke to him today?

[FATHER'S COUNSEL]: Correct, like very briefly a short time ago. He understands that we've not spoken substantively about the case and if he doesn't show up today I need to proceed on the Motion To Withdraw and he does not object to that.

THE COURT: All right. I will grant your motion but I'll hold it for a proper order to withdraw. If I sign this one I don't want to have to do an amended so --

[FATHER'S COUNSEL]: Okay.

THE COURT: -- I want to get something more fully but I'll go ahead and grant that motion at this time.

[FATHER'S COUNSEL]: I'll bring that tomorrow.

. . . .

THE COURT: So let me put it to you this way, [counsel]. I don't want to stop not going through to this afternoon's case and so I'm more inclined to write in my own little bits on this order and let that count and that way I can give it to you right now and we'll be ready to go; okay?

[FATHER'S COUNSEL]: Yes, ma'am.

THE COURT: All right. I'm just going to do it right now. Thank you.

[FATHER'S COUNSEL]: Your Honor, the main thing I wanted in it is that I had explained to the client that if he didn't show up today I would withdraw and they would proceed in his absence and that he did not object to that motion.

In a subsequent written order granting respondent-father's attorney's withdrawal motion, the trial court found that:

> [R]espondent-father has been in contact [with his attorney], but provided no direction or substance. [Respondent-father was] given [the opportunity] to show up in [court for the morning and afternoon] sessions, and opted to communicate no objection to [his counsel's] withdrawal. [Respondent-father] was aware of [the hearing to terminate his parental rights] and of [the] hearing on [the] motion to withdraw.

¶ 52 "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 J.E.B.*, 376 N.C. 629, 2021-NCSC-2 (cleaned up). "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." *In re K.M.W.*, 376 N.C. 195, 208 (2020). According to N.C.G.S. § 7B-1101.1(a) (2019), "[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."

¶ 53 As this Court has previously stated, "[c]onsistently 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.' " *In re K.M.W.*, 376 N.C. at 209. "[B]efore 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." *Id.* at 210.

¶ 54 A trial court's decision to grant or deny an attorney's withdrawal motion is reviewed on appeal using an abuse of discretion standard of review, *id.* at 209, with such an abuse of discretion having occurred only when the trial court's ruling is "so arbitrary that it could not have been the result of a reasoned decision." *White v. White*, 312 N.C. 770, 777 (1985). "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.' " *In re K.M.W.*, 376 N.C. at 209 (quoting *Williams & Michael, P.A. v. Kennamer*, 71 N.C. App. 215, 217 (1984)).

¶ 55 I see no indication, after a careful examination of the record, that respondent-father was served with his attorney's withdrawal motion prior to the hearing. Respondent-father's attorney attempted to serve her withdrawal motion upon her client by mailing it to him at an address at which respondent-father had previously stated that he did not receive mail. Although respondent-father's attorney told the trial court that she had spoken with her client and informed him that she intended to withdraw in the event that respondent-father failed to appear for the hearing, the attorney described her conversation with respondent-father as brief and indicated that it had occurred shortly before the termination hearing was scheduled to begin. In addition, the record does not reflect that the trial court made any inquiry concerning the nature and extent of the attorney's efforts to serve the withdrawal motion upon respondent-father prior to the date of the hearing or into what efforts the attorney had made to ensure that respondent-father "understood the implications of the action that [counsel] proposed to take or to protect [respondent-father's] statutory right to the assistance of counsel." *Id.* at 211. As a result, I believe that the trial court erred by failing to ensure that respondent-father had received "reasonable notice" of the attorney's withdrawal motion as required by N.C.G.S. § 7B-1101.1(a1) or by our decision in *K.M.W.* before allowing that motion.

¶ 56 In addition, even though respondent-father's counsel informed the trial court at the termination hearing that her client did not object to the allowance of the withdrawal motion, I am not persuaded that any statement that respondent-father might have made to that effect amounted to a waiver of his statutory right to counsel. "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.' " *Id.* at 209 (quoting N.C.G.S. § 7B-1101.1(a1) (2019)). Aside from the fact that the trial court was unable to make the required inquiry given respondent-father's failure to appear at the termination hearing, I agree with respondent-father that, given that his alleged "consent" to the attorney's withdrawal was obtained, at most, only a few hours before the hearing began and at a time when the record does not show that respondent-father had prior notice of the attorney's intention to withdraw or had been adequately advised about the implications of this action, respondent-father was not provided with

sufficient opportunity to make a reasoned decision concerning whether to waive his right to counsel. *Id.* (stating that "a waiver of counsel, generally speaking, requires a knowing and intentional relinquishment of that right").

¶ 57 The Court does not clearly indicate whether its decision to reject respondent-father's challenge to the trial court's termination orders rests upon a determination that respondent-father waived his statutory right to counsel or that respondent-father forfeited that right. To the extent that the Court's decision rests upon forfeiture-related, rather than waiver-related, considerations, I am unable to agree with any such determination. As this Court recently stated:

> in rare circumstances a defendant's actions frustrate the purpose of the right to counsel itself and prevent the trial court from moving the case forward. In such circumstances, a defendant may be deemed to have forfeited the right to counsel because, by his or her own actions, the defendant has totally frustrated that right. If one purpose of the right to counsel is to "justify reliance on the outcome of the proceeding," then totally frustrating the ability of the trial court to reach an outcome thwarts the purpose of the right to counsel.

State v. Simpkins, 373 N.C. 530, 536 (2020). In other words,

> [t]he 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. However, a finding that a [parent] has forfeited the right to counsel has been restricted to situations involving egregious dilatory or abusive conduct on the part of the litigant.

In re K.M.W., 376 N.C. at 209 (cleaned up); *see also State v. Blakeney*, 245 N.C. App. 452, 461–62 (2016) (stating that "forfeiture has generally been limited to situations involving 'severe misconduct' and specifically to cases in which the defendant engaged in one or more of the following: (1) flagrant or extended delaying tactics, such as repeatedly firing a series of attorneys; (2) offensive or abusive behavior, such as threatening counsel, cursing, spitting, or disrupting proceedings in court; or

(3) refusal to acknowledge the trial court's jurisdiction or participate in the judicial process, or insistence on nonsensical and nonexistent legal 'rights' "). Although respondent-father may have attempted to conceal his whereabouts and avoid service in the course of this proceeding and although the trial court warned respondent-father on at least two occasions that he was responsible for maintaining contact with his appointed counsel and to attend the trial court's hearings, with the potential consequence of any failure on his part to do so including the withdrawal of his trial counsel and the necessity for him to proceed without the assistance of counsel, I do not believe that respondent-father's conduct, as described in the record, suffices to support a finding that respondent-father had forfeited the right to counsel and my colleagues do not explicitly make an argument to the contrary. While "[t]here is no bright-line definition of the degree of misconduct that would justify forfeiture of a [parent's] right to counsel," *Blakeney*, 245 N.C. App. at 461, a finding of "[f]orfeiture of counsel should[, as the Court of Appeals has stated,] be a court's last resort," *State v. Wray*, 206 N.C. App. 354, 360 (2010). After carefully examining the record, I am unable to agree with the majority that the conduct in which respondent-father engaged in this case constituted conduct that was "so egregious as to justify forfeiture of the right to counsel." *Simpkins*, 373 N.C. at 540.

¶ 58 Aside from its failure to make any mention of the legal principles that control the resolution of issues like those that we have before us in this case, the Court's decision is patently inconsistent with our very recent decision in *K.M.W.*, in which we held that a "very limited inquiry undert[aken] [by the trial court] before allowing [counsel's] withdrawal motion" constituted error and that, "even if the trial court did not err by allowing [the] 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*." *In re K.M.W.*, 376 N.C. at 211–12. In reaching the first of these conclusions, we stated that:

> 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 [trial counsel'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 [trial counsel] was allowed to withdraw. On the contrary, the certificate of service attached to [trial counsel's] withdrawal motion appears to reflect

> that the only party upon whom that motion was served was DSS. Although [trial counsel] 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 [trial counsel] had informed respondent-mother that he intended to move to withdraw on that date; why respondent-mother had requested [trial counsel] to withdraw, including whether his withdrawal motion resulted from respondent-mother's inability to pay for his services; and what efforts [trial counsel] 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 [trial counsel's] withdrawal motion, we conclude that the trial court erred by allowing that motion.

Id. at 211. In addition, we held that,

> even if the trial court did not err by allowing [trial counsel'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 [her original trial counsel] 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 [trial counsel'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).

Id. at 211–12.

¶ 59 Although the facts before the Court in this case are not, of course, completely identical to those at issue in *K.M.W.*, the inquiry that the trial court conducted in this case is not materially different from the one that we found to be insufficient in *K.M.W.* After citing the dissenting opinion that was filed in *K.M.W.* rather than the analysis set out in the majority's decision, my colleagues make a number of fact-based arguments that misread our earlier decision and rest upon the same sorts of fact-based arguments that we held to be insufficient to support the affirmance of the trial court's order in that case. For example, my colleagues emphasize the fact that DSS made "diligent efforts to locate respondent-father" at earlier points during the history of this proceeding and the fact that respondent-father made it difficult for DSS to locate him. However, aside from the fact that similar difficulties existed in *K.M.W.*, the operative issue for purposes of this case is the extent to which the trial court, at the time that the withdrawal motion was made, conducted an adequate inquiry into the notice that respondent-father had received in advance of his counsel's request for leave to withdraw rather than whether respondent-father had been difficult to deal with earlier in the proceeding. Similarly, although my colleagues state that respondent-father's counsel "made a good faith effort to serve the [withdrawal] motion on respondent-father," they do not point to anything in the record that tends to support this particular assertion and appear to overlook the fact that the record does, as I have already noted, reflect that respondent-father's counsel sent the withdrawal motion to an address at which respondent-father had previously indicated that he did not receive mail. In addition, my colleagues emphasize the fact that

respondent-father's counsel talked to respondent-father shortly before the time at which the withdrawal motion was heard and told him that she would seek to withdraw from representing respondent-father despite the fact that a similar set of facts was addressed and found to be insufficient to support an affirmance in *K.M.W.* Finally, the Court states that this case is distinguishable from *K.M.W.* because respondent-father, unlike the respondent-mother in *K.M.W.*, did not attend any part of the hearing and could not, for that reason, have been questioned about the extent to which he knowingly and voluntarily waived his right to the assistance of counsel even though our opinion in *K.M.W.* clearly indicates that the trial court's failure to question respondent-mother when she arrived in the hearing room was an entirely separate error from the trial court's failure to conduct an adequate inquiry into the issue of whether respondent-mother's counsel should have been allowed to withdraw in the first place. As a result, there are no material differences between the facts in this case and those that were before us in *K.M.W.*

¶ 60 Finally, although my colleagues are correct in pointing out that the standard of review that is usually applicable in connection with appellate challenges to the allowance of withdrawal motions involves an inquiry into the issue of whether the trial court abused its discretion in allowing counsel to withdraw, they err to the extent that they treat this standard of review as the only one applicable in this case. Although the extent to which the trial court erred by allowing respondent-father's counsel to withdraw would have been subject to review on the basis of an abuse of discretion standard in the event that an adequate inquiry had been conducted into the issue of whether respondent-father had been properly notified of his counsel's request to withdraw, such a standard does not apply when the relevant issue is the extent to which the trial court conducted an adequate inquiry into the notice issue. The difference between the standards of review that apply with respect to these two distinct issues is clearly set out in *K.M.W.*, which my colleagues have, once again, simply failed to follow.

¶ 61 At the end of the day, I am unable to discern how our decision in this case can be squared with basic principles of stare decisis, pursuant to which those who disagree with an earlier decision are expected to continue to adhere to it unless and until it is overruled. *See State v. Straing*, 342 N.C. 623, 627 n.1 (stating that, "[a]lthough the author of this opinion still believes that [a former decision of this Court] was wrongly decided, he is now required by stare decisis to apply that precedent in the case sub judice"); *Hill v. Atlantic & N.C. R. Co.*, 143 N.C. 539, 574 (1906) (stating that "[w]hat our present opinion may be, as to

the merits of the decision in [a certain] case, is now of no consequence whatsoever" given that, "[i]n construing statutes, and the Constitution, the rule is almost universal to adhere to the doctrine of stare decisis"). As a result of its failure to adequately explain how the decision that it makes today can be squared with *K.M.W.*, it is difficult to avoid the conclusion that the Court has no basis for failing to rely upon our decision in that case other than the fact that my colleagues disagree with it. Moreover, even though "[t]he doctrine of stare decisis will not be applied . . . to preserve and perpetuate error and grievous wrong," *State v. Ballance*, 229 N.C. 764, 767 (1949), the Court has not made any attempt to establish how *K.M.W.* works such a "grievous wrong" that we should refuse to give it precedential effect. Such a disregard for precedent risks undermining the stability of North Carolina law.

¶ 62 At a deeper level, my colleagues appear to rest their decision to uphold the termination of respondent-father's parental rights on the basis of concerns that the decision that I believe to be appropriate "would cause further burdens on our already overburdened trial courts by imposing additional and unnecessary procedures regarding termination of parental rights hearings" and "thwart[ ] the over-arching North Carolina policy to find permanency for the juvenile at the earliest possible time." Aside from the fact that the principles that underlie the decision that I believe to be appropriate rest upon statutory provisions, judicial decisions, and portions of the General Rule of Practice that have been in effect for a considerable period of time, the number of reported cases relating to the waiver or forfeiture of counsel in termination cases is relatively small, a fact that suggests that my colleagues' concern for the efficiency with which termination cases will be handled in the future is substantially overstated. Simply put, while I acknowledge the difficulties that our colleagues on the trial bench face every day, the result that I believe to be appropriate in this case is solidly grounded in well-established North Carolina law, cannot be fairly accused of introducing any novelty into our termination of parental rights jurisprudence, does not involve any sort of extension of *K.M.W.*, and will not impose any undue burden upon our trial courts.

¶ 63 Secondly, and more importantly, the statutory provisions that govern this case are intended to serve a number of policy goals in addition to achieving permanence "within a reasonable amount of time" by placing a child up for adoption. N.C.G.S. § 7B-100(5). Aside from the fact that nothing contained in N.C.G.S. § 7B-100(5) creates any sort of presumption in favor of terminating a parent's parental rights and the fact that the decision to place the burden of proof with respect to

the issue of whether grounds for termination exist in a particular case upon the party seeking to achieve that result suggests that the opposite is, in fact true, N.C.G.S. § 7B-1111(b), the relevant provisions of our Juvenile Code are also intended to "assure fairness and equity" and "protect the constitutional rights of juveniles and parents," N.C.G.S. § 7B-100(1), and to "prevent[ ] the unnecessary or inappropriate separation of juveniles from their parents." N.C.G.S. § 7B-100(4). In other words, the policy that is sought to be achieved by means of the relevant statutory provisions, including those providing parents with the right to the assistance of counsel, does not consist of the achievement of a particular result. Instead, the relevant statutory provisions are intended to ensure that all affected parties have an adequate opportunity to be heard with respect to the issue of what is in the best interests of the child. As a result, given that the decision that the Court has reached in this case is inconsistent with controlling decisions of this Court and rests upon a mistaken view of the proper purpose of a termination of parental rights proceeding, I would hold that, while its termination order should be affirmed with respect to respondent-mother, the trial court erred by allowing respondent-father's trial counsel to withdraw from her representation of respondent-father and that this case should be remanded to the District Court, Buncombe County, for further proceedings not inconsistent with this opinion, including a new termination hearing concerning respondent-father's parental rights.

Justices HUDSON and EARLS join in this concurring and dissenting opinion.

IN RE Z.R.

[378 N.C. 92, 2021-NCSC-78]

IN THE MATTER OF Z.R., J.R., A.L.M.W.

No. 353A20

Filed 18 June 2021

Termination of Parental Rights—no-merit brief—neglect—willful failure to make reasonable progress

The termination of a mother's parental rights—based on grounds of neglect and willful failure to make reasonable progress—was affirmed where the mother's counsel filed a no-merit brief, the termination order's findings of fact had ample record support, and where those findings supported the trial court's conclusions. To permit appellate review, the Supreme Court invoked Appellate Rule 2 to suspend the requirements under Rule 3.1(a) (that counsel provide copies of the no-merit brief, transcript, and record on appeal to the mother and to inform her of her right to file a pro se brief) where the mother's counsel made exhaustive efforts to contact her but to no avail.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from an order entered on 13 May 2020 by Judge Tonia Cutchin in District Court, Guilford County.[1] This matter was calendared for argument in the Supreme Court on 22 April 2021, but was determined on the record and briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

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

Kelsey L. Kingsbery and Michelle C. Prendergast for appellee Guardian ad Litem.

Garron T. Michael for respondent-appellant mother.

PER CURIAM.

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1. The trial court's original termination order was filed on 31 March 2020, with an amended order having been filed on 13 May 2020, with the notice of appeal claiming to seek appellate relief from an order filed and served on 2 April 2020. In view of the fact that no party has objected to the sufficiency of the notice of appeal and the fact that the identity of the relevant termination order is clear from the record, we deem the notice of appeal sufficient to confer jurisdiction upon this Court.

IN RE Z.R.

[378 N.C. 92, 2021-NCSC-78]

¶ 1 Respondent-mother Tabitha W. appeals from the trial court's order terminating her parental rights in her minor children Z.R., J.R., and A.L.M.W.,[2] who were born in 2013, 2011, and 2008, respectively.[3] *See* N.C.G.S. § 7B-1001(a1) (2019). After careful consideration of the record and briefs in light of the applicable law, we conclude that the trial court's termination order should be affirmed.

¶ 2 On 27 January 2017, the Guilford County Department of Health and Human Services filed petitions alleging that three-year-old Zoey and five-year-old John were neglected and dependent juveniles and obtained the entry of orders placing both of them in nonsecure custody. In its petition, DHHS alleged that respondent-mother, who had had six children, had a child protective services history that dated back to July 2007 and involved multiple reports that she had failed to provide proper care for and supervision of her children and had engaged in substance abuse. In July 2016, DHHS had received another child protective services report alleging that the children's maternal grandmother, who was currently serving as the primary caretaker for five of respondent-mother's children, including Zoey, John, and Allison, had hit twelve-year-old Edward in the face with a belt and "that the mother and grandmother are overwhelmed due to the stressful situation with the kids." Although both Edward and Allison confirmed that she had engaged in violent conduct toward Edward, the maternal grandmother reacted to the initiation of the DHHS investigation in a hostile manner and denied having hit Edward. While speaking with a social worker, the maternal grandmother disclaimed any knowledge of respondent-mother's current location or how to contact her given that respondent-mother "moves from motel to motel and calls her from a bunch of different numbers."

¶ 3 In addition, DHHS alleged that, on 9 August 2016, the maternal grandmother had reported that respondent-mother had retrieved her children from the grandmother's home. After denying that she knew where respondent-mother was or how to contact her, the maternal grandmother stated that she was no longer willing to care for the chil-

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2. Z.R, J.R., and A.L.M.W. will be referred to throughout the remainder of this opinion as "Zoey," "John," and "Allison," which are pseudonyms used for ease of reading and to protect the juveniles' identities. We will refer to respondent-mother's minor child E.A.M. as "Edward," to her minor child Z.M.B.-M. as "Zach," and to her minor child T.A.S. as "Tina," none of whom are parties to this case, for the same reasons.

3. In addition, the trial court terminated the parental rights of Zoey and John's father and Allison's father. In view of the fact that neither of the children's fathers is a party to this appeal, we will refrain from discussing the proceedings relating to either father in any detail in this opinion.

dren. Following an unsuccessful attempt to contact respondent-mother by mail, a social worker used Student Locator to determine that Edward had been enrolled in school in the maternal grandmother's school district, while Zach and Allison had been enrolled in school in Haw River. At that point, the maternal grandmother told the social worker that "some of the children were in Haw River with her son and others were with their mother."

¶ 4 DHHS further alleged that the social worker had learned that the children's maternal aunt was caring for Zach, Allison, John, and Tina in her own home. As had been the case with the maternal grandmother, the aunt claimed not to know where respondent-mother was located or how to reach her given that respondent-mother "always calls from private numbers." The aunt told the social worker that respondent-mother "will get upset with her at times and will take the children but she is unable to care for them so she will eventually have to return them to her."

¶ 5 DHHS alleged that the social worker had made contact with respondent-mother on 19 October 2016. Respondent-mother "reported being unstable and bouncing from motel to motel" and explained that she had left the children with members of her family for that reason. In December 2016, the social worker spoke to Zoey and John's father, who was incarcerated and had a scheduled release date of July 2017. The father reported that John was staying with his maternal aunt and uncle, that Zoey had been residing with her maternal grandmother, and that he was willing to transfer custody of his children to their current caretakers in order to prevent them from being taken into DHHS custody.

¶ 6 Finally, the petition alleged that DHHS had held a team decision-making meeting with the parents and caretakers on 26 January 2017, during which respondent-mother had "admitted she [was] not in a position to care [for] the children at this time." As a result, DHHS and the parents agreed that Edward would be placed with his father; that Zach, Allison, and Tina would be placed with their maternal aunt and uncle; and that no suitable placement option could be identified for Zoey and John.

¶ 7 On 21 March 2017, DHHS filed a petition alleging that Allison was a neglected and dependent juvenile and obtained the entry of an order taking her into nonsecure custody. In its petition, DHHS alleged that Allison's father had agreed to leave his daughter in the care of her maternal aunt and uncle while he developed a relationship with her. Although he had failed to attend a scheduled visitation on 4 February 2017, Allison had a weekend-long visit with her father on 10 February 2017, after

which Allison "expressed that she did not like being at her father's home but would not elaborate." In addition, DHHS alleged that Allison's father had failed to attend an appointment at DHHS on 17 February 2017, at which he was scheduled to sign an agreement allowing the maternal aunt and uncle to take Allison into their custody. DHHS did not hear anything further from Allison's father until 27 February 2017, when he told the social worker that he had moved to Georgia and had no plans to return to North Carolina. Although he claimed that his preference was for Allison to come and live with him in Georgia, the father agreed to transfer custody to Allison's maternal aunt and uncle in the event that the necessary documents were mailed to him. However, even though she had mailed the relevant custody-related documents to the father in accordance with his request, the social worker had been unable to reach Allison's father by the date upon which the petition was filed.

¶ 8 On 20 February 2017, respondent-mother entered into a case plan agreement with DHHS. According to an updated case plan that she had entered into on 6 July 2017, respondent-mother agreed to complete a substance abuse and mental health assessment and comply with any resulting treatment recommendations; submit to random drug screens within forty-eight hours after a request for testing had been made; obtain and maintain housing that was suitable for herself and the children; verify that she had obtained sufficient income to meet her family's needs; successfully complete the Parent Assessment Training and Education Program; submit to a parenting and psychological evaluation and comply with any resulting treatment recommendations; attend scheduled visitations with the children; participate in shared parenting; refrain from making social media posts about the proceedings; and cooperate with Child Support Enforcement.

¶ 9 After a hearing held on 2 August 2017, Judge Betty J. Brown entered an order on 29 August 2017 in which she found Zoey, John, and Allison to be neglected and dependent juveniles. Judge Brown ordered that the children remain in DHHS custody, ordered respondent-mother to comply with the terms and conditions of her case plan, and authorized weekly supervised visits between respondent-mother and each of the children.

¶ 10 After the initial permanency planning hearing held on 27 October 2017, Judge Brown entered an order on 22 November 2017 establishing a primary permanent plan of reunification for all three children, with a secondary concurrent plan of guardianship for Allison and a secondary concurrent plan of adoption for Zoey and John. In light of respondent-mother's failure to make progress toward achieving stability

and her failure to comply with her mental health and substance abuse treatment recommendations, Judge Lora C. Cubbage entered an order on 15 August 2018 changing the children's primary permanent plan to one of adoption, with a secondary concurrent plan of reunification.

¶ 11 On 9 October 2018, DHHS filed a petition seeking to have the parents' parental rights in Zoey, John, and Allison terminated. Prior to the conclusion of a termination hearing held on 20 August 2019, Judge Angela Foster entered an order declaring a mistrial, appointing new counsel to represent Zoey and John's father, and recusing herself from the proceeding.

¶ 12 After a hearing held on 25 February 2020, the trial court entered an amended order on 13 May 2020 in which it determined that the parental rights of respondent-mother and both fathers were subject to termination on the basis of neglect, N.C.G.S. § 7B-1111(a)(1), and willful failure to make reasonable progress toward correcting the conditions that had resulted in the children's removal to a placement outside the family home, N.C.G.S. § 7B-1111(a)(2).[4] *See* N.C.G.S. § 7B-1111(a)(1)–(2) (2019). Similarly, after considering the dispositional factors enunciated in N.C.G.S. § 7B-1110(a) and determining that the termination of each parent's parental rights would be in the children's best interests, the trial court ordered that the parental rights of each parent be terminated. Respondent-mother noted an appeal to this Court from the amended termination order.

¶ 13 Respondent-mother's appellate counsel has filed a no-merit brief on her behalf with this Court as is authorized by N.C. R. App. P. Rule 3.1(e). As part of that process, respondent-mother's appellate counsel attempted to advise respondent-mother of her right to file a *pro se* brief on her own behalf and to provide respondent-mother with the documents that she would need to make such a filing. *See* N.C. R. App. P. 3.1(e). Subsequently, however, respondent-mother's appellate counsel notified this Court that his letter to respondent-mother explaining her right to file a *pro se* brief and providing her with copies of the relevant documents had been "returned to [his] office with an 'unable to forward' designation." Appellate counsel for respondent-mother described his subsequent efforts to contact respondent-mother for the purpose

4. The trial court also concluded that the parental rights of Zoey and John's father were subject to termination based upon his willful failure to pay a reasonable portion of the children's cost of care pursuant to N.C.G.S. § 7B-1111(a)(3) and that the parental rights of Allison's father were subject to termination for willful abandonment pursuant to N.C.G.S. § 7B-1111(a)(7) (2019).

of complying with his obligations pursuant to N.C. R. App. P. 3.1(e) as follows:

> 4. The undersigned mailed the no-merit documents via U.S. Priority Mail to the same address . . . he has previously sent mail correspondence [to respondent-mother]. No prior correspondences were returned before 17 September 2020.
>
> 5. The undersigned has never had direct contact with [respondent-mother] despite repeated efforts. The undersigned has contacted trial counsel on multiple occasions and requested additional contact information for [respondent-mother]. Trial counsel does not possess any viable telephone numbers, addresses, or other means of contact for [respondent-mother] beyond those already utilized by the undersigned.
>
> 6. Since the no-merit package was returned, the undersigned has attempted to locate [respondent-mother], or any viable contact information, through various means such as social media, including Facebook, as well as running searches with the BeenVerified program to no avail.
>
> 7. The undersigned has attempted to locate [respondent-mother's] relatives to obtain contact information but remains unable to locate or contact [respondent-mother] as of this filing.
>
> 8. The address utilized for mailing the no-merit documents on 8 September 2020 was the same address [respondent-mother] indicated as being her residence during her testimony on 25 February 2020.
>
> 9. The undersigned will continue to try and contact [respondent-mother] and remains willing to follow any further directives deemed necessary by this Court.

As of the present date, it appears that the subsequent efforts that respondent-mother's appellate counsel made for the purpose of attempting to contact her have proven equally unsuccessful. Respondent-mother has not submitted any written arguments to this Court for our consideration.

¶ 14 N.C. R. App. P. 3.1(e) provides that:

> Counsel *must* provide the appellant with a copy of the no-merit brief, the transcript, the printed record on appeal, and any supplements or exhibits that have been filed with the appellate court. Counsel *must* inform the appellant in writing that the appellant may file a pro se brief and that the pro se brief is due within thirty days after the date of the filing of the no-merit brief. Counsel must attach evidence of this communication to the no-merit brief.

N.C. R. App. P. 3.1(e) (emphases added). In this case, however, respondent-mother's "failure to communicate [her] current address to appellant counsel frustrates counsel's compliance with the Rule." *In re D.A.*, 262 N.C. App. 71, 74 (2018). Although we have recognized "the significant interest of ensuring that orders depriving parents of their fundamental right to parenthood are given meaningful appellate review," *In re L.E.M.*, 372 N.C. 396, 402, 831 S.E.2d 341, 345 (2019), in light of the "exhaustive efforts" that respondent-mother's appellate counsel has made to contact his client and to provide her with the notice and materials contemplated by N.C. R. App. P. 3.1(e), we elect to suspend the requirements of N.C .R. App. P. 3.1(e) as authorized by N.C .R. App. P. 2 in order "to 'expedite a decision in the public interest,' " *In re D.A.*, 262 N.C. App. at 75–76, 820 S.E.2d at 875 (quoting N.C. R. App. P. 2).

¶ 15 When a parent's appellate counsel files a no-merit brief on his or her client's behalf pursuant to N.C. R. App. P. 3.1(e), this Court reviews the issues that are identified in that brief to see if they have potential merit. *In re L.E.M.*, 372 N.C. at 402, 831 S.E.2d at 345. In the no-merit brief that he filed on his client's behalf, respondent-mother's appellate counsel identified certain issues relating to the adjudicatory and dispositional portions of this proceeding that could arguably support an award of appellate relief, including whether the trial court properly found that respondent-mother's parental rights in the children were subject to termination and whether the trial court abused its discretion by determining that the termination of respondent-mother's parental rights in the children would be in their best interests, before explaining why he believed that these potential issues lacked merit. After a careful review of the issues identified in the no-merit brief that respondent-mother's appellate counsel has filed on his client's behalf in light of the record and the applicable law, we are satisfied that the findings of fact contained in the trial court's termination order have ample record support and

that those findings of fact support the trial court's determination that respondent-mother's parental rights in Zoey, John, and Allison were subject to termination on the basis of at least one of the grounds delineated in N.C.G.S. § 7B-1111(a) and that the termination of respondent-mother's parental rights in the children would be in their best interests. As a result, we affirm the trial court's termination order.

AFFIRMED.

CAROLINA MULCHING CO. v. RALEIGH-WILMINGTON INVS. II, LLC

[378 N.C. 100, 2021-NCSC-79]

CAROLINA MULCHING CO.
v.
RALEIGH-WILMINGTON INVESTORS II, LLC AND SHALIMAR CONSTRUCTION, INC.

No. 348A20

Filed 13 August 2021

Contracts—breach—conflicts in evidence—additional findings of fact required—remand appropriate

In an action for breach of contract (involving a tree company that had been contracted to mulch trees up to six to eight inches in diameter), the Court of Appeals appropriately remanded the matter to the trial court for additional findings of fact where the lower court's findings, upon which rested its conclusion that there was no breach of contract, did not resolve conflicts in the evidence regarding which of two methods the tree company used to measure the size of the trees.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 272 N.C. App. 240 (2020), reversing a judgment entered on 21 May 2019 by Judge C. Ashley Gore in District Court, Brunswick County, and remanding for the trial court to make additional findings of facts and conclusions of law. Heard in the Supreme Court on 28 April 2021.

Law Offices of Timothy Dugan, by Timothy Dugan, for plaintiff-appellee.

Hodges Coxe & Potter LLP, by Bradley A. Coxe, for defendant-appellant.

BARRINGER, Justice.

¶ 1 In this case, we must decide whether the Court of Appeals erred as a matter of law when addressing a judgment for breach of contract entered after a bench trial. Given the record and procedural posture of this case, we conclude that the Court of Appeals did not err by reversing and remanding the judgment of the trial court back to the trial court to make "findings of fact based on the evidence and to enter clear and specific conclusions of law based on the findings of fact" after holding that the trial court failed to make findings of fact necessary to resolve conflicts

in the evidence and support the conclusions of law. *Carolina Mulching Co. v. Raleigh-Wilmington Invs. II, LLC*, 272 N.C. App. 240, 248 (2020). Thus, we affirm the Court of Appeal's decision.

I. Background

¶ 2 Carolina Mulching Co., LLC (Carolina Mulching) commenced this action against Raleigh-Wilmington Investors II, LLC and Shalimar Construction, Inc. (Shalimar) in District Court, Brunswick County, on 26 September 2018. Carolina Mulching asserted a claim for breach of contract, and in the alternative, a claim for unjust enrichment, and sought enforcement of a lien pursuant to Chapter 44A of the General Statutes of North Carolina against property owned by Raleigh-Wilmington Investors II, LLC. Shalimar, in response, filed an answer and counterclaim for breach of contract. Subsequently, Carolina Mulching voluntarily dismissed all claims against Raleigh-Wilmington Investors II, LLC. The remaining parties, Carolina Mulching and Shalimar, waived their right to a jury trial.

¶ 3 During the bench trial on 2 May 2019, both parties presented testimony from witnesses and introduced exhibits into evidence. After taking the matter under advisement, the trial court entered a judgment on 21 May 2019 in favor of Carolina Mulching. Following the trial court's statement that "by [the] greater weight of the evidence, THE COURT HEREBY FINDS THE FACTS AS FOLLOWS," the judgment contained twenty paragraphs. Then, following the trial court's statement that "BASED ON the Foregoing Findings of Fact, the [trial] court concludes as a MATTER OF LAW," the following five paragraphs are set forth in the judgment:

> 1. This Court has jurisdiction over the parties and the subject matter of this action.
>
> 2. [Carolina Mulching] and [Shalimar] entered into a written contract for [Carolina Mulching]'s tree mulching services. There was a meeting of the minds between the two parties when they entered into the essential terms of the written contract. [Shalimar] even included [Carolina Mulching]'s proposal in the body of the contract.
>
> 3. Both parties signed the written contract, and the terms of the contract were clear and unambiguous; [Carolina Mulching] would provide the mulching services for the Lena Springs Project

> and [Shalimar] would pay [Carolina Mulching] $15,000.00. [Carolina Mulching]'s services included mulching trees [six to eight inches] in diameter and [Carolina Mulching] satisfied those terms of the contract.
>
> 4. [Carolina Mulching] worked with [Shalimar] on the job site for approximately 10 days and [Carolina Mulching] satisfactorily complied with the terms of the contract. [Carolina Mulching] mulched the [eight and one-half] acres of land specified in the contract, and therefore should be paid for the completed work. There was no material breach of the contract by [Carolina Mulching].
>
> 5. [Shalimar] did not suffer any damages from [Carolina Mulching]'s performance of services rendered under their written contract. [Shalimar] planned on hiring a logging company to remove the larger trees on the job site before [Carolina Mulching] finished the job, and therefore did not incur any unreasonable expenses by hiring D&L Logging months after [Carolina Mulching] left the job site.

¶ 4 Shalimar subsequently filed a notice of appeal to the North Carolina Court of Appeals.

¶ 5 On appeal to the Court of Appeals, Shalimar made three arguments: (1) "[t]here is no finding of fact by the trial court to support conclusions of law [three] and [four] that [Carolina Mulching] mulched all trees [six to eight inches] in diameter and therefore satisfied the terms of the contract"; (2) "[t]he only competent evidence at trial leads to the conclusion that [Carolina Mulching] did not satisfy the terms of their contract by failing to mulch all trees [six to eight inches] in diameter"; and (3) "[t]here is no finding of fact by the trial court to support . . . conclusion of law [five] that [Shalimar] did not suffer any damages and did not incur unreasonable expenses from [Carolina Mulching]'s performance of services and the only competent evidence presented at trial leads to the conclusion that [Shalimar] was damaged by the failure of [Carolina Mulching] to abide by the terms of the contract."

¶ 6 A divided panel of the Court of Appeals agreed with Shalimar as to its first argument, ultimately holding that "the trial court failed to make

ultimate findings of fact necessary to resolve conflicts in the evidence, and that therefore the findings do not support the conclusions of law." *Carolina Mulching Co.*, 272 N.C. App. at 248. As a result, the Court of Appeals "reverse[d] and remand[ed] the judgment of the trial court with instructions to make ultimate findings of fact based on the evidence and to enter clear and specific conclusions of law based on the findings of fact." *Id.* (cleaned up). The Court of Appeals rejected Carolina Mulching's argument that certain statements in the paragraphs labeled conclusions of law constituted factual findings sufficient to support the trial court's ultimate legal conclusion. *Id.* at 247.

¶ 7 In contrast, the dissent concluded that the trial court had made a finding of fact resolving the conflicts in the evidence. *Id.* at 249 (Dillon, J., dissenting). The dissent stated that the contract required Carolina Mulching to mulch all trees up to six to eight inches in diameter and that the trial court's judgment under the conclusions of law section stated that Carolina Mulching "satisfied those terms of the contract." *Id.* While acknowledging that this statement was within the conclusions of law section, the dissent judged that "this statement is clearly a 'finding' that resolves any conflict in the evidence, no matter how it is labeled in the [judgment]." *Id.* The dissent gathered

> that *the evidence* was insufficient to submit the issue to the fact-finder. Carolina Mulching failed to meet its burden to reach the fact-finder (the trial judge in this case) to put on evidence that it mulched the trees up to [eight inches] in *diameter*. Accordingly, the trial court's [judgment] should be 'reversed[,]' and judgment should be entered for Shalimar.

Id. at 249–50.

¶ 8 While the dissent admitted that it is not appropriate to reweigh the evidence on appeal, that Carolina Mulching's witnesses testified that they mulched the trees that were up to six to eight inches in diameter, and that on rebuttal Carolina Mulching's witness testified that he was cutting down eight-inch diameter trees, the dissent found "the evidence [was] uncontradicted that Carolina Mulching's witnesses thought 'diameter' meant 'circumference' " because the Carolina Mulching witness "never demonstrated during his rebuttal testimony that he now understood what the term 'diameter' actually meant or the process by which he calculated the diameter." *Id.* at 250–51. The dissent concluded that Carolina Mulching "failed to meet its burden of showing that it cut down all of the trees under [eight inches] in diameter, the basis of the trial

court's judgment," *id.* at 250–51, and as a result, he would reverse and have judgment entered for Shalimar, *id.* at 250.

¶ 9 In addressing the dissent, the Court of Appeals stated that

> [t]he dissent characterizes the trial court's shortcoming not as a failure to show how it arrived at its conclusion but instead as arriving at an untenable conclusion, thus requiring a straight reversal instead of a reverse and remand with instructions. The dissent is certainly right that there is evidence that [Carolina Mulching] measured by circumference, not diameter. And it is certainly possible that the trial court might not be able to marshal sufficient evidentiary support to justify ruling for [Carolina Mulching] on remand. But, in the dissent's efforts to argue that it is clear that [Carolina Mulching] measured by circumference, no such clarity emerges. The dissent instead merely highlights the contradictory nature of the testimony. It is not our place to resolve these conflicts. The trial court, having heard the evidence and seen the witnesses, is much better situated to do so.

Id. at 247 n.1.

¶ 10 Shalimar filed a notice of appeal based on the dissent pursuant to N.C.G.S. § 7A-30(2) and N.C. R. App. P. 14.

II. Analysis

¶ 11 On appeal to this Court, Shalimar asks this Court to reverse the trial court's judgment and "render a judgment that, as a matter of law, Carolina Mulching failed to satisfy the terms of the contract and Shalimar . . . did not breach the contract." Shalimar argues that there was no competent evidence to support the trial court's finding that Carolina Mulching cut down all of the trees up to six to eight inches in diameter and the only competent evidence "leads inescapably to a conclusion of law that [Carolina Mulching] failed to abide by the essential terms of the Contract."

¶ 12 On this record and in this procedural posture, we conclude the Court of Appeals did not err as a matter of law in its disposition of Shalimar's appeal. As Carolina Mulching points out, this case addresses an appeal of a final judgment entered after a bench trial where the Court of Appeals agreed with Shalimar's first argument that the trial court's judgment lacked findings of fact to support the trial court's judgment in

favor of Carolina Mulching. Shalimar also argued in the alternative the argument it now makes to this Court. Specifically, Shalimar contended that "[e]ven if the Trial Court had made a Finding of Fact that the Plaintiff had mulched all trees up to [six to eight inches] in diameter, such a finding would be in error [as] [t]here is no competent evidence in the record supporting any such *potential* Finding of Fact." (Emphasis added.)[1] As Shalimar prevailed on its first argument—that the trial court's judgment lacked findings of fact to support the trial court's judgment in favor of Carolina Mulching—Carolina Mulching asserts that the Court of Appeals did not err. Carolina Mulching further asserts that consideration of Shalimar's alternative argument has been waived and is premature for this Court's ruling. We agree that the Court of Appeals did not err and that a ruling on Shalimar's alternative argument by this Court would be premature in this instance.

¶ 13 "In all actions tried upon the facts without a jury or with an advisory jury, the [trial] court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment." N.C.G.S. § 1A-1, Rule 52(a)(1) (2019). As to the facts, the trial court need not find all facts that support the conclusion of law but must specially find the facts necessary to establish the plaintiff's cause of action, the converse—the facts necessary to establish that plaintiff's cause of action fails—or the facts necessary to establish the defendant's affirmative defense. *Woodard v. Mordecai*, 234 N.C. 463, 470 (1951) (addressing predecessor statute, N.C.G.S. § 1-185 (repealed 1967)). Compliance with N.C. R. Civ. P. 52(a)(1) is not a mere formality but generally necessary for appellate courts "to perform their proper function in the judicial system" of reviewing a judgment entered after a bench trial to determine whether the trial court's findings of fact are supported by the evidence and whether the findings of fact support the conclusions of law. *Coble v. Coble*, 300 N.C. 708, 712 (1980) (quoting *Montgomery v. Montgomery*, 32 N.C. App. 154, 158 (1977)).

¶ 14 In this case, the Court of Appeals rejected Carolina Mulching's argument that some statements in the paragraphs under the conclusions of law section in the trial court's judgment were findings of fact that resolved the conflicts in the evidence. *Carolina Mulching Co.*, 272 N.C. App. at 247. The Court of Appeals held in favor of Shalimar's argument that "the trial court's findings do not support its conclusion that [Carolina

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1. As summarized in the background section, the Court of Appeals did not address Shalimar's alternative argument other than commenting on the dissent in a footnote. *Carolina Mulching Co. v. Raleigh-Wilmington Invs. II, LLC*, 272 N.C. App. 240, 247 n.1 (2020).

Mulching] fully performed under the contract." *Id.* at 245. While the dissent disagreed and concluded that such statements were findings of fact resolving the conflicts, *id.* at 249 (Dillon, J., dissenting), this issue is not presented in this appeal since Carolina Mulching has not sought review of this aspect of the Court of Appeals' decision. Shalimar's new brief accordingly did not identify this specific issue on appeal. Thus, we express no opinion about this aspect of the Court of Appeals' holding but consider it the final decision on this issue and respect it as such. *See* N.C. R. App. P. 16(b).

¶ 15 Carolina Mulching asserted, and Shalimar did not dispute, that Shalimar did not challenge any of the trial court's findings of fact in their initial appeal. Shalimar's alternative argument only challenged a *potential* finding of fact. Without an actual—as opposed to hypothetical—challenged finding of fact, we conclude that the Court of Appeals committed no error of law in its decision to reverse and remand the case back to the trial court for resolution of the conflicts in the evidence on remand.

¶ 16 Further, we find that neither the dissent nor Shalimar's argument or analysis convinces us to reverse the trial court's judgment and that judgment should be entered in favor of Shalimar. Neither cites authority in support of their conclusion, and a holding in their favor would seem to require us to muddle the standard of review applicable to actions tried by the trial court without a jury as set forth below.

¶ 17 Shalimar argues for reversal and judgment in its favor because in its opinion, there is no competent evidence that Carolina Mulching mulched all trees up to six to eight inches in diameter. Yet, Shalimar concedes its challenge to the judgment is pursuant to N.C. R. Civ. P. 52(c). Rule 52(c) allows parties to an action tried without a jury to challenge the sufficiency of the evidence supporting the trial court's findings of fact. N.C.G.S. § 1A-1, Rule 52(c). However, the finding that Carolina Mulching mulched all trees up to six to eight inches in diameter is not in the trial court's judgment but is instead a potential finding of fact identified by Shalimar and a fact inferred by the dissent from statements in the judgment. *Carolina Mulching Co.*, 272 N.C. App. at 249 (Dillon, J., dissenting). Thus, consideration of Shalimar's argument regarding a potential finding lacks support in the plain language of Rule 52(c) and reversing and remanding to the trial court as the Court of Appeals held respects the division of authority between the trial courts and appellate courts and the standard of review.

¶ 18 Both the dissent and Shalimar also couch their argument in terms of Carolina Mulching failing to meet its burden, and the dissent characterizes the evidence as insufficient to submit the issue to the fact-finder. *Carolina Mulching Co.*, 272 N.C. App. at 249 (Dillon, J., dissenting). This terminology is generally associated with a motion for a directed verdict, which is not before us. *See* N.C.G.S. § 1A-1, Rule 50. As Shalimar acknowledges, a motion for a directed verdict pursuant to N.C. R. Civ. P. 50 is not appropriate in an action tried by the trial court without a jury. *See Bryant v. Kelly*, 279 N.C. 123, 129 (1971) ("Directed verdicts are appropriate only in jury cases."). Rather, the appropriate motion by which a defendant tests the sufficiency of a plaintiff's evidence to show a right to relief in an action tried by the trial court without a jury is a motion pursuant to N.C. R. Civ. P. 41(b) for an involuntary dismissal. N.C.G.S. § 1A-1, Rule 41(b); *see also Dealers Specialties, Inc. v. Neighborhood Hous. Servs., Inc.*, 305 N.C. 633, 637 (1982) (determining "the standard which the [trial court] judge must apply in testing the sufficiency of the evidence, if he elects to so do, when ruling upon a motion to dismiss under Rule 41(b)"). Notably, a motion for involuntary dismissal pursuant to N.C. R. Civ. P. 41(b) requires the defendant to show that the plaintiff had "no right to relief" upon the facts and law. N.C.G.S. § 1A-1, Rule 41(b). In this case, the dissent did not conclude that Carolina Mulching had no right to relief, and Shalimar has not argued to this effect.

¶ 19 Therefore, we are not persuaded that Shalimar's arguments are consistent with our precedent, and we decline to assess the sufficiency of the evidence for a potential finding of fact by the trial court, especially when presented and sought without citation to precedent or persuasive authority for this Court's review.

III. Conclusion

¶ 20 On this record and in this procedural posture, the Court of Appeals did not err by reversing and remanding the case back to the trial court with instructions to make findings of fact and to enter clear and specific conclusions of law based on the findings of fact. Thus, we affirm the Court of Appeal's decision.

AFFIRMED.

IN RE HARRIS TEETER, LLC

[378 N.C. 108, 2021-NCSC-80]

IN THE MATTER OF THE APPEAL OF HARRIS TEETER, LLC
FROM THE DECISION OF THE MECKLENBURG COUNTY BOARD OF EQUALIZATION AND REVIEW

No. 311A20

Filed 13 August 2021

Taxation—ad valorem taxes—true value—appraisal methodology—functional and economic obsolescence

The Property Tax Commission properly accepted a county's valuation method to determine the true value of business personal property (used grocery store equipment) for purposes of an ad valorem tax assessment. The Commission's factual determinations regarding whether the appraisal properly accounted for functional and economic obsolescence were supported by substantial evidence in the form of an appraiser's testimony, and the Commission was justified in declining to adopt the business's approach of relying on market sales to determine the extent of depreciation adjustments.

Justice BERGER dissenting.

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

Justice BARRINGER dissenting.

Chief Justice NEWBY and Justice BERGER 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, 271 N.C. App. 589 (2020), affirming a Final Decision entered on 30 May 2019 by the North Carolina Property Tax Commission. Heard in the Supreme Court on 27 April 2021.

John A. Cocklereece, Justin M. Hardy, and Kyle F. Heuser for appellant-taxpayer Harris Teeter, LLC.

Ruff Bond Cobb Wade & Bethune, LLP, by Ronald L. Gibson and Robert S. Adden, Jr., for appellee Mecklenburg County.

ERVIN, Justice.

IN RE HARRIS TEETER, LLC

[378 N.C. 108, 2021-NCSC-80]

¶ 1 This case requires consideration of the extent to which the Court of Appeals erred by holding that an assessment that Mecklenburg County made of the business personal property owned by Harris Teeter, LLC, at six grocery stores reflected the "true value" of that property as required by N.C.G.S. § 105-283, which defines "true value" as the price "at which the property would change hands between a willing and financially able buyer and a willing seller, neither being under any compulsion to buy or to sell and both having reasonable knowledge of all the uses to which the property is adapted and for which it is capable of being used." After careful consideration of the record in light of the applicable law, we conclude that the Court of Appeals' decision should be affirmed.

¶ 2 In 2015, Mecklenburg County completed an ad valorem tax assessment of Harris Teeter's business personal property, with the property in question having included shelving, coolers, freezers, point-of-sale systems, computers and computer equipment, forklifts, trash compactors, and other items used in the operation of six of the Harris Teeter grocery stores located in Mecklenburg County.[1] Although the County assessed the value of the business personal property utilized at the six stores at $21,434,313.00, Harris Teeter contended that the "true value" of the property in question was only $13,663,000.00. As a result, Harris Teeter noted an appeal from the County's tax assessment to the North Carolina Property Tax Commission. On 5 March 2019, the Commission, sitting as the State Board of Equalization and Review, conducted a hearing concerning Harris Teeter's appeal.

¶ 3 At the hearing, Kenneth Joyner, a tax assessor employed by Mecklenburg County who had worked on the initial assessment of the value of the relevant property, testified that, in order to generate this initial valuation, the County had identified the appropriate cost indices and depreciation schedules and utilized computer software to apply those indices and schedules to the original cost of Harris Teeter's property. Mr. Joyner testified that, in performing this analysis, the County adhered to North Carolina Department of Revenue schedules and did not include any depreciation-related allowances for obsolescence or consider any other market value-related information. Mr. Joyner acknowledged that the North Carolina Department of Revenue advised that the relevant schedules had "been prepared [ ] as a general guide to be used in the valuation of business personal property" and that there "may be situa-

1. In advance of the hearing that was held before the Commission, the parties stipulated that they would limit their evidentiary presentations to property located at the six stores that the County had previously assessed given that the stores in question were representative of the other stores that Harris Teeter operated in Mecklenburg County.

tions where the appraiser will need to make adjustments for additional or less functional or economic obsolescence or for other factors."

¶ 4 Mitchell Rolnick, a machinery and equipment appraiser, testified on behalf of Harris Teeter. Mr. Rolnick stated that he had completed a separate appraisal of the subject property at Harris Teeter's request using market value-based depreciation schedules developed by Landmapp, a private appraisal company, in order to determine the true value of the property in question. The depreciation schedules developed by Landmapp rested upon information concerning sales of used equipment that were primarily made on eBay or other similar e-commerce websites. Mr. Rolnick testified that he took the original cost of the equipment, "index[ed] it to today's dollar," and applied Landmapp's depreciation schedules "to come to the fair market value installed." Mr. Rolnick refrained from including additional depreciation based upon considerations relating to functional or economic obsolescence on the theory that such factors were captured in the prices reflected in the underlying market transactions. Although Mr. Rolnick agreed that the Department of Revenue's schedules would capture physical deterioration, he believed that the marketplace was "the only place you're going to find" functional and economic obsolescence, which explained why Landmapp had used the prices resulting from market transactions in developing its depreciation schedules. Mr Rolnick acknowledged that, in general, used grocery store equipment either went "to liquidation or [ ] in the dumpster" at the end of its useful life.

¶ 5 According to Mr. Rolnick, in completing his appraisal, he and his colleagues had conducted a physical inventory of the property located at the six stores that were at issue in this case and then searched the Landmapp database, along with information available in other publications and on the internet, for the purpose of identifying sales of comparable property. Mr. Rolnick stated that he did not utilize a "sales comparison" approach given that "significant amounts of adjustments would need to be made" in order to make it viable, but that he used a "market-derived cost approach," in which he compared the price obtained for the property in question in the marketplace to the price of the same piece of equipment when purchased new, given that this approach "took less adjustments to be credible."

¶ 6 James Turner, the president of a business appraisal company, provided rebuttal testimony for the County. After conducting an appraisal of the relevant property, Mr. Turner concluded that the property had a "true value" of $22,100,000.00. In order to reach this result, Mr. Turner went to the relevant grocery stores, photographed the equipment that

was located at those facilities, and collected information about the equipment from the store managers. Mr. Turner used depreciation tables developed by Marshall & Swift to account for the physical deterioration of the equipment, indexed the cost of the equipment using the Producer Price Index, and developed values for the equipment using (1) the cost approach; (2) the market, or "comparable sales," approach; and (3) the income approach.

¶ 7 Mr. Turner testified that he had been able to use the market, or "comparable sales," approach to appraise the value of some of the equipment, such as shopping carts and forklifts, given that such items were relatively mobile, self-contained, and occasionally re-sold on an individual basis. Mr. Turner testified that, on the other hand, larger items of equipment, such as refrigerated cases, coolers, and shelving, were "tethered to the rack compressor system" and had to operate using the same refrigerant, resulting in the existence of higher installation costs and fewer incidences of re-sale that served to make the market approach "less reliable" in valuing these items.

¶ 8 In describing his use of the cost approach, Mr. Turner testified that he used Marshall & Swift valuation tables to account for physical deterioration and for functional obsolescence relating to certain computers, point-of-sale systems, and other computing equipment. Mr. Turner used the income approach to determine whether an additional adjustment needed to be made as the result of economic obsolescence and found that "the subject stores return[ed] a rate of return on their assets and on equity that [we]re above industry standards" and that the available information concerning the Harris Teeter stores "reflected a robust return on invested capital." In view of the fact that the return that Harris Teeter earned on the subject property was "above industry norms," Mr. Turner concluded that the "equipment didn't suffer any external obsolescence," i.e. economic obsolescence.[2] After stating that he had not "consider[ed] [Harris Teeter's] earnings when [he] was valuing the equipment independently," Mr. Turner acknowledged that he "did use [Harris Teeter's] earnings to determine whether or not there was economic obsolescence within the cost approach."

¶ 9 On 12 March 2019, the Commission entered an order in which it requested that both parties provide written answers to several questions,

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2. In explaining the concept of economic obsolescence, Mr. Turner stated that, when NAFTA was adopted, the textile industry had experienced economic obsolescence because many companies moved offshore and income in the industry was much lower than had been expected.

including the extent to which delivery and installation costs "are or are not an appropriate component of true value" and the "degree [to which] obsolescence is reflected in your opinion of value, and the dollar value attributed to any such obsolescence." In responding to the Commission's question regarding delivery and installation costs, Harris Teeter cited to a manual concerning "Personal Property Appraisal and Assessment" that had been published by the North Carolina Department of Revenue in 2007.

¶ 10 On 30 May 2019, the Commission entered a Final Decision affirming the County's initial assessed valuation. The Commission noted that both parties had used the cost approach to generate values for the subject property by determining the "original installed costs for each item of the subject property" and adjusting those costs "to reach an estimate of true value as of January 1, 2015." According to the Commission, the principal explanation for the varying valuation amounts provided by the parties stemmed from differing cost adjustment and depreciation methodologies. In addressing these methodological issues, the Commission found that Mr. Rolnick "had relied upon the sales of used equipment, without making any adjustments," to calculate depreciation, despite the fact that he had "abandoned the sales comparison approach" for the purpose of valuing the relevant property in light of the significant adjustments that would be necessary in order to utilize such an approach. The Commission described Mr. Rolnick's approach as "illogical" given that, on the one hand, he "determine[d] that sales [were] too unreliable to be useful in developing value using the sales comparison approach" while, on the other hand, he used "the same or similar" sales values "under the cost approach to determine the appropriate level of depreciation to apply." In addition, the Commission determined that Harris Teeter's proposed valuation method did not adequately account for delivery and installation costs on the theory that, "[i]f the basis for determining true value under the cost approach is the total cost required to put equipment to its intended use, then a resale of used equipment must also include installation and other necessary costs."

¶ 11 The Commission rejected Harris Teeter's argument that the County's valuation methodology inappropriately failed to account for functional and economic obsolescence on the grounds that the County had adequately addressed this subject. After noting that there were three types of depreciation, including (1) physical depreciation; (2) functional obsolescence, which consisted of "the decline in an object's value due to outdated or flawed design"; and (3) economic obsolescence, which consisted of "the decline in an object's value due to external economic

forces," the Commission found that the County had adequately accounted for physical deterioration, with "all or nearly all of the depreciation affecting the subject property [having been] the result of physical deterioration." In addition, the Commission found that, while "some assets exhibit[ed] functional obsolescence," the County had accounted for this sort of obsolescence in its valuation methodology and that Harris Teeter had "effectively limited the impact of functional obsolescence on its equipment through a program of regularly replacing it." Finally, with respect to the issue of economic obsolescence, the Commission found that the "evidence [did not tend to show] that [Harris Teeter] is itself closing stores as a result of economic conditions." In addressing both functional and economic obsolescence, the Commission stated that:

> 15. Mr. Turner testified that he identified additional functional obsolescence in computer-based equipment and further depreciated the value of those assets in order to account for the additional loss in value. He testified that he accelerated the depreciation on certain types of equipment as a result of information he received from the Appellant's staff—that some equipment was replaced before the end of its normal useful life because of severe use of that equipment. . . . Mr. Turner testified further that he had personally developed income-based values in order to determine for himself whether the subject property was producing an appropriate return for the Appellant, and determined that the subject property produced income greater than standard for the industry. His conclusion, therefore, is that the subject property does not exhibit economic obsolescence, and we agree. The property's apparent capacity to generate income greater than the industry standard is not an indication of economic obsolescence.

After finding that the County had correctly refrained from adjusting the value of the relevant property to account for economic obsolescence and that the County had properly accounted for physical depreciation and functional obsolescence in its assessment, the Commission concluded that the County's tax valuation was "a reasonable estimate of true value" for the subject property and that, even though Harris Teeter had successfully rebutted the County's initial showing of correctness

by offering evidence tending to show that the County's initial valuation exceeded the "true value" of the relevant property, the County had satisfied its ultimate burden of proving that its appraisal reflected the "true value" of the property. Harris Teeter noted an appeal from the Commission's Final Decision to the Court of Appeals.

¶ 12 In seeking relief from the Commission's Final Decision before the Court of Appeals, Harris Teeter argued that: (1) the Commission had erred by failing to find that the market for used grocery store equipment could be used to identify obsolescence given that market results "necessarily provide[ ] valuable evidence of economic and functional obsolescence"; (2) the Commission had erred by affirming the County's valuation of the relevant property based upon the value of its use by the taxpayer rather than its "fair market value," which is the "price at which the property would likely change hands between a willing buyer and a willing seller," citing *In re Parkdale Mills*, 225 N.C. App. 713, 720 (2013); and (3) the Commission had erred by concluding that the County had demonstrated that its assessment reflected the "true value" of the relevant property. In rejecting Harris Teeter's challenge to the Commission's order, the Court of Appeals began by holding that Harris Teeter had successfully rebutted the presumption of validity to which the County's initial appraisal was entitled by presenting competent evidence that the methodology used to develop the County's initial appraisal methods did not result in the "true value" of the relevant property. *In re Harris Teeter, LLC*, 271 N.C. App. 589, 601 (2020). In addition, the Court of Appeals held that the Commission's findings had sufficient evidentiary support and that those findings established that the County had satisfied its obligation to prove that the methods that it had employed in valuing Harris Teeter's property produced the "true value" of that property. *Id.* In reaching this result, the Court of Appeals noted that, while both the County and Harris Teeter had used the cost approach to determine the value of the relevant property, "the parties disagree[d] concerning the degree to which functional and economic obsolescence should be considered and used to further adjust appraisal values for additional depreciation" of the property. *Id.* at 602.

¶ 13 The Court of Appeals determined that the cost approach could properly be utilized to determine the value of business personal property based upon a determination of the initial cost of that property reduced by an allowance for depreciation. *Id.* at 601–02. According to the Court of Appeals, "[d]epreciation may be caused by deterioration, which is a physical impairment, such as structural defects, or by obsolescence, which is an impairment of desirability or usefulness brought about by

changes in design standards (*functional obsolescence*) or factors external to the property (*economic obsolescence*)." *Id.* at 602 (citing *In re Stroh Brewery*, 116 N.C. App. 178, 186 (1994)). In addition, the Court of Appeals defined "functional obsolescence" as "a loss in value due to impairment of functional capacity inherent in the property itself including factors such as overcapacity, inadequacy or changes in state of the art, or poor design." *Id.* at 603 (citing *In re Westmoreland-LG & E Partners*, 174 N.C. App. 692, 699 (2005)). In evaluating whether the Commission had correctly found that the County appropriately considered the issue of functional obsolescence, the Court of Appeals noted that Mr. Turner had "identified additional functional obsolescence in computer-based equipment" and made an appropriate adjustment in light of the degree of functional obsolescence that he had observed and that he had also "accelerated the depreciation on certain types of equipment as a result of information he received . . . that some equipment was replaced before the end of its normal useful life because of severe use of that equipment." *Id.* In addition, the Court of Appeals pointed out that the Commission had "f[ou]nd no evidence in the record to suggest that the equipment in question (collectively) is failing to perform adequately the job for which it was intended due to design or economic factors." As a result, the Court of Appeals held that the Commission did not err in determining that the County had properly accounted for functional obsolescence. *Id.* at 604.

¶ 14 Similarly, the Court of Appeals held that the "Commission's findings [relating to economic obsolescence] were supported by competent evidence and adequately address[ed] why consideration of the market for used grocery store equipment was inappropriate and did not warrant [the making of an] additional downward adjustment" in determining the "true value" of the relevant property. *Id.* at 605. The Court of Appeals held that the Commission had appropriately determined that the market prices paid for used grocery store equipment were not adequate indicators of economic obsolescence given that, "due to the prevailing industry trend of store closures flooding the supply in the secondary market for used equipment, the prices fetched by such sales do not represent transactions from 'willing sellers' of the equipment as mandated by N.C.[G.S.] § 105-283." *Id.* at 606. In addition, the Court of Appeals held that Harris Teeter's approach of "assum[ing] that each piece of equipment is due for replacement and headed to either the landfill or the glutted secondary market at the moment it is valuated" was erroneous and that the adoption of this assumption "would result in its equipment experiencing a drastic reduction in value the moment they are purchased new and

installed in its stores." *Id.* As a result, the Court of Appeals affirmed the Commission's order.

¶ 15 In a separate opinion concurring in the result, in part, and dissenting, in part, Judge Tyson expressed disagreement with the Court of Appeals' determination that the County had successfully established that the appraisal methodologies that it had used established the "true value" of the relevant property as required by N.C.G.S. § 105-283. *Id.* at 609. According to Judge Tyson, the valuation adopted by the County's valuation was "substantially greater" than that proposed by Harris Teeter and "substantially exceed[ed] true value." *Id.* at 613–14. In support of this assertion, Judge Tyson pointed to Mr. Rolnick's testimony that "low market prices for used grocery store equipment necessitated downward adjustment of any values estimated by depreciation schedules to reflect additional economic and functional obsolescence" and asserted that this portion of the evidence had not been "disputed nor rebutted by the County." *Id.* at 616. As a result, Judge Tyson concluded that, since neither the County nor Mr. Turner had properly accounted for economic and functional obsolescence, the Commission's conclusions were "arbitrary, unlawful, and . . . wholly inconsistent with long-established definitions, precedents, and attributes governing personal property." *Id.*

¶ 16 In seeking to persuade us to overturn the Court of Appeals' decision, Harris Teeter argues that, after it had demonstrated that the County's valuation was unreasonably high and shifted the burden of proof with respect to the "true value" issue to the County, the County had failed to prove that its appraisal methods resulted in the establishment of the "true value" of the relevant property and had not, for that reason, satisfied the applicable burden of proof. More specifically, Harris Teeter argues that the valuation procedures utilized by the County failed to establish the "true value" of the relevant property because those methods did not properly account for functional and economic obsolescence. Harris Teeter claims to have elicited substantial evidence concerning "economic conditions that put significant downward pressure on the fair market value of used grocery store equipment" and that this evidence indicated that the relevant property was subject to both functional and economic obsolescence. In support of this proposition, Harris Teeter notes that, "in 2013 and 2014, there were 5,500 mergers and acquisitions of grocery stores in the United States and 869 bankruptcies and closures" and points out that Harris Teeter "and its competitors remodel their stores — on average, every six to seven years — as they compete for consumers," with both of these developments having flooded the market for used grocery store equipment. In Harris Teeter's view, "[t]his

glut of used grocery store equipment *inevitably* affects the fair market value of the Property," with the County having failed to assess the property at issue in this case at its "true value" given its failure to account for this functional and economic obsolescence.

¶ 17 In addition, Harris Teeter directs our attention to *In re IBM Credit Corp.*, 201 N.C. App. 343, 350–51 (2009) (*IMB II*), in which the Court of Appeals reversed a Commission order upholding the manner in which Durham County had assessed the value of business personal property owned by IBM, in part, on the grounds that the Commission's finding that the County had properly considered obsolescence by relying upon a government depreciation schedule was erroneous given the absence of sufficient record support for that finding. According to the Court of Appeals, the County's "failure to make additional depreciation deductions due to functional and economic obsolescence due to market conditions result[ed] in an appraisal which [did] not reflect 'true value.' " *Id.* At 354. Harris Teeter contends that, in this case, as in *IBM II*, the County simply failed to "produce a valid explanation for its failure to make the required adjustments, only producing appraisals that do not rebut [Harris Teeter]'s evidence of significant economic and functional obsolescence affecting the Property."

¶ 18 Secondly, Harris Teeter argues that the Court of Appeals incorrectly interpreted the relevant statutory language, which provides that:

> All property, real and personal, shall as far as practicable be appraised or valued at its true value in money. When used in this Subchapter, the words "true value" shall be interpreted as meaning market value, that is, the price estimated in terms of money at which the property would change hands between a willing and financially able buyer and a willing seller, neither being under any compulsion to buy or to sell and both having reasonable knowledge of all the uses to which the property is adapted and for which it is capable of being used.

N.C.G.S. § 105-283 (2019). In Harris Teeter's view, the value of the relevant property for property tax valuation purposes should rest upon the price of used grocery store equipment, which is, quite literally, the price which a willing buyer would pay for the equipment to a willing seller, with the Court of Appeals' determination that the use of market prices was "inappropriate" for the purpose of determining the "true value" of used grocery store equipment being fundamentally flawed.

¶ 19 In addition, Harris Teeter takes issue with the Court of Appeals' determination that the Commission appropriately considered its favorable economic performance vis-à-vis that of its competitors in determining whether the value of the relevant property should be reduced to account for functional or economic obsolescence. In Harris Teeter's view, the Commission's belief that the property in question "must have a higher value than other used grocery store equipment because [Harris Teeter] uses it well in its business operations" rests upon its "subjective worth" to the taxpayer, an approach that the Court of Appeals disavowed in *Parkdale Mills*, 225 N.C. App. at 720, by stating that the "Commission's findings implicitly allow the County to measure the value of the properties as their subjective worth to" the taxpayer, a standard of valuation that was "obviously not the same as adequately determining the objective value of these properties to another willing buyer." *Id.* (citing *In re AMP, Inc.*, 287 N.C. 547, 568 (1975)).

¶ 20 The County, on the other hand, argues that the Court of Appeals correctly held that the Commission's findings of fact had sufficient record support and provided ample justification for the Commission's conclusions of law. The County claims to have presented evidence tending to show that its initial valuation captured the "true value" of the relevant property, with this evidence including the appraisal completed by Mr. Turner, who reduced his estimate of the value of some of Harris Teeter's computer-related property based upon a finding of functional obsolescence and failed to find any evidence that any of the relevant property was economically obsolete given that Harris Teeter achieved above-average income using the relevant property.

¶ 21 According to the County, the Court of Appeals correctly upheld the Commission's decision to reject the arguments advanced on Harris Teeter's behalf in Mr. Rolnick's testimony. The County contends that the Court of Appeals was not entitled to "re-weigh the evidence presented and substitute its evaluation for the Commission's," which is what, in the County's view, Harris Teeter was seeking to have it do. Instead, the County asserts that the issue for the Court of Appeals and this Court on appellate review is "whether an administrative decision has a rational basis in the evidence," citing *In re McElwee*, 304 N.C. 68, 87 (1981). In arguing that the Commission had a rational basis in the evidence for its decision, the County directs our attention to Mr. Turner's use of the cost approach, the manner in which he depreciated certain items of property, and the income-based values that Mr. Turner used in determining whether a further deduction for economic obsolescence would be appropriate. As a result, for all of these reasons, the County urges us to affirm the Court of Appeals' decision.

¶ 22 In evaluating whether the Commission "properly accepted [the] County's method of valuing [a taxpayer's property] rather than the method offered by [the] taxpayer, we use the whole-record test to evaluate the conflicting evidence." *In re Greens of Pine Glen Ltd.*, 356 N.C. 642, 647 (2003). As we have consistently noted,

> it is the function of the administrative agency to determine the weight and sufficiency of the evidence and the credibility of the witnesses, to draw inferences from the facts, and to appraise conflicting and circumstantial evidence. We cannot substitute our judgment for that of the agency when the evidence is conflicting. However, when evidence is conflicting, as here, the standard for judicial review of administrative decisions in North Carolina is that of the "whole record" test. . . . The whole record test is not a tool of judicial intrusion; instead, it merely gives a reviewing court the capability to determine whether an administrative decision has a rational basis in the evidence.

In re McElwee, 304 N.C. at 87 (cleaned up). In conducting "whole record" review, we are required to "evaluate the conflicting evidence" and determine "whether the Commission properly accepted [the] County's method of valuing" the property rather than that proffered by the taxpayer. *In re Greens of Pine Glen Ltd.*, 356 N.C. at 647. The "whole record" test does not, of course, allow a reviewing court to "replace the Commission's judgment with its own judgment even if there are two reasonably conflicting views; rather, [the reviewing court] merely determine[s] whether an administrative decision has a rational basis in evidence." *In re Westmoreland*, 174 N.C. App. at 697 (citing *In re Perry-Griffin Found.*, 108 N.C. App. 383, 393 (1993)). For that reason, the reviewing court simply "evaluate[s] whether the Commission's decision is supported by substantial evidence," which is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Id.* (citing *Comr. of Ins. v. Rating Bureau*, 292 N.C. 70, 80 (1977)) (cleaned up).

¶ 23 According to N.C.G.S. § 105-283, business personal property must be appraised for property taxation purposes at its "true value in money," defined, as has already been noted, as the property's "market value, that is, the price estimated in terms of money at which the property would change hands between a willing and financially able buyer and a willing seller." According to well-established North Carolina law, when interpreting a statute, "undefined words are accorded their plain meaning so long as it is reasonable to do so." *Polaroid Corp. v. Offerman*, 349 N.C.

290, 297 (1998). As a result, the statutory description of "true value" and the manner in which it is defined should be interpreted in accordance with the ordinary meaning of the relevant terms, a fact that clearly suggests the appropriateness of ordinary valuation methods in determining the "true value" of the relevant property.

¶ 24 "[A]d valorem tax assessments are presumed to be correct"; when "such assessments are attacked or challenged, the burden of proof is on the taxpayer to show that the assessment was erroneous." *In re AMP, Inc.*, 287 N.C. at 562. In order to rebut this presumption of correctness, the taxpayer must "produce 'competent, material and substantial' evidence that tends to show that: (1) Either the county tax supervisor used an arbitrary method of valuation; or (2) the county tax supervisor used an illegal method of valuation; AND (3) the assessment substantially exceeded the true value in money of the property." *Id.* at 563. "An illegal appraisal method is one which will not result in 'true value' as that term is used in [N.C.G.S.] § [105-]283." *In re S. Ry. Co.*, 313 N.C. 177, 181 (1985). In order to show that the County's initial assessment "substantially exceeded the true value in money of the property," the taxpayer must show that "the valuation was unreasonably high." *In re AMP*, 287 N.C. at 563. In the event that the taxpayer satisfies its initial burden of proving that the County's valuation was unreasonably high, the County is then required to "demonstrate [ ] that the values determined in the revaluation process were not substantially higher than that called for by the statutory formula" and "demonstrate the reasonableness of its valuation 'by competent, material and substantial evidence.' " *In re McElwee*, 304 N.C. at 86–87 (citation omitted); *see also In re Parkdale Mills*, 225 N.C. App. at 717 (holding that, "[o]nce the taxpayer rebuts the initial presumption, the burden shifts back to the County which must then demonstrate that its methods produce true values").

¶ 25 The record reflects that both Harris Teeter and the County utilized the cost approach in order to appraise the relevant property.[3] The cost approach "is the most effective methodology for the appraisal of personal property." North Carolina Dept. of Revenue Ad Valorem Tax Division, *2007 Personal Property Appraisal and Assessment Manual Section VIII: The Appraisal of Business Personal Property*, 14 (2007) [here-

3. As the record clearly reflects, neither party argued before the Commission or before this Court that the Commission was required to value the relevant business personal property on the exclusive basis of the prices charged for such property in the secondary market. Instead, the only purpose for which Harris Teeter proposed the use of secondary market prices was to determine the extent, if any, to which the original cost of the property should be reduced for economic obsolescence.

inafter *NCDOR Manual Section VIII*].[4] Given that business personal property, such as machinery and equipment, is "not traded regularly in the market" and that it is rare for "business taxpayers [to] purchase new equipment merely to update to the latest model available," "the cost (accounting method) approach is the recommended method for the valuation of business personal property." *Id.* An analyst should account for depreciation in utilizing the cost approach by

> estimating the current cost of a new asset, then deducting for various elements of depreciation, including physical deterioration and functional and external obsolescence to arrive at "depreciated cost new." The "cost" may be either reproduction or replacement cost. The logic behind this method is that an indication of value of the asset is its cost (reproduction or replacement) less a charge against various forms of obsolescence such as functional, technological and economic as well as physical deterioration if any.

IBM II, 201 N.C. App. at 351. "Depreciation may be caused by deterioration, which is a physical impairment such as structural defects, or by obsolescence, which is an impairment of desirability or usefulness brought about by changes in design standards (*functional obsolescence*) or factors external to the property (*economic obsolescence*)." *In re Stroh Brewery*, 116 N.C. App. at 186 (cleaned up). In view of the fact that Harris Teeter does not appear to contend that the Commission failed to properly address the issue of physical impairment, we will focus the remainder of our analysis upon issues surrounding functional and economic obsolescence.

¶ 26 As a definitional matter, functional obsolescence is "a loss in value due to impairment of functional capacity . . . inherent in the property itself" stemming from factors such as "overcapacity, inadequacy or changes in state of the art, or poor design." *In re Westmoreland*, 174 N.C. App. at 699 (citing North Carolina Dept. of Revenue Ad Valorem Tax

4. A portion of this manual was included in Harris Teeter's response to an Order of the Commission and in the record developed before the Court of Appeals. The manual can be found at: https://www.ncdor.gov/documents/2007-personal-property-appraisal-and-assessment-manual-section-viii-appraisal-business-personal. In view of the fact that this manual reflects the ordinary meaning of the statutory definition of "true value" set out in N.C.G.S. §105-283, it is appropriate for this Court to consider that document, upon which Harris Teeter relied before the Commission and the Court of Appeals, in evaluating the validity of the order that is before us in this case.

Division, *Business Personal Property Appraisal Manual*, 7–17 (1995)). In *Westmoreland*, the Court of Appeals found that the property under consideration in that case did not exhibit any signs of functional obsolescence in light of the fact that, at least in part, the relevant electric generating facilities had "outstanding performance records, operate[d] above industry standards in production, ha[d] no environmental problems, and ha[d] been consistently profitable" for the taxpayer. *Id.* at 699–700.

¶ 27 Similarly, economic obsolescence accounts for the change in the value of the relevant property that "results from economic forces, such as legislative enactments or changes in supply and demand relationships," *NCDOR Manual Section VIII*, 17, with such obsolescence being caused by "adverse influences arising from causes external to the machinery and equipment" such as social and legislative changes, general economic changes, considerations of supply and demand, and changes in prices and profitability. *Id.* at 19–20. "The most common causes of economic obsolescence in machinery and equipment are the changes in market demand for products being manufactured by the equipment and also the general economic conditions that are present." *Id.* at 30. Ordinarily, economic depreciation is estimated using either the "comparable sales" method, in which the analyst examines market sales of similar equipment, or by capitalizing income losses, *id.*, with the Commission having essentially adopted the second of these two approaches in this case. As the Department of Revenue has stated:

> The shortage of current market data in comparable sales has caused appraisers to search for other ways to quantify economic obsolescence in machinery and equipment. Market data often does not represent true value transactions . . . . Most equipment in the used equipment market is there because of liquidation, bankruptcy or other causes which could very well influence the sales price of the equipment. . . . It should be noted that many of the sales transactions on used equipment will not reflect true market value and as such, are not appropriate for ad valorem tax valuations.
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> As has been stated, machinery and equipment derives its value from its ability to generate a normal, profitable income to its owners during the expected useful life of the equipment. When the market demand for

> a product drops, causing income to be less than normal, the value of the equipment is affected.
>
> If market demand for a product drops, the degree to which the lack of product demand affects the value of the equipment (or the economic obsolescence), can be calculated by analyzing the current operating statements of the business and comparing them to expected statements at normal demand levels.

Id. As a result, the generally accepted methods for determining whether an adjustment for economic obsolescence should be made include an evaluation of the relative profitability of the specific business whose property is being valued, a fact that justifies a focus upon the profitability of that business. However, in spite of this admonition to avoid using the "comparable sales" method in instances in which it fails to reflect "true market value" of the relevant property and the Commission's apparent decision to accept this logic in its order, Harris Teeter argues that the Court of Appeals erred by taking its favorable economic performance into consideration in upholding the Commission's "true value" determination and contends that the evidence concerning the prices for used grocery store equipment in the secondary market necessitates an additional depreciation-related adjustment for economic obsolescence.[5]

¶ 28 The issue before the Court in this case is not a new one. In *AMP*, this Court examined the lawfulness of the Commission's decision to uphold the manner in which Guilford County valued the portion of an electronics manufacturer's business personal property that consisted of in-process inventory and raw materials. 287 N.C. at 555, 559. Although the taxpayer offered evidence tending to show that its raw materials were "so unique" that it got "nothing but scrap [metal] for them," so that the "raw materials and in-process inventories had a true value in money equivalent to their scrap value," which was "how much cash could be derived from the sale of the subjects, that is the underlying materials, that are available for sale if they should be sold at that date in their present state," *id.* at 556–57, we rejected that argument, stating that the taxpayer's

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5. Although Harris Teeter mentions the issue of functional obsolescence in its brief, its legal attack upon the Commission's order focuses upon the issue of economic obsolescence and fails to explicitly explain how the Commission erred in the course of addressing the issue of functional obsolescence. As a result, the discussion contained in the remainder of this opinion will focus upon the Commission's treatment of the issue of economic obsolescence.

> theory that the only value its inventories had was scrap value . . . [was] based on the assumption, obviously fictional, that on 1 January of each year it is required to sell all of its inventory, whether such inventory is in raw material or in an in-process state, to the only possible buyers of such materials, the scrap mills.

Id. at 567–68. As a result, we held that (1) the true value of "true scrap metal," which consisted of materials that could not be used to create electronics and simply had to be discarded, equaled the prices for which such items could be sold in the scrap metal market; (2) the true value of "non-defective in-process inventory," which consisted of incomplete, in-process electronics that would, upon completion, be sold to consumers, equaled "the cost of replacing the inventory, plus labor and overhead"; and (3) the true value of "non-damaged, raw material inventory," which consisted of undamaged brass and copper coils that could be converted into electronics for subsequent sale to consumers, equaled "the cost of replacing such inventory on the critical date." *Id.* at 569–75.

¶ 29 In affirming the Commission's determination that non-defective in-process inventory should not be appraised using the market price of scrap metal, we pointed out that "the record is totally devoid of any evidence that AMP 'usually' and 'freely' sold such materials back to its suppliers for scrap prices" and that "the evidence is that AMP NEVER made such sales." *Id.* at 570. In addition, we noted that "it would be ridiculous" to sell in-process inventory for scrap and that "no on-going business entity would adopt such a sales plan," which would result in the receipt of substantially less money for such property than the property would bring as a finished product. *Id.* After acknowledging that the record tended to show that there was no direct market for in-process inventories or raw materials, we stated that "the mere fact that there is no market for a particular property does not deprive it of 'market value,' [or] 'true value,' " and that "[m]arket value can be constructed of elements other than sales in the market place." *Id.* at 571. For that reason, we concluded that it would be appropriate to utilize valuation principles derived from cases involving damaged personal property and the valuation of stock in order to determine the "true value" of in-process inventory and raw materials. *Id.* at 572–73.

¶ 30 After reaching this conclusion, the Court went on to compare the value of the taxpayer's in-process inventory to the measure of damages associated with the loss of personal property for which there was no market, stating that:

> Cost of replacement or repair, with suitable adjustments for the fact that the damaged or destroyed property was old and had depreciated in value, is perhaps, as previously noted, the most commonly considered factor in fixing value of personal property that has no market. The usual formula employed for determining the value of the destroyed property in such cases deducts the accrued depreciation on the damaged property from the replacement costs.

Id. at 572 (citations omitted). As a result, the Court essentially approved the use of "replacement cost less depreciation" in order to value the taxpayer's in-process inventory rather than requiring the use of the market prices available for the relevant materials in the scrap metal market.

¶ 31 On the other hand, in *IBM II*, the Court of Appeals reviewed the Commission's decision to uphold the manner in which Durham County assessed the taxpayer's business personal property, including certain computers and computer equipment, and held that the county's initial assessment did not produce "true value." 201 N.C. App. 343. In order to determine the "true value" of the relevant property, Durham County had determined the original cost of the property in question and then adjusted it using a schedule that had been prepared by the Department of Revenue. *Id.* at 344. In spite of the fact that the Department of Revenue had cautioned that "the schedules [were] only a guide" and that appraisers might "need to make adjustments for additional functional or economic obsolescence," Durham County simply applied the numbers derived from the schedule to the original cost of the relevant items of property without doing anything more. *Id.* at 344–45. In upholding the validity of the taxpayer's assertion that the appraisal method that Durham County utilized in the instance before it in that case did "not produce a 'true value' or 'fair market value' for its equipment, because the schedule [did] not properly account for functional or economic obsolescence present in the 2001 computer and computer equipment market," *id.* at 347, the Court of Appeals concluded that the Commission had failed to "adequately track[ ] the detailed burden-shifting analysis required by" the relevant case law or to "adequately address key issues necessary to arrive at the ultimate decision" that it was required to make, which was "[w]hat is the market value of the property being appraised," resulting "in conclusions which lack evidentiary support and are therefore arbitrary and capricious." *Id.* at 349 (citing N.C.G.S. § 105-283).

¶ 32 A careful examination of the logic adopted by this Court in *AMP* and by the Court of Appeals in *IBM II* suggests that, on the one hand, the

Commission does not err by rejecting a method for determining "true value" that places exclusive, or even principal, reliance upon market sales and is, instead, entitled to consider the extent to which prices revealed by sales in particular markets are abnormally low or high as the result of external factors. For that reason, Harris Teeter's implicit argument that market sales should be deemed controlling in the context of determining "true value" was squarely rejected by this Court in *AMP*. On the other hand, the Court of Appeals correctly held in *IBM II* that "true value" cannot be properly determined by mechanically applying generic schedules without making sure that those schedules fairly and accurately reflect the conditions that the taxpayer actually faces. As a result, the ultimate lesson to be learned from *AMP* and *IBM II* is that there is no single required method for determining "true value" and that a proper "true value" determination must rest upon a careful analysis of all relevant factors. In our opinion, the Commission did exactly that in this instance.

¶ 33 The ultimate issue that confronts us in this case is whether the Commission's findings and conclusions have a "rational basis in the evidence," *In re McElwee*, 304 N.C. at 87, or whether they are "supported by substantial evidence," *In re Westmoreland*, 174 N.C. App. at 697, and whether those findings support the Commission's ultimate determination with respect to the issue of true value. In concluding that the County had made the necessary evidentiary showing, the Commission placed principal reliance upon the testimony provided by Mr. Turner, who stated that he had utilized the cost approach, the market, or "comparable sales," approach, and the income approach in valuing the relevant used grocery store equipment; that he had been able to use the market approach to value some of the more mobile and self-contained items, such as shopping carts and forklifts; that most of the larger items, such as refrigerated cases and coolers, had high delivery and installation costs and utilized the same refrigerant system; that these factors made the use of the market approach to value these items of property unreliable; and that he had used the "cost method" to value the remaining items. As we have already noted, the Commission also found that

> 15. Mr. Turner testified that he identified additional functional obsolescence in computer-based equipment and further depreciated the value of those assets in order to account for the additional loss in value. He testified that he accelerated the depreciation on certain types of equipment as a result of information he received

> from the Appellant's staff—that some equipment was replaced before the end of its normal useful life because of severe use of that equipment. . . . Mr. Turner testified further that he had personally developed income-based values in order to determine for himself whether the subject property was producing an appropriate return for the Appellant, and determined that the subject property produced income greater than standard for the industry. His conclusion, therefore, is that the subject property does not exhibit economic obsolescence, and we agree. The property's apparent capacity to generate income greater than the industry standard is not an indication of economic obsolescence.

Based upon these findings, the Commission concluded that "the county's value of $21,434,313 is not only supported by Mr. Turner's appraisal, but also is a reasonable estimate of true value." In other words, the Commission treated the issue of the extent to which an adjustment should be made to the original cost of Harris Teeter's property for economic obsolescence as a question of fact to be determined on the basis of the record evidence and reached a result that even our dissenting colleagues appear to concede has sufficient support in the record evidence. As a result, after carefully examining the record, we hold that the Commission's findings with respect to the issue of functional and economic obsolescence, which rely upon Mr. Turner's testimony that, with certain limited exceptions, he did not detect the presence of functional obsolescence and that his evaluation of Harris Teeter's economic performance precluded the need for an adjustment for economic obsolescence, have sufficient evidentiary support and support the Commission's conclusion that the County satisfied its obligation to rebut Harris Teeter's challenge to the validity of its appraisal methodologies.

¶ 34 We do not find Harris Teeter's contentions that the low prices of used grocery store equipment in the secondary market require the making of a further adjustment for economic obsolescence and that the Commission erred by relying upon Harris Teeter's favorable economic performance in concluding that such economic obsolescence did not exist to be persuasive. Such an argument assumes that, as a matter of law, there is one, and only one, way to calculate economic obsolescence in spite of the fact that the relevant statutory language contemplates the use of generally accepted valuation principles and the fact that

the approach that the Commission adopted for use in this case is fully consistent with both generally accepted valuation principles and the accounting and economic evidence in the record. For that reason, we believe that acceptance of Harris Teeter's argument would be inconsistent with the relevant statutory language and require us to engage in an impermissible exercise of appellate factfinding.

¶ 35 In addition, we believe that Harris Teeter's arguments rest upon an erroneous understanding of the nature of economic obsolescence. As we have previously demonstrated, economic obsolescence stems from the effects of economic conditions external to the property under consideration, such as social and legislative changes, current economic conditions, the taxpayer's ability to use the property to make a profit, and similar factors. According to the Department of Revenue, market prices "often do[ ] not represent true value transactions" given that "[m]ost equipment in the used equipment market is there because of liquidation, bankruptcy or other causes," which drastically reduces the equipment's market price. *NCDOR Manual Section VIII*, 30. In such instances, "sales transactions on used equipment will not reflect true market value and as such, are not appropriate for ad valorem tax valuations." *Id.*

¶ 36 As Mr. Rolnick admitted in his testimony before the Commission, Harris Teeter's used grocery store equipment goes "to liquidation or . . . the dumpster" at the end of its useful life. Our review of the record does not provide any basis for believing that the used grocery store equipment at issue in this case had reached the end of its useful life. In addition, Mr. Rolnick acknowledged that the market for used grocery store equipment had been flooded with such property, a fact that greatly reduced the prices that were being received in that market. In light of this set of facts, which appear to be undisputed, the record clearly supports the Commission's determination that the prices received for the sales of comparable items of used grocery store equipment in the secondary marketplace upon which Mr. Rolnick relied did not provide reliable evidence of economic obsolescence and certainly does not compel a conclusion to the contrary. As in *AMP*, the record here "is totally devoid of any evidence that [the taxpayer] 'usually' and 'freely' [bought or] sold such" used equipment in the marketplace and did not require the Commission to value the used equipment at its secondary market price. 287 N.C. at 570.

¶ 37 Moreover, the Department of Revenue has determined that "analyzing the current operating statements of the business and comparing them to expected statements at normal demand levels" is an appropriate way to determine if the business' property is economically obsolescent, with

an additional depreciation adjustment for economic obsolescence being appropriate in the event that the return that the business is earning is lower than one would otherwise expect. *NCDOR Manual Section VIII*, 30. The testimony provided by Mr. Turner tends to show that the equipment used in Harris Teeter's grocery stores generated "a rate of return on their assets and on equity" that was "above industry standards," with this being the sort of evidence that is ordinarily considered in determining whether an adjustment of economic obsolescence needs to be made. As a result, the record contains ample justification for the Commission's decision to consider the profitability of Harris Teeter's stores in determining whether an additional adjustment for economic obsolescence would be appropriate, given that the value of business personal property "derives its value from its ability to generate a normal, profitable income to its owners during [its] useful life," *NCDOR Manual Section VIII*, 30, and that no such adjustment needed to be made in this instance.

¶ 38 Although Harris Teeter argues that, in this case, "[a]s in *IBM II*, the County failed to produce a valid explanation for its failure to make the required adjustments" for depreciation due to functional and economic obsolescence and that, as was the case in *IBM II*, "[t]he failure to make additional depreciation deductions due to functional and economic obsolescence due to market conditions results in an appraisal which does not reflect 'true value,' " 201 N.C. App. at 354 (2009), we have no hesitation in concluding that the record in this case appears to be markedly different from the one that was before the Court of Appeals in *IBM II*. As we understand *IBM II*, the County applied a governmentally developed schedule to the original cost of the relevant property without making any additional adjustments despite the fact that the schedule upon which the County relied stated that the analyst might "need to make adjustments for additional functional or economic obsolescence" and that the Commission, rather than engaging in the burden-shifting analysis required by *AMP*, simply asserted that the County had met its "burden." In this case, on the other hand, the testimony of Mr. Turner, which tended to show that he made significant adjustments to the cost of certain items of Harris Teeter's property and that he had fully considered the extent to which additional adjustments needed to be made to appropriately account for functional and economic obsolescence, constituted substantial evidence that he appropriately considered both functional and economic obsolescence in his appraisal, an analysis which is fully reflected in the Commission's findings and conclusions. Although the record does, of course, contain evidence that would have supported a contrary conclusion, the Commission, rather than this Court, has the fact-finding responsibility in this case. In other words, rather than being

an issue of law, we conclude that the issue before the Commission in this case was one of fact, which the Commission resolved in a manner that had ample record support. As a result, for all of these reasons, we hold that none of Harris Teeter's challenges to the Commission's order have any merit and that the Court of Appeals' decision to uphold its lawfulness should be affirmed.[6]

AFFIRMED.

Justice BERGER dissenting.

¶ 39 I fully join in Justice Barringer's dissent but write separately because "[a] frequent recurrence to fundamental principles is absolutely necessary to preserve the blessings of liberty." N.C. Const. art. I, § 35.

> The admonition of the Constitution requiring frequent recurrence to fundamental principles is politically sound. . . . We violate no precedent in referring to the important function these guaranties of personal liberty perform in determining the form and character of our Government. . . . If those whose duty it is to uphold tradition falter in the task, these guaranties may be defeated temporarily, or permanently lost through obsolescence.

State v. Harris, 216 N.C. 746, 762–63, 6 S.E.2d 854, 865–66 (1940).

¶ 40 The non-uniform valuation method employed by the government and sanctioned by the majority is constitutionally suspect and detrimental to economic liberty. *See* N.C. Const. article V, § 2(2) ("No class of property shall be taxed *except by uniform rule*, and every classification shall be made by general law *uniformly* applicable[.]" (emphasis added)); article I, § 1 ("We hold it to be self-evident that all persons are created equal; that they are endowed by their Creator with certain inalienable

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6. Harris Teeter did not argue before this Court that the Commission used a non-uniform method for valuing its property, N.C. Const. art. V, §2(2) (2(2), or violated any other tax-related constitutional provision, *see Harris v. Harris*, 307 N.C. 684, 690 (1983) (stating that, "[w]hen a party fails to raise an appealable issue, the appellate court will generally not raise it for that party") (citing *Henderson v. Matthews*, 290 N.C. 87 (1976)); *Crockett v. First Fed. Sav. & Loan Ass'n of Charlotte*, 289 N.C. 620, 632 (1976) (stating that, in accordance with N.C.R. App. P. 28, "appellate review is limited to the arguments upon which the parties rely in their briefs"), and there does not appear to be any evidence that the Commission failed to apply the valuation principles used in this case to other taxpayers or to utilize the same justification for refusing to make an adjustment for economic obsolescence in other cases.

rights; that among these are life, liberty, *the enjoyment of the fruits of their own labor*, and the pursuit of happiness." (emphasis added)); and article I, § 19 ("No person shall be . . . in any manner deprived of his life, liberty, or property, but by the law of the land. No person shall be denied the equal protection of the laws[.]").

¶ 41 As noted in Justice Barringer's dissent, imposition of a "success tax" is problematic. The "uniform appraisal" of the subject property's "true value" should be based on fair market value, i.e., "the price estimated in terms of money at which the property would change hands between a willing and financially able buyer and a willing seller[.]" N.C.G.S. § 105-283 (2019). The valuation method employed by Harris Teeter's expert relied on information derived from sales of used equipment on eBay and other existing markets – exactly the circumstances contemplated by the statute. This statutorily acceptable valuation method produced an appraised "true value" of $13,663,000.00.

¶ 42 In contrast, the valuation method employed by the government bore little resemblance to the statutorily prescribed method. The government's expert testified that, rather than consulting prices derived from sales of similar equipment in existing markets, he "use[d] [Harris Teeter's] earnings to determine whether or not there was economic obsolescence[.]" The government's expert determined that Harris Teeter's "rate of return on the assets[,]" which was "above industry norms," supported his conclusion that the "equipment didn't suffer any external obsolescence[.]" In other words, because the government deemed Harris Teeter to be a successful company, the government determined they must be treated differently.

¶ 43 Here, the government created an artificial valuation of the subject property. As a result, this non-uniform, statutorily unacceptable valuation method produced an appraised value of $22,100,000.00 – more than $8,000,000.00 higher than the value produced by Harris Teeter's expert. The valuation method employed by the government ignores existing markets for used business equipment, creates an artificial market for said equipment to exact additional monies from taxpayers, and treats taxpayers differently based solely on profitability. The fact that a practice may be widespread does not make it constitutionally permissible. Here, the government deprives Harris Teeter of property in the form of profits through use of a valuation method that appears inconsistent with our State Constitution.

¶ 44 " 'All taxes on property in this State for the purpose of raising revenue are imposed under the rule of uniformity.' " *Hajoca Corp. v. Clayton*,

277 N.C. 560, 567–68, 178 S.E.2d 481, 486 (1971) (quoting *Roach v. Durham*, 204 N.C. 587, 591, 169 S.E. 149, 151 (1933)); *see also* N.C. Const. article V, § 2(2). "The fundamental right to property is as old as our state. . . . From the very beginnings of our republic we have jealously guarded against the governmental taking of property." *Kirby v. N.C. Dep't of Transp.*, 368 N.C. 847, 852–53, 786 S.E.2d 919, 923–24 (2016) (citing John Locke, *Two Treatises of Government* 295 (London, Whitmore & Fenn et al. 1821) (1689) ("The great and chief end, therefore, of men's uniting into commonwealths, and putting themselves under government, is the preservation of their property.").

¶ 45 "This Court's duty to protect fundamental rights includes preventing arbitrary government actions that interfere with the right to the fruits of one's own labor." *King v. Town of Chapel Hill*, 367 N.C. 400, 408, 758 S.E.2d 364, 371 (2014) (citing N.C. Const. art. I, § 1). The "fundamental guaranties" of Article I, section 1, which include the guarantee to the fruits of one's own labor, are "very broad in scope." *State v. Ballance*, 229 N.C. 764, 769, 51 S.E.2d 731, 734 (1949).

> The fundamental purpose for [the Declaration of Rights'] adoption was to provide citizens with protection from the State's encroachment upon these rights. Encroachment by the State is, of course, accomplished by the acts of individuals who are clothed with the authority of the State. . . . We give our Constitution a liberal interpretation in favor of its citizens with respect to those provisions which were designed to safeguard the liberty and security of the citizens in regard to both person and property.

Corum v. University of North Carolina, 330 N.C. 761, 782–83, 413 S.E.2d 276, 290 (1992) (citations omitted).

¶ 46 The case sub judice presents an even more compelling argument for a violation of Article I, section 1 than in the recently decided case of *Tully v. City of Wilmington*, 370 N.C. 527, 810 S.E.2d 208 (2018). In *Tully*, this Court held that to state a proper claim grounded in Article I, section 1, a public employee must establish: "(1) a clear, established rule or policy existed regarding the employment promotional process that furthered a legitimate governmental interest; (2) the employer violated that policy; and (3) the plaintiff was injured a result of that violation." *Id.* at 537, 810 S.E.2d at 216.

¶ 47 We are concerned here, not with an "established rule or policy[,]" but rather with fundamental rights guaranteed by our Constitution and

a plainly worded statutory provision. *See* N.C. Const. article V, § 2(2); article I, § 19; and N.C.G.S. § 105-283 (setting forth the "*[u]niform appraisal standards*" of "*[a]ll* property, real and personal." (emphasis added)). The violation of these fundamental rights by the government has deprived Harris Teeter of their profits, i.e., the fruits of their labor.

¶ 48 Beyond the immediate impact on Harris Teeter, this valuation method will curtail economic liberty and produce inconsistent and undesirable results for businesses in this State. Any business that earns a "rate of return on the[ir] assets" which is "above industry norms" risks the government effectuating an extra-statutory taking of the fruits of their labor, and this Court should decline to sanction such action. *See King*, 367 N.C. at 408, 758 S.E.2d at 371 ("This Court's duty to protect fundamental rights includes preventing arbitrary government actions that interfere with the right to the fruits of one's own labor.").

¶ 49 I respectfully dissent.

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

Justice BARRINGER, dissenting.

¶ 50 I join Justice Berger's dissent, but nonetheless write separately to specifically address the errors of the North Carolina Property Tax Commission.

I. Prologue

"A tax is a fine for doing well, a fine is a tax for doing wrong ."

Mark Twain

¶ 51 In this matter, the North Carolina Property Tax Commission without any statutory or pertinent legal authority, and perhaps inadvertently but nonetheless inexorably, effectively imposes a "success tax" under which the taxpayer's economic success relative to applicable industry standards subjects it to higher business personal property valuations and thus higher property tax liabilities. This is not sound tax policy nor law. It conflicts with the uniform appraisal standard established by our constitution and by statute requiring that all personal property "shall as far as practicable be appraised or valued at its true value in money." N.C.G.S. § 105-283 (2019). The profitability or revenue production of a successful taxpayer should not and, under constitutional and statutory principles, cannot impose higher valuation and property tax payments vis-à-vis a less successful taxpayer.

II. Background

¶ 52 In this matter, the Commission concluded that the taxpayer had "offered competent, material, and substantial evidence that the County's value of the subject property substantially exceeded the true value of the subject properties, when the [taxpayer] produced evidence tending to show that the true value of the subject properties was actually about one-third (1/3) less than the County's value, according to an appraisal developed by its expert witness." Nevertheless, the Commission ultimately though circuitously concluded that "[t]he County demonstrated that its methods in appraising the subject property produced true values when it provided evidence that the true values of the subject property, considering all forms of depreciation, was consistent with the County's values for the subject property." Not surprisingly, the County's evidence—its expert's appraised valuation—are consistent with the County's previously assessed values.

¶ 53 Both parties generated value opinions for the subject property based on the cost approach, beginning with the original installed costs for each item of the subject property, and then made adjustments to the cost. Where the value opinions diverge occurs in the consideration of "[t]he effect of obsolescence on the property," N.C.G.S. § 105-317.1(a). The taxpayer's appraisal apparently found obsolescence for all the subject property due to the current rampant and competitive nature of the grocery store industry's need to upfit every six to seven years.

¶ 54 The taxpayer's expert relied on depreciation tables compiled from data concerning sales of used equipment and concluded that the difference between the equipment new and used as reflected in the table calculations is the amount of physical depreciation and obsolescence for the property. Essentially, the taxpayer's position and testimony of its expert were that true value in money is the actual market value for the used property and pointed to the economic factors of high supply from store closures, mergers, and remodeling and minimal demand due to fewer store openings.

¶ 55 On the other hand, the County's expert deducted physical depreciation and tested for obsolescence. He employed the income approach to test for economic obsolescence. Because he found that the rate of return for the subject property exceeded the standard for the industry, he concluded that the subject property did not exhibit economic obsolescence. The County's expert also testified that from his research, most companies in the industry with the ability to buy do not buy in the secondary market. Thus, in his opinion, the market for used equipment is for a buyer who buys everything at once as a continuing operation.

Based on any layman's definition of supply and demand, fewer buyers in a used equipment market buying in large quantities should produce LOWER prices and thus LOWER "true values." The Commission agreed with the County's expert, concluding that "[t]he property's apparent capacity to generate income greater than the industry standard is not an indication of economic obsolescence."

III. Analysis

¶ 56 While the Commission's finding appears to be in accord with the tax and accounting standards for identifying economic obsolescence, see Connor J. Thurman & Robert F. Reilly, *What Tax Lawyers Need to Know about the Measurement of Functional and Economic Obsolescence in the Industrial or Commercial Property Valuation (Part 1)*, 35 Prac. Tax Law. 11, 16–18 (2020), allowing or disallowing an adjustment to a cost approach valuation on account of the rate of return for personal property conflicts with the design of a uniform appraisal standard requiring that all personal property "shall as far as practicable be appraised or valued at its true value in money." N.C.G.S. § 105-283.

¶ 57 Decisions of the Commission are reviewed by this Court pursuant to N.C.G.S. § 105-345.2. N.C.G.S. § 105-345.2 (2019). "Questions of law receive *de novo* review, while issues such as sufficiency of the evidence to support the Commission's decision are reviewed under the whole-record test." *In re Greens of Pine Glen Ltd.*, 356 N.C. 642, 647 (2003) (citing N.C.G.S. § 105-345.2(b)). The issue here—whether a taxpayer's relative economic success is determinative of economic obsolescence for a valuation of business personal property—is a question of law.

¶ 58 Section 105-283 of the General Statutes of North Carolina requires uniformity in appraisals for property taxation. N.C.G.S. § 105-283. Specifically,

> [a]ll property, real and personal, shall as far as practicable be appraised or valued at its true value in money. When used in this Subchapter, the words "true value" shall be interpreted as meaning market value, that is, the price estimated in terms of money at which the property would change hands between a willing and financially able buyer and a willing seller, neither being under any compulsion to buy or to sell and both having reasonable knowledge of all the uses to which the property is adapted and for which it is capable of being used.

N.C.G.S. § 105-283.

¶ 59 Thus, a valuation of property at true value in money does not consider who owns the property. *See* N.C.G.S. § 105-283. Rather, it is the valuation in money from a hypothetical transaction in a perfect market—the exchange "between a willing and financially able buyer and a willing seller, neither being under any compulsion to buy or to sell and both having reasonable knowledge of all the uses to which the property is adapted and for which it is capable of being used." N.C.G.S. § 105-283.

¶ 60 Economic obsolescence "is a reduction in the value of the property due to the effects, events, or conditions that are external to—and not controlled by—the current operation or condition of the taxpayer's property." Connor J. Thurman & Robert F. Reilly, *What Tax Lawyers Need to Know about the Measurement of Functional and Economic Obsolescence in the Industrial or Commercial Property Valuation (Part 1)*, 35 Prac. Tax Law. 11, 13 (2020); *see also Obsolescence*, *Black's Law Dictionary* (11th ed. 2019) (defining "economic obsolescence" as "[o]bsolescence that results from external economic factors, such as decreased demand or changed governmental regulations"). Given the definitive requirement of an external cause, economic obsolescence is unrelated to who owns the property, and logically, the amount of revenue or net profits generated by the owner of that property is not determinative of economic obsolescence.

¶ 61 Therefore, the fact that a specific taxpayer's rate of return on the subject property *exceeds industry standards* does not refute the existence of economic obsolescence, and certainly does not justify per se higher "true values." Economic obsolescence has an external cause and an immutable internal impact, but it will not necessarily result in underperformance relative to industry peers. *Cf. In re Colonial Pipeline Co.*, 318 N.C. 224, 229, 233–235 (1986) (finding no error in Commission's approval of the Department of Revenue's refusal to deduct from valuation opinion for true value an amount attributable to economic obsolescence where taxpayer's expert adjusted valuation by 25.36% on the grounds that investors were demanding a rate of return in the market of 14% for similar investments but taxpayer's rate of return was limited to 10.45% by Federal Energy Regulatory Commission).

¶ 62 Accordingly, the Commission's conclusion to this effect, while supported by the County's expert's testimony, reflects an error of law, necessitating remand to the Commission for further proceedings pursuant to N.C.G.S. § 105-345.2(b)(4). *See* N.C.G.S. § 105-345.2(b)(4) (providing reversal, remand, or modification of a Commission's order when the "Commission's findings, inferences, conclusions or decisions are . . . [a]ffected by other errors of law"). The Commission ignored the statuto-

ry mandate for true value in money required by N.C.G.S. § 105-283 when assessing the existence and arguable impact of economic obsolescence.

¶ 63 The majority overlooks this fundamental error of law. They raise that the County's expert did consider obsolescence, did make some adjustments for obsolescence, and did testify as to his assessment. They riddle their opinion with quotes from the North Carolina Department of Revenue 2007 Personal Property Appraisal and Assessment Manual. Yet, neither a manual issued by the North Carolina Department of Revenue nor the County's expert's testimony is law. *Cf. Midrex Techs., Inc. v. N.C. Dep't of Revenue*, 369 N.C. 250, 260 (2016) (giving only "due consideration" to the manner in which the Secretary of Revenue has interpreted the statutory language at issue in a published bulletin because the construction adopted by those who execute and administer the law is only persuasive); *In re IBM Credit Corp.*, 201 N.C. App. 343, 353 (2009) (rejecting county's argument that the schedule employed is legal and used by all 100 counties because to do so would render tax appeals limited to "determining whether or not the proper government schedule was employed" rather than applying the burden shifting analysis required by our precedent). Thus, when the testimony or publications conflict with N.C.G.S. § 105-283, it is this Court's duty to remand due to a fundamental error in law.

IV. Epilogue

¶ 64 As Judge Learned Hand of our Federal Second Circuit opined many decades ago: "Any one may so arrange his affairs that his taxes shall be as low as possible; he is not bound to choose that pattern which will best pay the Treasury; there is not even a patriotic duty to increase one's taxes." *Helvering v. Gregory*, 69 F.2d 809, 810 (2d Cir. 1934), *aff'd*, 293 U.S. 465 (1935) (quoted in *United States v. Carlton*, 512 U.S. 26, 36 (1994) (O'Connor, J. concurring)).

¶ 65 Later, Judge Hand expanded this principle in his dissent in *Commissioner of Internal Revenue v. Newman*, 159 F.2d 848 (1947) by observing: "Over and over again courts have said that there is nothing sinister in so arranging one's affairs as to keep taxes as low as possible. Everybody does so, rich or poor; and all do right, for nobody owes any public duty to pay more than the law demands: taxes are enforced exactions, not voluntary contributions. To demand more in the name of morals is mere cant." *Id.* at 850–51 (Hand, J., dissenting).

¶ 66 I respectfully dissent.

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

ESTATE OF MELVIN JOSEPH LONG, BY AND THROUGH
MARLA HUDSON LONG, ADMINISTRATRIX
v.
JAMES D. FOWLER, INDIVIDUALLY, DAVID A. MATTHEWS, INDIVIDUALLY,
DENNIS F. KINSLER, INDIVIDUALLY, ROBERT J. BURNS, INDIVIDUALLY,
MICHAEL T. VANCOUR, INDIVIDUALLY, AND MICHAEL S. SCARBOROUGH, INDIVIDUALLY

No. 303A20

Filed 13 August 2021

1. Immunity—sovereign—individual versus official capacity—dismissal improper

In a wrongful death action filed against individual employees of a state university, the trial court erred by dismissing the action after determining that the employees were entitled to sovereign immunity based on their status as state employees, since the employees were sued in their individual capacities, even if their alleged negligent acts were performed in the scope of their employment.

2. Negligence—sufficiency of pleading—proximate cause—burst pipes

In a wrongful death action filed against individual employees of a state university, the complaint adequately pled proximate cause through allegations that the employees knew or should have known, given warning signs posted outside a chiller, that their negligent acts in failing to properly drain the chiller and refill it with antifreeze could cause injury in the event the pipe froze and became pressurized. Therefore, the trial court improperly dismissed the action for failure to state a claim.

3. Damages and Remedies—punitive—sufficiency of pleading—willful or wanton conduct

In a wrongful death action filed against individual employees of a state university, the complaint contained sufficient allegations to put defendants on notice for punitive damages, based on willful and wanton conduct (N.C.G.S. § 1D-15(a)), where the allegations stated that defendants' negligent acts or omissions in failing to properly drain a chiller and refill it with antifreeze, particularly given warning signs posted on the chiller, could cause injury in the event the pipe froze and became pressurized, and that their conduct demonstrated a conscious disregard of the safety of others.

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, 270 N.C. App. 241 (2020), reversing an order entered on 3 May 2019 by Judge Josephine K. Davis in Superior Court, Person County, and remanding to the trial court. Heard in the Supreme Court on 18 May 2021.

Hardison & Cochran, PLLC, by John Paul Godwin; and Sanford Thompson, PLLC, by Sanford Thompson IV, for plaintiff-appellee.

Parker Poe Adams & Bernstein LLP, by Jonathan E. Hall and Patrick M. Meacham; and Joshua H. Stein, Attorney General, by Melissa K. Walker, Assistant Attorney General, Shannon Cassell, Civil Bureau Chief, and Sarah G. Boyce, Deputy Solicitor General, for defendant-appellants.

EARLS, Justice.

¶ 1 This case raises the question of whether the estate of an individual killed by the allegedly negligent acts of State employees can proceed in state court to assert wrongful death claims against those employees in their individual capacities or whether such a suit is barred by the doctrine of sovereign immunity. Following our precedent, sovereign immunity does not apply to suits against state employees in their individual capacities. We therefore hold that the trial court erred in dismissing the complaint on those grounds.

¶ 2 The tragic event giving rise to plaintiff's claims occurred on the morning of 20 January 2017, when Melvin Joseph Long was working to reconnect a trailer-mounted chiller on the campus of North Carolina State University (NCSU). To do so, he needed to remove metal flanges that capped two water pipes on the chiller. However, unbeknownst to Mr. Long, the pipes had become filled with pressurized gas after water in the pipes froze and the pipes cracked. As he began to loosen one of the metal flanges, it shot off the water pipe and hit him in the face with great force. Mr. Long died from his injuries five days later, on 25 January 2017.

¶ 3 Following his death, Mr. Long's estate brought the present action against James D. Fowler, David A. Matthews, Dennis F. Kinsler, Robert J. Burns, Michael T. Vancour, and Michael S. Scarborough (defendants), NCSU employees who had worked on the chiller during the months

before Mr. Long's injury and, according to plaintiff's allegations, caused his injury. In addition to arguing that the complaint failed to allege substantive elements of Mr. Long's claims, defendants have asked us to hold that Mr. Long's claims are brought against defendants in their official capacities or, in the alternative, that claims such as those brought by Mr. Long are necessarily claims against the State that cannot be brought against defendants in their individual capacities. Doing so would require us to overturn several decades of this Court's precedent establishing that claims brought against State employees in their individual capacities are not subject to the doctrine of sovereign immunity. However, we are constrained to promote the "stability in the law and uniformity in its application" which may only be achieved through "respect for the opinions of our predecessors." *Wiles v. Welparnel Constr. Co.*, 295 N.C. 81, 85 (1978).

¶ 4 The tie between injury and remedy is so fundamental to our law that it is enshrined in the first article of our state constitution—"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. Hewing close to our precedent in this case maintains the general principle that the law provides remedies to injured persons. *Cf. Wirth v. Bracey*, 258 N.C. 505, 508 (1963) ("The obvious intention of the General Assembly in enacting the Tort Claims Act was to enlarge the rights and remedies of a person injured by the actionable negligence of an employee of a State agency while acting in the course of his employment."). By preserving remedies in tort, we "deter certain kinds of conduct by imposing liability when that conduct causes harm." *Haarhuis v. Cheek*, 255 N.C. App. 471, 480 (2017) (quoting Dan B. Dobbs, Paul T. Hayden & Ellen M. Bublick, *The Law of Torts* § 14 (2d ed. 2011)). As we have previously stated, "[t]here can be little doubt that immunity fosters neglect and breeds irresponsibility, while liability promotes care and caution." *Rabon v. Rowan Mem'l Hosp., Inc.*, 269 N.C. 1, 13 (1967). Defendants in this case were sued in their individual capacities, and the complaint adequately stated claims for the tort relief sought by Mr. Long's estate. As a result, the trial court erroneously granted defendant's motion to dismiss, and we affirm the decision of the Court of Appeals reversing that order.

I. Background

¶ 5 Since this case comes to us on the trial court's order granting a motion to dismiss pursuant to Rules 12(b)(1), 12(b)(2), and 12(b)(6) of the North Carolina Rules of Civil Procedure, we accept the allegations in the complaint as true. *Corwin v. British Am. Tobacco PLC*, 371 N.C. 605, 611 (2018) (Rule 12(b)(1)); *Parker v. Town of Erwin*, 243 N.C. App. 84,

96 (2015) (Rule 12(b)(2)); *Bridges v. Parrish*, 366 N.C. 539, 541 (2013) (Rule 12(b)(6)).

¶ 6 The Complaint alleges that in December 2016, NCSU owned, operated, and used a large, trailer-mounted chiller. Around 21 December 2016, one or more of defendants, pursuant to a work order completed during the course of their employment, shut the chiller down, disconnecting its power and water sources. At that time, they drained water from the chiller. However, two signs on the chiller contained a warning indicating that it was "not possible to drain all water" from the chiller and that the chiller "must be drained and refilled with" antifreeze solution "[f]or freeze protection during shut-down." Similarly, the chiller's operating manual instructed that the chiller should be filled with antifreeze to "prevent freeze-up damage to the cooler tubes." Defendants did not put antifreeze into the chiller.

¶ 7 Almost two weeks later, on 3 January 2017, one or more defendants tightly secured heavy metal flanges, weighing approximately 13.1 pounds, to the ends of the chiller's water pipes to cap the pipes. A few days after that, the area experienced a hard freeze, with temperatures falling as low as nine degrees Fahrenheit. Water remaining in the pipes froze and ruptured the pipes, which caused the pipes to fill with a pressurized refrigerant gas. The gas built up in the pipes behind the metal flanges, and the pipes became pressurized.

¶ 8 On 20 January 2017, Mr. Long attempted to loosen the flanges on the chiller pipes so that the chiller could be reconnected. As he began doing so, one of the flanges flew off the end of the pipe, propelled by the pressurized refrigerant gas, and struck him in the face. The flange knocked off part of Mr. Long's skull, and he died five days later.

¶ 9 Marla Hudson Long, Mr. Long's wife and the personal representative of Mr. Long's estate, filed the instant action in Superior Court, Person County, on 13 November 2018. On 19 February 2019, defendants filed a motion to dismiss pursuant to Rules 12(b)(1), 12(b)(2), and 12(b)(6) of the North Carolina Rules of Civil Procedure, arguing that the trial court lacked jurisdiction over the subject matter and over the person of defendants and that the complaint failed to state a claim upon which relief could be granted. On 21 February 2019, defendants filed their answer and defenses. Following a hearing on 8 April 2019, the trial court granted defendants' motion to dismiss in an order filed 3 May 2019.

¶ 10 Following the trial court's order granting defendants' motion to dismiss, the estate appealed to the Court of Appeals. The Court of Appeals reversed the trial court's order in a divided decision, holding that

defendants, employees of NCSU, had been sued in their individual capacities and were therefore not entitled to the defense of sovereign immunity and that the complaint had adequately stated claims for negligence and gross negligence. *Estate of Long v. Fowler*, 270 N.C. App. 241, 250, 252–53 (2020). The dissent, on the other hand, would have held that the complaint failed to adequately plead negligence or gross negligence and that defendants were entitled to sovereign immunity because the allegedly negligent actions occurred within the scope of their employment as public employees. *Id.* at 254–55, 257 (Tyson, J., dissenting).

¶ 11 Before this Court, defendants assert that they are being sued in their official capacities and that the suit is actually one against NCSU, which is entitled to sovereign immunity. They also argue that the complaint fails to state claims for negligence and gross negligence because it does not allege facts establishing proximate cause, and that the complaint fails to adequately allege claims for punitive damages. We reject these arguments and affirm the Court of Appeals. A suit against State employees is not subject to the doctrine of sovereign immunity when brought against the employees in their individual capacities. The complaint in this case indicates that it is brought against defendants in their individual capacities. Moreover, the complaint adequately alleges that Mr. Long's injury was proximately caused by defendants' conduct and adequately alleges that defendants acted with the requisite willful or wanton conduct to support a claim for punitive damages.

II. Analysis

A. Sovereign immunity

¶ 12 **[1]** When reviewing a trial court's order granting a motion to dismiss pursuant to Rule 12(b)(1), "we apply de novo review, accepting the allegations in the complaint as true and viewing them in the light most favorable to the non-moving party." *Corwin*, 371 N.C. at 611.[1] We review de novo "[q]uestions of law regarding the applicability of sovereign or governmental immunity." *Wray v. City of Greensboro*, 370 N.C. 41, 47

1. As was the case in *Teachy v. Coble Dairies, Inc.*, we need not decide whether a motion to dismiss on the basis of sovereign immunity is properly designated as a Rule 12(b)(1) motion or a Rule 12(b)(2) motion. *See Teachy v. Coble Dairies, Inc.*, 306 N.C. 324, 328 (1982) (stating that "the distinction becomes crucial in North Carolina because" a denial of a Rule 12(b)(2) motion is immediately appealable by statute while a denial of a Rule 12(b)(1) motion is not). Here, the motion to dismiss was granted, and neither Ms. Long's appeal to the Court of Appeals nor defendants' appeal to this Court was an interlocutory appeal.

(2017) (alteration in original) (quoting *Irving v. Charlotte-Mecklenburg Bd. of Educ.*, 368 N.C. 609, 611 (2016)).

¶ 13 Defendants are not entitled to the defense of sovereign immunity merely because they are State employees, even when the tortious conduct is alleged to have occurred during the scope of their employment. *Miller v. Jones*, 224 N.C. 783, 787 (1945) ("The mere fact that a person charged with negligence is an employee of others to whom immunity from liability is extended on grounds of public policy does not thereby excuse him from liability for negligence in the manner in which his duties are performed, or for performing a lawful act in an unlawful manner."); *see also Isenhour v. Hutto*, 350 N.C. 601, 609 (1999) (stating that it is irrelevant whether allegations of tortious conduct relate to a public employee defendant's official duties "[b]ecause public employees are individually liable for negligence in the performance of their duties"); *Meyer v. Walls*, 347 N.C. 97, 108 (1997) ("Therefore, the fact that defendants may have been acting as agents of the State does not preclude a claim against defendants.").[2] However, as defendants correctly note, a suit against a State employee in that employee's official capacity is a suit against the State and therefore subject to the doctrine of sovereign immunity. *See Isenhour*, 350 N.C. at 608 ("A suit against a defendant in his individual capacity means that the plaintiff seeks recovery from the defendant directly; a suit against a defendant in his official capacity means that the plaintiff seeks recovery from the entity of which the public servant defendant is an agent." (quoting *Meyer*, 347 N.C. at 110)). As a result, as defendants acknowledge, the threshold question in this case is whether defendants are being sued in their individual or in their official capacities.[3]

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2. It is inconsistent with a fair reading of any of our precedents establishing that sovereign immunity is unavailable to a State employee sued in his or her individual capacity to suggest that the law is "less than clear," on this point. *See*, *e.g.*, *Mullis v. Sechrest*, 347 N.C. 548, 551 (1998) ("[T]he threshold issue to be determined" when evaluating what immunity defense are available "is whether [the] defendant [ ] is being sued in his official capacity, individual capacity, or both"); *see also* Trey Allen, *Local Government Immunity to Lawsuits in North Carolina*, (Inst. of Gov't, Univ. of N.C. at Chapel Hill, Oct. 2018, at 5–6) ("Under current case law, governmental immunity is not a defense to tort claims alleged against officers or employees in their individual capacities.").

3. The dissent wrongly posits that "the distinction between official and individual capacity conflicts with the concept of waiver of the State's sovereign immunity." In fact, the distinction between an "official" and "individual capacity" suit has been recognized as determinative when examining assertions of sovereign immunity by both the State of North Carolina under State law, as detailed above, and in claims arising under federal law. As we explained in *Corum*,

B. Individual or official capacity

¶ 14 It is abundantly clear from the complaint that defendants are being sued in their individual capacities. "It is a simple matter for attorneys to clarify the capacity in which a defendant is being sued. Pleadings should indicate in the caption the capacity in which a plaintiff intends to hold a defendant liable." *Mullis v. Sechrest*, 347 N.C. 548, 554 (1998). Here, the caption of the complaint lists each named defendant followed by "Individually" after each name. Moreover, the first line of the complaint indicates that the plaintiff is "complaining of the defendants in their individual capacities, jointly and severally." The prayer for relief seeks relief against defendants "jointly and/or severally" after "having stated claims against the defendants, individually and jointly." This is further indication that the complaint states claims against defendants in their individual capacities. *See id.* ("Finally, in the prayer for relief, plaintiffs should indicate whether they seek to recover damages from the defendant individually or as an agent of the governmental entity.").

¶ 15 Importantly, the prayer for relief does not seek injunctive relief implicating the exercise of governmental power—it instead seeks only compensatory and punitive damages against the individual defendants. *See id.* at 552 (discussing the distinction between official and individual capacity claims and noting that "seek[ing] an injunction requiring the defendant to take an action involving the exercise of a governmental power" is indicative of an official capacity suit (quoting *Meyer*, 347 N.C. at 110)). When, as in the instant case, the complaint seeks monetary damages, the claim "is an individual-capacity claim" if "the complaint

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> [S]tate governmental officials can be sued in their individual capacities for damages under [42 U.S.C. §] 1983. . . . [U]nlike a suit against a state official in his official capacity, which is basically a suit against the official office and therefore against the State itself, a suit against an individual who happens to be a governmental official but is not acting in his official capacity is not imputed to the State. Such individuals are sued as individuals, not as governmental employees. Presumably, they are personally liable for payment of any damages awarded.

Corum v. Univ. of N. Carolina Through Bd. of Governors, 330 N.C. 761, 772 (1992); *cf. Lewis v. Clarke*, 137 S. Ct. 1285, 1291 (2017) ("The identity of the real party in interest dictates what immunities may be available. Defendants in an official-capacity action may assert sovereign immunity. . . . But sovereign immunity does not erect a barrier against suits to impose individual and personal liability.") (internal quotation marks omitted). Recognizing the distinction between official and individual capacity claims in no way "conflicts with the concept of waiver of the State's sovereign immunity" because there is no sovereign immunity to assert when the defendant is sued in his or her individual capacity.

indicates that the damages are sought . . . from the pocket of the individual defendant." *Meyer*, 347 N.C. at 110 (quoting Anita R. Brown-Graham & Jeffrey S. Koeze, *Immunity from Personal Liability under State Law for Public Officials and Employees: An Update*, Loc. Gov't L. Bull. 67 (Inst. of Gov't, Univ. of N.C. at Chapel Hill), Apr. 1995, at 7).

¶ 16 Defendants have argued that they are being sued in their official capacities, and not in their individual capacities, because their allegedly tortious conduct was performed in the scope and course of their employment. However,

> [w]hether the allegations relate to actions outside the scope of defendant's official duties is not relevant in determining whether the defendant is being sued in his or her official or individual capacity. To hold otherwise would contradict North Carolina Supreme Court cases that have held or stated that public employees may be held individually liable for mere negligence in the performance of their duties.

Meyer, 347 N.C. at 111.

¶ 17 Defendants have also argued that "the course of proceedings" indicates that the suit is brought against defendants in their official capacities, not in their individual capacities. However, we need not look to "the course of proceedings" when "the complaint . . . clearly specif[ies] whether the defendants are being sued in their individual or official capacities." *Mullis*, 347 N.C. at 552 (quoting *Kentucky v. Graham*, 473 U.S. 159, 167 n.14 (1985)). As indicated above, the complaint in this case clearly indicates that defendants are being sued in their individual capacities. There is no ambiguity in the complaint which would require us to look to the course of proceedings to determine in what capacity defendants are being sued.

¶ 18 Essentially, defendants assert that this suit is one against the State because Ms. Long has also sued NCSU in the Industrial Commission. However, "the fact that the Tort Claims Act provides for subject matter jurisdiction in the Industrial Commission over a negligence claim against the State does not preclude a claim against defendants in Superior Court." *Meyer*, 347 N.C. at 108. "A plaintiff may maintain both a suit against a state agency in the Industrial Commission under the Tort Claims Act and a suit against the negligent agent or employee in the General Court of Justice for common-law negligence." *Id.* (citing *Wirth*, 258 N.C. at 507–08).

¶ 19 Finally, defendants asserted at oral argument that regardless of whether the complaint attempts to state claims against defendants in their individual capacities, the General Assembly has "taken off the table" suits against individual employees for conduct within the scope of their employment. Defendants assert that the suit is actually brought against them in their official capacities because the General Assembly has passed a law of general applicability which causes the State to pay judgments in actions brought against State employees. In defendants' view, any other conclusion would "subvert the General Assembly's efforts to route these kinds of tort claims to the Industrial Commission." We can divine no such intent from the statutes that defendants cite.

¶ 20 By statute, the General Assembly has provided that "upon request of an employee or former employee, the State may provide for the defense of any civil or criminal action or proceeding brought against him in his official or individual capacity, or both, on account of an act done or omission made in the scope and course of his employment as a State employee." N.C.G.S. § 143-300.3 (2019). In such a case, the State has set out its intention to "pay (i) a final judgment awarded in a court of competent jurisdiction against a State employee or (ii) the amount due under a settlement of the action under this section." N.C.G.S. § 143-300.6(a) (2019). Defendants argue that these two statutes indicate that an action against a State employee which the State chooses to defend is in actuality an action against the State entitled to sovereign immunity and required to be brought in the Industrial Commission pursuant to the State Tort Claims Act. *See* N.C.G.S. § 143-291(a) (2019) ("The North Carolina Industrial Commission is hereby constituted a court for the purpose of hearing and passing upon tort claims against the State Board of Education, the Board of Transportation, and all other departments, institutions and agencies of the State.").

¶ 21 The interpretation urged by defendants is belied by the text of the statutes themselves. The provision permitting the payment of judgments and settlements against State employees expressly provides that "[t]his section does not waive the sovereign immunity of the State with respect to any claim." N.C.G.S. § 143-300.6(a). If, as defendants claim, actions against State employees which the State has elected to defend are entitled to sovereign immunity protections and may only proceed in the Industrial Commission, there would have been no need for the General Assembly to specify that judgments or settlements paid in that context are not a waiver of the State's sovereign immunity. If defendants were correct, there would be no danger that the payment of a judgment or settlement in such an action could constitute a waiver of the State's sovereign immunity—the payment would have been made in an Industrial

Commission action pursuant to the State's limited waiver of immunity in the State Tort Claims Act. The General Assembly would have had no reason to specify that the payment of a judgment or settlement on behalf of a State employee "does not waive the sovereign immunity of the State with respect to any claim." *See* N.C.G.S. § 143-300.6(a). Adopting defendants' argument would necessitate the conclusion that section 143-300.6 contains superfluous language—this conclusion is fatal to their claim. *See State v. Morgan*, 372 N.C. 609, 614 (2019) ("[A] statute may not be interpreted 'in a manner which would render any of its words superfluous.' " (quoting *State v. Coffey*, 336 N.C. 412, 417 (1994))).

¶ 22 More broadly, the statutory scheme referenced by defendants would not exist if actions against State employees in their individual capacities were subject to the doctrine of sovereign immunity. "[T]he Tort Claims Act applies only to actions against state departments, institutions, and agencies and does not apply to claims against officers, employees, involuntary servants, and agents of the State." *Meyer*, 347 N.C. at 107. As a result, no action could be maintained in the Industrial Commission against the individual defendants being sued in the instant action. However, section 143-300.6 of our General Statutes contemplates the payment by the State of "a final judgment awarded in a court of competent jurisdiction against a State employee." N.C.G.S. § 143-300.6(a). If these actions could only be brought in the Industrial Commission, which has no jurisdiction over the individual defendants, there would have been no need for the General Assembly to provide for the payment of judgments against State employees in any "court of competent jurisdiction"—no such judgments would exist. *Id.* If the General Assembly had intended that tort claims against State employees be decided in the Industrial Commission, it would not have written a statute that specifically allowed for the State to pay "a final judgment awarded in a court of competent jurisdiction against a State employee." *Id.*

¶ 23 Two more considerations guide our decision on this point. First, adopting defendants' argument would require overruling our prior decisions holding that actions against public employees are not subject to the doctrine of sovereign immunity—decisions issued both before and after the enactment of statutory provisions providing for defense by the State of actions against State employees and the payment by the State of judgments against State employees. *See Wirth*, 258 N.C. at 508 (stating in 1963 that the Tort Claims Act permits a suit against a state agency in the Industrial Commission without abrogating a plaintiff's right to bring an action against the employee of such an agency, who remains "personally liable for his own actionable negligence"); *Meyer*, 347 N.C. at

108 ("Furthermore, the fact that the Tort Claims Act provides for subject matter jurisdiction in the Industrial Commission over a negligence claim against the State does not preclude a claim against defendants in Superior Court.").

¶ 24 Second, we note that the State's decision to defend a State employee for actions in the scope and course of employment is discretionary. *See* N.C.G.S. § 143-300.3. We decline to adopt an interpretation of our statutes which would create serious notice problems for plaintiffs who cannot know whether the State will choose to defend an action against a particular employee, which defendants assert would trigger sovereign immunity and preclude a remedy in superior court. Even assuming that defendants' interpretation was reasonable, we would avoid it. *See In re Arthur*, 291 N.C. 640, 642 (1977) ("Where one of two reasonable constructions will raise a serious constitutional question, the construction which avoids this question should be adopted."). For all of these reasons, we conclude that the trial court erred by granting defendants' motion to dismiss pursuant to Rules 12(b)(1) and 12(b)(2) on the basis of defendants' arguments pertaining to sovereign immunity.

C. Failure to state a claim

¶ 25 "Our review of the grant of a motion to dismiss under Rule 12(b)(6) of the North Carolina Rules of Civil Procedure is de novo." *Bridges*, 366 N.C. at 541. Our task is to determine "whether the allegations of the complaint, if treated as true, are sufficient to state a claim upon which relief can be granted under some legal theory." *Id.* (quoting *Coley v. Stat*e, 360 N.C. 493, 494–95 (2006)). Defendants argue that Mr. Long failed to allege that his injury was a reasonably foreseeable result of their conduct and that the complaint therefore did not sufficiently establish the element of proximate cause. Defendants also argue that the complaint did not adequately allege the willful or wanton conduct needed to support a claim for punitive damages. We reject both arguments and hold that the trial court erred in granting defendants' motion to dismiss pursuant to Rule 12(b)(6).

1. Proximate cause

¶ 26 **[2]** Defendants argue that the complaint fails to allege that Mr. Long's injury was a reasonably foreseeable consequence of defendants' actions. At oral argument, defendants asserted that there is nothing in the complaint suggesting that they should have known that their conduct could possibly result in the chiller freezing up and pressurizing, thereby causing injury. We conclude that the complaint sufficiently alleges that defendants' actions proximately caused Mr. Long's injury.

¶ 27 In a common law negligence claim, "[i]t is sufficient if by the exercise of reasonable care the defendant might have foreseen that some injury would result from his conduct or that consequences of a generally injurious nature might have been expected. Usually the question of foreseeability is one for the jury." *Fussell v. N.C. Farm Bureau Mut. Ins. Co.*, 364 N.C. 222, 226 (2010) (alteration in original) (quoting *Slaughter v. Slaughter*, 264 N.C. 732, 735 (1965)).

¶ 28 Defendants argue that the complaint "failed to include requisite allegations of fact that a reasonably foreseeable consequence of defendants' alleged failure to properly drain water from the chiller unit's pipes would be a chemical reaction that could lead to a pressurized explosion of sufficient force to propel a 13-pound metal flange at a person's head." However, there is nothing surprising about the fact that water left in pipes that are subjected to freezing temperatures may freeze and cause the pipes to burst. Defendants' description of this phenomenon as "a chemical reaction" does not make the result any less foreseeable. This unsurprising fact is underscored by two signs on the outside of the chiller that read

> **FREEZE WARNING!**
> It is not possible to drain all water from this heat exchanger! For freeze protection during shutdown, exchanger must be drained and refilled with 5 gals Glycol min. 80GX504736-
> **TRAPPED WATER!**

¶ 29 By comparison, the work order attached to the complaint indicates that defendants were instructed to "drain and secure carrier chiller for relocation." Given that the work order instructed defendants to "drain" the chiller, and that the notice on the chiller specified that it could not be completely drained and it "must be drained and refilled" with antifreeze, defendants were on notice that a necessary part of the task they were instructed to complete was ensuring that antifreeze was added to the chiller. As a result, it is irrelevant that the work order did not specifically instruct defendants to "winterize" the chiller—the complaint alleges sufficient facts that, if true, indicate defendants were on notice that they must refill the chiller with antifreeze after draining it. The work order did not need to set out every step required to execute the task properly and safely.

¶ 30 The complaint alleges that each defendant improperly drained water from the chiller, leaving water inside. It alleges that notices on the chiller warned that it was not possible to drain all water from the chiller and that the chiller must be filled with antifreeze to prevent freezing. The complaint alleges that defendants failed to fill the chiller with antifreeze. The complaint alleges that as a result of this failure, the pipes froze and ruptured. The complaint further alleges that each defendant knew or should have known that this could happen and that the pipes would become pressurized as a result. Finally, the complaint alleges that the pressure in the pipes caused one of the 13-pound metal flanges that defendants allegedly placed on the ends of the pipes to fly off, resulting in injuries that caused Mr. Long's death.

¶ 31 The complaint adequately alleged that defendants either knew or should have known that their conduct would cause damage to the chiller that might leave it in a dangerous state, that defendants in fact caused the damage through their actions, and that injury in fact resulted. This was sufficient, under principles of notice pleading, to "give the substantive elements of a legally recognized claim." *Estate of Savino v. Charlotte-Mecklenburg Hosp. Auth.*, 375 N.C. 288, 297 (2020) (quoting *Raritan River Steel Co. v. Cherry, Bekaert & Holland*, 322 N.C. 200, 205 (1988)). "[P]roximate cause is ordinarily a question of fact for the jury, to be solved by the exercise of good common sense in the consideration of the evidence of each particular case." *McAllister v. Khie Sem Ha*, 347 N.C. 638, 645 (1998) (alteration in original) (quoting *Williams v. Carolina Power & Light Co.*, 296 N.C. 400, 403 (1979)). At this stage of the trial, dismissal is not warranted and plaintiff is entitled to proceed in the litigation which will determine whether the evidence bears out the allegations of proximate cause contained in the complaint.

2. Punitive damages

¶ 32 **[3]** As an initial matter, we need to be clear about the statutory standards for recovery of punitive damages applicable here. *See* N.C.G.S. § 1D-15 (2019). There is some suggestion in the briefs that for purposes of punitive damages, gross negligence is equivalent to willful or wanton conduct. However, our law now provides that "[p]unitive damages may be awarded only if the claimant proves" that either fraud, malice, or "[w]illful or wanton conduct" occurred and related to the injury. N.C.G.S. § 1D-15(a). As used here, " '[w]illful or wanton conduct' means more than gross negligence" and is defined as "the conscious and intentional disregard of and indifference to the rights and safety of others, which the defendant knows or should know is reasonably likely to result in

injury, damage, or other harm." N.C.G.S. § 1D-5 (2019). The complaint alleges that each defendant is liable in negligence and gross negligence for compensatory damages and separately that punitive damages should be awarded. As to the punitive damages claims, we consider whether the complaint "gives sufficient notice of events or transactions to allow the adverse party to understand the nature and basis for the claim[s] [of punitive damages for willful or wanton conduct], to allow him to prepare for trial, and to allow for the application of *res judicata*." *Henry v. Deen*, 310 N.C. 75, 85 (1984). We conclude that it does. Because willful or wanton conduct is a higher standard than gross negligence, this inquiry obviates any need to separately determine whether the complaint adequately states a claim for gross negligence. *See Estate of Savino*, 375 N.C. at 300 ("[W]illful and wanton and reckless conduct is still a higher degree of negligence or a greater degree of negligence than the negligence of gross negligence . . . ." (quoting *Crow v. Ballard*, 263 N.C. 475, 477 (1965)).

¶ 33 In their brief, defendants argue that the allegations in the complaint do not rise to the level of "willful or wanton conduct" necessary to sustain a claim for punitive damages in the absence of fraud or malice. *See* N.C.G.S. § 1D-15(a). They argue that the complaint contains no allegations creating a factual basis for the "inference that NCSU's employees knew or should have known about the risk of pressurized gas build-up in the chiller's water pipes." In defendants' view, the allegations of the complaint fail to state a claim for punitive damages because they do not establish that defendants were on notice that their actions might cause injury.

¶ 34 Defendants went further at oral argument, contending that because the allegations in the complaint "at most" support the inference that defendants should have known that their conduct could cause injury, the complaint is insufficient to state a claim for punitive damages. Defendants argued that the "willful or wanton conduct" necessary to establish gross negligence requires actual knowledge of the possibility of injury.

¶ 35 As noted above, a claim for punitive damages may be based on allegations of fraud, malice, or "[w]illful or wanton conduct." N.C.G.S. § 1D-15(a). Here, where there are no allegations of fraud or malice, the punitive damages claims are based on the aggravating factor of willful or wanton conduct. Notice pleading principles are applicable to claims for punitive damages. *Shugar v. Guill*, 304 N.C. 332, 337–38 (1981). Under those principles, there must be "sufficient information in the complaint from which defendant [can] take notice and be apprised of 'the events and transactions which produce the claim to enable [him] to understand

the nature of it and the basis for it.' " *Id.* at 338 (second alteration in original) (quoting *Sutton v. Duke*, 277 N.C. 94, 104 (1970)). The complaint need not lay out the "detailed and specific facts giving rise to punitive damages." *Henry*, 310 N.C. at 85 (citing *Sutton*, 277 N.C. at 102).

¶ 36 As to each of the six defendants, the complaint alleges that the defendant's "acts and/or omissions . . . demonstrated a conscious or intentional disregard or indifference to the rights and safety of others, including Joe Long, which [that defendant] knew, or should have known, would be reasonably likely to result in injury or death and as such constituted willful or wanton conduct." The "acts and/or omissions" of each defendant are described as follows:

> a. He improperly drained water from the Carrier chiller;
>
> b. He did not fill the Carrier chiller with glycol, ethylene glycol or some other anti-freeze after draining water from it;
>
> c. He left the Carrier chiller outside when he knew or should have known there was still water in the cooler tubes;
>
> d. He left the Carrier chiller outside when there was water in the cooler tubes when the temperature dropped below freezing;
>
> e. He capped the inlet water pipe and the outlet water pipe of the Carrier chiller with metal flanges when he knew or should have known the cooler tubes could be damaged and the water tubes and pipes could become pressurized;
>
> f. He allowed the inlet water pipe and the outlet water pipe of the Carrier chiller to remain capped when he knew, or should have known, pressure could build up inside the chiller;
>
> g. He did not consult the labels on the Carrier chiller . . . when he shut-down, disconnected, drained, or capped the Carrier chiller;
>
> h. He did not follow the labels . . . when he shut-down, disconnected, drained, or capped the Carrier chiller;

i. He did not consult the Winter Shutdown instructions of the Operating Manual of the Carrier chiller . . . when he shut-down, disconnected, drained, or capped the Carrier chiller;

j. He did not follow the Winter Shutdown instructions of the Operating Manual . . . when he shut-down, disconnected, drained, or capped the Carrier chiller;

k. He ordered shut-down, disconnection, draining, and capping of the Carrier chiller in the wintertime without following the instructions on the labels, the Operating Instruction Manual, or otherwise exercising reasonable care;

l. He directed shut-down, disconnection, draining, and capping of the Carrier chiller in the wintertime without following the instructions on the labels, the Operating Instruction Manual, or otherwise exercising reasonable care;

m. He supervised one or more of the other defendants in the shut-down, disconnection, draining, or capping of the Carrier chiller in the wintertime without following the instructions on the labels, the Operating Instruction Manual, or otherwise exercising reasonable care;

n. He did not warn Joe Long that the Carrier chiller had been shut down in the winter contrary to reasonable safe procedures and that there was high pressure gas behind the metal flanges;

o. He did not warn anyone with Joe Long's employer, Quate Industrial Service, Inc., that the Carrier chiller had been shut down in the winter contrary to reasonable safe procedures and that there was high pressure gas behind the metal flanges;

p. He failed to exercise reasonable care during winter shut-down of the Carrier chiller in such a way that the chill water tubes were damaged by freezing and allowed to become pressurized

and then capped the inlet water pipe and the outlet water pipe so that the Carrier chiller became ultra-hazardous;

q. He did not exercise reasonable care to prevent the metal flange from becoming exposed to pressure from the inside of the chiller;

r. He was otherwise negligent as will be shown through discovery and proven at the trial of this action.

¶ 37 As to each defendant, the complaint alleges that the defendant, either knowingly or with reckless disregard of the consequences of his actions, left the chiller in such a condition that it was likely to seriously injure the next person who came along to work on it. The complaint specifically alleges that each defendant knew or should have known that the chiller's tubes would become damaged in cold weather (knowledge underscored by notices attached to the chiller), and thereby become pressurized. The complaint further alleges that each defendant capped the pipes when each defendant knew or should have known that the pipes would become pressurized. Moreover, the complaint alleges that each defendant's actions "demonstrated a conscious or intentional disregard or indifference to the rights and safety of others, including Joe Long, which [that defendant] knew, or should have known, would be reasonably likely to result in injury or death and as such constituted willful or wanton conduct." These allegations were sufficient to put defendants on notice of the events that the complaint asserts give rise to the claims for punitive damages and are sufficient to allow defendants "to understand the nature and basis for the claim." *See Henry*, 310 N.C. at 85 (citing *Sutton*, 277 N.C. at 102). As a result, the complaint states claims for punitive damages sufficient to survive a motion to dismiss pursuant to Rule 12(b)(6).

III. Conclusion

¶ 38 The complaint in this case makes clear that it is a suit brought against State employees in their individual capacities. Under our prior decisions, it is not subject to the doctrine of sovereign immunity. The State's voluntary election to defend State employees for conduct performed in the course of their employment does not change this analysis, nor does the State's payment of judgments entered against such employees. The complaint adequately alleges facts from which, if true, a jury could find that Mr. Long's injury was proximately caused by defendants' conduct and further alleges facts sufficient to state claims for punitive

damages against defendants. As a result, we affirm the decision of the Court of Appeals.

AFFIRMED.

Justice BERGER dissenting.

¶ 39 The State can only act through its officers and employees. The question presented is whether defendants were acting in their official capacity or individually. The statute waiving sovereign immunity grants the Industrial Commission exclusive jurisdiction to make this determination. The majority's holding removes this responsibility from the Industrial Commission and places it in the hands of a plaintiff, which could lead to double recovery by allowing plaintiff to pursue the same claim, for the same conduct, and the same injury, in both the Industrial Commission and superior court. Because the complaint in this case, when fully considered, indicates that plaintiff is suing defendants in their official capacities – the only capacity in which they performed their task – the Industrial Commission has exclusive jurisdiction over this case. Furthermore, the majority's holding constitutes a drastic departure from our requirements to plead facts sufficient to establish both proximate cause and willful or wanton conduct. Therefore, I respectfully dissent.

¶ 40 "Sovereign immunity is a legal principle which states in its broadest terms that the sovereign will not be subject to any form of judicial action without its express consent." *Guthrie v. N.C. State Ports Auth.*, 307 N.C. 522, 535, 299 S.E.2d 618, 625 (1983) (quoting 12 Wake Forest L. Rev. 1082, 1083 (1976)). "It has long been established that an action cannot be maintained against the State of North Carolina *or an agency thereof* unless it consents to be sued or upon its waiver of immunity, and that *this immunity is absolute and unqualified*." *Guthrie*, 307 N.C. at 534, 299 S.E.2d at 625 (citations omitted) (emphasis in original) ("The State has absolute immunity in tort actions . . . except insofar as it has consented to be sued or otherwise expressly waived its immunity."). Since the State can only act through individuals, its officers and employees enjoy the protection of the State's sovereign immunity as they perform their official duties.

¶ 41 In N.C.G.S. § 143-291, the General Assembly enacted the State Tort Claims Act (STCA) which partially waived the State's sovereign immunity in tort actions "to enlarge the rights and remedies of a person injured by the actionable negligence of an employee of a State agency while acting in the course of his employment." *Meyer v. Walls*, 347 N.C. 97,

109, 489 S.E.2d 880, 887 (1997) (quoting *Wirth v. Bracey*, 258 N.C. 505, 507–08, 128 S.E.2d 810, 813 (1963)). Subsection 143-291(a) states in relevant part:

> The North Carolina Industrial Commission is hereby *constituted a court for the purpose of hearing and passing upon tort claims* against the State Board of Education, the Board of Transportation, and all other departments, institutions and agencies of the State. *The Industrial Commission shall determine whether* or not each individual claim arose as a result of the *negligence of any officer, employee, involuntary servant or agent of the State while acting within the scope of his office, employment, service, agency or authority*, under circumstances where the State of North Carolina, if a private person, would be liable to the claimant in accordance with the laws of North Carolina.

N.C.G.S. § 143-291(a) (2019) (emphases added).

¶ 42 A plain reading of N.C.G.S. § 143-291(a) makes it clear that the Industrial Commission maintains exclusive jurisdiction over tort claims against "the State Board of Education, the Board of Transportation, and all other departments, institutions and agencies of the State." *Id.*; *see Meyer*, 347 N.C. at 105, 489 S.E.2d at 884 ("The only claim authorized by the Tort Claims Act is a claim against the State agency. True, recovery, if any, must be based upon the actionable negligence of an employee of such agency while acting within the scope of his employment." (quoting *Wirth*, 258 N.C. at 507–08, 128 S.E.2d at 813)).

¶ 43 Here, plaintiff sued defendants as employees of North Carolina State University (NCSU). According to the majority, a plaintiff may sue a defendant in their individual capacity in superior court for ordinary negligence that arose during the course and scope of their employment. However, the distinction between official capacity and individual capacity conflicts with both the concept of waiver of sovereign immunity and the plain language of N.C.G.S. § 143-291(a).[1]

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1. We readily acknowledge that our precedent in this area is less than clear and that there has been little discussion on the purpose of the STCA, the plain language of N.C.G.S. § 143-291(a), or the exclusive jurisdiction of the Industrial Commission to make course and scope determinations. The approach taken by the majority, however, is inconsistent with the jurisdiction vested in the Industrial Commission, the limited waiver of the State's sovereign immunity, and the plain language of N.C.G.S. § 143-291(a).

¶ 44 First, N.C.G.S. § 143-291(a) states that the Industrial Commission "shall determine whether or not each individual claim arose as a result of the negligence of any officer, employee, involuntary servant or agent of the State while acting within the scope of his office, employment, service, agency or authority[.]" N.C.G.S. § 143-291(a). The plain language of N.C.G.S. § 143-291(a) makes it clear that the Industrial Commission is vested with the power to determine whether the negligence of employees of the State occurred during the course and scope of their employment. However, under the majority's reasoning, a plaintiff is allowed to make this determination simply by including the words "in their individual capacity" in the complaint. In effect, this allows a plaintiff to take away the Industrial Commission's jurisdiction, while at the same time creating jurisdiction in superior court.[2]

¶ 45 Second, because the State can only act through officers and employees, the distinction between official capacity and individual capacity conflicts with the concept of waiver of the State's sovereign immunity. The STCA narrowly waived the State's sovereign immunity for ordinary negligence of a State employee that occurred *within the course and scope of their employment*. In this limited waiver of sovereign immunity, the STCA gave the Industrial Commission exclusive jurisdiction over these types of cases. *See* N.C.G.S. § 143-291(a) ("The North Carolina Industrial Commission is hereby constituted a court for the purpose of hearing and passing upon tort claims against the State Board of Education, the Board of Transportation, and all other departments, institutions and agencies of the State."). To allow a plaintiff to bring suit in superior court against an employee of the State for ordinary negligence that arose during the course and scope of their employment contravenes the purpose of the STCA.

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2. Allowing plaintiffs to create jurisdiction in superior court by simply using the words "in their individual capacity" in the complaint implicates N.C.G.S. § 143-300.3. N.C.G.S. § 143-300.3 states in relevant part, "upon request of an employee or former employee, the State may provide for the defense of any civil or criminal action or proceeding brought against him in his official or individual capacity, or both, on account of an act done or omission made in the scope and course of his employment as a State employee." N.C.G.S. § 143-300.3 (2019). While the majority is correct that the State's decision to pay is discretionary, this discretionary determination has far reaching consequences. If the State chooses not to provide for the defense of a State employee acting within the course and scope of their employment, State employees could potentially lose their homes and other assets simply because a plaintiff included the words "in their individual capacity" in the complaint. On the other hand, if the State chooses to defend an employee, a plaintiff who uses the words "in their individual capacity" has, in essence, circumvented the Industrial Commission's jurisdiction, and is now bringing a suit against the State in superior court, creating the potential of a double recovery for the same injury.

¶ 46 This situation is similar to cases arising in the workers' compensation context. This Court has stated that

> [t]he North Carolina Industrial Commission has a special or limited jurisdiction created by statute, and confined to its terms. Viewed as a court, it is one of limited jurisdiction, and it is a universal rule of law that parties cannot, by consent, give a court, as such, jurisdiction over subject matter of which it would otherwise not have jurisdiction. Jurisdiction in this sense cannot be obtained by consent of the parties, waiver, or estoppel.

Hart v. Thomasville Motors, Inc., 244 N.C. 84, 88, 92 S.E.2d 673, 676 (1956) (citations omitted). "The Workmen's Compensation Act, in [N.C.] G.S. [§] 97-9, provides that the sole remedy for a covered employee against his employer or those conducting the employer's business is to seek compensation under the Act. Thus, an employee subject to the Act whose *injuries arise out of and in the course of his employment* may not maintain" an action for negligence. *Strickland v. King*, 293 N.C. 731, 733, 239 S.E.2d 243, 244 (1977) (citation omitted) (emphasis added). However, in *Pleasant v. Johnson*, 312 N.C. 710, 325 S.E.2d 244 (1985), we held that "the Workers' Compensation Act does not shield a co-employee from common law liability for willful, wanton and reckless negligence." *Id.* at 716, 325 S.E.2d at 249.

¶ 47 Thus, in the realm of workers' compensation, a plaintiff cannot create jurisdiction and bring a common law negligence action in superior court unless they can show that a defendant's actions rose to the level of willful and wanton conduct. Turning to this case, because N.C.G.S. § 143-291(a) gives the Industrial Commission exclusive jurisdiction over claims against the State and vests the power to determine whether alleged negligence occurred during the course and scope of a defendant's employment, a plaintiff should not be allowed to create jurisdiction in superior court merely by claiming they are suing a defendant "in their individual capacity."

¶ 48 Nevertheless, even assuming that plaintiff can bring this action in superior court, plaintiff's complaint shows that she is suing defendants in their official capacities.

> In ruling on the individual defendants' motions to dismiss, the first step is to determine whether the complaint seeks recovery from the individuals in their official or individual capacities, or both. . . . A suit

> against a defendant in his individual capacity means that the plaintiff seeks recovery from the defendant directly; a suit against a defendant in his official capacity means that the plaintiff seeks recovery from the entity of which the public servant defendant is an agent.

Meyer, 347 N.C. at 110, 489 S.E.2d at 887; *see also White v. Trew*, 366 N.C. 360, 363, 736 S.E.2d 166, 168 (2013) ("A suit against a public official in his official capacity 'is a suit against the State.' " (quoting *Harwood v. Johnson*, 326 N.C. 231, 238, 388 S.E.2d 439, 443 (1990))).

¶ 49 When determining whether a defendant is being sued in their official or individual capacity

> [t]he crucial question . . . is the nature of the relief sought, not the nature of the act or omission alleged. If the plaintiff seeks an injunction requiring the defendant to take an action involving the exercise of a governmental power, the defendant is named in an official capacity. *If money damages are sought, the court must ascertain whether the complaint indicates that the damages are sought from the government or from the pocket of the individual defendant.* If the former, it is an official-capacity claim; if the latter, it is an individual-capacity claim; and if it is both, then the claims proceed in both capacities.

Mullis v. Sechrest, 347 N.C. 548, 552, 495 S.E.2d 721, 723 (1998) (emphasis added) (quoting *Meyer*, 347 N.C. at 110, 489 S.E.2d at 887).

¶ 50 The majority contends that it is "abundantly clear from the complaint that defendants are being sued in their individual capacities" because the caption and prayer for relief state that plaintiff is suing defendants in their individual capacities. While it is true that "including the words . . . 'in his individual capacity' after a defendant's name obviously clarifies the defendant's status[,]" *Mullis* makes clear that "the allegations as to the extent of liability claimed should provide further evidence of capacity." *Mullis*, 347 N.C. at 554, 495 S.E.2d at 724–25. Therefore, the allegations in the complaint itself must provide further evidence that plaintiff is suing defendants in their individual capacities.

¶ 51 By the majority's reasoning, plaintiffs who simply assert that they are suing defendants in their individual capacity can always bring suit in superior court. As illustrated above, this reasoning would allow

plaintiffs to circumvent the Industrial Commission's jurisdiction to "determine whether or not each individual claim arose as a result of the negligence of any officer, employee, involuntary servant or agent of the State while acting within the scope of his office, employment, service, agency or authority[.]" N.C.G.S. § 143-291(a). If the majority is correct, any plaintiff may strip the Industrial Commission of its jurisdiction and create jurisdiction in superior court by simply adding "in their individual capacity" to their complaint. This reasoning discards the " 'crucial question' " outlined in *Mullis*: whether monetary damages are being " 'sought from the government or from the pocket of the individual defendant.' " *Mullis*, 347 N.C. at 552, 495 S.E.2d at 723 (quoting *Meyer*, 347 N.C. at 110, 489 S.E.2d at 887). Simply put, the capacity listed by a plaintiff in their complaint is not dispositive.

¶ 52 Further, the majority relies on *Mullis* for the proposition that this Court can only examine the course of proceedings when "the complaint does not clearly specify whether the defendants are being sued in their individual or official capacities." However, nowhere in *Mullis* did this Court claim that when a complaint clearly states the capacity in which the defendant is being sued, we are barred from looking to the "course of proceedings."

¶ 53 Rather, this Court stated "[t]he 'course of proceedings' . . . typically will indicate the nature of the liability sought to be imposed." *Mullis*, 347 N.C. at 552, 495 S.E.2d at 723 (alterations in original) (quoting *Kentucky v. Graham*, 473 U.S. 159, 167 n.14 (1985)). If this Court is barred from looking to the course of proceedings, any plaintiff can circumvent the Industrial Commission by merely listing the defendants as being sued in their individual capacities in the complaint. Thus, the course of proceedings is helpful in determining the capacity in which a defendant is being sued, regardless of the capacity alleged in a complaint by an interested party.

¶ 54 Lastly, *Mullis* makes it clear that,

> it is often not clear in which capacity the plaintiff seeks to sue the defendant. In such cases it is appropriate for the court to either look to the allegations contained in the complaint to determine plaintiff's intentions or assume that the plaintiff meant to bring the action against the defendant in his or her official capacity.

Mullis, 347 N.C. at 552, 495 S.E.2d at 723 (quoting Anita R. Brown-Graham & Jeffrey S. Koeze, *Immunity from Personal Liability under State Law for Public Officials and Employees: An Update*, Loc. Gov't

L. Bull. 67, at 7 (Inst. Of Gov't, Univ. of N.C. at Chapel Hill), Apr. 1995). Because the capacity listed in a complaint is not dispositive, this Court should consider the allegations in the complaint when making a capacity determination.

¶ 55 Therefore, "our analysis begins with answering the 'crucial question' of what type of relief is sought." *Mullis*, 347 N.C. at 552, 495 S.E.2d at 723. Here, plaintiff is seeking to recover monetary damages. As illustrated above, "[i]f money damages are sought, the court must ascertain whether the complaint indicates that the damages are sought from the government or from the pocket of the individual defendant." *Id.* (quoting *Meyer*, 347 N.C. at 110, 489 S.E.2d at 887). To make this determination, it is appropriate for us to consider the allegations contained in the complaint and the course of proceedings to determine whether defendants are being sued in their official or individual capacities.

¶ 56 Here, the allegations in the complaint and the course of the proceedings indicate that plaintiff is suing defendants in their official capacities.

¶ 57 First, plaintiff alleges that "[a]t all times pertinent to this action, each defendant was employed by NCSU." This establishes that defendants are agents of NCSU. *See Mullis*, 347 N.C. at 553, 495 S.E.2d at 724 (finding that because the plaintiffs alleged that the defendant was an employee of the Charlotte-Mecklenburg Board of Education "[t]his allegation establishes that defendant . . . is an agent of defendant Board"). Next, plaintiff alleges that the tasks to drain and maintenance the water pipes on the chiller "were done pursuant to NCSU Facilities Operations Work Order # 17-037848." Specifically, the work order states, "Please Drain and Secure Carrier Chiller For Relocation." Nowhere in the work order is it stated that defendants were required to refill the chiller with antifreeze upon completion of their maintenance. Therefore, the substance of plaintiff's allegations show that the alleged negligence arose from defendants carrying out a work order directed by NCSU.

¶ 58 This situation is similar to this Court's analysis in *Mullis*. In *Mullis* this Court stated

> plaintiffs set forth only one claim for relief in their complaint. In the beginning of their claim for relief, plaintiffs allege that "the Defendant Charlotte[–] Mecklenburg School System provided, permitted and directed the operation of a Rockwell tilting arbor saw, model # 34–399 in its industrial arts class." Later in the complaint, plaintiffs specifically allege that defendant Sechrest negligently failed to give reasonable

> or adequate instructions or warnings concerning the dangers inherent in the use of the saw and provided a machine that was unsafe. However, we note that it was necessary to allege defendant Sechrest's negligence in the complaint because he was acting as an agent of defendant Board in performing his duties. The fact that there is only one claim for relief is also indicative of plaintiffs' intention to sue defendant Sechrest in his official capacity, as an agent of defendant Board.

Mullis, 347 N.C. at 553, 495 S.E.2d at 724 (alteration in original) (citation omitted). Here, plaintiff's only real claim for relief is that defendants were negligent in carrying out a work order issued by NCSU. While plaintiff alleged defendants' negligence in failing to properly refill the chiller and warn Mr. Long, this was necessary to allege defendants' negligence in the complaint because these employees were acting as agents of NCSU. *See id.* ("[I]t [is] necessary to allege defendant['s] . . . negligence in the complaint because he was acting as an agent of defendant Board in performing his duties."). In essence, there is only one claim for relief because it is readily apparent that plaintiff was suing defendants in their official capacities for the work performed pursuant to the work order.

¶ 59 Further, the fact that plaintiff's complaints in the Industrial Commission and superior court are largely duplicative is indicative that plaintiff is suing defendants in their official capacities. In both complaints, plaintiff alleges that defendants failed to properly follow protocols when performing maintenance on the chiller before moving it outside, that they negligently put metal flanges on the ends of the water lines, and that they failed to warn Mr. Long of their failure to follow protocol. The only major difference between the complaints is that the Industrial Commission complaint listed NCSU and "John Doe" as defendants and the superior court complaint listed defendants as individuals. As illustrated above, a plaintiff should not be able to circumvent the Industrial Commission's jurisdiction and create jurisdiction in superior court by simply alleging they are suing defendants in their individual capacities. Accordingly, the duplicative nature of plaintiff's complaints further illustrates that this suit is against defendants in their official capacities.

¶ 60 Thus, "the [allegations in the] complaint, along with the course of proceedings in the present case," indicate that this case is really an official-capacity claim couched under the heading of an individual capacity suit. *Mullis*, 347 N.C. at 554, 495 S.E.2d at 725. As such, this suit is effectively one against the State. *See White*, 366 N.C. at 363, 736 S.E.2d

at 168 ("A suit against a public official in his official capacity 'is a suit against the State.' " (quoting *Harwood*, 326 N.C. at 238, 388 S.E.2d at 443)). Thus, the Industrial Commission has exclusive jurisdiction to resolve this dispute, and plaintiff should be precluded from bringing this action in superior court.

¶ 61 Nevertheless, even assuming plaintiff's suit was against defendants in their individual capacity and the superior court had jurisdiction to hear it, plaintiff has failed to allege facts sufficient to show that defendants' actions were the proximate cause of Mr. Long's injuries. Plaintiff also failed to allege facts sufficient to state a claim for punitive damages.

> This Court reviews a trial court's order on a motion to dismiss de novo and considers "whether the allegations of the complaint, if treated as true, are sufficient to state a claim upon which relief can be granted under some legal theory[.]"

Cheryl Lloyd Humphrey Land Inv. Co., LLC v. Resco Prods., Inc., 2021-NCSC-56, ¶ 8 (citation omitted) (quoting *Coley v. Stat*e, 360 N.C. 493, 494–95, 631 S.E.2d 121, 123 (2006)).

> Dismissal under Rule 12(b)(6) is proper when one of the following three conditions is satisfied: (1) the complaint on its face reveals that no law supports the plaintiff's claim; (2) the complaint on its face reveals the absence of facts sufficient to make a good claim; or (3) the complaint discloses some fact that necessarily defeats the plaintiff's claim.

Id. (citation and quotation marks omitted).

> An allegation of negligence must be sufficiently specific to give information of the particular acts complained of; a general allegation without such particularity does not set out the nature of plaintiff's demand sufficiently to enable the defendant to prepare his defense.
>
> The complaint must show that the particular facts charged as negligence were the efficient and proximate cause, or one of such causes, of the injury of which the plaintiff complains.

Stamey v. Rutherfordton Elec. Membership Corp., 247 N.C. 640, 645, 101 S.E.2d 814, 818 (1958) (cleaned up).

¶ 62 This Court has stated

> [t]he fact that the defendant has been guilty of negligence, followed by an injury, does not make him liable for that injury, which is sought to be referred to the negligence, unless the connection of cause and effect is established; and the negligent act of the defendant must not only be the cause, but the proximate cause, of the injury. The burden was therefore upon the plaintiff to show that defendant's alleged negligence proximately caused his intestate's death, and the proof should have been of such a character as reasonably to warrant the inference of the fact required to be established, and *not merely sufficient to raise a surmise or conjecture as to the existence of the essential fact.*

Byrd v. S. Express Co., 139 N.C. 273, 275, 51 S.E. 851, 851–52 (1905) (emphasis added) (citation omitted). In defining proximate cause, we have said

> [p]roximate cause is a cause which in natural and continuous sequence, unbroken by any new and independent cause, produced the plaintiff's injuries, and without which the injuries would not have occurred, and one from which a person of ordinary prudence could have *reasonably foreseen* that such a result, or consequences of a generally injurious nature, was probable under all the facts as they existed. Foreseeability is thus a requisite of proximate cause, which is, in turn, a requisite for actionable negligence.

Hairston v. Alexander Tank & Equip. Co., 310 N.C. 227, 233, 311 S.E.2d 559, 565 (1984) (emphasis added) (citations omitted).

> To establish foreseeability, the plaintiff must prove that defendant, in the exercise of reasonable care, might have foreseen that its actions would cause some injury. The defendant must exercise reasonable prevision in order to avoid liability. *The law does not require a defendant to anticipate events which are merely possible but only those which are reasonably foreseeable.*

Bolkhir v. N.C. State Univ., 321 N.C. 706, 710, 365 S.E.2d 898, 901 (1988) (cleaned up) (emphasis added). Further, "[p]roximate cause is

an inference of fact to be drawn from other facts and circumstances." *Hairston*, 310 N.C. at 234, 311 S.E.2d at 566.

¶ 63 As an initial matter, the majority diminishes the pleading requirements to sufficiently allege proximate cause. In her complaint, plaintiff asserted that "[defendants] capped the inlet water pipe and the outlet water pipe of the Carrier chiller with metal flanges when [they] knew or should have known the cooler tubes could be damaged and the water tubes and pipes could become pressurized[.]" Additionally, plaintiff alleged that "[defendants] allowed the inlet water pipe and the outlet water pipe of the Carrier chiller to remain capped when [they] knew, or should have known, pressure could build up inside the chiller[.]" However, outside of a cursory allegation that defendants' negligence was a "direct and proximate result" of Mr. Long's injuries, plaintiff failed to adequately allege that the foreseeable consequence of this negligence was that the chiller would pressurize, explode, and blow the metal flange into Mr. Long causing injury.

¶ 64 As the majority notes, a sign on the chiller contained a warning indicating that it was "not possible to drain all water" from the chiller and that the chiller "must be drained and refilled with" antifreeze solution "[f]or freeze protection during shut-down." Similarly, the chiller's operating manual instructed that the chiller should be filled with antifreeze to "prevent freeze-up damage to the cooler tubes[.]" It appears that the majority is correct that defendants did not put antifreeze into the chiller. However, nothing in the work order or on the labels contained on the outside of the chiller mentioned that failing to refill the chiller with antifreeze would create a possibility of a pressurized buildup that could cause injury. In fact, the only warning mentioned on the labels was that failure to fill the chiller with antifreeze could cause "damage to the cooler tubes." Thus, the foreseeable consequence of failing to follow the chiller's warning labels is damage to the machinery itself.

¶ 65 Accordingly, plaintiff has failed allege facts sufficient to establish that defendants "in the exercise of reasonable care, might have foreseen that [their] actions" in failing to refill the chiller with antifreeze would cause some injury. *Bolkhir*, 321 N.C. at 710, 365 S.E.2d at 901. Simply put, it was not reasonably foreseeable that, in the face of the instructions on the work order and the labels on the chiller, defendants' actions would cause injury to Mr. Long. Because "[t]he law does not require a defendant to anticipate events which are merely possible but only those which are reasonably foreseeable[,]" *id.*, plaintiff has failed allege facts sufficient to establish that defendants' actions were the proximate cause of Mr. Long's injuries.

¶ 66 Lastly, the majority's holding that plaintiff adequately alleged willful or wanton conduct to bring a claim for punitive damages constitutes a dangerous reduction of the pleading requirements necessary for punitive damages in this State. Section 1D-15(a) of our General Statutes states that

> [p]unitive damages may be awarded only if the claimant proves that the defendant is liable for compensatory damages and that one of the following aggravating factors was present and was related to the injury for which compensatory damages were awarded:
>
> (1) Fraud.
>
> (2) Malice.
>
> (3) Willful or wanton conduct.

N.C.G.S. § 1D-15(a) (2019). Section 1D-5 defines "[w]illful or wanton conduct" as

> the conscious and intentional disregard of and indifference to the rights and safety of others, which the defendant knows or should know is reasonably likely to result in injury, damage, or other harm. "Willful or wanton conduct" means more than gross negligence.

N.C.G.S. § 1D-5(7) (2019). "[T]his Court held that it was not sufficient to state a cause of action for punitive damages to allege that the defendant's conduct was 'willful, wanton and gross' . . . . " *Shugar v. Guill*, 304 N.C. 332, 336, 283 S.E.2d 507, 509 (1981) (quoting *Clemmons v. Life Ins. Co. of Ga.*, 274 N.C. 416, 424, 163 S.E.2d 761, 767 (1968)). Rather, a "plaintiff's complaint *must* allege facts or elements showing the aggravating circumstances which would justify the award of punitive damages." *Shugar*, 304 N.C. at 336, 283 S.E.2d at 510 (citation omitted).

¶ 67 Here, plaintiff alleged "[s]ome or all of the acts and/or omissions of defendant[s] . . . constituted gross negligence" and that "[s]ome or all of the acts and/or omissions of defendant[s] . . . demonstrated a conscious or intentional disregard or indifference to the rights and safety of others, including Joe Long, which defendant[s] . . . knew, or should have known, would be reasonably likely to result in injury or death and as such constituted willful or wanton conduct." Outside of these allegations, plaintiff failed to set out the facts and circumstances to illustrate that defendants' actions constituted a "conscious and intentional dis-

regard of and indifference to the rights and safety of others." *Hinson v. Dawson*, 244 N.C. 23, 28, 92 S.E.2d 393, 397 (1956). Plaintiff's complaint, at most, alleges that defendants negligently failed to follow the warning signs on the chiller which ultimately lead to Mr. Long's injuries. Nothing in the complaint points to any conscious disregard for the safety of others to rise to the level of willful or wanton conduct. As such, plaintiff failed to adequately allege willful or wanton conduct.

¶ 68 The allegations in the complaint, coupled with the course of proceedings, make it clear that plaintiff is suing defendants in their official capacities, and the Industrial Commission has exclusive jurisdiction over this case. Even assuming the superior court had jurisdiction to hear this case, plaintiff has failed to allege facts sufficient to show that defendants' conduct proximately caused Mr. Long's injuries. Plaintiff has also failed to state a claim for punitive damages. Therefore, the decision of the Court of Appeals should be reversed, and I respectfully dissent from the majority's opinion.

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

MARISA MUCHA
v.
LOGAN WAGNER

No. 307PA20

Filed 13 August 2021

Jurisdiction—personal—minimum contacts—cell phone calls—no knowledge recipient in N.C.

Defendant lacked the requisite minimum contacts with the state of North Carolina to be subject to the exercise of personal jurisdiction in a domestic violence protection order (DVPO) proceeding where defendant, who had previously been in a romantic relationship with plaintiff outside of North Carolina, called plaintiff's cell phone many times on the evening that plaintiff had moved from South Carolina to North Carolina—when there was no evidence that defendant knew or had reason to know that plaintiff was in North Carolina. Because he did not know plaintiff was in North Carolina, defendant's phone calls did not constitute purposeful availment of the benefits and protections of the laws of North Carolina. In

addition, plaintiff's argument that the "status exception" doctrine allowed exercise of personal jurisdiction was rejected.

On discretionary review pursuant to N.C.G.S. § 7A-31 and on appeal of right of a substantial constitutional question pursuant to N.C.G.S. § 7A-30(1) of a unanimous decision of the Court of Appeals, 271 N.C. App. 636 (2020), affirming orders entered on 13 June 2018 and 27 June 2018 by Judge Debra S. Sasser in District Court, Wake County.

Robinson, Bradshaw & Hinson, P.A., by Erik R. Zimmerman, Andrew R. Wagner, and Jazzmin M. Romero, for plaintiff-appellee.

Parrott Law, PLLC, by Robert J. Parrott Jr., for defendant-appellant.

EARLS, Justice.

¶ 1 Before the advent of mobile telephone technology and before call forwarding was available, a person making a telephone call would know the approximate physical location of anyone who answered the phone based on the area code and prefix of the telephone number they dialed. However, the number of landlines is rapidly dwindling, and a person's phone number alone no longer provides a reliable indication of that person's location.[1] As a result, it is important to determine whether, and under what circumstances, a telephone call to a cell phone can subject the caller to personal jurisdiction in the state where the phone happens to be when it is answered.

¶ 2 Specifically, in this case, we examine whether the District Court, Wake County, could exercise personal jurisdiction over the defendant, Logan Wagner, in a proceeding initiated by the plaintiff, Marisa Mucha, who was seeking to obtain a domestic violence protection order (DVPO). The only contact Wagner had with North Carolina was a series of phone calls he made to Mucha's cell phone on the day she moved to the State. We conclude that Wagner did not have the requisite minimum contacts with North Carolina because he did not purposefully avail himself of the benefits and protections of North Carolina's laws. Therefore, we hold that the trial court could not exercise personal jurisdiction over Wagner consistent with the Due Process Clause of the Fourteenth Amendment

1. According to the National Center for Health Statistics, "[t]he second 6 months of 2016 was the first time that a majority of American homes had only wireless telephones." Stephen J. Blumberg & Julian V. Luke, *Wireless Substitution: Early Release of Estimates From the National Health Interview Survey, July-December 2016*, U.S. Department of Health and Human Services Centers for Disease Control and Prevention (May 2017).

to the Constitution of the United States. We reverse the decision of the Court of Appeals which affirmed the trial court's decision to exercise jurisdiction, and we vacate the trial court's order for lack of personal jurisdiction over Wagner.

I. Factual Background

¶ 3 Wagner and Mucha were previously in a romantic relationship for some time. After the relationship ended, Mucha—who was attending college in South Carolina— told Wagner—who lived in Connecticut—never to contact her again. Wagner did not abide by Mucha's request. While Mucha was living in South Carolina, Wagner sent her a letter and a text message. His unwelcome efforts to reach Mucha culminated on 15 May 2018. That afternoon, unbeknownst to Wagner, Mucha moved from South Carolina to North Carolina after finishing her college semester. That evening, Mucha received twenty-eight phone calls from an unknown number. When she answered one of the calls, Wagner identified himself, and Mucha hung up. Wagner kept calling. Mucha picked up again and told Wagner to stop. Wagner left a voice message. When Mucha listened to the message, she suffered a panic attack. The next day, she filed a pro se complaint and motion for a DVPO in District Court, Wake County.

¶ 4 Wagner's attorney entered a limited appearance for the purposes of contesting the trial court's personal jurisdiction and filed a motion to dismiss. According to Wagner, the Due Process Clause of the Fourteenth Amendment forbade the trial court from exercising personal jurisdiction over him because he neither "affirmatively direct[ed] any phone calls [to] North Carolina" nor "purposefully avail[ed] himself of any protections of the State."[2] Wagner contended that because he did not know or have any reason to know Mucha would be located in North Carolina when he called her, he lacked "fair warning that he might be required to defend himself there."

¶ 5 The trial court denied Wagner's motion to dismiss and, after a hearing during which Mucha and two witnesses testified, entered a DVPO. Wagner appealed solely the trial court's order finding personal jurisdiction. The Court of Appeals unanimously affirmed. According to the Court of Appeals, because Wagner "knew that [Mucha's] semester of

2. Wagner failed to preserve his challenge to the trial court's jurisdiction as exceeding the scope of North Carolina's long-arm statute, N.C.G.S. § 1-75.4, which he attempted to raise for the first time on appeal. Therefore, we assume for purposes of resolving this case that the trial court's exercise of personal jurisdiction was authorized by the long-arm statute.

college had ended and she may no longer be residing [in South Carolina] . . . his conduct—purposefully directed at Mucha—was sufficient for him to reasonably anticipate being haled into court wherever Mucha resided when she received the calls." *Mucha v. Wagner*, 271 N.C. App. 636, 637–38 (2020).

II. Personal Jurisdiction Analysis

¶ 6 The reason Wagner's phone calls to Mucha brought him into contact with North Carolina is because Mucha had traveled here, just hours before Wagner made the calls to her cell phone. Although Wagner may have known or had reason to know that Mucha would be leaving South Carolina at the end of her semester, there is nothing in the record to support the inference that Wagner knew or had any reason to know that Mucha was present in North Carolina.[3] Both the trial court and the Court of Appeals ignored this distinction. In doing so, the courts below failed to adhere to the fundamental due-process principle that there is no personal jurisdiction over a defendant who has not initiated "certain minimum contacts with [the forum state]." *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

¶ 7 In examining a defendant's connection to the forum state, the Due Process Clause "requires a forum-by-forum, or sovereign-by-sovereign, analysis." *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 884 (2011). Here, Wagner's only connection with the State of North Carolina resulted from "random, isolated, or fortuitous" events. *Keeton v. Hustler Mag., Inc.*, 465 U.S. 770, 774 (1984). Under these circumstances, the Due Process Clause does not permit a North Carolina court to exercise personal jurisdiction over Wagner.

A. Personal jurisdiction under the Due Process Clause

¶ 8 "The Fourteenth Amendment's Due Process Clause limits a state court's power to exercise jurisdiction over a defendant." *Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct.*, 141 S. Ct. 1017, 1024 (2021). "The primary concern of the Due Process Clause as it relates to a court's jurisdiction over a nonresident defendant is the protection of 'an individual's liberty interest in not being subject to the binding judgments of a forum with which he has established no meaningful contacts, ties, or relations.' "

3. Mucha's argument to the contrary is that Wagner "had reason to know that Mucha had recently moved" because she was a college student, "[s]pring semesters at college typically end by mid-May[,] . . . [a]nd many college students move to other states during the summer." At most, this supports the inference that Wagner should have known Mucha might not be located in South Carolina, but it does not support the inference that Mucha had reason to know where specifically Mucha had travelled.

Beem USA Ltd.-Liab. Ltd. P'ship v. Grax Consulting LLC, 373 N.C. 297, 302 (2020) (cleaned up) (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 471–72 (1985)).

¶ 9 In order for a state court to exercise jurisdiction over a defendant who is not subject to general jurisdiction in the forum state[4] and who is not present in the forum state, the defendant must "have certain minimum contacts with [the forum state] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." *Int'l Shoe Co.*, 326 U.S. at 316 (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)). Although this canonical formulation has been tested over the years, the United States Supreme Court has continued to emphasize that the due process inquiry is "focused on the nature and extent of '*the defendant's* relationship to the forum State.' " *Ford Motor Co.*, 141 S. Ct. at 1024 (emphasis added) (quoting *Bristol-Myers Squibb Co. v. Super. Ct. of California, San Francisco Cnty.*, 137 S. Ct. 1773, 1779 (2017)). Courts must not "improperly attribute a plaintiff's forum connections to the defendant and make those connections decisive in the jurisdictional analysis." *Walden v. Fiore*, 571 U.S. 277, 289 (2014) (quoting *Rush v. Savchuk*, 444 U.S. 230, 332 (1980)).

¶ 10 To ascertain whether a defendant's contacts are of the frequency and kind necessary to surpass the "minimum contacts" threshold, courts must first examine whether the defendant has taken "some act by which [he or she] *purposefully avails* [himself or herself] of the privilege of conducting activities within the forum State." *Hanson v. Denckla*, 357 U.S. 255, 253 (1958). To establish that a defendant has purposefully availed himself or herself of the benefits and protections of the laws of a forum state, the plaintiff has the burden of proving that the defendant "deliberately 'reached out beyond' its home—by, for example, 'exploit[ing] a market' in the forum State or entering a contractual relationship centered there." *Ford Motor Co.*, 141 S. Ct. at 1025 (second alteration in original) (quoting *Walden*, 571 U.S. at 285). The focus on the defendant's conduct reflects one of the core concerns underpinning personal jurisdiction doctrine and the Due Process Clause, "treating defendants fairly." *Id.* at 1025. Due process requires "that individuals have

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4. There is no disputing that Wagner is not subject to general jurisdiction in North Carolina because his "affiliations with the State are [not] so 'continuous and systematic' as to render [him] essentially at home in the forum State." *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011) (quoting *Int'l Shoe*, 326 U.S. at 317). Instead, we consider only whether Wagner is subject to specific jurisdiction, because the proceeding at issue "aris[es] out of or relate[s] to the defendant's contacts with the forum." *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 415 (1984).

fair warning that a particular activity may subject them to the jurisdiction of a foreign sovereign," so that they may "structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit." *Burger King Corp.*, 471 U.S. at 472 (cleaned up) (first quoting *Shaffer v. Heitner*, 433 U.S. 186, 218 (1977); then quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 297 (1980)).

¶ 11 Under the "purposeful availment" test, the absence of any evidence suggesting Wagner had any reason to know Mucha was in North Carolina at the time he called her is dispositive. In prior cases where this Court has found a defendant's one-time contacts sufficient to create specific personal jurisdiction in North Carolina, the defendant knew or reasonably should have known that by undertaking some action, the defendant was establishing a connection with the State of North Carolina. This awareness—whether actual or imputed—is what permits a court in North Carolina to exercise judicial authority over the nonresident defendant.

¶ 12 For example, in *Tom Togs, Inc. v. Ben Elias Indus. Corp.*, the defendant was a clothing distributor with its principal place of business in New York who entered into a contract to purchase clothes from a North Carolina manufacturer. 318 N.C. 361, 362–63 (1986). When a dispute regarding the contract arose, the plaintiff sued the defendant in a North Carolina court, and the defendant moved to dismiss for lack of personal jurisdiction, which the trial court denied. *Id.* at 364. On appeal, this Court concluded that the defendant had purposefully availed itself of the benefits and protections of the laws of North Carolina when it entered into the contract with the clothing manufacturer. *Id.* at 367. Yet it was not the existence of the defendant's contract with a North Carolina resident which alone sufficed to "establish the necessary minimum contacts with this State." *Id.* at 367. It was the fact that the defendant had "made an offer to [a] plaintiff whom defendant *knew to be located in North Carolina*." *Id.* (emphasis added). Because the defendant "was told that the shirts would be cut in North Carolina, and defendant also agreed to send its personal labels to plaintiff in North Carolina for plaintiff to attach to the shirts[, d]efendant was thus aware that the contract was going to be substantially performed in this State." *Id.*

¶ 13 Similarly, in *Beem*, we held that it was permissible for a North Carolina court to exercise personal jurisdiction over a nonresident corporate defendant because the defendant's "sole representative came to North Carolina to open a bank account on behalf [of] the partnership that [it] subsequently used for [ ] business activities [with the plaintiff], and he also traveled to this state on three separate occasions to discuss

[business]." *Beem USA Ltd.-Liab. Ltd. P'ship*, 373 N.C. at 306. Thus, in both *Tom Togs* and *Beem*, it was fair to exercise personal jurisdiction over the defendant because there was evidence indicating the defendant knew (or should have known) that conduct directed at the plaintiff was conduct directed at the State of North Carolina.

¶ 14 The significance of a defendant's awareness of the connection between the conduct the defendant chooses to engage in and the forum state is also reflected in United States Supreme Court precedent. The Due Process Clause requires evidence indicating that a defendant was on notice he or she could be subjected to suit in the specific state in which the plaintiff seeks redress, not merely in any state besides the one in which the defendant is domiciled. For example, in *Keeton*, the fact that the defendant "produce[d] a national publication aimed at a nationwide audience" did not, on its own, necessarily give rise to personal jurisdiction in every state in the nation. *Keeton v. Hustler Mag., Inc.*, 465 U.S. at 781. Instead, the New Hampshire court seeking to exercise personal jurisdiction over the defendant could do so because the defendant had "continuously and deliberately exploited the New Hampshire market," as evidenced by the "substantial number of copies . . . regularly sold and distributed" in the state. *Id.* There was "no unfairness in calling [the defendant] to answer for the contents of that publication" in a jurisdiction it had purposefully sought to enter into. *Id.*

¶ 15 The United States Supreme Court's more recent "stream of commerce" decisions also support Wagner's position. These cases have drawn a distinction between conduct targeted at states generally and conduct targeted at the specific forum state seeking to exercise jurisdiction over the defendant. Thus, the Court has held that a forum state may exercise personal jurisdiction over a defendant who "delivers its products into the stream of commerce with *the expectation* that they will be purchased by consumers in the forum State," *World-Wide Volkswagen Corp.*, 444 U.S. at 297–98 (emphasis added), but not over a defendant who "directed marketing and sales efforts at the United States" without "engag[ing] in conduct purposefully directed at [the forum state]." *J. McIntyre Mach., Ltd.*, 564 U.S. 885–86.

¶ 16 Concurring separately in *J. McIntyre*, Justice Breyer explained that jurisdiction did not arise even when the defendant "kn[ew] or reasonably should [have] know[n] that its products [we]re distributed through a nationwide distribution system that *might* lead to those products being sold in any of the fifty states." *Id.* at 891 (Breyer, J., concurring) (cleaned up) (quoting *Nicastro v. McIntyre Mach. Am., Ltd.*, 201 N.J. 48, 76–77 (2010)). Rather, the defendant must have targeted the forum

state specifically. Finding personal jurisdiction without evidence that the defendant intentionally targeted the forum state would "abandon the heretofore accepted inquiry of whether, focusing upon the relationship between 'the defendant, the *forum*, and the litigation,' it is fair, in light of the defendant's contacts *with that forum*, to subject the defendant to suit there." *Id.* (quoting *Shaffer*, 433 U.S. at 204).

¶ 17 These cases establish two important principles. First, conduct directed at a person is not necessarily the same as conduct directed at a forum state. Second, a defendant's knowledge that a plaintiff could be somewhere other than the state in which the plaintiff typically resides is not sufficient to establish personal jurisdiction in any state where the plaintiff happens to be. Applying these principles to this case, Wagner has not purposefully availed himself of the benefits and protections of the laws of North Carolina. While Wagner purposefully directed conduct at Mucha, he had no way of knowing that in doing so he was establishing any connection with the State of North Carolina. There is no evidence in the record to support the conclusion that he could have "reasonably anticipate[d] being haled into court" in North Carolina. *World-Wide Volkswagen Corp.*, 444 U.S. at 297.

¶ 18 In the alternative, Mucha asserts that "purposeful availment" is not the proper test for determining personal jurisdiction when the defendant is accused of committing an act of domestic violence, which Mucha analogizes to an intentional tort. As she correctly notes, many of the cases applying the purposeful availment test "involved business-related claims and conduct," such as those arising from contract disputes or allegedly defective products. Mucha argues that instead of the "purposeful availment" test, the right standard is "purposeful direction" because Wagner has undertaken an intentional course of conduct which violated North Carolina law. According to Mucha, the purposeful direction standard differs from the purposeful availment test because "the question is not whether an intentional tortfeasor *availed* himself of the forum state's laws. It is whether he *obstructed* the forum state's laws by directing his tortious conduct at the forum."

¶ 19 Even if the "purposeful direction" standard applies—and assuming "purposeful direction" and "purposeful availment" impose distinct requirements[5]—Mucha still cannot prevail. Mucha's argument, in essence,

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5. It is not clear that they do. In *Burger King*, which involved a tortious interference claim, the Court explained that the Due Process Clause's " 'fair warning' requirement is satisfied if the defendant has 'purposefully directed' his activities at residents of the forum, and the litigation results from alleged injuries that 'arise out of or relate to' those

is that a defendant is subject to personal jurisdiction in a state whenever (1) he intentionally engages in conduct, (2) which "obstructs" the laws of the forum state, and (3) injures someone in the forum state. This proposed test overlooks the requirement that the defendant himself have established minimum contacts with the forum state, which necessitates the defendant having some reason to know his conduct will bring him into contact with the particular forum state, a requirement which is found in numerous cases resolving intentional tort claims. *See*, *e.g.*, *Tamburo v. Dworkin*, 601 F.3d 693, 706 (7th Cir. 2010) (holding that there was personal jurisdiction because defendants "specifically aimed their tortious conduct at [plaintiff] and his business in Illinois with the knowledge that he lived, worked, and would suffer the brunt of the injury there") (cleaned up).

¶ 20 For jurisdiction to vest in a particular forum state under the purposeful direction test, the defendant must "expressly aim" his or her conduct at that state. *Calder v. Jones*, 465 U.S. 783, 789 (1984). This requirement demands proof the defendant had some reason to foresee which state's laws would be obstructed and where harm would occur when choosing to engage in the conduct purporting to vest the forum state's courts with jurisdiction. *See Walden*, 571 U.S. at 290 ("[M]ere injury to a forum resident is not a sufficient connection to the forum. . . . The proper question is not where the plaintiff experienced a particular injury or effect but whether the defendant's conduct connects him to the forum in a meaningful way."); *Marten v. Godwin*, 499 F.3d 290, 297–98 (3d Cir. 2007) ("To establish that the defendant expressly aimed his conduct [at the forum state], the plaintiff has to demonstrate the defendant knew that the plaintiff would suffer the brunt of the harm caused by the tortious conduct in the forum." (cleaned up) (quoting *IMO Indus. v. Kiekert AG*, 155 F.3d 254, 265–66 (3d Cir. 1998)); *Dole Food Co. v. Watts*, 303 F.3d 1104, 1111 (9th Cir. 2002) (interpreting *Calder* to "require[ ] that the defendant allegedly have (1) committed an intentional act, (2) expressly aimed at the forum state, (3) causing harm that the defendant *knows is likely to be suffered in the forum state*.") (emphasis added).

¶ 21 The act of calling a cell phone number registered in one state does not automatically vest jurisdiction in any state where the recipient of

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activities." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472–73 (1985) (citations omitted) (first quoting *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 774 (1984); then quoting *Helicopteros Nacionales de Colombia, S.A.*, 466 U.S. 408, 414 (1984)). The Court then proceeded to analyze whether the defendant had maintained the requisite "minimum contacts" with the forum state. *Id.* at 474. This suggests that "purposeful availment" and "purposeful direction" are largely interchangeable.

the call happens to be located at the time the call is made. For example, in *Long v. Vitkauskas*, the Mississippi Supreme Court held that a Mississippi trial court lacked personal jurisdiction over a defendant in an alienation of affection action when the only evidence establishing a connection between the defendant and the state was "an extensive log of telephone calls and text messages between [the defendant] and [a Mississippi resident]." 287 So. 3d 171, 174 (Miss. 2019). Even though the defendant did not dispute that he had made phone calls to a Mississippi resident who was located in Mississippi when she received the calls, the court was found to lack jurisdiction because the Mississippi resident had a cellphone number registered in Tennessee and there was no other evidence the defendant was aware of her Mississippi residency. *Id.*; *see also Hood v. Am. Auto Care, LLC*, No. 18-CV-02807-PAB-SKC, 2020 WL 1333091, at *4 (D. Colo. Mar. 23, 2020) (holding that a Colorado court lacked personal jurisdiction over a telemarketing company who called a Colorado resident on a cell phone with a Vermont area code in the absence of "evidence that would allow the Court to infer that defendants knew that his Vermont phone number was associated with a Colorado resident").

¶ 22 Finally, Mucha argues that due process permits "a lesser showing of minimum contacts than would otherwise be required" to establish personal jurisdiction in a business dispute given the State's significant interest in protecting its residents against domestic violence. *See Burger King Corp.*, 471 U.S. at 477. No one disputes the magnitude of the State's interest in enabling its residents to live free from harassment, abuse, and violence. To be sure, DVPOs implicate very different governmental interests than the need for orderly resolution of contract disputes. Nevertheless, other state courts examining personal jurisdiction claims in the context of domestic violence orders have not jettisoned the purposeful availment requirement. *See Fox v. Fox*, 2014 VT 100, ¶ 30, 197 Vt. 466, 106 A.3d 919 (concluding that Vermont trial court lacked personal jurisdiction to enter protective order because "defendant did not avail himself of any benefits or protections of Vermont's laws, or subject himself to the authority of Vermont's courts"); *Shah v. Shah*, 184 N.J. 125, 139, 875 A.2d 931, 940 (2005) (concluding that the trial court lacked personal jurisdiction over a defendant who "has not 'purposefully availed' himself of the laws of New Jersey").

¶ 23 Indeed, under similar circumstances, a Florida intermediate appellate court concluded its courts lacked personal jurisdiction to enter a protective order against a defendant who sent voice and text messages to the plaintiff's cellphone while she was located in Florida, because the

plaintiff had a Maryland number and "there [was] nothing in the petition . . . alleging that [the defendant] knew [the plaintiff] was present in Florida at the time he left the messages on her cellular phone." *Becker v. Johnson*, 937 So. 2d 1128, 1131 (Fla. Dist. Ct. App. 2006). While these decisions are not binding on this Court, they are instructive as to how other courts have given meaning to Due Process Clause protections. We conclude that even taking into account the nature of the important governmental interest in preventing domestic violence, minimum contacts are required for personal jurisdiction to vest over a nonresident defendant, and there are not sufficient minimum contacts absent proof that the defendant purposefully established a connection with the forum state.

¶ 24 Under the Due Process Clause, the "constitutional touchstone" is always "whether the defendant *purposefully* established 'minimum contacts' in the forum State." *Burger King Corp.*, 471 U.S. 462 at 474 (emphasis added) (quoting *Int'l Shoe Co.*, 326 U.S. at 316). To hold that the magnitude of the State's interest justifies an exercise of personal jurisdiction in the absence of proof the defendant "purposefully availed" himself of or "expressly aimed" his conduct towards North Carolina would necessarily "offend 'traditional notions of fair play and substantial justice.' " *Int'l Shoe Co.*, 326 U.S. at 316 (quoting *Milliken*, 311 U.S. at 463). It would also open the door to the abandonment of due process protections in other settings where the State's interest is also compelling.

¶ 25 Our decision in this case addresses a unique situation characterized by a crucial fact: Wagner lacked any reason to know or suspect that Mucha had moved to and was present in North Carolina. Further, it also appears from the record that neither Mucha nor Wagner had any ties to North Carolina at all prior to Mucha moving to the state. In another case, it would likely alter the jurisdictional analysis if the defendant had called the plaintiff in North Carolina on a phone number linked to a physical address in North Carolina, *see*, *e.g.*, *Hughs ex rel. Praul v. Cole*, 572 N.W.2d 747, 751 (Minn. Ct. App. 1997) (concluding Minnesota court had personal jurisdiction because "[t]he record indicates [the defendant] made repeated telephone calls to respondent's home" in Minnesota while maintaining a relationship with his son who lived there), if the defendant had reason to anticipate that the plaintiff would travel to or "seek refuge" in North Carolina, *Becker*, 937 So. 2d at 1131, or if the prior relationship between the defendant and the plaintiff began in or significantly involved the State of North Carolina.

¶ 26 Having determined that the trial court lacked personal jurisdiction over Wagner, we now consider Mucha's argument that the trial court

did not need to have personal jurisdiction over Wagner to enter a DVPO against him.

B. The "status exception" to personal jurisdiction

¶ 27 Mucha next argues that even if Wagner did not establish minimum contacts with the State of North Carolina, the trial court could permissibly bind him through entry of the DVPO by applying the "status exception" doctrine. As we recently explained,

> The Supreme Court of the United States has long recognized that some cases warrant an exception to the traditional due process requirements. Specifically, the Court has held that 'cases involving the personal status of the plaintiff, such as divorce actions, could be adjudicated in the plaintiff's home State even though the defendant could not be served within the State.' *Shaffer v. Heitner*, 433 U.S. 186, 202, 97 S.Ct. 2569, 53 L.Ed.2d 683 (1977) (citing *Pennoyer v. Neff*, 95 U.S. 714, 733–35, 24 L.Ed. 565 (1878)). The Court's recognition of the status exception implies that minimum contacts are not required in status cases because jurisdiction is established by the status of the plaintiff, rather than the location of the defendant.

In re F.S.T.Y., 374 N.C. 532, 538 (2020). Thus, in *In re F.S.T.Y.*, we concluded that the State's interest in protecting the welfare of children residing in North Carolina, combined with the procedural protections afforded to litigants in termination proceedings (including the right to appointed counsel), justified allowing a North Carolina court to enter an order terminating the parental rights of an out-of-state parent of a resident child, even though the parent lacked "minimum contacts" with this State. *Id.* at 541. The Court of Appeals has also recognized the status exception in divorce cases. *See, e.g.*, *Chamberlin v. Chamberlin*, 70 N.C. App. 474, *disc. review denied*, 312 N.C. 621 (1984). According to Mucha, "[b]ecause th[is] case focuses on the status of the relationship between the plaintiff and the defendant, as opposed to focusing on the defendant alone, the plaintiff's connection to the forum state is itself enough to justify the exercise of jurisdiction as a matter of due process."

¶ 28 Although some state courts have chosen to recognize the status exception in the domestic violence context, *see, e.g.*, *Bartsch v. Bartsch*, 636 N.W. 2d. 3 (Iowa 2001), we decline Mucha's invitation to do so here for two reasons. First, there is a significant conceptual distinction be-

tween termination-of-parental-rights and divorce proceedings on the one hand and a domestic violence proceeding on the other. When a trial court terminates an individual's parental rights or a marriage, the court acts to dissolve an extant legal relationship. An order dissolving an individual's legal identity as a parent or spouse is not itself the source of new rights or duties—it is merely "a declaration of status." *Fox*, 2014 VT at ¶ 17. By contrast, when a trial court enters a DVPO, the court creates a "status" which did not previously exist and then invokes that newly-created status to "prohibit[the defendant] from engaging in behavior that would be entirely legal but for the court's order." *Id.* at ¶ 19. Mucha concedes as much when she asserts that a DVPO "grants the plaintiff a protected status vis-à-vis the defendant." This distinction between dissolving a legal status that already exists and creating a new status with new legal consequences is a significant one, which explains why a court may find jurisdiction in the absence of minimum contacts to accomplish the former but not the latter.

¶ 29 Second, as the Court of Appeals explained in *Mannise v. Harrell*, "the issuance of a [DVPO] implicates substantial rights of [d]efendant[s]." 249 N.C. App. 322, 332 (2016). When a trial court enters a DVPO, the court may, in addition to prohibiting the defendant from engaging in future acts of domestic violence, impose various obligations on the defendant, such as requiring the defendant to vacate his or her home and granting the complainant possession of any shared residences or personal property. N.C.G.S. § 50B-3(a)(2), (5) (2019). The trial court may restrain the defendant from exercising his or her constitutional rights, including the right to purchase a firearm, N.C.G.S. § 50B-3(a)(11).[6] In addition, "[t]he entry of a North Carolina [DVPO] involves both legal and non-legal collateral consequences," which cannot easily be undone. *Mannise*, 249 N.C. App. at 332.

¶ 30 The fact that a DVPO creates significant legal consequences is, of course, not an accident. These consequences are precisely what the General Assembly has deemed are necessary to protect victims of domestic violence from further harassment, abuse, or worse. But the power and reach of a DVPO also heighten the fairness concerns which arise when a trial court chooses to act outside of the typical boundaries imposed by the Due Process Clause. For these reasons, we conclude that the status exception should not be extended to this case.

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6. Under federal law, it is unlawful for any person subject to a DVPO to purchase or possess a firearm. 18 U.S.C. § 922(g)(8).

¶ 31 Although our decision deprives Mucha of one avenue for obtaining protection against further harassment, she is not without a remedy. She may seek a DVPO in any court with personal jurisdiction over Wagner, including his home state of Connecticut, which if granted would be fully enforceable in North Carolina. *See* 18 U.S.C. § 2265(a). In addition, we note that upon receiving notice of Mucha's filing in North Carolina, Wagner became aware Mucha was residing in this State. Accordingly, in a subsequent proceeding if the alleged harassment continued, it is doubtful Wagner could successfully defeat the trial court's exercise of personal jurisdiction on the same grounds as asserted in the proceedings below.

III. Conclusion

¶ 32 "[T]raditional notions of fair play and substantial justice" require something more than proof that an out-of-state defendant has directed conduct at an individual who happened to be located in North Carolina. *Int'l Shoe Co.*, 326 U.S. at 316 (quoting *Milliken*, 311 U.S. at 463). At a minimum, there must be some evidence from which the court can infer that in undertaking an act, the defendant purposefully established contacts with the State of North Carolina specifically. The question is not, as the Court of Appeals framed it, whether Wagner should have reasonably understood the risk that Mucha would be located somewhere other than South Carolina when he chose to dial her cellphone number. The question is whether Wagner had "followed a course of conduct directed at the society or economy existing within" North Carolina, such that a North Carolina court "has the power to subject the defendant to judgment concerning that conduct." *J. McIntyre Mach., Ltd.*, 564 U.S. at 884. Because the requisite minimum contacts between Wagner and North Carolina are not present in this case, we conclude that the Due Process Clause forbids the trial court from exercising personal jurisdiction over him to enter a DVPO. Therefore, we reverse the Court of Appeals decision in this case and vacate the trial court's order for lack of jurisdiction.

REVERSED.

NORTH CAROLINA FARM BUREAU MUTUAL INSURANCE COMPANY, INC.
v.
JUDY LUNSFORD

No. 242A20

Filed 13 August 2021

Motor Vehicles—insurance—underinsured motorist coverage—applicable limit—interpolicy stacking

A North Carolina resident injured in an out-of-state car accident as a passenger in a car owned and operated by a Tennessee resident and insured by a Tennessee insurer, where that driver's negligence caused the accident, was entitled to collect underinsured motor vehicle (UIM) coverage benefits from her North Carolina insurer. Based on North Carolina law allowing interpolicy stacking when calculating applicable policy limits (pursuant to N.C.G.S. § 20-279.21(b)(4)), the Tennessee policy's UIM coverage limit constituted an "applicable limit" and, because the stacked UIM coverage limits exceeded the sum of the applicable bodily injury coverage limits, the car owned by the Tennessee resident was an underinsured motor vehicle as defined in North Carolina.

Justice BARRINGER dissenting.

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

Appeal from the opinion of a divided Court of Appeals panel, 271 N.C. App. 234 (2020), affirming entry of Order and Declaratory Judgment in favor of the plaintiff on 3 February 2019 by Judge Michael D. Duncan in Superior Court, Guilford County. Heard in the North Carolina Supreme Court on 17 May 2021.

William F. Lipscomb for the Plaintiff-Appellee.

Burton Law Firm, PLLC, by Jason M. Burton, for the Defendant-Appellant.

Jon. R. Moore and C. Douglas Maynard, Jr., for North Carolina Advocates for Justice, amicus curiae.

Bailey & Dixon, LLP, by J.T. Crook, for North Carolina Association of Defense Attorneys, amicus curiae

EARLS, Justice.

¶ 1 Cars and people are, naturally, mobile. They regularly traverse state lines. Unfortunately, but inevitably, cars and people also get into accidents. When they do, it can raise issues regarding which state's law governs the interpretation of various provisions of each of the involved parties' insurance contracts. In this case, we must determine whether a North Carolina resident is entitled to collect underinsured motor vehicle coverage benefits from her North Carolina insurer, after she was injured while traveling in Alabama in a car owned and operated by a Tennessee resident and insured by a Tennessee insurer. To answer that question, we must decide if North Carolina or Tennessee law applies when ascertaining whether the Tennessee vehicle is "underinsured" within the meaning of a contract executed in North Carolina between a North Carolina resident and a North Carolina insurer.

¶ 2 Judy Lunsford, a North Carolina resident, was a passenger in her sister Levonda Chapman's vehicle when a serious accident occurred as they were travelling through Alabama. Chapman negligently drove her vehicle across a highway median into oncoming traffic, where it collided with an 18-wheeler. As a result of the accident, Lunsford was severely injured. Chapman was tragically killed.

¶ 3 Chapman was insured by a Nationwide Insurance Company policy purchased in her home state of Tennessee. As a passenger in Chapman's vehicle, Lunsford was entitled to recover from Nationwide, under the terms of Chapman's bodily injury liability coverage. Nationwide offered—and Lunsford accepted—the full $50,000 available under the policy's per person bodily injury coverage limit. Lunsford also claimed she was entitled to coverage under the underinsured motorist (UIM) provision of her own insurance contract executed in North Carolina with a different insurer, North Carolina Farm Bureau Mutual Insurance Company, Inc. (NC Farm Bureau). NC Farm Bureau denied her claim and initiated a declaratory judgment action to establish its liability to Lunsford. The trial court agreed with NC Farm Bureau's position, concluding that Chapman's vehicle was not an "underinsured highway vehicle" as defined under North Carolina's Financial Responsibility Act (FRA). A divided panel of the Court of Appeals affirmed.

¶ 4 In its argument before this Court, NC Farm Bureau concedes that the majority below "employed incorrect reasoning" in reaching its

conclusion that Lunsford was not entitled to coverage under the UIM provision of her insurance contract. Still, NC Farm Bureau argues the Court of Appeals "reached the correct result" in affirming the trial court's entry of declaratory judgment for NC Farm Bureau, contending that Chapman's vehicle is not an underinsured motor vehicle as defined by the terms of Chapman's Nationwide insurance contract, which incorporates Tennessee law.

¶ 5 However, in determining whether Lunsford is entitled to collect pursuant to the contract she entered into with NC Farm Bureau, we must apply North Carolina law to interpret the terms of a contract executed in North Carolina that necessarily incorporates North Carolina's FRA. We need not interpret Chapman's Nationwide insurance contract incorporating Tennessee law. Resolving this dispute does not require us to adjudicate any of Chapman's or Nationwide's rights, nor does it implicate any other state's interest in enforcing its own laws regulating the provision and maintenance of motor vehicle insurance.

¶ 6 Applying North Carolina law, we affirm prior decisions of the Court of Appeals allowing interpolicy stacking when calculating the "applicable" policy limits as required under the relevant provision of the FRA, N.C.G.S. § 20-279.21(b)(4) (2019). Because the amount of the stacked UIM coverage limits exceeds the sum of the applicable bodily injury coverage limits, Chapman's car is an "underinsured motor vehicle" as defined by the FRA for the purposes of giving effect to Lunsford's contract with NC Farm Bureau. Accordingly, we reverse the decision of the Court of Appeals, vacate the trial court's order entering declaratory judgment for NC Farm Bureau, and remand to the trial court for further proceedings consistent with this opinion.

I. Factual Background

¶ 7 At the time of the crash, both Lunsford and Chapman maintained motor vehicle accident insurance policies. Chapman's Nationwide policy provided her and her vehicle with bodily injury liability coverage subject to limits of $50,000 per person and $100,000 per accident, and UIM coverage subject to the same limits. Lunsford's NC Farm Bureau policy provided her with UIM coverage subject to the same limits as Chapman's bodily injury liability coverage ($50,000 per person / $100,000 per accident). After the crash, Nationwide offered, and Lunsford accepted, the full $50,000 available under the Nationwide bodily injury liability policy per person limit. Lunsford then sought an additional $50,000 in UIM coverage from her own insurer, NC Farm Bureau.

¶ 8 NC Farm Bureau denied Lunsford's claim and initiated a declaratory judgment action in Superior Court, Guilford County seeking a ruling establishing that "the UIM coverage of [the NC Farm Bureau policy] does not apply to [Lunsford's] injuries from the . . . motor vehicle collision in question and that [Lunsford] is not entitled to recover any UIM coverage from said policy." NC Farm Bureau contended that Chapman's vehicle was not an "underinsured motor vehicle" under North Carolina law. Lunsford argued in response that, under the relevant provision of the FRA as interpreted by the Court of Appeals in *Benton v. Hanford*, 195 N.C. App. 88 (2009), she was entitled to stack her NC Farm Bureau UIM coverage limit ($50,000) with the Nationwide UIM coverage limit ($50,000) for the purposes of determining whether "the applicable limits of underinsured motorist coverage for the vehicle involved in the accident and insured under the owner's policy" exceeded "the sum of the limits of liability under all bodily injury liability bonds and insurance policies applicable at the time of the accident." *Id.* at 92 (quoting N.C.G.S. § 20-279.21(b)(4)). After stacking the policies, Lunsford contended she would be entitled to recover UIM benefits from NC Farm Bureau because the stacked UIM limits ($100,000) would be greater than Nationwide's bodily injury liability coverage limit ($50,000).

¶ 9 On 19 December 2018, the trial court entered judgment on the pleadings in NC Farm Bureau's favor. The trial court reasoned that because the Nationwide insurance contract was executed in Tennessee, "Chapman's policy is governed by Tennessee law." Under Tennessee law, an "uninsured[1] motor vehicle does not include a motor vehicle . . . [i]nsured under the liability coverage of the same policy of which the uninsured motor vehicle coverage is a part." Tenn. Code § 56-7-1201(2) (2016). Because Chapman's vehicle was "insured under the liability coverage of the same policy from which the claimant [Lunsford] is seeking UIM coverage," the trial court concluded that Chapman's vehicle "*cannot* be an underinsured motor vehicle under Chapman's policy, the UIM coverage of Chapman's policy does not apply to the accident in question and, therefore, it is not 'applicable' UIM coverage within the meaning of the North Carolina UIM statute's definition of the 'underinsured highway vehicle' and [*Benton*]." Since the Nationwide UIM coverage was not "applicable," there was no limit for Lunsford to stack with her own NC Farm Bureau UIM coverage limit. Defined thusly, "Chapman's vehicle does not satisfy [the FRA's definition of an underinsured motor vehicle]

1. Chapman's contract uses the term "uninsured motor vehicle" in a manner which encompasses what would be termed an "underinsured motor vehicle" under North Carolina law. We use the latter throughout for ease of reading.

because the liability coverage of Chapman's policy ($50,000 / $100,000) is equal to (not less than) the UIM coverage of Lunsford's policy."

¶ 10 A divided panel of the Court of Appeals affirmed, but on a different rationale than the one utilized by the trial court. The majority agreed with the trial court that Chapman's Nationwide UIM policy was not "applicable at the time of an accident under [N.C.G.S.] § 20-279.21(b)(4)." *North Carolina Farm Bureau Mut. Ins. Co., Inc. v. Lunsford*, 271 N.C. App. 234, 238 (2020). However, the majority's conclusion that the Nationwide policy was not "applicable" rested upon its belief that Lunsford did not "qualif[y] as a 'person insured' [under the Nationwide policy] as that term is defined by [N.C.G.S. § 20-279.21(b)(3)]." *Id.* According to the majority, because Lunsford was neither "the named insured [nor], while resident of the same household, the spouse of the named insured [or] relatives of either," she did not "qualif[y] as a 'person insured' " under Chapman's Nationwide policy, precluding Lunsford from stacking the Nationwide UIM coverage limit. *Id.* at 237 (quoting *Sproles v. Greene*, 329 N.C. 603, 608 (1991)).

¶ 11 Judge Murphy dissented based upon his interpretation of Chapman's contract with Nationwide. According to Judge Murphy, Chapman's Nationwide policy contained a "conformity clause" stating that the insurer would "adjust this policy to comply . . . [w]ith the financial responsibility law of any state or province which requires higher liability limits than those provided by this policy." *Id.* at 242–43 (Murphy, J., dissenting). Therefore, Judge Murphy read Chapman's Nationwide policy as "explicitly incorporat[ing] our FRA," requiring the court to apply the definition of an "underinsured motor vehicle" provided by N.C.G.S. § 20-279.21(b)(4). *Id.* at 242. Under *this* definition of an underinsured motor vehicle, as interpreted by the Court of Appeals in *Benton*, Lunsford was entitled to "stack the $50,000.00 limit of UIM coverage in Chapman's Nationwide policy with the $50,000.00 limit of UIM coverage in Lunsford's [NC Farm Bureau] policy." *Id.* at 245.

¶ 12 Judge Murphy also disputed the majority's conclusion that Lunsford was not a "person[ ] insured" by Chapman's Nationwide policy. He noted that in *Sproles*, this Court interpreted the relevant provision of the FRA, N.C.G.S. § 20-279.21(b)(3), to

> essentially establish[ ] two "classes" of "persons insured": (1) the named insured and, while resident of the same household, the spouse of the named insured and relatives of either and (2) any person who uses with the consent, express or implied, of the named insured, the insured vehicle, and a guest in such vehicle.

Id. at 244. Applying *Sproles*, Judge Murphy concluded that "Lunsford, as the named insured, is a class one insured with respect to the NCFB policy . . . . She is also a class two insured with respect to Chapman's Nationwide policy as a guest in the insured vehicle with consent of the named insured." *Id.*

II. Analysis

¶ 13 All insurers doing business in North Carolina are required to offer UIM coverage. *See* N.C.G.S § 20-279.21(b)(4) (stating that every insurer's "policy of liability insurance . . . [s]hall . . . provide underinsured motorist coverage"). "The purpose of underinsured motorist (UIM) coverage in our state is to serve as a safeguard when tortfeasors' liability policies do not provide sufficient recovery—that is, when the tortfeasors are 'under insured.' " *Lunsford v. Mills*, 367 N.C. 618, 632 (2014) (Newby, J., concurring in part, dissenting in part). UIM coverage kicks in when the insured is injured due to the tortious conduct of another driver. "Following an automobile accident, a tortfeasor's liability coverage is called upon to compensate the injured plaintiff, who then turns to *his own UIM coverage* when the tortfeasor's liability coverage is exhausted." *Harris v. Nationwide Mut. Ins. Co.*, 332 N.C. 184, 188 (1992) (emphasis added); see also Douglas R. Richmond, *Issues and Problems in "Other Insurance," Multiple Insurance, and Self-Insurance*, 22 Pepp. L. Rev. 1373, 1420 (1995) ("UIM policies provide first-party coverage" to insureds).

¶ 14 To determine whether Lunsford is entitled to access the UIM coverage she purchased from NC Farm Bureau, "[t]he threshold question . . . is whether the tort-feasor's vehicle is an 'underinsured highway vehicle' as the term is used in N.C.G.S. § 20–279.21(b)(4)." *Harris*, 332 N.C. at 187. Under N.C.G.S. § 20–279.21(b)(4), a vehicle is an "underinsured highway vehicle" if

> the sum of the limits of liability under all bodily injury liability bonds and insurance policies applicable at the time of the accident is less than the applicable limits of underinsured motorist coverage for the vehicle involved in the accident and insured under the owner's policy.

¶ 15 Everyone agrees that the only bodily injury liability insurance policy "applicable at the time of the accident" is Lunsford's Nationwide policy, and that Lunsford's NC Farm Bureau UIM policy is an "applicable" UIM coverage limit. The crux of the parties' dispute is whether Chapman's Nationwide UIM coverage limit is also an "applicable limit of underin-

sured motorist coverage for the vehicle involved in the accident and insured under the owner's policy." Lunsford says it is. NC Farm Bureau says it is not.

¶ 16 Because of each policy's respective limits, the answer to this question is dispositive in this case. If the Nationwide UIM coverage limit is "applicable," then—under Court of Appeals precedent which NC Farm Bureau does not challenge—Lunsford is entitled to stack the Nationwide UIM coverage limit ($50,000) with the NC Farm Bureau coverage limit ($50,000). *Benton*, 195 N.C. App. at 92 ("UIM coverage may be stacked interpolicy to calculate the applicable limits of underinsured motorist coverage for the vehicle involved in the accident for the purpose of determining if the tortfeasor's vehicle is an 'underinsured highway vehicle.' "). If Lunsford is entitled to stack the Nationwide and NC Farm Bureau UIM coverage limits, "the sum of the limits of liability under all bodily injury liability bonds and insurance policies applicable at the time of the accident" (Nationwide's $50,000 bodily injury coverage limit) would be "less than the applicable limits of underinsured motorist coverage for the vehicle involved in the accident and insured under the owner's policy" (the $100,000 in stacked UIM coverage limits), and Chapman's vehicle would be "underinsured." If the Nationwide UIM coverage limit is not "applicable," then it cannot be stacked with Lunsford's NC Farm Bureau coverage limit, the bodily injury liability coverage limit ($50,000) would be equal to the sum of the "applicable" UIM coverage limits ($50,000), and Chapman's vehicle would not be "underinsured."

¶ 17 Initially, we reject the distinction the majority below relied upon in arriving at its conclusion that Chapman's Nationwide coverage limit was not "applicable" within the meaning of N.C.G.S. § 20-279.21(b)(4). As Judge Murphy's dissent correctly explains, there are two "classes" of "persons insured" set forth in N.C.G.S. § 20-279.21(b)(3), "Class I" insureds (named insureds and relatives who reside in the insured's household) and "Class II" insureds (individuals using a vehicle with the driver's consent). Lunsford is plainly a "Class I" insured with regards to the NC Farm Bureau policy and a "Class II" insured with regards to the Nationwide policy. Therefore, the fact that Lunsford is not a relative who resides in Chapman's household is irrelevant. NC Farm Bureau acknowledges as much—in their presentation to this Court, they concede that "it is undisputed that Lunsford *was an insured* of Chapman's UIM coverage . . . because she was occupying Chapman's vehicle and the [c]ourt's opinion does not explain why her status as a Class II insured of the Chapman policy prevents that policy from being applicable within the meaning of N.C.G.S. § 20-279.21(b)(4)."

¶ 18 Rather than defend the Court of Appeals' reasoning—or ask this Court to overrule *Benton* and other cases recognizing the propriety of interpolicy stacking—NC Farm Bureau contends that interpolicy stacking is not permitted in this case because Chapman was a Tennessee resident who entered into a contract with Nationwide in Tennessee. In NC Farm Bureau's view, Chapman's Nationwide contract does not incorporate North Carolina's FRA, and it need not, because it was executed in Tennessee and North Carolina lacks any substantial connection to Chapman or the accident at issue. By extension, NC Farm Bureau contends that the terms of the Nationwide contract, which incorporate Tennessee's definition of an underinsured motor vehicle, supply the definition to be applied in determining whether Chapman's vehicle is underinsured. It is uncontroverted that under the relevant Tennessee statute, Tenn. Code § 56-7-1201(2), Chapman's vehicle cannot be underinsured.

¶ 19 To be clear, NC Farm Bureau does not dispute that (1) Lunsford is seeking UIM coverage under her *own* insurance policy issued by NC Farm Bureau pursuant to a contract entered into in North Carolina, (2) all automobile accident insurance policies executed in North Carolina necessarily incorporate North Carolina's FRA, and (3) this Court must apply North Carolina law when interpreting an insurance policy issued in North Carolina to a North Carolina insured. What NC Farm Bureau appears to be arguing is that North Carolina law requires us to look to the terms of Chapman's Nationwide policy to ascertain whether the UIM coverage limit contained therein is an "*applicable* limit[ ] of underinsured motorist coverage for the vehicle involved in the accident and insured under the owner's policy." N.C.G.S. § 20-279.21(b)(4) (emphasis added). As we understand it, NC Farm Bureau's position can be articulated as follows: When an individual is injured by a driver's tortious conduct, the driver's UIM coverage limit is not an "applicable limit[ ] of underinsured motorist coverage for the vehicle involved in the accident and insured under the owner's policy" which can be stacked with the injured party's UIM coverage limit if, under the terms of the *tortfeasor's* contract, the vehicle is not underinsured.

¶ 20 The essential question in this case is one of statutory interpretation: What did the General Assembly intend by using the phrase "applicable limits of underinsured motorist coverage for the vehicle involved in the accident and insured under the owner's policy" in N.C.G.S. § 20-279.21(b)(4)? "The primary objective of statutory interpretation is to ascertain and effectuate the intent of the legislature." *Lunsford v. Mills*, 367 N.C. at 623. "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." *Lenox, Inc. v. Tolson*, 353 N.C. 659, 664 (2001) (cleaned up). Thus, we begin with the statutory language the General Assembly selected. "If the language of a statute is clear, the court must implement the statute according to the plain meaning of its terms so long as it is reasonable to do so." *Id.* If the language is ambiguous or susceptible to multiple meanings, we turn to the other sources to identify the General Assembly's intent.

¶ 21 Read in context, the General Assembly's choice of the term "applicable" does not unambiguously answer the question of whether an injured party is or is not permitted to stack the tortfeasor's UIM coverage limit under these circumstances. *Black's Law Dictionary* defines applicable as "1. Capable of being applied; fit and right to be applied. 2. (Of a rule, regulation, law, etc.) affecting or relating to a particular person, group, or situation; having direct relevance." *Black's Law Dictionary* (11th ed. 2019). Citing a similar dictionary definition, NC Farm Bureau argues that "[t]he UIM coverage of Chapman's policy is not capable of being applied to Lunsford's claim because the policy provisions, and the applicable Tennessee statutes, preclude her vehicle from being an underinsured vehicle for the UIM coverage of her policy."

¶ 22 But this tautological proposition smuggles into the FRA the very premise NC Farm Bureau seeks to uncover in the statutory text. The provision does not state that "applicable" means "contained in a policy which would by its own terms define the tortfeasor's vehicle as underinsured." The text contains only the phrase "applicable limits." The question before this Court is what meaning the General Assembly intended to communicate by including that phrase. NC Farm Bureau offers one possible answer, but that answer cannot be derived from the text alone, and we must not read into a statute "language that simply is not there." *Boseman v. Jarrell*, 364 N.C. 537, 554 (2010) (Hudson, J., dissenting); *see also Borden v. United States*, 141 S.Ct. 1817, 1829 (2021) ("[W]e must construe the [statutory clause] as it is—without first inserting the word[s] that will (presto!) produce the dissent's reading.").

¶ 23 *Benton* and the other cases construing N.C.G.S. § 20–279.21(b)(4) to allow interpolicy stacking do not precisely define the phrase "applicable limits." Still, nothing in those cases supports NC Farm Bureau's proposed construction. In *Benton*—which, we reiterate, NC Farm Bureau does not challenge—the Court of Appeals did not refer to the tortfeasor's state of residence. The Court of Appeals explicitly rejected the tortfeasor's insurer's effort to define "underinsured motor vehicle" in accordance with the terms of the *tortfeasor's* UIM policy, instead defining "underinsured motor vehicle" in accordance with the terms of the

FRA. *Benton*, 195 N.C. App. at 91–92 ("Because the [FRA] specifically defines 'underinsured highway vehicle[,]' . . . we turn to the Act and the cases interpreting it without regard to the definition of the term in the [tortfeasor's] policy."). In applying the definition supplied by the FRA, the *Benton* court without further explanation treated "the UIM coverage for the vehicle owned by the [tortfeasor] policy holder" as "applicable." *Id.* at 97.

¶ 24 Even though *Benton* interpreted and applied N.C.G.S. § 20–279.21(b)(4), the decision contains no reference to the fact NC Farm Bureau and the dissent now claims was dispositive.[2] Acknowledging this omission, NC Farm Bureau invites us to take "judicial notice" that the record in *Benton* indicates the tortfeasor's insurance contract was executed in North Carolina. We decline the invitation to read *Benton* as turning on a fact which, upon close examination of the decision itself, appears to have been entirely extraneous to the court's reasoning and ultimate holding. We are unconvinced by NC Farm Bureau's effort to find in *Benton* a legal rule the court did not propound.

¶ 25 Instead, we understand the General Assembly's use of the phrase "applicable limits" to refer to the UIM coverage limits contained within the insurance policy covering the tortfeasor's vehicle, in a circumstance such as this one where the tortfeasor is the driver and the injured party is a passenger seeking to access the UIM coverage contained within his or her own policy incorporating North Carolina's FRA. This interpretation is consistent with "the spirit of the [FRA] and what the [FRA] seeks to accomplish." *Lenox*, 353 N.C. at 664 (cleaned up).

¶ 26 "The avowed purpose of the Financial Responsibility Act, of which N.C.G.S. § 20–279.21(b)(4) is a part, is to compensate the innocent victims of financially irresponsible motorists. It is a remedial statute to be liberally construed so that the beneficial purpose intended by its enactment may be accomplished." *Sutton v. Aetna Cas. & Sur. Co.*, 325 N.C.

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2. Although *Benton* is not controlling, it is also not irrelevant, as the dissent suggests. In addition to not asking this Court to consider whether *Benton* was wrongly decided, NC Farm Bureau does not dispute that *Benton* was the governing law at the time it entered into an insurance contract with Lunsford. Thus, although we undoubtedly have the authority to displace *Benton*, doing so sua sponte would risk depriving the parties of the benefit of the bargain they struck. Further, we find it notable that the General Assembly has not acted in a way that evinces disagreement with *Benton* in the years since that case was decided. *See, e.g.*, *Brown v. Kindred Nursing Centers E., L.L.C.*, 364 N.C. 76, 83 (2010) ("[L]egislative acquiescence is especially persuasive on issues of statutory interpretation. When the legislature chooses not to amend a statutory provision that has received a specific interpretation, we assume lawmakers are satisfied with that interpretation.").

259, 265 (1989) (citation omitted). Interpreting the ambiguous language contained in N.C.G.S. § 20–279.21(b)(4) to permit interpolicy stacking in this circumstance is "[i]n keeping with the purpose of the [FRA]" because it allows injured North Carolina insureds to access the UIM coverage they paid for in a greater number of circumstances, reducing the likelihood that the costs of the damage caused by an underinsured tortfeasor will be borne by the insured alone. *Benton*, 195 N.C. App. at 92; *see also Proctor v. North Carolina Farm Bureau Mut. Ins. Co.*, 324 N.C. 221, 225 (1989) ("[T]he statute's general purpose, which has not been changed, is best served when the statute is interpreted to provide the innocent victim with the fullest possible protection."). The magnitude of North Carolina's interest in protecting insureds in no way depends upon the state in which the tortfeasor executed his or her insurance contract. Nor is there any reason to look to another state's law in defining the circumstances under which a North Carolina insured can access UIM coverage under his or her own insurance policy.

¶ 27 Further, NC Farm Bureau's proposed interpretation does not reflect the way UIM coverage functions. UIM coverage becomes available to an insured from his or her own insurer when the damage caused by a tortfeasor exceeds the tortfeasor's bodily injury liability coverage limits. The circumstances under which an insured will be able to claim UIM benefits are dictated by the terms and limits of the insured's own contract with his or her insurer—and, by extension when the insurance contract is executed in North Carolina, the provisions of the FRA. *See, e.g.*, *Lunsford v. Mills*, 367 N.C. at 635 (2014) (Newby, J., concurring in part, dissenting in part) ("[A]n insured plaintiff's UIM recovery 'is controlled contractually by the amount of the UIM policy limits purchased and available to her.' ") (quoting *Nikiper v. Motor Club of Am. Cos.*, 232 N.J. Super. 393, 398–99, *certification denied*, 117 N.J. 139 (1989)). It follows logically that the availability of UIM coverage to the insured—which hinges upon the threshold determination of whether a vehicle is underinsured—should be dictated by the terms of the bargain struck by the insured and the insurer, not by the terms of the bargain struck by the tortfeasor with his or her insurer. The availability of the UIM coverage Lunsford obtained should not be contingent on the tortfeasor fortuitously residing in a state whose elected officials share the North Carolina General Assembly's concern for protecting injured insureds to the same extent.

¶ 28 If it were Chapman seeking to recover UIM benefits from Nationwide after an accident caused by Lunsford's tortious driving, then the terms of the Nationwide contract would supply the definition of an "underinsured

vehicle."[3] But the very reason an insurance contract includes a UIM coverage provision is to define the circumstances under which another vehicle (the one driven by the tortfeasor) is to be considered underinsured, for the purpose of establishing when the insurer's obligation to disburse UIM benefits is triggered. The definition of an underinsured motor vehicle that a North Carolina insured agrees to with his or her insurer does not incorporate or in any way depend upon the definition that would be operative if it were the tortfeasor who was seeking to recover under his or her own insurance policy.

¶ 29 It is not at all anomalous that a vehicle might be considered "underinsured" as that term is defined in a North Carolina contract incorporating the FRA, but not "underinsured" as that term is defined in an out-of-state contract incorporating that state's insurance laws. Out of concern for the consequences of leaving North Carolina insureds vulnerable to financial ruin, or even simply being undercompensated, when they are harmed by irresponsible drivers, North Carolina has chosen to mandate that insurers make UIM coverage available in a circumstance where Tennessee has not. To give effect to the public policy considerations motivating the General Assembly's legislative choice, and to honor the bargains struck by North Carolinians with their insurers in light of the North Carolina FRA, we must apply the definition of an "underinsured motor vehicle" chosen by the representatives of the people of North Carolina, not the one chosen by the representatives of the people of Tennessee. *See Fortune Ins. Co. v. Owens*, 351 N.C. 424, 428 (2000) ("[A]n automobile insurance contract should be interpreted and the rights and liabilities of the parties thereto determined in accordance with the laws of the state where the contract was entered."). Therefore, we hold that the UIM coverage limit contained in Chapman's Nationwide policy is an "applicable" limit within the meaning of N.C.G.S. § 20–279.21(b)(4).[4]

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3. If this circumstance were presented to this Court, we would be called upon to interpret a contract executed in Tennessee incorporating Tennessee law, and NC Farm Bureau's argument that the Full Faith and Credit Clause of Art IV. § 1 of the United States Constitution might be relevant. However, in this case, we are called upon to interpret a contract executed in North Carolina ordering the relations between two North Carolina residents which incorporated North Carolina law.

4. Because we reach this conclusion based upon our interpretation of Lunsford's NC Farm Bureau insurance contract and the North Carolina FRA, we do not reach the question of whether the "conformity clause" in Chapman's Nationwide insurance contract incorporates N.C.G.S. § 20-279.21(b)(4).

III. Conclusion

¶ 30 When a passenger who has previously obtained UIM coverage pursuant to a contract executed in North Carolina is injured while travelling in a vehicle driven by someone else, and the injury results from that driver's tortious conduct, the driver's UIM coverage limits are "applicable" within the meaning of N.C.G.S. § 20-279.21(b)(4). Under these circumstances, the injured passenger is entitled to stack the driver's UIM coverage limit with the limits contained in the passenger's own policy for the purposes of determining whether the vehicle is an "underinsured motor vehicle" within the meaning of his or her own policy, which necessarily incorporates North Carolina's FRA. In this case, after stacking the applicable Nationwide and NC Farm Bureau coverage limits, Chapman's vehicle is "underinsured" as that term is defined in N.C.G.S. § 20-279.21(b)(4). Accordingly, we reverse the decision of the Court of Appeals and remand to the trial court for entry of an order granting a declaratory judgment in favor of Judy Lunsford.

REVERSED.

Justice BARRINGER, dissenting.

¶ 31 This matter concerns the underinsured motorist bodily injury coverage in the insurance policy between North Carolina Farm Bureau Mutual Insurance Company, Inc. (Farm Bureau) and Judy Lunsford (Lunsford Policy). The material facts are undisputed and the law well-established. However, the majority assumes the role of the legislature in this matter and ignores our well-established principles for the construction of insurance policies and the determination of what law applies to insurance policies. Applying the plain language of the statute enacted by the North Carolina legislature to a policy entered in North Carolina and Tennessee law to a policy entered in Tennessee, consistent with our precedent, clearly leads to affirming the trial court's granting of judgment on the pleadings in Farm Bureau's favor. Therefore, I respectfully dissent.[1]

I. Background

¶ 32 Lunsford, while a resident of North Carolina, applied in North Carolina for and was issued in North Carolina the Lunsford Policy from

1. However, we agree with the majority and the parties to this appeal that the Court of Appeals erred in its application of the classes of insured. *N.C. Farm Bureau Mut. Ins. Co., Inc. v. Lunsford*, 271 N.C. App. 234, 238–39 (2020). In this matter, it is undisputed that Lunsford was an insured under Chapman's underinsured motorist coverage.

Farm Bureau. The named insured for the Lunsford Policy was Lunsford, and the Lunsford Policy covered a 2016 Toyota RAV4, which at all relevant times, was titled and registered to Lunsford in North Carolina. The Lunsford Policy provided uninsured and underinsured motorist bodily injury coverage of $50,000 per person/$100,000 per accident.

¶ 33 While a passenger in a 2015 Chevrolet Silverado (Silverado) owned by and being driven by Levonda Chapman, a resident of Tennessee, Lunsford was seriously injured as a result of Chapman's negligent driving. The accident occurred in Alabama. At the time of the accident, Chapman's Silverado was covered by an automobile insurance policy between Nationwide Mutual Insurance Company (Nationwide) and Chapman (Chapman Policy), which provided bodily injury liability coverage of $50,000 per person/$100,000 per occurrence and underinsured motorist coverage of $50,000 per person/$100,000 per occurrence. The Chapman Policy was entered into in Tennessee. Nationwide offered the policy limit of the Chapman Policy bodily injury liability coverage, $50,000, to Lunsford.

¶ 34 The dispute between Lunsford and Farm Bureau concerns whether Chapman's vehicle was an underinsured highway vehicle. As relevant to this appeal, the underinsured motorist coverage under the Lunsford Policy applies when "[Lunsford] is legally entitled to recover from the owner or operator of an underinsured [highway] vehicle because of bodily injury sustained by [her] and caused by the accident." Recognizing that the definition of underinsured highway vehicle in the Lunsford Policy is narrower than the applicable subsection of the statute, N.C.G.S. § 20-279.21(b)(4), enacted by the North Carolina legislature, Farm Bureau conceded that N.C.G.S. § 20-279.21(b)(4) prevails over the narrower policy provision in the Lunsford Policy. Subsection 20-279.21(b)(4) of the General Statutes of North Carolina defines underinsured highway vehicle as

> a highway vehicle with respect to the ownership, maintenance, or use of which, the sum of the limits of liability under all bodily injury liability bonds and insurance policies applicable at the time of the accident is less than the applicable limits of underinsured motorist coverage for the vehicle involved in the accident and insured under the owner's policy. For purposes of an underinsured motorist claim asserted by a person injured in an accident where more than one person is injured, a highway vehicle will also be an "underinsured highway vehicle" if the total amount

> actually paid to that person under all bodily injury liability bonds and insurance policies applicable at the time of the accident is less than the applicable limits of underinsured motorist coverage for the vehicle involved in the accident and insured under the owner's policy. Notwithstanding the immediately preceding sentence, a highway vehicle shall not be an "underinsured motor vehicle" for purposes of an underinsured motorist claim under an owner's policy insuring that vehicle unless the owner's policy insuring that vehicle provides underinsured motorist coverage with limits that are greater than that policy's bodily injury liability limits.

N.C.G.S. § 20-279.21(b)(4) (2019).

¶ 35 Farm Bureau also acknowledges that the Court of Appeals has construed the legislature's use of the plural "limits" in the phrase "less than the applicable limits" to allow interpolicy stacking of applicable policies and does not challenge this holding in this matter. *See Benton v. Hanford*, 195 N.C. App. 88, 92–93 (2009); *N.C. Farm Bureau Mut. Ins. Co. v. Bost*, 126 N.C. App. 42, 50–51 (1997). Instead, Farm Bureau contends that the Chapman Policy is not an *applicable* policy. Specifically, the Chapman Policy excludes from the definition of underinsured highway vehicle[2] the Silverado—as both a vehicle insured under the liability coverage of the Chapman Policy and a vehicle operated by the insured, Chapman. This exclusion is consistent with the statutes enacted by the Tennessee legislature defining an uninsured highway vehicle for purposes of uninsured and underinsured motorist coverage. *See* Tenn. Code §§ 56-7-1201, -1202 (2016).

¶ 36 Lunsford does not dispute that the Chapman Policy is an insurance contract entered into in Tennessee by a Tennessee resident or the construction of the Chapman Policy under Tennessee law presented by Farm Bureau. Instead, Lunsford, relying on *Benton*, appears to contend that the definition of underinsured highway vehicle in the statute enacted by the North Carolina legislature applies to every policy, including the Chapman Policy. Thus, according to Lunsford, we ignore the plain language of the Chapman Policy and Tennessee law. Lunsford also ar-

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2. The Chapman Policy and the Tennessee statutes use the term "uninsured motor vehicle." Because the distinction in the terms is not significant and to aid the reader, the term "underinsured highway vehicle" is also used when referring to the Chapman Policy and the Tennessee statutes.

gues Tennessee law does not apply because injury to a North Carolina resident is sufficient to establish a close connection with North Carolina and require the application of North Carolina law to the construction of the policy as in *Collins & Aikman Corp. v. Hartford Acc. & Indemnity* Co., 335 N.C. 91 (1993). Lastly, Lunsford raised in her reply before the Court of Appeals and her brief with this Court that a financial responsibility provision in the Chapman Policy dictates the application of North Carolina law in this matter.

II. Construction of Insurance Policies

¶ 37 "This Court has long recognized its duty to construe and enforce insurance policies as written, without rewriting the contract or disregarding the express language used." *Fid. Bankers Life Ins. Co. v. Dortch*, 318 N.C. 378, 380 (1986). "However, when a statute is applicable to the terms of an insurance policy, the provisions of the statute become a part of the policy as if written into it." *Bray v. N.C. Farm Bureau Mut. Ins. Co.*, 341 N.C. 678, 682 (1995). Thus, the policy is construed in accordance with its written terms unless a binding statute, regulation, or order requires a different construction. *Allstate Ins. Co. v. Shelby Mut. Ins. Co.*, 269 N.C. 341, 345 (1967). When unambiguous, the plain language of the policy controls, *N.C. Farm Bureau Mut. Ins. Co. v. Martin*, 376 N.C. 280, 286 (2020), or if superseded by a binding statute, the plain language of the statute controls, *see generally Fid. Bank v. N.C. Dep't of Revenue*, 370 N.C. 10, 20 (2017).

> Where a policy defines a term, that definition is to be used. If no definition is given, non-technical words are to be given their meaning in ordinary speech, unless the context clearly indicates another meaning was 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). This Court regularly looks to non-legal dictionaries to determine plain meaning for policies and statutes. *See, e.g.*, *Raleigh Hous. Auth. v. Winston*, 376 N.C. 790, 2021-NCSC-16, ¶ 8 (2021); *Martin*, 376 N.C. at 287.

¶ 38 When a provision of an insurance policy is ambiguous, the provision will be given the meaning most favorable to the insured. *Shelby Mut.*, 269 N.C. at 346. However, "[t]he terms of another contract between different parties cannot affect the proper construction of the provisions of an insurance policy." *Id.* Rather,

> [t]he existence of the second contract, whether an insurance policy or otherwise, may or may not be an event which sets in operation or shuts off the liability of the insurance company under its own policy. Whether it does or does not have such effect, first requires the construction of the policy to determine what event will set in operation or shut off the company's liability and, second, requires a construction of the other contract, or policy, to determine whether it constitutes such an event.

Id.

¶ 39 In this matter, Farm Bureau has argued that the language written into the Lunsford Policy of N.C.G.S. § 20-279.21(b)(4)—"the applicable limits of underinsured motorist coverage"—is clear and unambiguous. Farm Bureau, relying on the definition from the American Heritage Dictionary of English Language, identifies that the plain meaning of "applicable" as "[c]apable of being applied; relevant or appropriate." *Applicable*, *The American Heritage Dictionary of the English Language* (5th ed. 2020), https://ahdictionary.com/word/search.html?q=applicable. Lunsford has neither disputed that the language is unambiguous nor disputed or offered an alternative plain meaning of the term "applicable."

¶ 40 The language is unambiguous. Thus, the statutory language and policy language of the Lunsford Policy provide that only underinsured motorist coverage capable of being applied are added together, i.e., stacked, for purposes of determining whether the threshold requirement of an underinsured highway vehicle is met under N.C.G.S. § 20-279.21(b)(4). Thus, in order for Lunsford to prevail, she would have to prove that the underinsured motorist coverage of the Chapman Policy is capable of being applied. *See Martin*, 376 N.C. at 285 ("The party seeking coverage under an insurance policy bears the burden 'to allege and prove coverage.' " (quoting *Brevard v. State Farm Mut. Auto. Ins. Co.*, 262 N.C. 458, 461 (1964)). In this case, which state's law applies determines whether the underinsured motorist coverage of the Chapman Policy is capable of being applied.

¶ 41 Adopting Lunsford's argument as done by the majority requires this Court to omit the word "applicable" and read the statute as:

> An "uninsured motor vehicle," as described in subdivision (3) of this subsection, includes an "underinsured highway vehicle," which means a highway vehicle with respect to the ownership, maintenance,

> or use of which, the sum of the limits of liability under all bodily injury liability bonds and insurance policies applicable at the time of the accident is less than the . . . limits of underinsured motorist coverage for the vehicle involved in the accident and insured under the owner's policy.

N.C.G.S. § 20-279.21(b)(4). This construction clearly disregards established canons of construction for statutes and insurance policies that, when possible, "every word and every provision is to be given effect," *Woods*, 295 N.C. at 506.

¶ 42 The majority's construction also does not serve the avowed purpose of the Motor Vehicle Safety and Financial Responsibility Act (the Act) "to require financial responsibility of reckless, inefficient and irresponsible operators of motor vehicles involved in accidents." *Howell v. Travelers Indem. Co.*, 237 N.C. 227, 232 (1953). This case does not involve mandatory or compulsory motor vehicle liability insurance to protect against the financial irresponsibility of reckless drivers. *Under*insured motorist coverage is optional for the insured. *Comp.* N.C.G.S. § 20-279.21(b)(4) *with* N.C.G.S. § 20-279.21(b)(2), (3); *see also Hartford Underwriters Ins. Co. v. Becks*, 123 N.C. App. 489, 493–94 (1996) (rejecting defendants' suggestion that underinsured motorist coverage "is 'required' or 'deemed mandatory' in *all* liability policies"). Our legislature also specifically provided in subsection 20-279.21(n) of the General Statutes of North Carolina that "[n]othing in this section shall be construed to provide greater amounts of uninsured or underinsured motorist coverage in a liability policy than the insured has purchased from the insurer under this section." N.C.G.S. § 20-279.21(n). Ironically, the construction adopted by the majority also results in Chapman's vehicle being deemed an *under*insured highway vehicle when Chapman's vehicle has the *same* liability coverage amounts as Lunsford's policy amounts for underinsurance. The majority's decision, thus, provides compensation for Lunsford exceeding her purchase as an insured and may have the effect of limiting the options available to residents in North Carolina for underinsured motorist coverage by increasing the costs of underinsured motorist coverage beyond the means of some. Thus, while the Act is remedial and to be liberally construed, *Liberty Mut. Ins. Co. v. Pennington*, 356 N.C. 571, 573–74 (2002), substituting the Court's judgment and words for that of the legislature, especially when it may undermine the beneficial purposes of the Act, is not appropriate. *See Howell*, 237 N.C. at 232 ("Whether [the Act] ought to be brought more nearly into harmony with its declared object is a legislative and not a judicial matter.").

III. Choice of Law

¶ 43 This Court has held in accordance with the principles of *lex loci contractus* that an automobile insurance policy "should be interpreted and the rights and liabilities of the parties thereto determined in accordance with the laws of the state where the contract was entered even if the liability of the insured arose out of an accident in North Carolina." *Fortune Ins. Co. v. Owens*, 351 N.C. 424, 428 (2000) (citing *Roomy v. Allstate Ins. Co.*, 256 N.C. 318, 322 (1962)). However, this Court in *Collins* construed N.C.G.S. § 58-3-1 as recognizing an exception to the general rule of *lex loci contractus* "where a close connection exists between this State and the interests insured by an insurance policy." *Id.* (citing *Collins*, 335 N.C. at 95). *Collins* acknowledged that when a policy was purchased in another state, owned by a resident of another state, and for a vehicle titled in another state, the policy is governed by the law of the state in which the policy was issued. *Collins*, 335 N.C. at 94 (1993) (citing *Connor v. Insurance Co.*, 265 N.C. 188, 190 (1965); *Roomy*, 256 N.C. at 322). However, *Collins* involved an umbrella/excess liability insurance policy covering the wrongful acts of agents of the insured with property predominately in North Carolina—ninety-seven trucks titled in North Carolina where the insured's transportation division was located. *Id.* at 93–95. Given this close connection between North Carolina and the interests insured, the Court in *Collins* applied North Carolina law instead of the law of the state where the policy was issued. *Id.* at 95.

¶ 44 The Chapman Policy, however, did not insure any property in North Carolina. Also, as the accident did not occur in North Carolina, neither the Silverado, Chapman, nor Lunsford were in North Carolina at the time of the liability triggering event. Thus, Lunsford's reliance on *Collins* for the proposition that North Carolina has a close connection to the interests insured under the Chapman Policy is misplaced.

¶ 45 The Court of Appeals decision in *Benton*, relied on by Lunsford, also does not support Lunsford's position. Not only is this decision not binding on this Court, but it is not relevant to the dispute. *Benton* did not involve or address a policy entered outside of North Carolina. *See* 195 N.C. App. at 89–90.[3]

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3. The majority dismisses but does not deny that *Benton* did not involve or address a policy entered outside of North Carolina. While the *Benton* opinion does not expressly state that it addresses policies entered outside or inside of North Carolina, it is clear from the *Benton* opinion that the argument before this Court concerning the impact of an out-of-state policy was not decided by the *Benton* court. Thus, we neither ignore Farm Bureau's argument nor precedent from this Court. We are also mindful that even when

¶ 46 Instead, this case is more analogous to *Owens* where this Court found no error in the trial court's conclusion that no significant connections existed between the tortfeasor's policy and North Carolina where the policy was issued to the tortfeasor in Florida, the insured vehicle involved in the accident had a Florida identification number and Florida license plate, the tortfeasor had a Florida license, the tortfeasor never had a North Carolina license, and the accident occurred in North Carolina. 351 N.C. at 428–29. In *Owens*, the location at the time of the accident was casual, and all significant connections occurred in Florida. *See id.* at 429. As a result, this Court concluded the policy "must be construed in accordance with Florida law." *Id.*

¶ 47 In this matter, it is undisputed that the policy was purchased in Tennessee, owned by a Tennessee resident, and covered a vehicle owned by a Tennessee resident. The accident also did not occur in North Carolina. Thus, all the significant connections occurred in Tennessee. The residency of the passenger at the time of the accident occurred by chance, just as the location of the accident occurred by chance in *Owens*. Thus, Tennessee law applies to the Chapman Policy. The residency of a passenger in North Carolina at the time of the accident by itself does not constitute a sufficient connection to warrant application of North Carolina law.[4]

¶ 48 As it is undisputed that underinsured motorist coverage is not capable of being applied under Tennessee law in the facts of this case, there are no "limits of underinsured motorist coverage," applicable under the Chapman Policy. *See* N.C.G.S. § 20-279.21(b)(4). Hence, the underinsured motorist coverage limits under the Chapman Policy of $50,000 per person/$100,000 per accident cannot be stacked, i.e., added to the underinsured motorist coverage under the Lunsford Policy. Because the "sum of the limits of liability under all bodily injury liability bonds and

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our rulings do not implicate the Full Faith and Credit Clause of Art IV. § 1 of the United States Constitution, we should not only consider our law where consideration for other sovereigns in this federation is due.

4. Lunsford's final argument that the financial responsibility provision, located in the Auto Liability section of the Chapman Policy, mandates that North Carolina law applies to the Chapman Policy in this matter was not raised before the trial court and was presented for consideration for the first time on appeal in her reply before the Court of Appeals. This Court, however, "has long held that where a theory argued on appeal was not raised before the trial court, 'the law does not permit parties to swap horses between courts in order to get a better mount in the Supreme Court.' " *State v. Sharpe*, 344 N.C. 190, 194 (1996) (quoting *Weil v. Herring*, 207 N.C. 6, 10 (1934)). Because this is a new theory for the application of North Carolina law not raised before the trial court, it is not appropriate for this Court to address this argument.

insurance policies applicable at the time of the accident," $50,000 per person/$100,000 per accident under the Chapman Policy, is not less than the sum of "the applicable limits of underinsured motorist coverage," $50,000 per person/$100,000 per accident under the Lunsford Policy, there is no underinsured highway vehicle. N.C.G.S. § 20-279.21(b)(4). Absent an underinsured highway vehicle, Lunsford cannot satisfy the statutory and policy requirement for underinsured motorist coverage in North Carolina—that the insured person, Lunsford, be legally entitled to recover bodily damages from the owner or operator of an *underinsured highway vehicle*. *See* N.C.G.S. § 20-279.21(b)(3), (4).

IV. Conclusion

¶ 49 Applying the plain language of the statute dictates that the underinsured motorist coverage of the Chapman Policy must be capable of being applied to be stacked. As Tennessee law applies to the Chapman Policy and excludes underinsured motorist coverage in the facts of this case, the trial court's judgment in favor of Farm Bureau should be affirmed.

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

S. ENV'T LAW CTR. v. N.C. RAILROAD CO.

[378 N.C. 202, 2021-NCSC-84]

SOUTHERN ENVIRONMENTAL LAW CENTER
v.
THE NORTH CAROLINA RAILROAD COMPANY, AND MICHAEL WALTERS, JACOB F. ALEXANDER III, WILLIAM V. BELL, MARTIN BRACKETT, LIZ CRABILL, WILLIAM H. KINCHELOE, JAMES E. NANCE, JOHN M. PIKE, GEORGE ROUNTREE III, FRANKLIN ROUSE, NINA SZLOSBERG-LANDIS, AND MICHAEL L. WEISEL, IN THEIR OFFICIAL CAPACITIES AS MEMBERS OF THE BOARD OF DIRECTORS OF THE NORTH CAROLINA RAILROAD COMPANY

No. 453A20

Filed 13 August 2021

Public Records—North Carolina Railroad Company—private company—State sole shareholder—not subject to Public Records Act

The North Carolina Railroad Company—a private company whose sole shareholder was the State of North Carolina and which was organized and operated for the benefit of the public—was not an agency or subdivision of the North Carolina government subject to the Public Records Act. Although, among other things, the State was the company's sole shareholder, the State selected the company's board members, and the State would receive the company's assets in the event of the company's dissolution, nonetheless the General Assembly indicated its intent in relevant legislation that the company should not be considered an entity of the State, and decisions of other State entities also supported this conclusion. Furthermore, the company consistently maintained its separate corporate identity and made decisions independently, demonstrating that the State's exercise of authority over the company was in its capacity as shareholder rather than as sovereign.

Justice EARLS dissenting.

Justice HUDSON joins in this dissenting opinion.

Appeal pursuant to N.C.G.S. § 7A-27(a)(2) from an order and opinion entered on 20 August 2020 by Judge Michael L. Robinson, Special Superior Court Judge for Complex Business Cases, in Superior Court, Wake County, after the case was designated a mandatory complex business case by the Chief Justice pursuant to N.C.G.S. § 7A-45.4(b). Heard in the Supreme Court on 19 May 2021.

Kimberly Hunter, Ramona H. McGee, and Maia Hutt for plaintiff-appellant.

James P. Cooney III and Rebecca C. Fleishman for defendant-appellees.

ERVIN, Justice.

¶ 1 In this case, we are called upon to decide whether defendant North Carolina Railroad Company is an "agency" or "subdivision" of "North Carolina government" for purposes of the Public Records Act, N.C.G.S. § 132-1. In order to resolve this issue, we are required to interpret the pertinent provisions of the Public Records Act, in light of the totality of the circumstances, in order to determine whether the state government exercises such substantial control over the Railroad that it is necessarily an agency or subdivision of state government. After carefully weighing all of the relevant facts and circumstances, we determine that the Railroad has been an independent, private corporation since it was chartered in 1849 and that, while the State does exert a considerable degree of control over the Railroad, it primarily exercises this authority in its capacity as the Railroad's sole shareholder rather than in its capacity as a sovereign. As a result, we affirm the trial court's order.

I. Factual and Procedural Background

A. History and Current Operations of the Railroad

¶ 2 The Railroad, which was chartered by an act of the General Assembly in 1849, An Act to incorporate the North Carolina Rail Road Company, ch. LXXXII, § 1, 1848–1849 N.C. Laws, 138, 139, is the oldest existing North Carolina corporation. Although interest in building a railroad in North Carolina surfaced as early as the 1820's and even though the construction of such a facility was delayed for over twenty years by high construction costs and the fact that "[p]rivate capital was inadequate," "the legislature long refused to tax the public for state aid." Trelease, Allen W., *The North Carolina Railroad, 1849-1871, and the Modernization of North Carolina*, 14 (1991). Throughout this period, the proponents of a railroad argued that the availability of such a facility was critical to the improvement of North Carolina's notoriously poor internal transportation system and expressed concern that, without a railroad, "North Carolina's ports would continue to languish while her neighbors waxed rich and powerful at her expense" and that the State "would remain what many of her citizens ruefully admitted her to be, a backwater, the Rip Van Winkle State." *Id.*

¶ 3 Although many people opposed the idea of State ownership of a business enterprise, the State's involvement in the development, construction, and operation of a railroad was "the product of state pride and economic necessity." Trelease, Allen W., *The Passive Voice: The State and the North Carolina Railroad, 1849-1871*, 61 The North Carolina Historical Review 174, 175 (1984). In view of the fact that the proposed railroad had an estimated construction cost of three million dollars and the fact that "[n]o one believed that private investors in the state would or could subscribe that much money," railroad advocates believed that "[c]hief reliance would have to be placed on the public sector, primarily the state." *Id.* at 177. On the other hand, railroad critics "demanded most commonly that the state turn over control of the road to its private stockholders, whose enlightened self-interest would quickly maximize earnings and dividends." *Id.* at 175. According to the Railroad, "[t]he working model devised was a public-private entity structured as a private business corporation."

¶ 4 As an initial matter, the State pledged to contribute two million dollars to the cost of building the proposed railroad, with this amount to be paid once private investors had pledged the remaining one million dollars. *Id.* at 177. After construction of the railroad began, however, it became apparent that the completion of the project would require another one million dollars, with the State ultimately agreeing to provide the needed additional funds for the project. *Id.* at 178.

¶ 5 The Railroad's original charter allowed the Governor to appoint eight of the twelve members of the Railroad's board. *Id.* According to an amended charter that was approved by the board in 1855, the State held three-quarters of the Railroad's stock and an equivalent number of voting shares in corporate elections. *Id.* at 179. However, "[t]he state's power was exercised very lightly." *Id.* at 180. More specifically, "[a]lthough politics played a large role in directorship appointments, it almost never intruded on operational or financial matters," so that, as a general proposition, "[s]tate control was unobtrusive." Trelease, Allen W., *A Southern Railroad at War: The North Carolina Railroad and the Confederacy*, 164 Railroad History 5, 5 (1991).

¶ 6 In 1997, the General Assembly authorized the State to buy out the remaining privately held shares of Railroad stock. An Act to Make Appropriations for Current Operations and for Capital Improvements for State Departments, Institutions, and Agencies, and for Other Purposes [hereinafter 1997 Budget Appropriation], ch. 443 § 32.30, 1997 N.C. Sess. Laws 1344, 1842–44. In 1998, the State loaned the Railroad sixty-one million dollars to complete this stock purchase transaction. The Railroad

repaid the principal amount of this loan to the State over a period of five years, during the first two of which it paid interest on the loan, after which the General Assembly enacted legislation which provided that interest would no longer accrue on the principal balance. As a result of the buyout, the State became the only holder of voting shares in the Railroad by 1998 and became the Railroad's sole shareholder in 2006.

¶ 7 After the approval of the purchase of the remaining privately held shares by the State in 1997, all of the Railroad's directors have been appointed by the State. *Id.* at 1843–44. At present, the Railroad's board consists of thirteen directors, seven of whom are appointed by the Governor, three of whom are appointed by the General Assembly upon the recommendation of the Speaker of the House of Representatives, and three of whom are appointed by the General Assembly upon the recommendation of the President Pro Tempore of the Senate. N.C.G.S. § 124-15(a) (2019). Of the seven gubernatorial appointees, one must be a member of the Board of Transportation and one must be either the Secretary of Commerce or the Secretary's designee. *Id.* The Railroad cannot sell, lease, mortgage, or otherwise encumber its property without board approval. *Id.* § 124-15(b).

¶ 8 Consistently with the requirements of Chapter 55 of the North Carolina General Statutes, the Railroad operates pursuant to a set of corporate bylaws. Although the Governor does appoint a majority of the members of the board, the board does not have to obtain approval from the Governor or any other state official before taking actions such as establishing a budget or selling property. In 2019, the Governor sent a letter to the Railroad asking to be provided with the information required by N.C.G.S. § 124-17, additional information relating to the actions that had been taken at board meetings, and the contents of trackage rights agreements and requesting that, "as the shareholders' representative," "the Board refrain from engaging in any real estate transactions until further notice." Although the board complied with the Governor's request for information, it "continued to do business in [its] real estate transactions" while "ke[eping the Governor's office] abreast of the negotiations" relating to a specific real estate transaction in which the Governor had expressed interest. All of the members of the Railroad's board testified that they cast independent votes during board meetings and act independently of the will of the Governor or the General Assembly.[1]

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1. At least one board member testified that he had "never–in [his] entire time on the Board . . . gotten directions from" or "been directed to do something by anybody, either legislatively or executive branch," while another testified that no elected official, member or

¶ 9 At present, the Railroad owns approximately 317 miles of railroad trackage that runs from Charlotte to Morehead City. The Railroad holds this property in its own corporate name and pays property taxes to the sixteen counties through which its tracks run. The Railroad's revenue is derived from a trackage rights agreement that it has with Norfolk Southern, a private railroading entity that operates using the Railroad's property. In addition, the Railroad generates revenue through utility encroachment fees, the proceeds from leasing real property, and investment earnings. The Railroad's stated mission is to "develop the railroad's unique assets for the good of the people of North Carolina" "by enabling freight to grow business, expanding rail to move people and investing in North Carolina."

¶ 10 The General Assembly directed the Railroad to pay a one-time dividend of $15,500,000 to the State, in its capacity as the Railroad's sole shareholder, in 2013. An Act to Make Base Budget Appropriations for Current Operations of State Departments, Institutions, and Agencies, and for Other Purposes [hereinafter 2013 Budget Appropriation], S.L. 2013-360, § 34.14(f), 2013 N.C. Sess. Laws 995, 1340. In addition, the 2013 legislation required the Railroad to submit annual reports to the General Assembly that included information concerning its strategic and capital investment plans; its anticipated dividends for the next three fiscal years; and a description of its business and subsidiaries, the markets in which it operates, and the properties that it owns. *Id.* § 34.14(d) at 1339–40.

¶ 11 Although the Railroad pays property taxes to the counties in which it owns property, it does not pay property taxes to the State. The Railroad does, however, pay franchise taxes to the State. In spite of the fact that it files a federal income tax return, it does not pay federal taxes because its revenues qualify as "income derived from . . . the exercise of any essential governmental function and accruing to a State." 26 U.S.C. § 115. The State University Railroad Company, which is a for-profit subsidiary of the Railroad, pays both federal and state income taxes.

¶ 12 The Railroad works closely with the Department of Transportation and communicates frequently with Department employees concerning transportation-related matters. In the past, the Department of Transportation has made investments using federal and state funds to

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agent of the General Assembly, or representative of the Department of Transportation or the Department of Commerce had ever directed him to vote a certain way during a board meeting.

improve the Railroad's corridor. According to the Railroad, these monies constitute a "capital contribution to the company by the shareholder."

B. Procedural History

¶ 13 In 2018, plaintiff Southern Environmental Law Center was one of several organizations advocating for the construction of the Durham-Orange light rail transit project, a 17.7-mile system that would have provided an additional mass transit connection between Durham and Chapel Hill. The proposed light rail project would have utilized facilities adjacent to certain existing railroad trackage and other real property that the Railroad owned in downtown Durham. In 2019, the Railroad and certain other entities declined to sign a cooperative agreement that would have allowed the light rail project to move forward. After the collapse of the proposed cooperative agreement, the project's board voted to cease further efforts toward the completion of the light rail project. On 23 May 2019, SELC, acting in reliance upon the Public Records Act, submitted a request to defendant Scott M. Saylor, president of the Railroad, seeking to inspect all of the records in the Railroad's possession relating to the light rail project that had been generated on or after 1 January 2018. The Railroad declined to provide the requested records on the grounds that it was not subject to the Public Records Act.

¶ 14 On 1 July 2019, the SELC filed a complaint in the Superior Court, Wake County, against, Mr. Saylor; the Railroad; and Michael Walters, Jacob F. Alexander, III, William V. Bell, Martin Brackett, Liz Crabill, William H. Kincheloe, James E. Nance, John M. Pike, George Rountree, III, Franklin Rouse, Nina Szlosberg-Landis, and Michael L. Weisel, in their official capacities as members of the Railroad's board of directors, in which it requested the entry of an order declaring that the Railroad was an agency of the State of North Carolina for purposes of the Public Records Act, declaring that the records that SELC had requested from the Railroad constituted public records, and ordering the Railroad to make those records available for inspection by SELC. On 2 August 2019, defendants filed a motion seeking the entry of judgment on the pleadings in their favor, which the trial court denied on 11 September 2019.

¶ 15 After the discovery process had been completed, the parties filed cross-motions seeking the entry of summary judgment in their favor, with both parties having acknowledged that an examination of the record did not reveal the issue of any genuine issue of material fact and that the sole issue before the trial court was "whether, as a matter of law, the [Railroad] is an agency of the State for purposes of the Public

Records Act." On 20 August 2020, the trial court entered an order granting summary judgment in favor of defendants.

¶ 16 In reaching this result, the trial court began by describing the establishment and subsequent operations of the Railroad before discussing the decisions of the Court of Appeals in *News & Observer Publ'g Co. v. Wake Cty. Hosp. Sys., Inc.*, 55 N.C. App. 1, 7 (1981), and *Chatfield v. Wilmington Hous. Fin. and Dev. Inc.*, 166 N.C. App. 703 (2004), both of which addressed the issue of whether certain entities were subject to the Public Records Act. According to the trial court, "the facts of neither case [we]re substantially similar to the unique situation before the court [in this case]—a private corporation whose sole shareholder is the State of North Carolina; therefore, a comparison of these two cases to the facts of this case [was] insufficient" to permit a determination of whether the Railroad was a government agency or subdivision.

¶ 17 After concluding that the ultimate issue that it faced in this case hinged "on whether the [Railroad was] subject to provisions of the Public Records Act, a statute duly enacted by the General Assembly of North Carolina," the trial court reasoned that it "ha[d] a responsibility to consider whether the General Assembly intended for the [Railroad] to be considered a government agency for purposes of the Act." In conducting the required inquiry, the trial court identified "several instances in which the General Assembly ha[d] seemingly expressed its intent that the [Railroad] should not be considered an agency of the State," such as the fact that N.C.G.S. § 124-12 authorized the Railroad to exercise the power of eminent domain under the statutory provisions related to private condemnors rather than public condemnors. In addition, the trial court pointed out that "the fact that the [Railroad] has to qualify for an exemption in order for its taxable gross income to be excluded from the Internal Revenue Code is further indication that the [Railroad] is not an agency of the State" on the theory that state government agencies "are not subject to federal taxation to begin with." In the same vein, the trial court determined that the fact that the Secretary of Commerce was statutorily required to serve as a member of the Railroad's board provided further evidence that the Railroad was not a government agency in light of the constitutional and statutory provisions that are intended to limit double office-holding.

¶ 18 The trial court further noted that legislation enacted in 2013, which required the Railroad to make an annual report to the General Assembly, provided additional grounds for believing that the General Assembly did not intend for the Railroad to be subject to the Public Records Act. 2013 Budget Appropriation, S.L. 2013-360, § 34.14, 2013 N.C. Sess. Laws

at 1138–42. The 2013 legislation rested upon a study completed by the General Assembly's Program Evaluation Division,[2] an independent entity that conducts research for the General Assembly, which found that the Railroad was "not subject to the State's public records law." After highlighting the Railroad's corporate status, the trial court expressed concern that "equating majority, or sole, ownership with degree of supervisory control would, in effect, collapse the [Railroad]'s corporate personhood" on the theory that a corporation, even one with a single owner, is an entity that is distinct from its shareholders. For that reason, the trial court concluded that the SELC was essentially asking it to ignore the Railroad's corporate structure, an action that the trial court did not believe itself authorized to take. In light of its determinations that the Railroad "operates as an independent corporate entity" and that the General Assembly had failed on multiple occasions to declare the Railroad a public agency, the trial court concluded that, since the Railroad was not an agency of the State, it was not subject to the Public Records Act. The SELC noted an appeal from the trial court's order to this Court.

C. Parties' Arguments

¶ 19 In seeking relief from the trial court's order before this Court, the SELC begins by arguing that the Railroad should be deemed to be subject to the Public Records Act on the grounds that it performs important public and government functions, that the State owns one hundred percent of the Railroad's stock, and that the Railroad "was formed to enhance the economic well-being of the State and its citizens as a whole." In discussing the nine factors enumerated by the Court of Appeals in *News & Observer*, 55 N.C. App. at 11, the SELC asserts that, when each of these factors is properly evaluated in light of the record that was developed before the trial court in this case, the resulting analysis "establish[es] the State's substantial degree of supervision and control"

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2. N.C.G.S. § 120-36.11 provides that the Program Evaluation Division

> is established as a staff agency of the General Assembly. The purpose of the [Program Evaluation Division] is to assist the General Assembly in fulfilling its responsibility to oversee government functions by providing an independent, objective source of information to be used in evaluating whether programs or activities of a State agency, or programs or activities of a non-State entity conducted or provided using State funds, are operated and delivered in the most effective and efficient manner and in accordance with law.

over the Railroad. More specifically, the SELC argues that: (1) the State selects all of the Railroad's directors; (2) the State must approve all substantive amendments to the Railroad's articles of incorporation; (3) the State provided the primary source of funding for the initial construction of the Railroad, loaned sixty-one million dollars to the Railroad at the time that the remaining shares of that entity came into State ownership in 1998, and has continued to invest in the Railroad; (4) the Railroad is required to transfer its assets to the State upon dissolution; (5) revenue collected by the Railroad is to be used "for the public good"; (6) the Railroad's records are subject to government audit pursuant to N.C.G.S. § 124-17; (7) the Railroad must make a report concerning its receipts, expenditures, debts, leases, sales, property acquisitions, sales of stock, and more to the State pursuant to N.C.G.S. § 124-17; (8) the State reviews the Railroad's investment plan and has influence upon the Railroad's annual budget by virtue of the fact that two appointees to positions in the Governor's administration are required to serve on the Railroad's board; and (9) the State has other means to control the Railroad's activities, including the fact that the Governor has the ability to appoint members of the board and the fact that the Railroad's "stated purpose is to serve North Carolina rather than generate profit."

¶ 20 In light of the substantial degree of control that the State exercises over the Railroad, the SELC argues that the trial court's decision that the Railroad was not subject to the Public Records Act conflicts with *News & Observer* and *Chatfield*. In the SELC's view, the fact that the Railroad has a separate corporate existence does not make the Railroad a distinct entity from the State, which is "different from a traditional private shareholder," rendering the Railroad "a unique entity, with unique powers and responsibilities owed to its citizens as a sovereign." According to the SELC, the issue of "why the State exerts control [over the Railroad] is less important than the substance of the control," with the extensive degree of control that the State exercises over the Railroad being sufficient to make the Railroad the functional equivalent of an agency of the State.

¶ 21 The SELC disputes the validity of the trial court's analysis of the relevant legislative intent by arguing that the trial court erroneously examined legislative materials other than the Public Records Act in the course of determining that the Railroad was not subject to the Public Records Act. According to the SELC, the trial court's determination that the Railroad is not an agency of the State "as a general matter" and "for all purposes" is irrelevant to the issue that is before us in this case on the theory that the trial court should have focused upon the issue of whether the Railroad was an agency of the State for purposes of the Public

Records Act rather than whether it was an agency of the State for all purposes. The SELC argues that the Program Evaluation Division's conclusion that the Railroad was "not subject to the State's public records law" was nothing more than an "unconsidered statement by staff in a report prepared decades after the Public Records Act" that "warrants no deference and does not come close to constituting legislative intent," with "[f]ootnotes in legislative research reports [not being] how law is made in North Carolina." Finally, the SELC contends that the people's power to inspect government records under the Public Records Act is derived from the constitutional principle that all governmental power originates "from the people," N.C. Const. art. I § 2, and that the people of North Carolina "shall not be taxed or made subject to the payment of any impost or duty without the consent of themselves or their representatives in the General Assembly, freely given." N.C. Const. art. I § 8. As a result, the SELC argues that the citizens of North Carolina "must have access to records of the railroad company they own."

¶ 22 In seeking to persuade us to uphold the trial court's order, defendants argue that the State does not exercise sufficient control over the Railroad to warrant a finding that the Railroad is a public agency under the factors discussed in *News & Observer* and *Chatfield*. Defendants note that *Chatfield* held that "an entity's stated purpose of performing a function that is of use to the general public, without more, is insufficient to make the Public Records Law applicable," 166 N.C. App. at 709, and that many private organizations, such as non-profit corporations, have been formed for the purpose of benefiting the general public. In defendants' view, the Railroad is not a government agency for purposes of *Chatfield* given that it acts independently of the State and has, on occasion, declined to comply with requests that the board had received from the Governor.

¶ 23 After discussing the nine factors delineated in *News & Observer* for the purpose of determining the degree of control that the government exercises over the Railroad, defendants conclude that a proper analysis of the relevant factors weighs in favor of a determination that the Railroad is a private entity. For example, defendants argue that the only reason that the Railroad's assets would be transferred to the State upon dissolution is that the State is the Railroad's sole shareholder and that any one hundred percent shareholder would be able to name all of the members of the corporation's board. In addition, defendants note that the Railroad owns its real property independently of the State and that the State is required to pay the Railroad for the right to lease property from it. Similarly, defendants assert that the Railroad is a

for-profit corporation that earns its own revenue and distributes dividends to the State at the sole discretion of the board.

¶ 24 According to defendants, the ultimate issue that must be decided in this case is one of statutory interpretation, which means that the General Assembly's intent with respect to whether the Railroad is subject to the Public Records Act should be deemed to be controlling. Defendants contend that the trial court correctly evaluated the impact of the 2013 legislation, which "imposed reporting requirements [on the Railroad] similar to those required of companies whose stock is publicly traded" and evinced the General Assembly's belief that the Railroad was not a government agency. In defendants' view, the Program Evaluation Division's report regarding the Railroad did not constitute an "unconsidered statement" or a "footnote"; instead, defendants contend that this determination was critical to an understanding of the manner in which the 2013 legislation was structured. Defendants express concern that a decision to disregard the Railroad's corporate existence in this case would have broader implications for other for-profit and non-profit corporations in which the State holds interests. In view of the fact that the State "invests as a shareholder in hundreds, if not thousands, of entities, both publicly traded and privately held," defendants caution that a holding that the State's ownership of corporate stock has the effect of making the entity in question a public agency would render many private and nonprofit institutions entities subject to the Public Records Act.

II. Legal Analysis

A. Standard of Review

¶ 25 This Court reviews appeals from trial court summary judgment orders using a de novo standard of review. *JVC Enterprises, LLC v. City of Concord*, 376 N.C. 782, 2021-NCSC-14, ¶ 8 (citing *In re Will of Jones*, 362 N.C. 569, 573 (2008)). Summary judgment is appropriate when "there is no genuine issue as to any material fact" and a "party is entitled to a judgment as a matter of law." N.C.G.S. § 1A-1, Rule 56(c) (2019). As both parties have acknowledged in their briefs, the record in this case does not reveal the existence of a disputed issue of material fact. For that reason, the ultimate issue that has been presented for our consideration in this case is the purely legal question of whether, given the undisputed facts set out in the record, the Railroad is an "agency of North Carolina government or [a] subdivision" of such an agency as defined by the Public Records Act. *See Chatfield*, 166 N.C. App. at 706–07 (holding that summary judgment was appropriate when the facts were not disputed "and the only issues are whether as a matter of law [the entity] is subject to the Public Records Law of North Carolina").

¶ 26 The North Carolina Public Records Act provides that:

> (a) "Public record" or "public records" shall mean all documents, papers, letters, maps, books, photographs, films, sound recordings, magnetic or other tapes, electronic data-processing records, artifacts, or other documentary material, regardless of physical form or characteristics, made or received pursuant to law or ordinance in connection with the transaction of public business by any agency of North Carolina government or its subdivisions. Agency of North Carolina government or its subdivisions shall mean and include every public office, public officer or official (State or local, elected or appointed), institution, board, commission, bureau, council, department, authority, or other unit of government of the State or of any county, unit, special district or other political subdivision of government.
>
> (b) The public records and public information compiled by the agencies of North Carolina government or its subdivisions are the property of the people. Therefore, it is the policy of this State that the people may obtain copies of their public records and public information free or at minimal cost unless otherwise specifically provided by law. . . .

N.C.G.S. § 132-1 (2019). "When interpreting statutes, our principal goal is to effectuate the purpose of the legislature." *State v. Jones*, 358 N.C. 473, 477 (2004) (quoting *Liberty Mut. Ins. Co. v. Pennington*, 356 N.C. 571, 574 (2002)) (cleaned up). "Legislative intent controls the meaning of a statute." *In re B.O.A.*, 372 N.C. 372, 380 (2019) (quoting *Brown v. Flowe*, 349 N.C. 520, 522 (1998)). "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." *Lenox, Inc. v. Tolson*, 353 N.C. 659, 664 (2001) (quoting *Polaroid Corp. v. Offerman*, 349 N.C. 290, 297 (1998)) (cleaned up).

¶ 27 Although the issue of whether a particular entity is "an agency" or "subdivision" of state government for purposes of the Public Records Act is a question of first impression for this Court, the Court of Appeals has previously addressed this issue on two prior occasions. In *News & Observer*, 55 N.C. App. at 7, the Court of Appeals considered the extent to which the Wake County Public Health System was an "agency

of North Carolina government" for purposes of the Public Records Act. According to the Court of Appeals, "[t]he critical determination" that had to be made in deciding whether the Public Health System was a government agency was whether its " 'independent authority' so overshadows the county's supervisory responsibilities that it forecloses a conclusion that the System is an 'agency of North Carolina government or its subdivisions.' " *Id.* at 9. In holding that the Public Health System was subject to the Public Records Act, the Court of Appeals "look[ed] at the nature of the relationship between the System and the county" government and found that the county's "supervisory responsibilities and control over the System [were] manifest." *Id.* at 11. In the course of its analysis, the Court of Appeals identified the following facts as indicative of the substantial degree of control that the county government exercised over the Public Health System:

> (1) that upon its dissolution, the System would transfer its assets to the county; and (2) that all vacancies on the board of directors would be subject to the Commissioners' approval[;] (3) that the System occup[ies] premises owned by the county under a lease for $ 1.00 a year; (4) that the Commissioners review and approve the System's annual budget; (5) that the county conduct[s] a supervisory audit of the System's books; and (6) that the System report[s] its charges and rates to the county[;] (7) that the System be financed by county bond orders; (8) that revenue collected pursuant to the bond orders be revenue of the county; and (9) that the System would not change its corporate existence nor amend its articles of incorporation without the county's written consent.

Id. In the Court of Appeals' view, the county continued to exercise substantial control over the Public Health System, the Public Health System performed important public functions, and, before the Public Health System had assumed corporate status, it had conceded that it was an agency of the state and had "undergone little more than a change of name through incorporation." *Id.* at 12. As a result, the Court of Appeals found that the Public Health System was a governmental agency subject to the Public Records Act.

¶ 28 In *Chatfield*, 166 N.C. App. at 704, the Court of Appeals was called upon to decide whether an entity which had been formed by the Wilmington Housing Authority and the City of Wilmington as a nonprofit corporation and the charter of which had been modified to make it more

independent of the Housing Authority and the City, was subject to the Public Records Act. At the beginning of its analysis, the Court of Appeals noted that "each new arrangement must be examined anew and in its own context" and that the "nature of the relationship between a corporate entity and the government is the dispositive factor in determining whether the corporate entity is governed by the Public Records Law." *Id.* at 707–08 (quoting *News & Observer*, 55 N.C. App. at 11). After holding that, "[p]ursuant to this Court's decision in *News & Observer*, the government must exercise 'supervisory responsibilities and control' over a corporate entity for such an entity to qualify as a government agency and fall within the ambit of the Public Records Law," the Court of Appeals found that none of the nine factors indicating substantial government control upon which it had relied in *News & Observer* were present in *Chatfield*, with "an entity's stated purpose of performing a function that is of use to the general public, without more, [being] insufficient to make the Public Records Law applicable." *Id.* at 709.

¶ 29 Although we believe that both *News & Observer* and *Chatfield* were correctly decided and that the analytical approach that was utilized in those decisions is certainly relevant to the proper resolution of this case, we are not prepared to conclude that the nine factors delineated in *News & Observer* should be treated as outcome-determinative. Instead, we recognize that the Court of Appeals utilized a totality of the circumstances approach in both *News & Observer* and *Chatfield*, pursuant to which it weighed all of the relevant facts and circumstances in order to determine whether the record, when viewed in its entirety, showed that the government exercised such substantial control over the operations of the relevant entity as to render it a governmental agency or subdivision, with "each new arrangement [to] be examined anew and in its own context." *Id.* at 707–08. At the end of the day, however, we must recognize that we are necessarily attempting to determine whether the relevant facts do or do not satisfy a statutory standard, a fact that, ultimately, makes the inquiry in which we are required to engage in this case, in large part, one of statutory construction. After conducting the required totality of the circumstances evaluation, we hold that the Railroad is not an agency or subdivision of government that is subject to the requirements of the Public Records Act.

B. Legislation involving the North Carolina Railroad Company

¶ 30 In examining past laws, decisions, and governmental opinions relating to the Railroad, we conclude that, in addition to the fact that the General Assembly has had multiple opportunities to define the Railroad as a governmental agency without having done so, various components

of state government have acted on numerous occasions in such a manner as to suggest their belief that the Railroad is a private corporate entity rather than a governmental agency or subdivision. While these determinations do not, of course, control the outcome in this case, they are, when taken in conjunction with our evaluation of the relevant facts and circumstances outlined in *News & Observer* and *Chatfield*, sufficient to persuade us that the Railroad is not a governmental agency or subdivision for purposes of the Public Records Act.

¶ 31 As we have already noted, the General Assembly enacted new reporting requirements applicable to the Railroad in the 2013 Budget Appropriation, S.L. 2013-360, § 34.14(d), 2013 N.C. Sess. Laws at 1139–40 (codified at N.C.G.S. § 124-17), pursuant to which the Railroad was required to "submit an annual report" to the General Assembly that included the Railroad's strategic and capital investment plans, the dividends that the Railroad anticipated paying during the next three fiscal years, a list of the properties owned by the Railroad, and a list of the Railroad's officers and directors, among other things. N.C.G.S. § 124-17(a). The enactment of the 2013 legislation followed a comprehensive study of the Railroad conducted by the Program Evaluation Division. In the legislation commissioning the Program Evaluation Division's study of the Railroad, An Act to Make Technical, Clarifying, and Other Modifications to the Current Operations and Capital Improvements Appropriations Act [hereinafter 2011 Technical Corrections Act], S.L. 2011-391, § 52, 2011 N.C. Sess. Law 1557, 1584–85, the General Assembly noted that, for the purposes of the study, "the terms 'State agency' or 'agency' as used under Article 7C of Chapter 120 of the General Statutes shall include the North Carolina Railroad Company." The inclusion of this language tends to suggest a recognition on the part of the General Assembly that the Railroad was not a state agency, given that the Program Evaluation Division is tasked with "evaluating whether programs or activities of a State agency, or programs or activities of a non-State entity conducted or provided using State funds" are being operated efficiently and in accordance with law. N.C.G.S. § 120-36.11 (2019). Since the Railroad is not a "State agency" and is not operated "using State funds," it was necessary for the General Assembly to define the Railroad as a state agency in the 2011 Technical Correction Act, S.L. 2011-391, § 52, 2011 N.C. Sess. Law at 1585, to give it the authority to conduct the required evaluation. This language would have been unnecessary in the event that the Railroad was already considered a state agency.

¶ 32 On the first page of the study that it performed pursuant to the requirements of the 2011 legislation, the Program Evaluation Division

noted that the "State ha[d] limited mechanisms for oversight" of the Railroad given the Railroad's status as "a private corporation" and that the Railroad was subject to "less stringent reporting requirements than publicly-traded corporations." For that reason, the Program Evaluation Division suggested that the General Assembly "amend Chapter 124 of the General Statutes to strengthen reporting" requirements applicable to the Railroad. In support of its recommendations, the Program Evaluation Division stated that the

> State of North Carolina is the sole shareholder of the [Railroad], but it remains a private corporation. . . . As a private corporation, [the Railroad] files with the U.S. Internal Revenue Service as a C corporation and is subject to Chapter 55 of the General Statutes. Because [the Railroad] is not part of state government, several state laws do not apply to the corporation.
>
> - [Railroad] employees are not state employees under the State Personnel Act.
> - [The Railroad's] Board of Directors is not a covered board under the State Government Ethics Act.
> - [The Railroad] is not subject to the State's public records law.
> - [The Railroad] is not reviewed as a part of the state budget process because it does not receive state appropriations.

Although the Program Evaluation Division acknowledged that the General Assembly had the authority to transform the Railroad into an entity of state government by repealing the Railroad's corporate charter and dissolving the corporation, it cautioned that acting in such a manner "would be a lengthy and complicated process" that had "several legal and financial implications," including the risk that the State would become responsible for the Railroad's financial obligations and the fact that the State would lose the income that was currently being derived from the Railroad's franchise tax payments. As a result, the Program Evaluation Division did not advise the General Assembly to convert the Railroad into a state agency and, instead, recommended that the General Assembly enact legislation strengthening the reporting requirements to which the Railroad was subject and requiring the Railroad to pay a dividend to the State.

¶ 33 According to the SELC, the trial court placed "undue reliance on a footnote in a report written by the [Program Evaluation Division]—unelected staff tasked with completing research, not drafting law," in reaching the conclusion that the Railroad was not subject to the Public Records Act. Although the SELC is certainly correct in pointing out the non-binding nature of the Program Evaluation Division's comment, the record also reflects that the General Assembly enacted legislation during the 2013 session that imposed additional reporting requirements upon the Railroad and required the Railroad to make a specific dividend payment. Although the General Assembly did not, to be sure, include any sort of explicit endorsement of the Program Evaluation Division's position with respect to the issue of whether the Railroad was subject to the Public Records Act in the 2013 legislation, the General Assembly's decision to adopt the Division's ultimate recommendations does tend to suggest that it agreed with the logic that undergirded those recommendations.

¶ 34 In addition, the General Assembly stated in the 2013 legislation that:

> (b) Upon the request of the Governor or any committee of the General Assembly, [the Railroad] shall provide all additional information and data within its possession or ascertainable from its records. . . . At the time [the Railroad] provides information under this section, it shall indicate whether the information is confidential. Confidential information shall be subject to subsection (c) of this section.
>
> (c) Confidential information includes (i) information related to a proposed specific business transaction where inspection, examination, or copying of the records would frustrate the purpose for which the records were created, or (ii) information that is subject to confidentiality obligations of [the Railroad]. Confidential information is exempt from Chapter 132 of the General Statutes and shall not be subject to a request under G.S. 132-6(a).

N.C.G.S. at § 124-17(b), (c). A careful reading of N.C.G.S. § 124-17 suggests that, consistently with the approach adopted by the Program Evaluation Division, the General Assembly did not consider the Railroad to be a governmental agency or subdivision that was subject to the Public Records Act. Simply put, there would have been no need for the enactment of subsection (b), which requires the Railroad to provide

the information that had to be submitted to the Governor or the General Assembly without in any way limiting such requests to confidential information, in the event that the Railroad was already subject to the provisions of the Public Records Act. A similar deduction can be made from the fact that, in subsection (c), the General Assembly adopted a confidentiality provision applicable to information that it received from the Railroad that would have been unnecessary in the event that the Public Records Act directly applied to the Railroad. As a result, we find it difficult to reach any conclusion other than that the General Assembly agreed with the Program Evaluation Division that the Railroad was not, under existing North Carolina law, an agency or subdivision of State government that is obligated to comply with the Public Records Act.

¶ 35 Although the history surrounding the language contained in the 2013 legislation provides the strongest indication of the General Assembly's belief that the Railroad is not a governmental agency or subdivision subject to the Public Records Act, the language of other statutory provisions points in a similar direction. For example, in 1997, the General Assembly enacted legislation permitting the members of the Railroad's board to request coverage under the State's officers, directors, and employees' liability policy while specifying that "[c]overage of the officers, directors, and employees of the [Railroad] under this subsection shall not be construed as defining the [Railroad] as a public body or defining its officers, directors, or employees as public officials." 1997 Budget Appropriation, ch. 443, § 32.30, 1997 N.C. Sess. Laws at 1844. In 2000, the General Assembly passed An Act to Implement the Recommendations of the Future of the North Carolina Railroad Study Commission, S.L. 2000-146, 1999 N.C. Sess. Laws 869, 872, which gave the Railroad "the power of eminent domain to acquire property in fee simple for the purposes specified in G.S. 40A-3(a)(4)," which affords eminent domain authority to private, rather than public, condemnors. N.C.G.S. § 124-12. As a result, other relevant statutory provisions enacted by the General Assembly consistently suggest that the Railroad is not a governmental agency or subdivision subject to the Public Records Act.

¶ 36 The Attorney General has suggested that the Railroad is not subject to the Public Records Act as well. In a 2000 opinion, the Attorney General stated that the "North Carolina Constitution [ ] sanctions the appropriation of public money to a private corporation for the accomplishment of a public purpose," citing N.C. Const. art. V, § 2(7). After noting that "the 1997 General Assembly authorized the investment of Sixty-One Million Dollars ($61,000,000) in order to acquire the outstanding private shares, and thereby total control, of the [Railroad]," the Attorney

General opined that the State also had the authority to acquire control over a healthcare corporation without rendering that corporation an agency of the State, described the Railroad as an example of a private corporation in which the State is nothing more than a shareholder, and stated that "it is clear that the System's acquisition of corporate control over a nonprofit corporation does not alter the legal status of the corporation or vest within it attributes of the State of North Carolina." Letter from Grayson G. Kelley, Senior Deputy Attorney General, to Representative Daniel T. Blue, *Proposed Acquisition of Rex Healthcare by the University of North Carolina Health Care System* (Mar. 8, 2000) (available at https://ncdoj.gov/opinions/proposed-acquisition-of-rex-healthcare-by-the-university-of-north-carolina-health-care-system/).

¶ 37 Similarly, according to materials provided to the trial court in this case, the State Ethics Commission voted in 2010 that the Railroad's directors were not subject to the provisions of the State Government Ethics Act, Chapter 138A of the General Statutes.[3] In seeking a determination that the Railroad was not a state agency subject to the provisions of the State Ethics Act, the Railroad contended, by means of a letter drafted by private counsel,[4] that the "fact that the State is the sole-shareholder . . . does not change the private corporate status" of the Railroad, with there being multiple grounds for concluding that the Railroad was not an agency of state government, including the fact that the Railroad did not have the eminent domain authority available to public condemnors, that the Railroad paid property taxes to the sixteen counties in which it owned property, that the Railroad did not have the benefit of sovereign immunity, and that the Railroad's employees were not state employees. In light of these and similar factors, the Commission concluded that the Railroad was a "unique agency," that it "presented special issues not previously considered by the Commission," and that it should not be deemed to be a state agency subject to the State Ethics Act. As a result, certain relevant statutory provisions and the decisions of the Attorney General and the State Ethics Commission, which clearly constitute persuasive authority that sheds light on the question that is before us in this

3. The State Government Ethics Act is intended to "ensure that elected and appointed State agency officials exercise their authority honestly and fairly, free from impropriety, threats, favoritism, and undue influence," with the Act serving to establish a code of ethical conduct "for elected and appointed state agency officials." N.C.G.S. § 138A-2 (2019).

4. We further note that the Railroad is not represented by the Department of Justice in this case and has, instead, conducted its defense using privately retained counsel, a fact that further tends to show that the Railroad is not a governmental agency or subdivision.

case, suggest, if they do not explicitly state, that the Railroad is not a governmental agency or subdivision subject to the Public Records Act.

C. Presence of "Substantial Government Control"

¶ 38 The legislative enactments and other official determinations outlined above are consistent with our understanding of the information contained in the record concerning the extent to which the State, acting in a governmental capacity, exercises sufficient supervision and control over the Railroad to make it a state agency or subdivision. Admittedly, the Railroad has enjoyed and continues to enjoy a number of benefits from its relationship with the State. For example, the State provided three-quarters of the Railroad's initial capital and loaned the Railroad the funds that it used to complete the purchase of its remaining shares. In addition, the General Assembly allowed the Railroad to forego the payment of interest on the principal balance of this loan during the final three years of the repayment period. Finally, the Railroad benefits from the use of state and federal funds in making safety and service-related improvements to the corridor that the Railroad owns and the fact that it is not required to pay state and federal income taxes. As a result, a number of factors would tend to support a determination that the Railroad is a governmental agency or subdivision.

¶ 39 However, we believe that a number of countervailing factors arising from the Railroad's status as a separate corporate entity outweigh the factors that favor classifying the Railroad as a governmental agency or subdivision. Among other things, the undisputed record evidence reflects that the Railroad has consistently maintained its separate corporate identity and structure and makes decisions independently of any directives that it might receive from governmental officials, including the Governor. For example, the Railroad adopts and funds its own budget without the necessity for prior approval from any governmental entity. In addition, the Railroad, rather than the State, owns title to its own property and exercises eminent domain authority as a private, rather than a public, condemnor. The revenues that the Railroad uses to support its operations are titled to the Railroad rather than the State; are derived from the Railroad's trackage right agreements, utility encroachment agreements, real estate leases, and investment earnings rather than from the appropriation of state funds; and are spent, as a general proposition, in a manner controlled by the board rather than the Governor, the General Assembly, or any other agency of State government. Although the Railroad does, and has even been ordered, on one occasion, to pay dividends to the State, those dividend payments are, for the most part, made at the behest of and in an amount determined

by the board. The revenues earned by the Railroad are reinvested into the company, whether through dividends that are received by the State and reinvested in the company's infrastructure, or as directed by the board. Similarly, the Railroad pays local property taxes to the counties in which it owns property and a franchise tax to the State and claims an exemption from federal income taxation on the basis of a statutory provision that would be irrelevant in the event that the Railroad was a governmental agency. Although the Railroad does, on occasion, engage in planning-related activities with governmental agencies, the same can be said of other private entities as well. As a result, the manner in which the Railroad operates much more closely resembles the activities of a private corporation rather than those of a governmental agency or subdivision.

¶ 40 In seeking to persuade us to reach a different result, the SELC emphasizes the fact that the State is the Railroad's sole shareholder, that the members of the board are chosen by the Governor and the General Assembly, that certain members of the board must be members of the Governor's administration, that the Railroad's property must be transferred to the State upon dissolution, that the State must approve fundamental changes to the Railroad's corporate documents, that the Railroad is entitled to favorable tax treatment in some instances, and that the General Assembly has exercised authority over the Railroad for the purpose of requiring the provision of certain information and the making of certain dividend payments.[5] Although the State, in its capacity as the Railroad's sole shareholder, does have a certain degree of indirect control of the entity's day-to-day operations and has the right to approve or disapprove certain fundamental corporate decisions, those facts, standing alone, do not serve to make the Railroad a state agency or subdivision and exist in all situations in which the corporation is owned by a single stockholder. The same is true of the fact that the Railroad was organized and continues to operate for the benefit of the public rather than for purely profit-seeking purposes, with a similar statement being applicable to many nonprofit corporations in which the State has no interest. Simply put, most of the information upon which the SELC relies in seeking to persuade us that the Railroad should be deemed subject

5. In view of the fact that many of the indicia of control upon which the SELC relies stem from the fact that the State is the Railroad's sole shareholder, any effort to cumulate both the fact that the State is the Railroad's sole shareholder and the fact that the State's status as the Railroad's sole shareholder gives it the right to make certain decisions relating to the Railroad, such as the election of the members of the Railroad's board, seems to us to result in the placing of impermissible weight upon those more specific factors in the required totality of the circumstances analysis.

to the Public Records Act is the direct result of the State's status as the Railroad's sole shareholder rather than the exercise of the State's sovereign authority.

¶ 41 Although the SELC argues that the nature of the State's authority over the Railroad, rather than the source of that authority, should be deemed controlling, we do not find this argument persuasive. The SELC's argument to the contrary notwithstanding, the basis of the State's influence over the Railroad is critical to the proper resolution of the issue of whether the Railroad is a governmental agency or subdivision for purposes of the Public Records Act. The fundamental difference between a governmental entity and a private one is the extent, if any, to which the entity in question exercises the sovereign authority of the State. As a result, it stands to reason that the extent to which the State exercises sovereign authority, rather than authority derived from some other source, should be an important feature of any determination concerning the applicability of the Public Records Act.

¶ 42 The SELC's suggestion that we should overlook the nature and source of the State's authority over the Railroad is inconsistent with this Court's jurisprudence for a second reason as well. Although the Railroad's separate corporate existence does not, of course, control the outcome of this case, we have consistently, throughout our history, been disinclined to disregard the distinction between a corporation and its shareholders. For that reason, we have recently stated, in a different context, that, "[o]nce a corporate form of ownership is properly established, the corporation is an entity distinct from the shareholder, even a shareholder owning one-hundred percent of the stock." *Glob. Textile All., Inc. v. TDI Worldwide, LLC*, 375 N.C. 72, 74 (2020). Nothing in the present record tends to suggest that the Railroad has failed to take the steps necessary to maintain its separate corporate identity or to operate in a fashion that exhibits a degree of independence from direct governmental control, a fact that further persuades us to refrain from holding that the mere fact that the State has certain authority over the Railroad by virtue of its status as the Railroad's sole shareholder and the fact that the Railroad was organized and operates for the benefit of the public suffices to make the Railroad a governmental agency or subdivision subject to the provisions of the Public Records Act.[6]

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6. The SELC's suggestion that the trial court erred by examining whether the Railroad was a governmental agency or subdivision in general, rather than whether it was a governmental agency or subdivision for purposes of the Public Records Act, does not strike us as persuasive given that nothing in the relevant statutory language suggests that there is any difference between a governmental agency or subdivision, in general, and a

¶ 43 Thus, given that both the General Assembly and other governmental entities have consistently treated the Railroad as a private corporation rather than a public agency or subdivision and given that the State, acting in its capacity as sovereign, does not have a sufficient degree of control over the day-to-day operations of the Railroad, we hold that the trial court did not err by granting summary judgment in defendants' favor in this case. As a result, the trial court's order is affirmed.

AFFIRMED.

Justice EARLS dissenting.

¶ 44 This case presents a single question: can a corporate entity, wholly owned by the State of North Carolina, directed by a board whose members are appointed by State elected officials, wielding the power of eminent domain, and comprised of assets that will escheat to the State in the event of dissolution, evade public scrutiny under the Public Records Act (the Act)? The majority says yes. Because this holding runs contrary to the purpose of the Act and privileges the form of the corporation over the public nature of its governance and activities, I respectfully dissent.

I. Background

¶ 45 The North Carolina Railroad Company (NCRR) was created by statute in 1849. An Act to incorporate the North Carolina Rail Road Company, ch. LXXXII, § 1, 1848–1849 N.C. Laws, 138. The State paid $2 million to be NCRR's majority shareholder at that time, *Id.* § 36, came to own more of NCRR's stock through transactions in the ensuing decades, and by 2006 owned *all* NCRR stock. Today, through its officials, the State chooses NCRR's directors (N.C.G.S. § 124-15 (2019)), approves all substantive changes to NCRR's articles of incorporation, facilitates financing for NCRR, receives reports of NCRR rates and rate changes (N.C.G.S. § 124-17), assumes control of revenue it collects, and stands to receive the assets of NCRR in the event of dissolution.

¶ 46 In 2019, the Southern Environmental Law Center (SELC) wrote to NCRR to request records related to NCRR's involvement in a light rail project. SELC believed NCRR would be compelled to provide the

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governmental agency or subdivision for purposes of the Public Records Act. Instead, the relevant statutory language simply speaks of an "agency" or "subdivision" of State government. In the same vein, any argument that the Public Records Act requires an expansive interpretation of what is and is not a "public agency" or "subdivision" assumes the answer to the point at issue given that the relevant statutory language invariably refers to covered agencies or officers as "public" without further elaboration.

records under the Public Records Act. NCRR denied the request and sent no records, claiming it was not subject to the Act. SELC filed suit to compel production of the records. After a hearing, the North Carolina Business Court granted NCRR's motion for summary judgment, concluding "that if it were the Legislature's intent that [NCRR] be subject to the Public Records Act, [the Legislature] could have made that expressly clear . . . ." Today's majority affirms the Business Court's decision, holding that although the State has exercised a "considerable degree" of authority over NCRR in the past 170 years, it has done so as NCRR's "sole shareholder rather than in its capacity as a sovereign." But the majority's decision ignores the legislative intent of the Public Records Act, the scope of the statutes governing NCRR's activities, and the realities of NCRR's relationship with the government of North Carolina.

¶ 47 Today's decision runs contrary to precedent and threatens the vitality of the Public Records Act. It allows a corporate entity—fully owned by the State and operationally intertwined with numerous government officials and agencies—to shield from public scrutiny its records made in connection with the transaction of public business. It also risks allowing the State to sidestep the requirements of the Public Records Act by conducting its business through a nominally private entity. It is the substance of an entity's actions or operations, not its particular form, which dictates whether the public has right to access its records. Accordingly, I would hold that NCRR is a government agency subject to the Public Records Act. I respectfully dissent.

II. Analysis

¶ 48 Enacted in 1975, the North Carolina Public Records Act provides that "[t]he public records and public information compiled by the agencies of North Carolina government or its subdivisions are the property of the people." N.C.G.S. § 132-1(b) (2019). A "public record" is defined to include documents "made or received pursuant to law or ordinance in connection with the transaction of public business by any agency of North Carolina government or its subdivisions." N.C.G.S. § 132-1(a). The Act further defines "agency of North Carolina government or its subdivisions" broadly to include "every public office, public officer or official (State or local, elected or appointed), institution, board, commission, bureau, council, department, authority or other unit of government of the State or of any county, unit, special district or other political subdivision of government." *Id.* The question we must answer—and where I differ from the majority—is whether the phrase "agency of North Carolina government or its subdivisions" includes NCRR for the purposes of the Public Records Act.

A. NCRR's operations are sufficiently intertwined with those of North Carolina's government to subject it to the Public Records Act

¶ 49 Forty years ago, the Court of Appeals concluded that the Wake County Hospital System, organized as a nonprofit corporation, was a government agency within the meaning of the Public Records Act because it "exercise[d] its 'independent authority' so intertwined with the [government] that it must be, and is, an 'agency of North Carolina government or its subdivisions.' " *News & Observer Publ'g Co. v. Wake Cty. Hosp. Sys., Inc.*, 55 N.C. App. 1, 12 (1981), *disc. rev. denied*, 305 N.C. 302 (1982). Since the Court of Appeals decided *Wake County Hospital System*, it has been the undisturbed law of our state that a formally corporate entity may be considered a government agency for the purposes of the Act depending upon "the nature of the relationship between the [entity] and the [government]." *Id.* at 11. Given the legislature's intent in passing the Public Records Act, this rule makes good sense—the purpose of the Act is to ensure that the people of North Carolina have the information they need to hold the government accountable to the citizens it serves.

¶ 50 A corporation's public-serving actions do not, on their own, subject the corporation to the Act. *See Chatfield v. Wilmington Hous. Fin. and Dev. Inc.*, 166 N.C. App. 703, 709 (2004) ("[A]n entity's stated purpose of performing a function that is of use to the general public, without more, is insufficient to make the [Act] applicable."). Rather, it is the "substance and not the form of the [corporation] that is the key" to our evaluation. *Wake Cty. Hosp. Sys., Inc.*, 55 N.C. App. at 10. The substance of the corporation is often revealed by the extent to which the government exercises "supervisory responsibilities and control" over the entity. *See Chatfield*, 166 N.C. App. at 707. Put simply, a corporation can be "so intertwined" with the government that it is "an agency of North Carolina" for the purposes of the Act. *Wake Cty. Hosp. Sys., Inc.*, 55 N.C. App. at 12. But critically, it is possible that such a corporate entity, intertwined with the State, can be considered a public agency for the purposes of the Act without being treated as a state agency for all purposes. *See id.* at 7-8. The majority errs by collapsing this distinction.

¶ 51 In *Wake County Hospital System*, the Court of Appeals cited several specific aspects of the relationship between the hospital system and the county that demonstrated the government and the hospital system were substantially "intertwined." They are of the categories that are essential to the operation of a corporate entity, including, but not limited to, financing, asset management, operations, and decision-making and

control. *Id.* at 11. But as the court also noted, these aspects are not factors or elements that can be applied in each circumstance— "each new arrangement must be examined anew and in its own context." *Id.*

¶ 52 Indeed, "examin[ing]" the relationship between NCRR and the State of North Carolina "anew and in its own context" reveals that the state's "responsibilities and control" over NCRR are "manifest." *Wake Cty. Hosp. Sys., Inc.*, 55 N.C. App. at 11. A close examination of the relationship supports only the conclusion that NCRR must be a state agency for the purposes of the Act. The State selects every Director of NCRR, N.C.G.S. § 124-15, and those Directors perform State-mandated obligations. N.C. Exec. Order No. 2009-034 (Dec. 9, 2009). Two of the thirteen Directors must be members of the Governor's administration, N.C.G.S. § 124-15, serving both NCRR and the administration to ensure effective communication and coordination between the organizations. The State must approve all substantive amendments to NCRR's articles of incorporation. Revenue earned today by NCRR belongs to the State and is treated as revenue for "the public good." In turn, the General Assembly often directs how those revenues are spent once they accrue to the State. *See* An Act to Make Base Budget Appropriations for Current Operations of State Departments, Institutions, and Agencies, and for Other Purposes [hereinafter 2013 Budget Appropriation], S.L. 2013-360, 2013 N.C. Sess. Laws 995. NCRR's finances and records are subject to State review and records requests from State officials, and the results of external audits are provided to the General Assembly. N.C.G.S. § 124-17. Moreover, NCRR is statutorily mandated to annually submit to the General Assembly a detailed financial report concerning its strategy, operations, and personnel. *Id.* NCRR also enjoys powers of eminent domain. N.C.G.S. § 124-12. As the majority notes, that authority is given to NCRR as a private condemnor, not a public one, under N.C.G.S. § 40A-3(a)(4). Yet N.C.G.S. § 40A-3(a) grants the power of eminent domain for "the public use or benefit," another example of NCRR's obligations to the people of North Carolina.

¶ 53 Just like conventional state agencies, NCRR is frequently a partner to departments of state government in planning and decision-making. NCRR often collaborates on projects with the Department of Transportation (DOT), and staff from both NCRR and DOT discuss those projects routinely. Leaders at the organizations aim to have a "regular exchange of information" between their respective governing boards. NCRR cooperates with DOT to serve as an intermediary between DOT and Norfolk Southern, another railroad company. Elsewhere, directors from the Department of Commerce are regularly updated on NCRR's

activities so that, in the words of one such director, "[c]ommerce [can] thrive in North Carolina."

¶ 54 And, as mentioned previously, the State has owned all of NCRR's stock since 2006. NCRR contends that many of its entanglements with the State, like those detailed above, arise from the fact that the State is the sole shareholder of NCRR's stock, and are thus irrelevant. But the State's control of NCRR is essential context. To NCRR, the appointment of its Board members by elected state officials—the Governor and the General Assembly—is "the same . . . as any other private corporation." Legislation mandating the frequency and content of reports is merely a "shareholder agreement." As noted, under current arrangements, were the NCRR to be dissolved as a corporation, its assets would return to the State. NCRR claims that because this is simply one post-dissolution option among many, it should not bear on our analysis But I am unconvinced that what is presently true should be discounted simply because we can imagine other future alternatives. NCRR seeks to hide behind "the fundamental principle of corporate law that a corporation has a legal existence that is distinct from its shareholders" and accuses SELC of attempting to "merge the identity" of the State with that of the corporation, but this case requires us to examine the substantive relationship between the corporation and the State. We cannot, as the majority does, rely upon the fact of NCRR's "separate corporate identity" or "corporate form." Our inquiry concerns when a corporation is obligated to be transparent about its operations, and we beg the question if we rest on corporate formalities.

¶ 55 The majority notes that we have "consistently . . . been disinclined to disregard the distinction between a corporation and its shareholders." In the majority's view, we may recognize that the State is NCRR's "sole shareholder," possesses "a certain degree of indirect control of the entity's day-to-day operations," and "has the right to approve or disapprove certain fundamental corporate decisions," but "those facts, standing alone, do not serve to make [NCRR] a state agency or subdivision." Yet this gives insufficient weight to the many facts relevant to our inquiry which all point in the direction of treating NCRR as a public entity for the purposes of the Act. When the State owns the corporation, appoints its board, mandates its reporting, spends its revenue, and stands to receive the assets in the event of dissolution, we should recognize the obvious truth that the identity of the corporation and its sole shareholder—the State—are meaningfully intertwined. NCRR's argument—that the activities of this kind of corporation can be hidden from scrutiny by the people of North Carolina—is a self-interested attempt to cleave its

public business from its public responsibilities. Today's decision gives that attempt the force of law. The "manner in which [NCRR] operates," which the majority characterizes vaguely as "resembl[ing] the activities of a private corporation," should not distract us from the manifest conclusion that NCRR and the State are substantially intertwined.

B. Holding that NCRR is subject to the Public Records Act is consistent with the legislature's intentions toward both NCRR and the Public Records Act

¶ 56 Contrary to the arguments promoted by NCRR and the majority, the conclusion that NCRR is subject to the Public Records Act is consistent with the intent of the General Assembly. This is true for two reasons.

¶ 57 First, the legislature created NCRR to benefit the State, and it has continued to exercise its authority over NCRR to serve the public. Troubled by the poor condition of the State's transportation system and the limited connections between western North Carolina and the State's eastern seaports, the General Assembly chartered NCRR "[t]o create a railroad company . . . to promote growth in the state." Their efforts were motivated by a belief in "the importance of the railroad to the economic well-being of the State and its citizens as a whole." While it is true, as NCRR repeatedly notes, that the large amount of money required to fund the initial investment in NCRR came from private sources, it is also apparent from the records of the time that the General Assembly intended to link the eastern and western parts of the State by rail with a new public-private venture.[1] Moreover, the State invested the lion's share of the capital: two-thirds of the initial $3 million capitalization and an additional $1 million just four years later. NCRR's charter gave it powers of eminent domain and the liberty to build widely, "across or along any public road or water source." An Act to incorporate the North Carolina Rail Road Company, ch. LXXXII, §§ 26–28, 1848–1849 N.C. Laws, 138, 145–50.

¶ 58 The General Assembly's actions in the years since corroborate its original intent to require NCRR to operate for the benefit of the state.

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1. NCRR contends that its view of history, that "[the Company] was formed as a private corporation to meet a pressing public need the government had been unable to meet and in which private participation was necessary," is "[c]ontrary to" SELC's "assertion that the Company was created 'for the benefit of the State.' " This is an attempt to draw a distinction without a difference. It benefits the State when the government charters a company to build a railroad connecting the ends of the State to one another and provides the majority of the start-up capital. An action undertaken to "meet[ ] a pressing public need" is an action undertaken "for the benefit of the State." Here, the private nature of the corporation does not alter the General Assembly's intention, which was to create a railroad to serve North Carolina and its people.

In 1992, a State advisory study group issued a report in which it noted that "where the State grants a private corporation special governmental powers, such as eminent domain, those powers are to be used for the public benefit," and public-private partnerships like NCRR are "obligated to carry out the public purpose for which they were chartered." In service to this obligation, the State began buying more of NCRR's shares "to help promote trade, industry, and transportation within the State of North Carolina and to advance the economic interest of the state." An Act to Make Appropriations for Current Operations and for Capital Improvements for State Departments, Institutions, and Agencies, and for Other Purposes, ch. 443 § 32.30, 1997 N.C. Sess. Laws 1344, 1842–1844. This is not to say, of course, that any public-private venture necessarily becomes subject to the Public Records Act. However, where the venture is wholly owned and controlled by the State, it seems self-evident that the "public" part of the venture holds more import than that which is "private," at least for the purposes of the Public Records Act.

¶ 59 Second, and separately, the legislature enacted the Public Records Act to enable public inspection of the workings of the state government and its agencies, not to create formalistic hideouts for public-private partnerships that wish to escape scrutiny. Sorely missing from the majority's "totality of the circumstances analysis" is any meaningful evaluation of the scope and purpose of the Public Records Act. In my view, the General Assembly's motivations for passing the Public Records Act suggest it intended entities like NCRR to fall within the Act's purview.

¶ 60 The first North Carolina public records statute affirmed that public records are "the chief monuments of North Carolina's past and are invaluable for the effective administration of government [and] for the conduct of public and private business." An Act to Safeguard Public Records in North Carolina, ch. 265, § 1, 1935 N.C. Sess. L., 288. This statute and its 1975 successor are in keeping with American common law's centuries-old recognition of the public's right to inspect public records. *See* Joseph D. Johnson, *Administrative Law—Public Access to Government-Held Records: A Neglected Right in North Carolina*, 55 N.C. L. Rev. 1187 (1977). Historically, our appellate courts have agreed. Given the legislature's "mandate for open government," *News & Observer Publ'g Co., Inc. v. Poole*, 330 N.C. 465, 475 (1992), "it is clear that the legislature intended to provide [through the Public Records Act] that, as a general rule, the public would have liberal access to public records." *News & Observer Publ'g Co. v. State ex rel. Starling*, 312 N.C. 276, 281 (1984). This is because "[g]ood public policy is said to require liberality in the right to examine public records." *Advance Publ'ns, Inc.*

v. Elizabeth City, 53 N.C. App. 504, 506 (1981). Just last year, this Court affirmed this principle:

> The Act is intended to be liberally construed to ensure that governmental records be open and made available to the public, subject only to a few limited exceptions. The Public Records Act thus allows access to all public records in an agency's possession "*unless* either the agency or the record is specifically exempted from the statute's mandate." *Times-News*, 124 N.C. App. at 177, 476 S.E.2d at 452 (emphasis added). "Exceptions and exemptions to the Public Records Act must be construed narrowly." *Carter-Hubbard Publ'g Co.*, 178 N.C. App. at 624, 633 S.E.2d at 684.

DTH Media Corp. v. Folt, 374 N.C. 292, 300–01 (2020).

¶ 61 Liberal access to public records is, of course, not the same as liberal construction of what is a public record. But there, too, our lawmakers have recognized the importance of granting the people ready access to records concerning the operations and transactions of their government: "It is an uncontestable pre-condition of democratic government that the people have information about the operation of their government . . . ." Sam J. Ervin, Jr., *Controlling "Executive Privilege*,", 20 Loy. L. Rev. 11, 11 (1974). At bottom, "[w]hile some degree of confidentiality is necessary for government to operate effectively, the general rule in the American political system must be that the affairs of government be subject to public scrutiny." Johnson, 55 N.C. L. Rev. at 1188. Today's decision undermines that principle.

¶ 62 "In matters of statutory construction, our primary task is to ensure that the purpose of the legislature, the legislative intent, is accomplished." *Elec. Supply Co. of Durham, Inc. v. Swain Elec. Co., Inc.*, 328 N.C. 651, 656 (1991). That purpose is "first ascertained from the plain words of the statute." *Id.* When the General Assembly passed the Public Records Act, it was so the public would have insight into how decisionmakers were going about their work, how public policy was being enacted, and how the agencies of North Carolina were being operated. Indeed, the Act applies to records produced by an "agency" which are "made . . . in connection with the transaction of *public business*." N.C.G.S. § 132-1(a). Furthermore, the legislature provided an expansive definition of what might be considered an agency. As discussed above, if we were to apply the rule which has been the law in our state for the

past forty years, NCRR falls firmly within the meaning of "agency." While some government entities are enumerated, the language of the statute considers that not all could be named specifically:

> Agency of North Carolina government or its subdivisions shall mean and *include every* public office, public officer or official (State or local, elected or appointed), institution, board, commission, bureau, council, department, authority *or other unit of government* of the State or of any county, unit, special district or other political subdivision of government.

N.C.G.S. § 132-1 (emphasis added). If we were to place NCRR within the definition of "agency" within the statute, it would fit well within "institution" and certainly within the catchall of "other unit of government."

¶ 63 In our consideration of the statues relevant to this case, we should "adopt an interpretation which will avoid absurd or bizarre consequences." *State ex rel. Com'r of Ins. v. N.C. Auto. Rate Admin. Office*, 294 N.C. 60, 68, (1978). An interpretation that results in an entity created by the State for public benefit shielding its records from public scrutiny is an absurd one. Accordingly, I reject the necessary premise of the majority's decision which says that the legislature, in enacting the 1975 Public Records Act, intended to permit the State or a related entity to hide from scrutiny merely by conducting its operations behind the corporate form.

¶ 64 The majority, as did the Business Court, makes much of a 2011 report from the General Assembly's Program Evaluation Division (PED), which is "a staff agency of the General Assembly . . . [purposed to provide] an independent, objective source of information to be used in evaluating" the activities of state agencies or those of non-state entities conducted using state funds. N.C.G.S. § 120-36.11(a) (2019). In that 2011 report, as was well-documented by both parties, the PED found that "[NCRR] is not subject to the State's [Public Records Act]." Both parties rightly recognize that whether NCRR is subject to the Public Records Act, a question of law, is a determination to be made by this court, not by a staff agency of the General Assembly.[2] The PED report, then, adds little to our analysis.

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2. Whether the NCRR is subject to the Public Records Act, a narrow question of law, is also not a determination to be made by the Attorney General or the State Ethics Commission in their realms of authority, though the majority points to decisions by both as "persuasive" in support of its ruling.

¶ 65 As the majority notes, in advance of the PED study of NCRR, the General Assembly passed legislation stipulating that "[f]or the purposes of [the] evaluation, the terms 'State agency' or 'agency' " would include NCRR. An Act to Make Technical, Clarifying, and Other Modifications to the Current Operations and Capital Improvements Appropriations Act, S.L. 2011-391, § 52, 2011 N.C. Sess. Law No. 1557, 1584–85. The majority claims that that "this language tends to suggest a recognition on the part of the General Assembly that [NCRR] was not a state agency," but this does not follow in light of the issue before us. It seems instead that the legislature thought it necessary to define the NCRR as a "State agency" for the limited purpose of the evaluation. I believe the Public Records Act contemplates the same—that a corporate entity can be considered a state agency for some purposes, but not all.

¶ 66 The majority advances two further arguments by pointing to General Assembly activities in the wake of the PED report. Neither is availing. Both arguments focus on a 2013 statute imposing "additional reporting requirements," N.C.G.S. § 124.17. In that legislative process, the General Assembly—equipped with the 2011 PED report which stated NCRR was not subject to the Public Records Act—"deci[ded] to adopt" the recommendations in the report, a decision the majority reads to mean the General Assembly "agreed with" the PED's assessment of NCRR. However, it is just as likely that the General Assembly disagreed with the PED report and saw no need to act in light of it. In other words, the General Assembly did not bring NCRR within the auspices of the Act in 2013 because they believed NCRR to already be there. The PED is, after all, a staff agency of the General Assembly. It is unlikely that, faced with a report containing an inaccuracy from one of its staff agencies, the General Assembly would see a need to respond with legislation to correct the error.

¶ 67 The majority also points to the provisions of the 2013 statute that imposed those additional reporting requirements, arguing that such legislation would be superfluous if NCRR were already a state agency. This position defies the plain reading of the 2013 statute. The statute is indeed meant to provide for an "*[e]nhanced* annual report." N.C.G.S. § 124-17 (emphasis added). NCRR is mandated to "submit an annual report to the Joint Legislative Commission of Governmental Operations and the Joint Legislative Transportation Oversight Committee." N.C.G.S. § 124-17(a). In other words, the Public Records Act imposes no affirmative obligation on NCRR to produce a report or records—the 2013 statute does. An entity subject to the Public Records Act is only required to make some of its records made available on request. The 2013 statute, on the other hand, establishes an affirmative reporting requirement for NCRR

to regularly provide information to certain state government entities. As a result, the reporting requirements of the 2013 statute say nothing about whether NCRR was already subject to the requirements of the Public Records Act.

¶ 68 The majority's argument regarding the 2013 statute is called into further question by a comparison of the text of that statute to the text of the Public Records Act. The 2013 statute requires that NCRR, "[u]pon the request of the Governor or any committee of the General Assembly . . . provide *all* additional information and data within its possession or ascertainable from its records." N.C.G.S. § 124-17(b) (emphasis added). The Public Records Act, however, only applies to information "made or received pursuant to law or ordinance in connection with the transaction of public business." N.C.G.S. § 132-1(a). These obligations are not the same. The 2013 statute compels NCRR to provide *all* information by request of the Governor or legislature; the Public Records Act makes available only information related to public businesses.

¶ 69 The majority attempts a similar line of reasoning with respect to the 2013 statute's provision allowing NCRR to "indicate whether the information [provided upon request of the Governor or General Assembly] is confidential." N.C.G.S. § 124-17(b). Were NCRR subject to the Public Records Act, it might possess information that is not covered by the Act, but which would otherwise become subject to the Act upon fulfilling a request for information from the Governor of the General Assembly pursuant to Section 124-17(b). This provision, then, does not prove extraneous to the Public Records Act or any of NCRR's obligations under it. Instead, it provides additional safeguards for the enhanced reporting requirements the legislature has chosen to impose on NCRR.

¶ 70 Ultimately, I am unpersuaded by the evidence cited by the majority for the proposition that NCRR should not be subject to the Public Records Act. Rather, I believe a more just and accurate reading of the legislature's intent in passing the Public Records Act and in creating NCRR is that NCRR is subject to the Act.[3]

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3. Whether the specific records sought by SELC are covered by the Act's requirements is a separate question not before us here. However, there is no denying that the public has been impacted by NCRR's decision to abandon a light rail project in the Triangle. Public/private partnerships for the public good are not new. It is equally still true that the public's trust in government suffers when government decision-making is shielded from public view. "The generation that made the nation thought secrecy in government one of the instruments of Old World tyranny and committed itself to the principle that a democracy cannot function unless the people are permitted to know what their government is up to." *EPA v. Mink*, 410 U.S. 73, 105 (1973) (Douglas, J. dissenting) (quoting Henry Steele Commager).

III. Conclusion

¶ 71 Subjecting NCRR to the Public Records Act would not grant the people of North Carolina unfettered access to NCRR's records. As discussed, the Public Records Act only applies to records "made or received pursuant to law or ordinance in connection with the transaction of public business." N.C.G.S. § 132-1(a). NCRR maintains the right to indicate that other information is confidential when it is "related to a proposed specific business transaction where inspection, examination, or copying of the records would frustrate the purpose for which the records were created." N.C.G.S. § 124-17(b), (c). NCRR, then, would still be permitted to limit the public's access to its records. But given the deeply intertwined relationship between NCRR and the State, those records which are sufficiently connected "with the transaction of public business" should be made available for public scrutiny.

¶ 72 I agree with the majority that our approach to interpreting statutes must always reckon with the "totality of the circumstances." The circumstances to be considered here include both the scope and purpose of the Public Records Act and the legislation governing the NCRR's activities. Because I believe the legislature's intent was for the Public Records Act to make more, not less, of our government's activities and operations available for public examination, and because I read our state's prior appellate cases and the General Assembly's actions as indicating that the North Carolina Railroad Company, owned fully by the State of North Carolina and obligated in several ways to its branches of government, should be subject to the Public Records Act, I respectfully dissent.

Justice HUDSON joins in this dissenting opinion.

STATE v. JOHNSON

[378 N.C. 236, 2021-NCSC-85]

STATE OF NORTH CAROLINA
v.
BRYAN XAVIER JOHNSON

No. 3A20

Filed 13 August 2021

Search and Seizure—traffic stop—Terry search for weapons in vehicle—totality of circumstances—history of violent crime

A police officer who initiated a traffic stop of defendant for a fictitious license plate had reasonable suspicion to justify a *Terry* search for weapons in the areas of the vehicle that were under defendant's immediate control where the traffic stop occurred at night in a high-crime area, defendant appeared very nervous, defendant bladed his body when he accessed his center console to look for registration papers, and defendant's criminal history indicated a trend in violent crime. Further, the traffic stop was not unconstitutionally prolonged where the officer stopped defendant's vehicle, spoke with defendant, performed a routine records check that showed defendant's violent criminal history, and then performed the *Terry* search of the vehicle for weapons.

Chief Justice NEWBY concurring.

Justice EARLS dissenting.

Justice HUDSON 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, 269 N.C. App. 76 (2019), finding no error after appeal from an order denying defendant's Motion to Suppress entered on 29 June 2018 by Judge Forrest D. Bridges in Superior Court, Mecklenburg County. Heard in the Supreme Court on 22 March 2021.

Joshua H. Stein, Attorney General, by Kristin J. Uicker, Assistant Attorney General, for the State-appellee.

Kimberly P. Hoppin for defendant-appellant.

MORGAN, Justice.

¶ 1 Defendant's appeal requires this Court to review the trial court's order denying defendant's motion to suppress evidence of a bag of narcotics seized from his vehicle during a traffic stop on 14 January 2017. The dispositive question on appeal is whether the law enforcement officers conducting a search for weapons on defendant's person and in the areas of defendant's vehicle under his immediate control possessed the requisite reasonable suspicion to initiate such a warrantless search pursuant to *Terry v. Ohio*, 392 U.S. 1 (1968). Because we hold that the law enforcement officer who conducted the traffic stop presented articulable facts at the suppression hearing which gave rise to a reasonable suspicion that defendant was armed and dangerous, the trial court did not commit error in denying defendant's request to suppress the controlled substances which were discovered as a result of the search of the areas of defendant's vehicle which were under defendant's immediate control.

I. Factual and Procedural Background

¶ 2 As a seven-year veteran of the Charlotte-Mecklenburg Police Department (CMPD) and a member of the law enforcement agency's Crime Reduction Unit, Officer Whitley was conducting patrol operations in the early morning hours of 14 January 2017 in a location of the city that he described at the suppression hearing as a "very high crime area." Officer Whitley and his partner, Sergeant Visiano, were traveling along Central Avenue in the Hickory Grove section of Charlotte when they observed a black Dodge Charger. While Officer Whitley continued to operate their patrol vehicle, Sergeant Visiano ran the license plate displayed on the Dodge Charger through the agency's computer system and discovered that the license plate was actually registered to an Acura MDX. Having determined that the tag displayed on the Dodge Charger was "fictitious," Officer Whitley initiated a traffic stop, and the two vehicles pulled into a Burger King parking lot.

¶ 3 While approaching the driver's side of the Dodge Charger, Officer Whitley noticed that the car's occupant had raised his hands in the air. It was determined that the individual in the Dodge Charger was defendant. Officer Whitley subsequently testified at the suppression hearing that he had observed persons raising their hands in such a manner ten to twenty times previously and that, based upon his experience which included specialized training in recognizing armed individuals, this behavior can "sometimes . . . mean that they have a gun." Officer Whitley conversed with defendant at the driver's window as defendant remained seated in the Dodge Charger, while Sergeant Visiano positioned himself at the passenger side window in order to see defendant's right side. Officer Whitley asked for defendant's driver's license and registration and in-

quired about the possible presence of any weapons in the vehicle; defendant denied the presence of such items. Officer Whitley explained that the mismatched license plate served as the reason for the traffic stop, prompting defendant to volunteer that defendant had just purchased the Dodge Charger in a private sale that day and that defendant knew that the displayed tag did not belong to the vehicle that he was driving. Defendant readily produced his driver's license but had to search for the car's registration and bill of sale in the center console of the vehicle. Officer Whitley testified at the suppression hearing that during this interaction, defendant "seemed very nervous . . . like his heart is beating out of his chest a little bit. He was very nervous." Further, as defendant reached into the center console to find the requested documentation, Officer Whitley recalled during his testimony that defendant was "blading [his body] . . . as if he is trying to conceal something that is to his right, as if he's using his body to distance what I can see from what he's doing." This appeared odd to Officer Whitley, who testified at the suppression hearing that while "typically people obviously reach and turn" to retrieve items from the center consoles of their vehicles, defendant did so "to the extent where his shoulders were completely off the seat."

¶ 4 "[A]t this point," Officer Whitley testified, defendant's positioning of his hands above his head as the officers approached his vehicle, his nervousness, and the "blading" of his body as he reached into the center console were "adding up as . . . characteristics of an armed subject." After defendant produced a bill of sale for the Dodge Charger from the center console, Officer Whitley left defendant in the driver's seat of the vehicle while defendant spoke with Sergeant Visiano. Meanwhile, Officer Whitley returned to his patrol car in order to process the information and paperwork provided by defendant through multiple law enforcement intelligence databases, which is "a standard practice for every traffic stop that" the officer conducts. Information gathered from Officer Whitley's search of North Carolina's CJLEADS system—a database which details a person's history of contacts with law enforcement in the form of a list of criminal charges filed against the individual—indicated that defendant had been charged with multiple violent crimes and offenses related to weapons from the years 2003 through 2009. While he could not offer testimony as to which charges against defendant had resulted in convictions, Officer Whitley testified that the "trend in violent crime" revealed by the CJLEADS search, combined with the "holding up of the hands, as well as the blading of the body," and the fact that defendant appeared very nervous, "led [the officer] to believe that he was armed and dangerous at that point."

¶ 5 Officer Whitley exited his patrol car, returned to defendant's vehicle, and asked defendant to step out of the Dodge Charger, with the intent of conducting a frisk of defendant's person and a search of the vehicle. Defendant got out of his car and went to the rear door on the driver's side of the vehicle at Officer Whitley's request before defendant consented to be frisked by the law enforcement officer for weapons. A pat down of defendant's clothing revealed no weapons or other indicia of contraband. At this point, Officer Whitley walked to the rear of defendant's Dodge Charger and asked for defendant's consent to search the vehicle. Defendant refused to grant such consent. Officer Whitley then explained that the officers were going to conduct a limited search of defendant's vehicle nonetheless based on defendant's "criminal history . . . and some other things." While defendant continued to protest the search of the Dodge Charger, Officer Whitley left him with Sergeant Visiano and began a search of the front driver's side of defendant's vehicle. Immediately upon opening the unlocked center console, Officer Whitley discovered a baggie of "[w]hat appeared to be powder cocaine" and removed the suspected contraband from the vehicle. After completing his search of the area of the vehicle immediately behind the driver's seat, Officer Whitley placed defendant under arrest.

¶ 6 On 14 January 2017, defendant was charged with the felonious offense of possession with intent to sell or deliver cocaine and the misdemeanor offense of possession of drug paraphernalia, and was formally indicted by a Mecklenburg County grand jury for possession of cocaine on 25 September 2017.

¶ 7 Defendant filed a motion to suppress on 16 May 2018, which came on for hearing before the Honorable Forrest D. Bridges in Superior Court, Mecklenburg County, on 26 June 2018. Officer Whitley testified about the course of events which resulted in defendant's arrest. Additionally, the trial court viewed Officer Whitley's body camera recording of the incident after defendant's counsel stipulated to the video's admissibility. After hearing arguments from counsel for the State and defendant, the trial court denied defendant's motion to suppress. While defendant initially indicated a desire to proceed to trial, he agreed to plead guilty to felony possession of cocaine and misdemeanor possession of drug paraphernalia after a short recess before the jury was selected. The trial court accepted defendant's guilty plea and noted for the record that defendant had preserved his right to appeal the trial court's earlier ruling on defendant's motion to suppress.

¶ 8 The trial court then asked the State's attorney to prepare an order reflecting the details of the hearing on defendant's motion to suppress.

In providing direction regarding the desired contents of the order, the trial court recounted the factual basis upon which it had concluded that Officer Whitley had established the reasonable suspicion necessary to conduct a *Terry* search[1] of defendant's vehicle. In open court, the trial court recalled the manner in which Officer Whitley had conducted the traffic stop in the location which the officer had described as a high-crime area and the officer's discovery of defendant's prior charges, upon researching the state's criminal record databases, for robbery with a dangerous weapon, assault with a deadly weapon with the intent to kill, and discharging a weapon into occupied property. The trial court noted that defendant raised his hands out of the window of the Dodge Charger as Officer Whitley approached, which had put the officer "on alert for the possible presence of a gun within the vehicle." In addition, the trial court explained that, while Officer Whitley reasonably believed that defendant's maneuver to raise his hands out of the car's window could indicate the presence of a gun, defendant had acted appropriately in holding his hands up and out of the window "in this day and time," and such conduct was not to be considered independently incriminating. The trial court entered a written order dated 29 July 2018 which included the above findings and concluded:

> 2. That based on the totality of [the] circumstances, *including but not limited to*: the [d]efendant's hands in the air upon the Officer's approach, and the [d]efendant's prior criminal history, that the limited frisk of the lungeable areas of the vehicle was justified.
>
> 3. That the Officer's scope of the frisk was properly limited only to areas where the [d]efendant would have had access to retrieve a weapon if he chose to do so.

¶ 9 Defendant was sentenced to a term of 8 to 19 months in prison, which was suspended for 24 months of supervised probation. Defendant appealed to the North Carolina Court of Appeals, where a divided panel issued its decision on 17 December 2019 affirming the trial court's denial of defendant's motion to suppress. Defendant appeals to this Court as a matter of right pursuant to N.C.G.S. § 7A-30(2) based upon the dissenting opinion filed in the lower appellate court's consideration of this matter.

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1. A shorthand reference commonly used to describe a warrantless search which is performed pursuant to the principles stated in *Terry v. Ohio*, 392 U.S. 1 (1968).

II. Analysis

¶ 10 Defendant argues before this Court that several of the trial court's findings and conclusions announced in open court and reproduced in the subsequent written order in which the trial court denied defendant's motion to suppress were not supported by the evidence. In removing these disputed findings and conclusions from the trial court's contemplation, defendant contends that Officer Whitley did not have a reasonable suspicion that defendant was armed, that the *Terry* search of defendant's vehicle represented an unconstitutional extension of the traffic stop, and that this Court's correction of the trial court's supposed error should result in an outcome which vacates the trial court's order and overturns defendant's conviction. We disagree with defendant's assertions and address them in turn.

A. Standard of Review

¶ 11 We review a party's challenges to a trial court's findings of fact to ascertain whether those findings are supported by any competent evidence, the presence of which will render such findings binding on appeal. *State v. Reed*, 373 N.C. 498, 507 (2020). The trial court's conclusions of law, including the ultimate conclusion as to whether a law enforcement officer had the constitutional authority to conduct a *Terry* frisk of a defendant's vehicle, are reviewed on a de novo basis. *Id.*

B. Trial Court's Findings and Conclusions

¶ 12 As an initial matter, defendant complains of the consideration by the Court of Appeals of Officer Whitley's uncontroverted testimony concerning defendant's nervousness and the "blading" of defendant's body as defendant accessed the center console of his vehicle, as well as the lower appellate court's recognition that the traffic stop took place late at night. To bolster his position, defendant observes that the trial court did not make express findings concerning these factors. Although North Carolina statutory law establishes that, "in making a determination whether or not evidence shall be suppressed," the trial court is required to "make findings of fact and conclusions of law which shall be included in the record, pursuant to [N.C.]G.S. [§] 15A-977(f)[,]" N.C.G.S. § 15A-974(b) (2019), nonetheless the reduction of the trial court's considerations to a written order is not required. *State v. Oates*, 366 N.C. 264, 268 (2012) ("While a written determination is the best practice, nevertheless [N.C.G.S. § 15A-977(f)] does not require that these findings and conclusions be in writing."). In the present case, the trial court, in its discretion, included a recitation of some of the evidence before the tribunal in its written order and specifically noted the sufficiency of

the evidence to establish reasonable suspicion in the mind of the officer to support a *Terry* search, which involved the trial court's evaluation of factors which "includ[ed] but [was] not limited to" the factors listed in the written order. "Although [N.C.G.S. § 15A-974(b)'s] directive is in the imperative form, only a material conflict in the evidence" requires a trial court to make "explicit factual findings that show the basis for the trial court's ruling." *State v. Bartlett*, 368 N.C. 309, 312 (2015) (citing *State v. Salinas*, 366 N.C. 119, 123–24 (2012)). Thus, "[w]hen there is no conflict in the evidence," an appellate court may infer a trial court's findings in support of its decision on a motion to suppress so long as that unconflicted evidence was within the trial court's contemplation. *Bartlett*, 368 N.C. at 312 (citing *State v. Munsey*, 342 N.C. 882, 885 (1996)). In applying these enunciated principles to the instant case, the Court of Appeals did not wrongly infer from the uncontroverted evidence before the trial court adduced at the suppression hearing and the subsequent findings and conclusions which the trial court entered in its order, that the factors—among other factors—of Officer Whitley's testimony about defendant's nervousness, defendant's "blading" of his body, and the late hour of the traffic stop constituted circumstances which provided reasonable suspicion for the *Terry* search to be conducted. The lack of controverted evidence at the suppression hearing strengthened the trial court's ability to choose the evidentiary facts and the resulting persuasive factors which the trial court elected to expressly include in its order.

¶ 13 Furthermore, defendant does not contest the evidence, in the form of Officer Whitley's testimony and the body camera footage viewed by the trial court, regarding defendant's nervousness and defendant's maneuver of "blading" his body; rather, defendant opts to attempt to contextualize these behavioral displays by characterizing defendant's emotional and physical issues during his interaction with Officer Whitley. In this regard, defendant merely attempts to relitigate the veracity of Officer Whitley's interpretation of defendant's conduct. "The weight, credibility, and convincing force of such evidence is for the trial court, who is in the best position to observe the witnesses and make such determinations." *Macher v. Macher*, 188 N.C. App. 537, 540, *aff'd per curiam*, 362 N.C. 505 (2008). The trial court in this matter was "the sole judge of the credibility and weight of the evidence," and it was free to "accept or reject the testimony of a witness, either in whole or in part, depending solely upon whether it believes or disbelieves the same." *Moses v. Bartholomew*, 238 N.C. 714, 718 (1953). For this Court to accept defendant's invitation to reinterpret Officer Whitley's suppression hearing testimony, when the original interpretation of defendant's conduct made by the officer on scene has already been evaluated by the trial

court in a manner contemplated by, and consistent with, the operational structure of our legal system, would be to ignore the trial court's status as "the sole judge of the credibility of the witnesses and of the weight of their testimony." *State v. Johnson*, 230 N.C. 743, 745 (1949).

¶ 14 Likewise, defendant does not challenge the evidentiary basis for the trial court's consideration of Officer Whitley's discovery of defendant's criminal history as a contributing factor to the officer's development of reasonable suspicion to justify the officer's execution of a *Terry* search; instead, defendant submits that the evidence "did not support a finding that Officer Whitley had reasonable concerns for his safety based on [defendant's] prior criminal history." Additionally, defendant endeavors to fortify his impression that the officer's concerns for the officer's safety were not supported by the evidence of the officer's awareness of defendant's criminal history at the time of the traffic stop by emphasizing that the officer did not fully recall at the suppression hearing all of the details and the outcomes of defendant's criminal history, which therefore negated the manifestation of reasonable suspicion in the mind of the officer during Officer Whitley's interaction with defendant. Again, like defendant's concerns about Officer Whitley's observance of defendant's nervousness and "blading" of his body, this amounts to defendant's renewed invitation for our Court to substitute our judgment regarding the veracity and accuracy of a witness's testimony for the determination of a trial court which occupied "the best position to observe the witnesses and make such determinations." *Macher*, 188 N.C. App. at 540 (quoting *Freeman v. Freeman*, 155 N.C. App. 603, 608 (2002)). Here, Officer Whitley testified without contravention that he "discovered that the defendant did have a history, violent history, related to firearms" in the form of various charges extending from 2003 to 2009, which the officer described as a "trend in violent crime" that, in conjunction with the other evidentiary facts already discussed, "led [him] to believe that [defendant] was armed and dangerous at that point." Defendant's position from this cosmetically different, yet fundamentally identical, premise is also without merit.

¶ 15 By way of review, the unconflicted evidence introduced by the State at the hearing conducted by the trial court on defendant's motion to suppress—that (1) the traffic stop occurred late at night (2) in a high-crime area, with (3) defendant appearing "very nervous" to the detaining officer to the point that it "seem[ed] like his heart [was] beating out of his chest a little bit[,]" with (4) defendant "blading his body" as he accessed the Dodge Charger's center console, and (5) defendant's criminal record indicating a "trend in violent crime" and weapons-related charges—was

sufficient for the trial court to make findings of fact and conclusions of law that the investigating law enforcement officer had reasonable suspicion to conduct a *Terry* search of defendant's person and in areas of defendant's vehicle under defendant's immediate control for the officer's safety.

C. Reasonable Suspicion for the *Terry* Search

¶ 16 Both the Fourth Amendment to the Constitution of the United States and article I, section 20 of the North Carolina Constitution protect private citizens against unreasonable searches and seizures. *State v. Otto*, 366 N.C. 134, 136 (2012). Traffic stops are considered seizures subject to the strictures of these provisions and are "historically reviewed under the investigatory detention framework first articulated in *Terry v. Ohio*." *Id.* at 136–37 (quoting *State v. Styles*, 362 N.C. 412, 414 (2008)); *Reed*, 373 N.C. at 507. Law enforcement officers may initiate a traffic stop if the officer has a "reasonable, articulable suspicion that criminal activity is afoot." *Styles*, 362 N.C. at 414 (quoting *Illinois v. Wardlow*, 528 U.S. 119, 123 (2000)). The reasonableness of a traffic stop is determined "by examining (1) whether the traffic stop was lawful at its inception, and (2) whether the continued stop was 'sufficiently limited in scope and duration to satisfy the conditions of an investigative seizure.' " *Reed*, 373 N.C. at 507 (citations omitted) (quoting *Florida v. Royer*, 460 U.S. 491, 500 (1983)). Once the traffic stop is initiated, a law enforcement officer may conduct a limited search of the passenger compartment of the vehicle so long as the officer develops a reasonable suspicion that the suspect of the traffic stop is armed and dangerous. *Terry*, 392 U.S. at 27. The Supreme Court of the United States has extended the reasonable suspicion standard originally established in *Terry* to allow for these limited searches:

> [T]he search of the passenger compartment of an automobile, limited to those areas in which a weapon may be placed or hidden, is permissible if the police officer possesses a reasonable belief based on "specific and articulable facts which, taken together with the rational inferences from those facts, reasonably warrant" the officer in believing that the suspect is dangerous and the suspect may gain immediate control of weapons.

Michigan v. Long, 463 U.S. 1032, 1049 (1983) (quoting *Terry*, 392 U.S. at 21). Reasonable suspicion demands more than a mere "hunch" on the part of the officer but requires "less than probable cause and considerably

less than preponderance of the evidence." *State v. Williams*, 366 N.C. 110, 117 (2012). In any event, reasonable suspicion requires only "some minimal level of objective justification," *Styles*, 362 N.C. at 414 (quoting *United States v. Sokolow*, 490 U.S. 1, 7 (1989)), and arises from "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant" the intrusion presented by the limited search of the vehicle, *Terry*, 392 U.S. at 21.

¶ 17 As discussed above, competent evidence exists in the record of the suppression hearing that Officer Whitley encountered a "very nervous" individual—specifically, defendant—late at night in a high-crime area. The officer saw defendant "blade" his body by way of defendant's assumption of a physical position which the officer interpreted to be an effort by defendant to conceal defendant's entry into the vehicle's center console. "All [of] these things," Officer Whitley testified, were "adding up as, from my training and experience, as characteristics of an armed suspect." Also, upon Officer Whitley's return to his patrol car in order to conduct a criminal records check of defendant, the officer obtained information about defendant's criminal history that solidified the existence of reasonable suspicion for the officer to conduct a *Terry* search, based on the belief developed by Officer Whitley that defendant was armed and dangerous.

¶ 18 Standing alone, defendant's criminal record for which defendant has already paid his debt to society does not constitute reasonable suspicion and hence cannot singly serve as a basis for the law enforcement officer who effected the traffic stop to conduct a *Terry* search of the passenger compartment of defendant's vehicle.[2] Likewise, defendant's mere presence in a high-crime area does not solely provide the officer with the necessary reasonable suspicion to authorize the officer to order defendant to exit the vehicle so that the officer can look for weapons. *See State v. Jackson*, 368 N.C. 75, 80 (2015). Similarly, defendant's nervousness does not in and of itself amount to reasonable suspicion when displayed to a detaining officer. *State v. Pearson*, 348 N.C. 272, 276 (1998). However, we do not assess each of these factors, specifically

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2. However, a law enforcement officer's specific knowledge of a suspect's felonious criminal *convictions* alters the reasonable suspicion inquiry when the officer (1) conducts a lawful investigative stop of the suspect for the very conduct which serves as the basis for those criminal convictions (albeit this circumstance is not present here), and (2) testifies that based on the training and experience of the officer, the felonious conduct for which defendant has been convicted and is currently being investigated is normally associated with the possession of weapons. *State v. McGirt*, 122 N.C. App. 237, 240 (1996), *aff'd per curiam*, 345 N.C. 624 (1997).

articulated by Officer Whitley in this case, in isolation. *See Jackson*, 368 N.C. at 80. We examine the totality of the circumstances surrounding Officer Whitley's interaction with defendant in order to achieve a comprehensive analysis as to whether the officer's conclusion that defendant may have been armed and dangerous was reasonable. *Id.* In the case at bar, in which the officer rendered uncontroverted testimony that he conducted a late-night traffic stop of defendant's vehicle in a high-crime area and encountered defendant who acted very nervous, appeared to purposely hamper the officer's open view of defendant's entry into the vehicle's center console, and possessed a criminal history which depicted a "trend in violent crime," we conclude that the officer's suspicion of defendant's potentially armed and dangerous status was reasonable. Therefore, Officer Whitley operated within the bounds of both the Fourth Amendment to the Constitution of the United States and article I, section 20 of the North Carolina Constitution in removing defendant from the Dodge Charger and searching the area of the vehicle's passenger compartment that was within defendant's control for weapons.

¶ 19 In determining that the aforementioned factors were sufficient to constitute reasonable suspicion for the officer's *Terry* search based on the totality of the circumstances, we have purposely and expressly removed from the assemblage of factors which were considered by the trial court to establish reasonable suspicion the factor gleaned from Officer Whitley's uncontroverted testimony that defendant's act of raising his hands and extending them from the driver's side window, so that defendant's hands could readily be seen by the approaching officers, was interpreted by Officer Whitley as a sign that there could be the presence of a firearm in the vehicle. The officer testified at the suppression hearing that defendant's placement of defendant's hands figured into the officer's belief that defendant "was armed and dangerous at that point." The Court of Appeals, in giving deference to the officer's right "to rely on his experience and training" and to the trial court's order, included this factor of "raising one's hands" as defendant did in the present case to be properly considered in the totality of the circumstances which resulted in the existence of the officer's reasonable suspicion to execute the *Terry* search. *Johnson*, 269 N.C. App. at 85–86.

¶ 20 In his brief, defendant's appellate counsel argues that defendant's action of raising defendant's hands and clearly exposing them to the officers as they neared defendant's vehicle during the traffic stop should be construed differently than Officer Whitley, the trial court, and the Court of Appeals did:

> In this case, the trial court commended [defendant] for raising his hands and placing them out the window upon being stopped by officers . . . . He was praised by the trial court for taking action considered helpful to avoid getting shot, but this same action was found to establish, in part, the basis for a frisk for weapons. This presents an unjust choice.

¶ 21 We do not need, nor choose, to address any such real or perceived conundrum with regard to the existence of reasonable suspicion for the *Terry* search because in this Court's view, the factor of defendant's raised hands upon the officer's effectuation of the traffic stop is unnecessary to consider for the purpose of the establishment of reasonable suspicion in light of the totality of the circumstances which include the other factors comprising the officer's reasonable suspicion which collectively have already been deemed by this Court to be sufficient in the present case. Like the Fourth Circuit Court of Appeals, we harbor some "concern about the inclination of the [State] toward using whatever facts are present, no matter how innocent, as indicia of suspicious activity." *State v. Nicholson*, 371 N.C. 284, 291 n.4 (2018) (quoting *United States v. Foster*, 634 F.3d 243, 248 (4th Cir. 2011)). Nonetheless, for the purpose of our legal analysis as to the State's establishment of the existence of reasonable suspicion for the officer's *Terry* search, we conclude that the totality of the circumstances supports the trial court's ultimate conclusion that such reasonable suspicion existed, even after this Court eliminates defendant's gesture of raising his hands as a factor.

D. Extension of the Stop

¶ 22 Lastly, defendant contends that Officer Whitley's search of defendant's vehicle after discovering defendant's criminal history represented an unconstitutional extension of the traffic stop because "it seems evident that Officer Whitley was satisfied that a traffic citation for displaying a fictitious tag was not warranted under the circumstances as he did not issue such a citation." Therefore, defendant posits that the officer's subsequent *Terry* frisk of defendant's person and accompanying search of defendant's vehicle were not in furtherance of the officers' safety while fulfilling the purpose of the traffic stop itself, but were instead independent investigative actions targeting other unarticulated suspicions of criminal activity. In defendant's view, since Officer Whitley did not demonstrate a reasonable suspicion prior to leaving defendant to conduct the criminal records check, coupled with the officer's inability to form reasonable suspicion to justify the *Terry* search based on

defendant's criminal history alone, then the officer's decision to search defendant after the juncture when defendant assumes that Officer Whitley had decided not to charge defendant for the traffic violation constituted an unlawful extension of the traffic stop. This description mischaracterizes the timing of Officer Whitley's interactions with defendant and disregards the totality of the circumstances which yielded the factors upon which Officer Whitley formed the reasonable suspicion required to conduct the limited Fourth Amendment search.

¶ 23 "[T]he duration of a traffic stop must be limited to the length of time that is reasonably necessary to accomplish the mission of the stop, unless reasonable suspicion of another crime arose before that mission was completed." *State v. Bullock*, 370 N.C. 256, 257 (2017) (citations omitted). While this rule describes the temporal nature of the scope of a constitutionally appropriate traffic stop, the exercise of "police diligence 'includes more than just the time needed to issue a citation.' " *Reed*, 373 N.C. at 509 (quoting *Bullock*, 370 N.C. at 257). To ensure that the exercise of such enterprise by law enforcement remains within the confines of the Fourth Amendment, however, "an investigation unrelated to the reasons for the traffic stop must not prolong the roadside detention." *Reed*, 373 N.C. at 509. In order to prolong a traffic stop beyond the amount of time necessary to investigate and address the reason for the stop itself, the detaining officer must "possess a justification for doing so other than the initial traffic violation that prompted the stop in the first place." *Id.* at 510 (quoting *United States v. Branch*, 537 F.3d 328, 336 (4th Cir. 2008)). The development of a reasonable suspicion that a suspect may be armed in the normal course of an investigation into the basis for a traffic stop provides one such justification. *Id.* (quoting *Branch*, 537 F.3d at 336, to explain that prolonging a traffic stop "requires either the driver's consent or a reasonable suspicion that illegal activity is afoot").

¶ 24 Here, Officer Whitley testified that after observing that defendant exhibited some of the characteristics of an armed subject, the officer returned to the officer's patrol car in order to conduct a records check of defendant and of the vehicle itself to confirm the veracity of defendant's statements as to the ownership of the car. Such a course of action on the part of Officer Whitley is readily recognized as a proper function of the police during traffic stops which are effected under the Fourth Amendment, and the officer's deeds were directly related to addressing the purpose of the stop itself. *Rodriguez v. United States*, 575 U.S. 348, 355 (2015). The officer's activities were not, as represented by defendant, exercises of the officer which were external to the traffic stop,

nor did they prolong the stop beyond the mission's purpose. Although Officer Whitley testified that he did not intend to arrest defendant for the minor traffic infraction of a fictitious license plate which served as the impetus for the traffic stop, the officer did not testify—inconsistent with defendant's self-serving assumption—that the officer had already made a determination to refrain from charging defendant for the traffic violation at the time that the officer was engaged in the process of performing the records check. The officer's declination to issue a citation to defendant for the traffic offense, with only defendant's speculation as to the timing of the officer's decision to refrain from charging defendant with the violation in the dearth of any evidence to support defendant's theory, does not equate to a conclusion that the officer unreasonably prolonged the traffic stop. This is particularly true in light of the testimony rendered by Officer Whitley as to the actual chain of events and the observations by the officer which culminated in the *Terry* search. The officer represented at the suppression hearing that the records check was a standard aspect of any traffic stop that he conducted. The information obtained by the officer from the records check disclosed defendant's "trend in violent crime."

¶ 25 The entirety of the sequence of events which was started by virtue of Officer Whitley's initiation of a traffic stop of defendant's vehicle in order to investigate an apparent license plate violation, during which the officer's interaction with defendant featured behavioral cues by defendant that prompted Officer Whitley to consider that defendant might be armed, which in turn led the officer to particularly note during the officer's routine records check that he performed pursuant to every traffic stop that he effectuated that defendant's criminal history indicated a "trend in violent crime," thus compelling Officer Whitley to believe that defendant was "armed and dangerous" and establishing reasonable suspicion in the officer's mind so as to justify a *Terry* frisk of defendant's person and a *Terry* search of defendant's vehicle for weapons in areas that were subject to defendant's direct and immediate control, demonstrate that there was not an unconstitutional extension of the traffic stop. In light of these facts, we adopt the observant phrase employed by the Supreme Court of the United States, "[c]learly this case does not involve any delay unnecessary to the legitimate investigation of the law enforcement officers." *United States v. Sharpe*, 470 U.S. 675, 687 (1985).

III. Conclusion

¶ 26 Based upon the foregoing factual background, procedural background, and analysis, we affirm the holding of the Court of Appeals

finding no error in the trial court's order denying defendant's motion to suppress in agreement with the conclusion of the Court of Appeals as modified by our discussion in this opinion.

AFFIRMED.

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

Chief Justice NEWBY concurring.

¶ 27 I agree with the well-reasoned majority opinion that the evidence it considers was sufficient for the trial court to find Officer Whitley had reasonable suspicion to justify the limited *Terry* search for weapons in the area immediately surrounding defendant. Although not needed to resolve this case, however, I do not believe this Court should remove from the analysis defendant's gesture of raising his hands out of his car window. Like other movements, which may be innocent standing alone, with the proper testimony the act of raising one's hands can be a factor to support an officer's reasonable suspicion.

¶ 28 The trial court here found:

> 8. That after the Defendant stopped, he raised both of his hands in the air upon the officers' approach.
>
> 9. That Officer Whitley observed the Defendant's hands in the air, and based on Officer Whitley's training and experience, he believed that the gesture of raising one's hands in the air can indicate that a person has a gun inside the vehicle.
>
> 10. That based on his training and experience, Officer Whitley was on alert about the possible presence of a gun.

Based on these findings, the trial court concluded:

> 1. That the motion of having hands up upon an officer's approach does not automatically incriminate an individual by itself, and the Defendant's action of showing his hands was reasonable. However, based on an officer's experience, it is reasonable for an officer to infer that the motion of hands up upon

> an officer's approach could indicate the presence of a weapon.

Thus, based on Officer Whitley's testimony, the trial court included defendant's action of raising his hands as a factor to support reasonable suspicion.

¶ 29 The trial court properly considered all the relevant factors to determine that Officer Whitley had reasonable suspicion justifying the limited *Terry* search for a weapon. In determining whether reasonable suspicion exists, this Court "consider[s] 'the totality of the circumstances—the whole picture,' " *State v. Watkins*, 337 N.C. 437, 441, 446 S.E.2d 67, 70 (1994) (quoting *United States v. Cortez*, 449 U.S. 411, 417, 101 S. Ct. 690, 695 (1981)), including the perspective "of a reasonable, cautious officer, guided by his experience and training," *State v. Styles*, 362 N.C. 412, 414, 665 S.E.2d 438, 439 (2008) (quoting *Watkin*s, 337 N.C. at 441, 446 S.E.2d at 70). Other courts have found that a defendant's raised hands can support reasonable suspicion for a limited *Terry* search. *See Clark v. Clark*, 926 F.3d 972, 979 (8th Cir. 2019) (concluding that the defendant's action of "pull[ing] over and put[ting] his hands outside the driver's side window" supported reasonable suspicion for a *Terry* investigatory seizure and search of the defendant's vehicle for a gun); *State v. King*, 206 N.C. App. 585, 590, 696 S.E.2d 913, 916 (2010) (holding that "the unusual gesture of [the d]efendant placing his hands out of his window" supported reasonable suspicion for a limited *Terry* search); *cf. State v. Mbacke*, 365 N.C. 403, 404–10, 721 S.E.2d 218, 219–22 (2012) (analogizing the "reasonable to believe" standard from *Arizona v. Gant*, 556 U.S. 332, 129 S. Ct. 1710 (2009), to the *Terry* reasonable suspicion standard to conclude that officer had reason to believe the defendant's vehicle contained additional evidence of the offense of arrest to justify search for handgun while the defendant was detained outside the vehicle based on, *inter alia*, the defendant's furtive behavior of lowering hands off the steering wheel), *cert. denied*, 568 U.S. 864, 133 S. Ct. 224 (2012). Therefore, I believe the trial court properly relied on defendant's raised hands as a factor in finding the existence of reasonable suspicion. Otherwise, I fully concur with the majority opinion.

Justice EARLS dissenting.

¶ 30 The sole question before this Court is whether, under "the totality of the circumstances as viewed from the standpoint of an objectively reasonable police officer," *State v. Wilson*, 371 N.C. 920, 926 (2018) (cleaned

up) (quoting *State v. Johnson*, 370 N.C. 32, 34–35 (2017)), it would be reasonable for an officer "to believe that he [was] dealing with an armed and dangerous individual" after initiating a traffic stop of Bryan Xavier Johnson. *Terry v. Ohio*, 392 U.S. 1, 27 (1968). The majority answers in the affirmative. To reach this conclusion, the majority converts a jumble of subjective, innocuous, or irrelevant facts into indicia of dangerousness. The result is a decision inconsistent with the Fourth Amendment and which fails to consider the racial dynamics underlying reasonable suspicion determinations. Therefore, I respectfully dissent.

I. Reasonable suspicion under *Terry*

¶ 31 According to the majority, five factors contribute to the reasonable belief that Johnson was armed and dangerous under *Terry*: "(1) the traffic stop occurred late at night (2) in a high-crime area, with (3) defendant appearing 'very nervous' to the detaining officer to the point that it 'seem[ed] like his heart [was] beating out of his chest a little bit[,]' with (4) defendant 'blading his body' as he accessed the Dodge Charger's center console, and (5) defendant's criminal record indicating a 'trend in violent crime' and weapons-related charges." The majority repeatedly asserts that although no one individual factor may be sufficient to justify the search "standing alone," these factors are sufficient when viewed collectively under the "totality of the circumstances." Although I agree with the majority that *Terry* demands a flexible, holistic approach, I cannot join the majority in its refusal to enforce the limits imposed by the Fourth Amendment on the State's authority to conduct warrantless searches. Facts which individually do not contribute to reasonable suspicion in isolation should not be accorded outsized significance merely because they appear alongside other facts which also do not contribute to reasonable suspicion. Even viewed under the "totality of the circumstances," I would hold that the State has failed to meet its burden of proving that an objective officer would reasonably believe Johnson was armed and dangerous at the time Officer Whitley initiated the search of his vehicle.

1. Presence in a "high crime area" late at night

¶ 32 At the suppression hearing, Officer Whitley described the area in which he apprehended Johnson as a "very high crime area, where we have a lot of narcotic sales." A defendant's presence in a "high crime area" can sometimes be "among the relevant contextual considerations in a *Terry* analysis." *Illinois v. Wardlow*, 528 U.S. 119, 124 (2000) However, a defendant's presence in a "high crime area" is only probative when it is paired with conduct suggesting the defendant's presence

is in some way connected to the criminal conduct known to occur in that area. There must be some basis for suspecting the individual was someone other than one of the countless innocent people whose daily routines involve spending time in a "high crime area" for the individual's mere presence to be relevant.

¶ 33 Thus, in *State v. Butler*, it was not the defendant's mere presence on a street corner the arresting officer "knew . . . to be a center of drug activity" which contributed to reasonable suspicion, it was the defendant's presence coupled with the fact that the defendant "was seen in the midst of a group of people congregated on a corner known as a 'drug hole' " and that "upon making eye contact with the uniformed officers, [the] defendant immediately moved away, behavior that is evidence of flight." 331 N.C. 227, 233 (1992). Similarly, in *State v. Jackson*, the defendant's presence in a "high crime area" contributed to reasonable suspicion because the defendant "stood at 9:00 p.m. in a specific location known for hand-to-hand drug transactions . . . walked in [the] opposite direction[ ] upon seeing a marked police vehicle approach . . . came back very near to the same location once the patrol car passed . . . [and] walked [away] a second time upon seeing [the police officer] return." 368 N.C. 75, 80 (2015). In both cases, it was the combination of a defendant's presence in a "high crime area" with behavior suggestive of the defendant's personal involvement in the area's criminal activities which made the defendant's geographic location relevant under *Terry*.

¶ 34 By contrast, in this case, Johnson did not do anything to suggest his presence in a "high crime area" was in any way motivated by or connected to the alleged prevalence of drug trafficking in that neighborhood. He was simply driving his vehicle down Central Avenue in Charlotte. He was stopped because the license plate on his vehicle was not registered to the type of vehicle he was driving. He was not observed interacting with suspected drug dealers, visiting places where drug transactions were known to occur, or attempting to evade the police. Nothing Officer Whitley observed distinguished Johnson from the many other people who undoubtedly pass through this "high crime area" with no intention of doing anything other than getting from one location to the next. In my view, this renders Johnson's physical location irrelevant to the *Terry* analysis.

¶ 35 There is nothing reasonable about believing that an individual is armed and dangerous merely because he drove his vehicle down a particular street, no matter where that street is located. The majority's rejoinder that Johnson's location is probative when considered "in the totality of the circumstances" does not answer the question of why

Johnson's presence in this particular location in any way suggested he was armed and dangerous. Johnson's conduct did nothing to convert Officer Whitley's generalized observation about the nature of the area into a reasonable, particularized, and individualized suspicion regarding Johnson. The majority's position risks "making the simple act of [driving] in one's own neighborhood a possible indication of criminal activity." *Jackson*, 368 N.C. at 80.

¶ 36 In his brief, Johnson does not appear to directly challenge the trial court's implied finding of fact that the area he was travelling through was fairly characterized as a "high crime area." However, in a different case, it may be necessary for this Court to define what a "high crime area" is, what competent evidence is necessary to support the finding that a defendant was located in one, and the circumstances under which a defendant's presence in a "high crime area" supports an officer's reasonable suspicion that he is armed and dangerous.

¶ 37 For example, the First Circuit has held that in order for a defendant's location in a "high crime area" to contribute to reasonable suspicion, the government is required to present evidence tending to prove "(1) [a] nexus between the type of crime most prevalent or common in the area and the type of crime suspected in the instant case, (2) limited geographic boundaries of the 'area' or 'neighborhood' being evaluated, and (3) temporal proximity between evidence of heightened criminal activity and the date of the stop or search at issue." *United States v. Wright*, 485 F.3d 45, 53–54 (1st Cir. 2007) (citations omitted). Further, while it is certainly appropriate to credit "the testimony of police officers[ ] describing their experiences in the area" in determining whether an area is a "high crime area," I would agree with the First Circuit that we should also look to data and other sources of information to ensure the reasonableness inquiry at the heart of the *Terry* analysis remains tethered to objective facts. *Id.* at 54; *see also N. Mariana Islands v. Crisostomo*, 2014 WL 7072149, at *2 (N. Mar. I. Dec. 12, 2014) ("[A]n officer's confident body language and tone of voice are not enough to prove a high-crime claim. Allowing such a finding solely through unsubstantiated testimony (no matter how confidently stated) would give police the power to transform 'any area into a high crime area based on their unadorned personal experiences.' " (quoting *United States v. Montero-Camargo*, 208 F.3d 1122, 1143 (9th Cir. 2000))).

¶ 38 Further, I share the concern expressed by many courts that encouraging reliance on undefined, amorphous signifiers like "high crime area" as a proxy for suspected criminal activity risks subjecting identifiable racial minority communities to disproportionate, invasive, and unlawful

searches. *See, e.g.*, *United States v. Caruthers*, 458 F.3d 459, 467 (6th Cir. 2006) ("[L]abeling an area 'high-crime' raises special concerns of racial, ethnic, and socioeconomic profiling."); *Montero-Camargo*, 208 F.3d at 1138 ("The citing of an area as 'high-crime' requires careful examination by the court, because such a description, unless properly limited and factually based, can easily serve as a proxy for race or ethnicity."). There is research demonstrating that the reported rate of crime in a particular geographic area is driven not only by the actual incidence of criminal conduct in that area, but also by law enforcement's choices regarding where and how to conduct enforcement activities. *See* Sandra G. Mayson, *Bias in, Bias Out*, 128 Yale L.J. 2218, 2253 (2019) ("Blacks are more likely than others to be arrested in almost every city for almost every type of crime. Nationwide, black people are arrested at higher rates for crimes as serious as murder and assault, and as minor as loitering and marijuana possession."); *see also* K. Babe Howell, *Prosecutorial Discretion and the Duty to Seek Justice in an Overburdened Criminal Justice System*, 27 Geo. J. Legal Ethics 285, 298 (2014) ("It is the police who choose what areas to target, who respond to calls, and who make the initial decision whether to make an arrest or issue an informal warning when minor misconduct occurs."). My concern is especially acute in this case because Officer Whitley "did not observe [defendant] engage in any type of behavior that is consistent with [the criminal] activity" thought to occur with greater frequency in the area where he was apprehended. *United States v. Beauchamp*, 659 F.3d 560, 570 (6th Cir. 2011).

¶ 39 I have similar concerns regarding the majority's reliance on the fact that "the traffic stop took place late at night." It is correct that this Court has previously held the time of night when a stop occurs to be "an appropriate factor for a law enforcement officer to consider in formulating a reasonable suspicion." *State v. Watkins*, 337 N.C. 437, 442 (1994). Yet we have also recognized a difference between being present late at night in a place where it is expected people might be found at that hour and being present late at night somewhere where one's presence is anomalous. Thus, in *Watkins*, we distinguished between a defendant "standing in an open area between two apartment buildings . . . in Greensboro, an urban area, shortly after midnight" and a defendant who was observed "proceeding slowly on a dead-end street of locked businesses at 12:50 a.m. in an area with a high incidence of property crime." *Id.* The latter circumstance was indicative of reasonable suspicion while the former was not. There must be some other objective basis from which to infer that the individual is travelling late at night for a nefarious purpose and is not just a parent heading home to tuck his or her children in after a late-night shift.

¶ 40 In this case, there is no evidence indicating Johnson's presence or behavior was unusual or alarming for the place and hour. There is no evidence that individuals who drive down Central Avenue late at night are disproportionately likely to be armed and dangerous. Nor is there any evidence that individuals who possess guns and present a danger to law enforcement officers tend to travel at night. *Cf. United States v. Williams*, 808 F.3d 238, 249 (4th Cir. 2015) ("This record does not make an evidentiary connection between nocturnal travel and drug trafficking . . . . Absent such a connection, that the traffic stop of [the defendant] occurred at about 12:37 a.m. does not contribute to a reasonable, articulable suspicion for extending the otherwise-completed traffic stop . . . ."). Accordingly, I would hold that neither the location nor the time of the traffic stop contribute to a reasonable suspicion that Johnson was armed and dangerous under *Terry*.

2. Nervousness

¶ 41 We have previously held that nervousness can be "an appropriate factor to consider when determining whether a basis for a reasonable suspicion exists." *State v. McClendon*, 350 N.C. 630, 638 (1999). But nervousness only supports an officer's reasonable suspicion when it is something "more than ordinary nervousness." *Id.* at 639. "This Court has expressly determined that *general nervousness* is not significant to reasonable suspicion analysis because many people become nervous when stopped by a [law enforcement officer]." *State v. Reed*, 373 N.C. 498, 515 (2020) (cleaned up) (emphasis added) (quoting *State v. Pearson*, 348 N.C. 272, 276 (1998)). We have treated nervousness as supporting an officer's reasonable suspicion when the defendant "was fidgety and breathing rapidly, sweat had formed on his forehead, he would sigh deeply, and he would not make eye contact with the officer," but we also explained that when "the nervousness of the defendant [is] not remarkable . . . it d[oes] not support a reasonable suspicion." *McClendon*, 350 N.C. at 639.

¶ 42 None of the twenty-four findings of fact contained in the trial court's order on the motion to suppress included any reference to Johnson's alleged nervousness. While the trial court was not required by statute to reduce all its findings to writing, it goes beyond the scope of appellate review to accord deference to a supposed fact based solely on the officer's observations of the witness's demeanor, when the trial court itself made no such finding. Silence by the trial court is not endorsement of the witness' veracity nor does it give the appellate court any guidance as to the weight to accord that testimony.

¶ 43 Finally, even if it is proper to consider evidence not incorporated into any of the trial court's express findings of fact, the record does not sup-

port the conclusion that Johnson was unusually or remarkably nervous. The only evidence attesting to Johnson's level of nervousness is Officer Whitley's testimony that he "seemed very nervous and to the point of where, as you can imagine, his heart's beating, but it seems like his heart is beating out of his chest a little bit. He was very nervous. . . . you could see his heart rising in his chest." However, Johnson did not exhibit any physical symptoms of anything other than an ordinary response to an understandably stressful situation. He did not act in an inexplicable or aberrant manner, he did not appear disoriented or disheveled, and he did not do anything other than respond to Officer Whitley's questions appropriately and intelligibly. Absent any evidence that Johnson was inordinately nervous, Officer Whitley's bare assertion that Johnson was "very nervous" in no way contributes to the reasonable suspicion that he was armed and dangerous.

¶ 44 Other courts have expressed skepticism regarding the probative value of an officer's observation that the defendant was nervous during a traffic stop. *See*, *e.g.*, *United States v. Fernandez*, 18 F.3d 874, 879 (10th Cir. 1994) ("We have repeatedly held that nervousness is of limited significance in determining reasonable suspicion and that the government's repetitive reliance on the nervousness of either the driver or passenger as a basis for reasonable suspicion 'in all cases of this kind must be treated with caution.' " (cleaned up) (quoting *United States v. Millan-Diaz*, 975 F.2d 720, 722 (10th Cir. 1992))). And with good reason. Common sense tells us it is not at all surprising that an individual might look and feel nervous, even "very nervous," when interacting with a law enforcement officer in this context. *See*, *e.g.*, *United States v. Beck*, 140 F.3d 1129, 1139 (8th Cir. 1998) ("It certainly cannot be deemed unusual for a motorist to exhibit signs of nervousness when confronted by a law enforcement officer."); *United States v. Wood*, 106 F.3d 942, 948 (10th Cir. 1997) ("It is certainly not uncommon for most citizens—whether innocent or guilty—to exhibit signs of nervousness when confronted by a law enforcement officer."); *State v. Schlosser*, 774 P.2d 1132, 1138 (Utah 1989) ("When confronted with a traffic stop, it is not uncommon for drivers and passengers alike to be nervous and excited and to turn to look at an approaching police officer."). Even physical manifestations of nervousness do not necessarily warrant the inference that an individual is hiding something. *See State v. Anderson*, 258 Neb. 627, 641 (2000) ("Trembling hands, a pulsing carotid artery, difficulty locating a vehicle registration among documents in a glove box, and hesitancy to make eye contact are signs of nervousness which may be displayed by innocent travelers who are stopped and confronted by an officer.").

¶ 45 Our traditional distinction between general nervousness—which does not support an officer's reasonable suspicion—and extreme nervousness—which may support an officer's reasonable suspicion—reflects this reality. The majority's decision to rely upon Johnson's nervousness in this case, based solely upon Officer Whitley's testimony that he observed Johnson's heart "beating out of his chest a little bit," erodes that distinction and turns an entirely understandable physiological response into a ground for conducting a warrantless search.

¶ 46 There are numerous completely innocent reasons why any person might be nervous during a traffic stop. There are also specific reasons why someone who looks like Johnson—a large Black man—might be especially nervous during a traffic stop. Black people are more likely than white people to be pulled over while driving, more likely than white people to be subjected to investigatory stops, and more likely than white people to be shot and killed by law enforcement officers.[1] Any driver who has followed the news in recent years would have learned the names of numerous people of color killed during or after routine traffic stops. These encounters can be fraught under any circumstance and especially so when the driver fears that one false step might cost him his life. Thus, I cannot agree with the majority that Johnson's purported level of apparent nervousness, as described by the officer's testimony in this case, can support a rational inference that he was armed and dangerous.

3. Blading

¶ 47 The majority holds that Officer Whitley's testimony Johnson was "blading [his body] . . . as if he [was] trying to conceal something" contributes to reasonable suspicion under *Terry*. To be precise, this fact—which the trial court did not explicitly find—is based entirely upon Officer Whitley's perception that Johnson did not reach into his center console in the way Officer Whitley believed a driver "typically" would. I do not dispute that "an obvious attempt to hide or to evade the au-

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1. *See, e.g.*, Emma Pierson et al., *A Large-Scale Analysis of Racial Disparities in Police Stops Across the United States*, 4 Nature Hum. Behav. 736, 736 (July 2020), https://doi.org/10.1038/s41562-020-0858-1 ("We assessed racial disparities in policing in the United States by compiling and analysing a dataset detailing nearly 100 million traffic stops . . . . Our results indicate that police stops and search decisions suffer from persistent racial bias . . . ."); Wesley Lowery, *A Disproportionate Number of Black Victims in Fatal Traffic Stops*, Washington Post (Dec. 24, 2015), https://www.washingtonpost.com/national/a-disproportionate-number-of-black-victims-in-fatal-traffic-stops/2015/12/24/c29717e2-a344-11e5-9c4e-be37f66848bb_story.html (finding that one third of all individuals shot and killed during traffic stops in 2015 were Black, "making the roadside interaction one of the most common precursors to a fatal police shooting of a black person in 2015").

thorities can be a factor in the calculus of reasonable suspicion." *United States v. Woodrum*, 202 F.3d 1, 7 (1st Cir. 2000). However, I disagree with the majority that Officer Whitley's subjective perception that Johnson "bladed" his body contributes to reasonable suspicion in this case.

¶ 48 The significance of Johnson's motion in retrieving his paperwork from the center console of his vehicle lies entirely in the meaning a reasonable officer would ascribe to the motion, not in the motion itself. "[N]ot every slouch, crouch, or other supposedly furtive movement justifies a stop. The proper inquiry is case-specific and context-contingent, and the surrounding circumstances ordinarily will tell the tale." *Id.* (citation omitted). Here, Johnson's body movement is probative only insofar as a reasonable officer would perceive his movement to be an effort to shield a weapon from view. For this reason, it is notable that when Johnson supposedly "bladed" his body to shield the contents of his center console from Officer Whitley's view, there was another officer standing on the other side of the vehicle looking in through the passenger side window. Further, it is not as if Johnson's movements were unnatural or disconnected from the events of that moment. He was a large man reaching across his body while remaining seated in his vehicle. The fact that he lifted his shoulders off the seat to do is not a reason to conclude he was armed and dangerous.

¶ 49 We should be hesitant to rely so completely on the subjective perceptions of an individual officer whose interpretation of a body motion that is not inherently suspicious is the sole basis for the conclusion that Johnson's movements contributed to reasonable suspicion. We should be especially hesitant to do so when the trial court did not enter an express finding of fact that Johnson "bladed" his body. This Court is not a factfinding tribunal, and it stretches both our competence and authority when we "[i]nfer[ ] additional findings, ones that go beyond what the trial court actually found, to rescue an otherwise insufficient ruling of the trial court." *State v. Johnson*, 269 N.C. App. 76, 88–89 (2019) (Murphy, J., dissenting).[2] Further, "an officer's impression of whether a movement was 'furtive' may be affected by unconscious racial biases," which is an additional reason to leave factfinding, which often involves credibility

2. The majority asserts that it is appropriate to imply facts not expressly found by the trial court because the trial court noted its ruling was "based on the totality of [the] circumstances, *including but not limited to* [the enumerated facts]." Similarly, the majority argues its factfinding endeavor is appropriate because Officer Whitley's testimony was "uncontroverted." But uncontroverted testimony is not the same as an established fact—it is for the trial court to "itself determine what pertinent facts are actually established by the evidence before it." *Coble v. Coble*, 300 N.C. 708, 712 (1980).

determinations, to the trial court. *Floyd v. City of New York*, 959 F. Supp. 2d 540, 578 (S.D.N.Y. 2013).

¶ 50 Even if it is proper to treat Officer Whitley's testimony regarding Johnson's "blading" his body as an express finding of fact, this fact adds little to the reasonable suspicion calculus. *Cf. State v. Johnson*, 2006 WI App 15, ¶ 18, 288 Wis. 2d 718, 709 N.W.2d 491, *aff'd*, 2007 WI 32, 299 Wis. 2d 675, 729 N.W.2d 182 (concluding that the defendant's "furtive" movements did not support reasonable suspicion he was armed and dangerous because "[t]he officers pulled [the defendant] over for traffic violations . . . and not for a crime[,]" and the officers "had no prior contacts with [the defendant] that would suggest that he would be armed or otherwise dangerous"). This Court has never before recognized "blading" as a behavior which gives rise to the reasonable inference that an individual is armed and dangerous. In the only other Court of Appeals decision previously recognizing "blading" as a contributing factor under *Terry*, the defendant "bladed" his body in such a way as to prevent the arresting officer from viewing his hip, where a firearm is often carried, immediately after making eye contact with the officer. *State v. Malachi*, 264 N.C. App. 233, 238, *appeal dismissed*, 372 N.C. 702 (2019). In that case, there was no other reason for the defendant to move his body in that manner. Furthermore, the officer in that case testified about the basis for his suspicion including training he received that a person with a gun often turns his hip to hide the weapon. *See Malachi*, 264 N.C. App. at 237-38. Finally, officers had received an anonymous tip that someone wearing a red shirt and black pants had put a gun in his waistband. *Id.*, at 234. By contrast, in this case, there was no tip, there was no testimony regarding the officer's training, and most importantly, Johnson was moving his body to accomplish an apparent, noncriminal purpose. Indeed, courts in other jurisdictions have concluded that movements which are contextually appropriate and not inherently suspect do not contribute to the reasonable suspicion analysis. *Cf. United States v. Hood*, 435 F. Supp. 3d 1, 8 (D.D.C. 2020) (rejecting the government's "blading" argument because "the positioning of [the defendant's] body seems consistent with an individual who was crossing a street at a diagonal from north to south"). Therefore, I would not consider Johnson's alleged "blading" significant in the reasonable suspicion analysis.

4. Prior record

¶ 51 The majority finds probative Officer Whitley's testimony that he believed Johnson was "armed and dangerous" after he reviewed Johnson's criminal record and discerned a "trend in violent crime." I would conclude this finding is unsupported by competent evidence in the record

and thus cannot contribute to the reasonable suspicion analysis in this case.

¶ 52 At the suppression hearing, Officer Whitley could not recall the dates of the entries he viewed in Johnson's record, whether those entries documented charges or convictions, or the total number of charges or convictions Johnson's record contained. He did recall that that the dates of these entries "started somewhere around 2003 to the 2009 mark." In 2009, it might have been reasonable to conclude, based on this evidence, that Johnson's criminal record indicated a "trend in violent crime." In 2017, when the stop occurred, eight years had passed since Johnson had been charged or convicted of *any* crime, let alone a violent one. Notwithstanding this lengthy gap, the majority concludes Johnson's criminal record supports the reasonable belief he was armed and dangerous in 2017.

¶ 53 A trend implies some accounting for recent events. Otherwise, it would be correct to say that the Seattle Supersonics have demonstrated a "trend in winning basketball games," even though they ceased to exist around the same time as Johnson's last conviction. By concluding that it would be reasonable for an officer to ignore the eight-year period during which Johnson maintained a clean record immediately preceding the traffic stop, the majority suggests that no matter how far back in time an individual's prior charges and convictions occurred, no matter how successful that individual has been in re-entering society, it is reasonable for an officer to believe that an individual with a prior record is a threat. At a minimum, we should make clear that "the age of [a defendant's] convictions is a factor to consider in determining their relevance" in the *Terry* analysis to avoid lending the impression that once an individual has been arrested or convicted of some crime, he is marked as presumptively dangerous for life. *United States v. Scott*, 818 F.3d 424, 431 (8th Cir. 2016); *see also United States v. Falso*, 544 F.3d 110, 122 (2d Cir. 2008) (holding with respect to warrant application based in part on 18-year-old conviction that "even if [the defendant's] prior conviction were relevant to the analysis, it should have only been marginally relevant because the conviction was stale").

¶ 54 Under these circumstances—where the defendant's last conviction occurred eight years prior to the traffic stop and there is no indication the defendant continued to engage in criminal activity in the intervening years—I disagree with the majority that Johnson's criminal record supports the reasonable belief he was armed and dangerous at the time of the traffic stop, "[s]tanding alone" or otherwise. I also note that prior convictions are not evenly distributed among all segments of the popula-

tion and that the distribution of convictions does not necessarily track meaningful distinctions in the frequency or severity of criminal conduct engaged in by members of different racial or ethnic groups. *See*, *e.g.*, *Terry v. United States*, 141 S. Ct. 1858, 1865 (2021) ("Under [federal] law, crack cocaine sentences were about 50 percent longer than those for powder cocaine. Black people bore the brunt of this disparity." (citation omitted)); *Mandala v. NTT Data, Inc.*, 975 F.3d 202, 220 (2d Cir. 2020) ("As the statistics show, there are significant racial disparities in arrest, conviction, and incarceration rates in this country."). Absent further clarification from this Court regarding the significance of an individual's prior criminal record, I worry that our decision today will allow historic racial disparities in policing to perpetuate ongoing ones.

¶ 55 One of the fundamental principles of our common law jurisprudence is that we punish acts, not an individual merely because of his or her status. *See*, *e.g.*, *Robinson v. California*, 370 U.S. 660 (1962) (holding a California law making it illegal to be a drug addict unconstitutional because the mere status of being a drug addict was not an act and thus not criminal.). The majority's conclusion that Johnson's prior criminal record contributes to reasonable suspicion—which treats his more recent, lengthier period of non-involvement with the criminal justice system as irrelevant—conveys the unmistakable impression that "felon" is a lifelong status which renders an individual's choices and behavior irrelevant. Moreover, the majority's reasoning contributes to a legal reality in which an individual's felony conviction is used to justify according an entire class of people diminished constitutional protections, going well beyond the legal debilities imposed by our constitution and statutes on individuals who have been convicted of a felony offense.

5. Raising hands

¶ 56 The majority notes that its conclusion there was reasonable suspicion to search Johnson's vehicle is in no way predicated on the fact that Johnson placed his hands up in the air when he was stopped by Officer Whitley. I wholeheartedly agree that Johnson's conduct in this respect should be given no probative weight in the *Terry* analysis. I would also go a step further and resolve the "real or perceived conundrum" that arises when the State claims that a defendant's raising his hands when surrendering to a law enforcement officer is evidence supporting a reasonable suspicion that the defendant is armed and dangerous.

¶ 57 The very obvious problem with this claim is that raising one's hands in this manner is an entirely natural way for one person to signal to another that they mean no harm. Indeed, police officers will often or-

der an individual suspected of being armed and dangerous to raise his hands, and the individual's failure to do so would certainly contribute to reasonable suspicion under *Terry*. *See United States v. Soares*, 521 F.3d 117, 121 (1st Cir. 2008) (concluding there was reasonable suspicion where the defendant "refused repeated orders to remain still and keep his hands in [the officer's] view"). At the same time, courts have held that it contributes to reasonable suspicion when a defendant moves his hands out of view of the arresting officer. *See United States v. Johnson*, 212 F.3d 1313, 1316–17 (D.C. Cir. 2000) (concluding that the defendant's "shoving down" motions with his hands were motions "which a reasonable officer could have thought were actually suggestive of hiding (or retrieving) a gun"). If raising one's hands contributes to reasonable suspicion, and failing to raise one's hands contributes to reasonable suspicion, then there is always reasonable suspicion.

¶ 58 The concurrence treats Johnson's hand raising as the majority treats every other fact it believes contributes to reasonable suspicion—according to the concurrence, while raising one's hands may sometimes be an innocent gesture, it takes on talismanic significance when considered "in the totality of the circumstances." The assertion is that "[l]ike other movements, which may be innocent standing alone, with the proper testimony the act of raising one's hands can be a factor to support an officer's reasonable suspicion." But the "proper testimony" referred to here is only the officer's subjective belief that the conduct was suspicious. This is not what the law requires. To protect Fourth Amendment rights this Court must ask whether the officer can articulate a reasonable, objective basis for his suspicion. Allowing "the proper testimony" to magically transform innocent acts into suspicious ones makes those rights illusory. As we recently stated in *Reed*,

> An officer may, consistent with the Fourth Amendment, conduct a brief, investigatory stop when the officer has a reasonable, articulable suspicion that criminal activity is afoot. *Illinois v. Wardlow*, 528 U.S. 119, 123, 120 S. Ct. 673, 145 L. Ed. 2d 570 (2000). An obvious, intrinsic element of reasonable suspicion is a law enforcement officer's ability to articulate the objective justification of his or her suspicion. . . . [We cannot] conveniently presuppose a fundamental premise which is lacking here in the identification of reasonable, articulable suspicion: the suspicion must be articulable as well as reasonable.

Reed, 373 N.C. at 514. Today's decision fails to adhere to this recent precedent.

¶ 59 The majority pays lip service to our previously stated "concern about the inclination of the [State] toward using whatever facts are present, no matter how innocent, as indicia of suspicious activity." *State v. Nicholson*, 371 N.C. 284, 291 n.4 (2018) (quoting *United States v. Foster*, 634 F.3d 243, 248 (4th Cir. 2011)). But the Fourth Amendment requires us to avoid "plac[ing] undue weight on [the arresting officer's] subjective interpretation of the facts rather than focusing on how an objective, reasonable officer would have viewed them." *Nicholson*, 371 N.C. at 291–92. In this case, the only "evidence" linking Johnson's hand motion to a risk of dangerousness was Officer Whitley's testimony that "typically when people [raise their hands in this manner], sometimes it can mean that they have a gun." We should not blindly acquiesce to one officer's subjective interpretation, which runs contrary to common sense and which makes the individuals most likely to experience trepidation when interacting with law enforcement more likely to be deemed suspicious because of their efforts to mitigate the risk of an encounter turning violent. Absent specific evidence illustrating why a hand gesture commonly understood to convey that the individual making the gesture means no harm should instead be understood as evidence that the individual is a threat, I would hold that this hand gesture does not contribute to reasonable suspicion under *Terry*.

II. Conclusion

¶ 60 Johnson did everything he was supposed to do when he was stopped by police officers. When he saw flashing lights in his rearview mirror, he pulled over "fairly immediately." When an officer approached his vehicle, he placed his hands up and out of the driver side window to show that he was unarmed. When the officer asked him why his license plate did not match the registration for his vehicle, he explained that he had purchased the vehicle earlier that day and reached into his center console to retrieve corroborating paperwork, including a bill of sale. When the officer asked him to step out of his vehicle, he stepped out of his vehicle. When the officer asked him to consent to a frisk for weapons, he consented. The officer found nothing suspicious on his person.

¶ 61 Under *Terry*, our analysis is supposed to focus on the behavior of each individual defendant under the circumstances of each individual case, but in this case nothing Johnson did mattered. Rather than hold the State to its burden under the Fourth Amendment, the majority reasons that the whole of the evidence supporting reasonable suspicion is greater than the sum of the parts. In doing so, the majority converts a generalized hunch into individualized suspicion, eroding the Fourth Amendment rights of all North Carolinians in the process. The majority

also ignores, and may well exacerbate, issues relating to racially disparate policing, issues which have been forthrightly examined by many courts confronted with similar kinds of *Terry* claims. Therefore, respectfully, I dissent.

Justice HUDSON joins in this dissenting opinion.

STATE OF NORTH CAROLINA
v.
FABIOLA ROSALES CHAVEZ

No. 184A20

Filed 13 August 2021

Conspiracy—jury instructions—conspirators—plain error analysis—no prejudice shown

In a trial for conspiracy to commit first-degree murder, where the trial court erred by instructing the jury that defendant could be found guilty if he conspired with "at least one other person" without naming the only co-conspirator listed in the conspiracy indictment, there was no plain error because there was no reasonable probability the jury would have reached a different result absent the error given the overwhelming evidence of defendant's guilt. The decision of the Court of Appeals reaching the opposite conclusion, without a prejudice analysis being conducted, was reversed.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 270 N.C. App. 748 (2020), finding no error in part, vacating and new trial in part, and remanding a judgment entered on 29 November 2018 by Judge Joseph N. Crosswhite in Superior Court, Mecklenburg County. Heard in the Supreme Court on 18 May 2021.

Joshua H. Stein, Attorney General, by Asher Spiller, Assistant Attorney General, for the State-appellant.

Marilyn G. Ozer for defendant-appellee.

BARRINGER, Justice.

¶ 1 Defendant was convicted of attempted first-degree murder, conspiracy to commit first-degree murder, and assault with a deadly weapon with intent to kill inflicting serious injury. Defendant appealed to the Court of Appeals, which held in a divided opinion, as relevant to this appeal, that the trial court committed plain error by incorrectly instructing the jury on the conspiracy to commit first-degree murder charge.[1] *State v. Chavez*, 270 N.C. App. 748, 761–62 (2020). The dissent disagreed, concluding, among other things, that defendant "cannot carry her burden to show any prejudice under the standard of review of plain error to warrant a new trial." *Id.* at 771 (Tyson, J., dissenting). After careful review, we reverse the decision of the Court of Appeals as to this issue. As to the other issues which were not brought forward to this Court, the decision of the Court of Appeals remains undisturbed.

I. Factual and Procedural Background

¶ 2 Hugo Avila Martinez (Martinez)[2] was renting an apartment to defendant until he told her to leave on 21 August 2016 due to defendant "having problems with rent." Following Martinez's conversation with defendant, defendant slapped him in the face, and Martinez filed a police report. Despite the altercation that occurred, Martinez allowed defendant to remain in the apartment. Martinez later evicted defendant sometime before 21 September 2016.

¶ 3 On 21 September 2016, defendant, along with Carlos Manzanares (Manzanares)[3] and an unidentified man, broke into Martinez's home. Defendant was armed with a machete while the two other men were armed with a hammer. When the defendant and the two men entered Martinez's house, Martinez was asleep in his bed with his girlfriend, Maria Navarro (Navarro) and her 16-month-old baby. Navarro testified that the three perpetrators entered Martinez's bedroom and defendant immediately announced to Martinez that, "Nobody makes fun of me, and I'm here to kill you." Martinez got up from the bed and asked defendant

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1. The Court of Appeals also found no error related to issues of ineffective assistance of counsel and supposed hearsay. Neither of these issues were raised in the appeal to this Court.

2. The Court of Appeals' opinion lists the victim's name as Roberto Hugo Martinez but the warrants, indictment, and his statement to police lists his name as Hugo Avila Martinez. We will refer to the victim as the name recorded in those documents.

3. Although Maria Navarro, one of the State's main witnesses, referred to Manzanares throughout her testimony as the "man in the yellow shirt" and the "guy that stayed," she positively identified the person depicted in the State's Exhibit 8 as the "man in the yellow shirt," which was confirmed to be a photograph of Manzanares by the responding police.

"what's wrong with you?" Defendant then threw the machete at Martinez and Martinez attempted to defend himself. Manzanares and the other man then proceeded to beat Martinez and continually struck him in the head with the machete and the hammer.

¶ 4 Navarro further testified that while Manzanares and the other man were beating Martinez, defendant told Navarro that she was going to kill Navarro and Navarro's baby. Defendant retrieved the machete and began attacking Navarro and her baby with the machete. Navarro was cut several times trying to protect her baby. Defendant also hit Navarro in the head with the hammer. After beating Martinez unconscious and seeing that defendant was attacking Navarro, Manzanares detained defendant and instructed Navarro to grab her baby and leave or else defendant would kill her.

¶ 5 After Navarro was able to escape from defendant, she called 9-1-1. Defendant and Manzanares followed Navarro. Once they caught up with Navarro, defendant instructed Manzanares to kill Navarro for calling the police. However, after Manzanares could not find Navarro's cellphone to verify whether she had called the police, defendant continued to grab and pull Navarro while saying "I'm going to kill you." Manzanares intervened, saying "no you're not going to [kill Navarro] . . . you're not going to do that because you told me, we were here for something else," which then led defendant to abandon her attempt to kill Navarro and Navarro's baby. Defendant fled the scene by way of a nearby pedestrian path. The responding police officer testified that when he arrived on the scene, he found Navarro "covered in blood" and Martinez unresponsive with a "heavy laceration to his head."

¶ 6 On 3 October 2016, defendant was indicted on two counts of attempted first-degree murder, one count of conspiracy to commit first-degree murder, two counts of assault with a deadly weapon with intent to kill inflicting serious injury, and one count of first-degree burglary. On 26 November 2018, the State dismissed one count of attempted first-degree murder, the first-degree burglary charge, and one count of assault with a deadly weapon with intent to kill inflicting serious injury. Defendant was subsequently found guilty of attempted first-degree murder, conspiracy to commit first-degree murder, and assault with a deadly weapon with intent to kill inflicting serious injury. Defendant gave oral notice of appeal.

¶ 7 Before the Court of Appeals, defendant argued that the trial court "(1) erred by denying [d]efendant's motion to dismiss the conspiracy charge; (2) plainly erred by instructing the jury, and accepting its ver-

dict of guilty, on the offense of conspiracy to commit first-degree murder; and (3) plainly erred by admitting hearsay evidence that violated [d]efendant's right to confrontation." *Chavez*, 270 N.C. App. at 751. The Court of Appeals rejected defendant's arguments as to issues one and three, *id.* at 763–64, but in a divided opinion concluded that the trial court plainly erred by instructing the jury on the conspiracy to commit first-degree murder charge, *id.* at 761–62. The majority reasoned that because the indictment "named only Manzanares as [d]efendant's co-conspirator," the evidence presented at trial supported a finding that [d]efendant conspired with Manzanares and another unidentified male." *Id.* at 760. However, the jury instructions instructed that a conspiracy could be found if "the defendant and *at least one other person* entered into an agreement," *id.* at 760. Accordingly, the majority held that "[d]efendant's fundamental right to be informed of the accusations against [her]" was violated. *Id.* at 761 (citing N.C. Const. Art. I, sec. 23).

¶ 8 In contrast, the dissent reasoned that "[d]efendant does not and cannot show 'that the erroneous jury instruction was a fundamental error—that the error had a probable impact on the jury verdict' and was so prejudicial to be awarded a new trial." *Id.* at 767 (Tyson, J., dissenting) (quoting *State v. Lawrence*, 365 N.C. 506, 518 (2012)). The dissent asserted that not only did the majority fail to conduct a prejudice analysis, but defendant cannot demonstrate prejudice based on the "overwhelming and uncontroverted evidence" against her. *Id.* at 768 (Tyson, J., dissenting).

¶ 9 The State appealed pursuant to N.C.G.S. § 7A-30(2) (2019). Based on the dissent, the State raised one issue on appeal to this Court: "[d]id the Court of Appeals err in granting defendant a new trial on the charge of conspiracy to commit murder based on an instructional error where there was overwhelming evidence of defendant's guilt?" The alleged error was that "the trial court . . . failed to identify [d]efendant's co-conspirator by name in the jury instructions."

¶ 10 At trial, the jury was instructed as follows, and without objection from defendant:

> The defendant has been charged with conspiracy to commit murder. For you to find the defendant guilty of this offense, the State must prove three things beyond a reasonable doubt. First; that the defendant and at least one other person entered into an agreement. Second; that the agreement was to commit murder. Murder is the unlawful killing of another with

> malice. And third; that the defendant and at least one other person intended that the agreement be carried out at the time it was made. The State is not required to prove that the murder was committed.

The majority in the Court of Appeals concluded that the jury instructions were "not in accord, with both the indictment and evidence presented at trial, and thus the trial court's instruction was error." *Chavez*, 270 N.C. at 761 (cleaned up).

II. Standard of Review

¶ 11 If in a criminal case an issue was not preserved by objection at trial and was not deemed preserved by rule or law the unpreserved error is reviewed only for plain error. *See* N.C. R. App. P. 10(a)(4). To obtain plain error review, a "defendant must specifically and distinctly contend that the alleged error constitutes plain error. Furthermore, plain error review in North Carolina is normally limited to instructional and evidentiary error." *State v. Lawrence*, 365 N.C. 506, 516 (2012). (cleaned up). Defendants "bear the heavier burden of showing that [an] error rises to the level of plain error." *Id.*

> [T]he plain error rule ... is always to be applied cautiously and only in the exceptional case where, after reviewing the entire record, it can be said the claimed error is a "*fundamental error*, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done," or "where [the error] is grave error which amounts to a denial of a fundamental right of the accused," or the error has "resulted in a miscarriage of justice or in the denial to appellant of a fair trial" or where the error is such as to "seriously affect the fairness, integrity or public reputation of judicial proceedings" or where it can be fairly said "the instructional mistake had a probable impact on the jury's finding that the defendant was guilty."

Lawrence, at 516–17 (alterations in original) (quoting *State v. Odom*, 307 N.C. 655, 660–61).

III. Analysis

¶ 12 The issue before us on appeal is whether the Court of Appeals erred by not conducting a prejudice analysis after finding the trial court erred in its instruction as to the charge of conspiracy for first-degree murder and whether if such analysis occurred, can defendant show prejudice

considering the overwhelming and uncontroverted evidence against her. Upon careful review of this case, we conclude that defendant has failed to demonstrate prejudice because the State presented overwhelming and uncontroverted evidence of defendant's guilt at trial. Accordingly, the Court of Appeals erred by failing to perform the required prejudice analysis required for plain error review.

¶ 13 Where there is highly conflicting evidence in a case, an error in the jury instructions *may* tilt the scales and cause the jury to convict a defendant. *See State v. Tucker*, 317 N.C. 532, 540 (1986) (emphasis added). In situations where the instructional error had a probable impact on the jury's finding that the defendant was guilty, a defendant can show plain error. *See id.* In contrast, where the evidence against a defendant is "overwhelming and uncontroverted[, a] defendant cannot show that, absent the error, the jury probably would have returned a different verdict." *Lawrence*, 365 N.C. at 519.

¶ 14 Defendant cannot show plain error because the evidence presented by the State that defendant formed a conspiracy with Manzanares to commit first-degree murder was overwhelming and uncontroverted.

> A criminal conspiracy is an agreement between two or more persons to do an unlawful act or to do a lawful act in an unlawful way or by unlawful means. To constitute a conspiracy[,] it is not necessary that the parties should have come together and agreed in express terms to unite for a common object: A mutual, implied understanding is sufficient, so far as the combination or conspiracy is concerned, to constitute the offense. The conspiracy is the crime and not its execution. Therefore, no overt act is necessary to complete the crime of conspiracy. As soon as the union of wills for the unlawful purpose is perfected, the offense of conspiracy is completed.
>
> . . . The existence of a conspiracy may be established by direct or circumstantial evidence. . . . However, direct proof of the charge [conspiracy] is not essential and for such is rarely obtainable. It may be, and generally is, established by a number of indefinite acts, each of which, standing alone, might have little weight, but, taken collectively, they point unerringly to the existence of a conspiracy.

State v. Gibbs, 335 N.C. 1, 47–48 (1993) (cleaned up).

¶ 15 Based on Navarro's uncontroverted testimony, defendant and Manzanares arrived at Martinez's apartment together in the middle of the night, awakening Martinez and Navarro. After defendant, armed with a machete, declared "I'm here to kill you" and threw the machete at Martinez, Manzanares began hitting and kicking Martinez, rendering Martinez unable to defend himself. Shortly thereafter, Manzanares began using a hammer to repeatedly hit Martinez in the head. Navarro escaped from the house, but both defendant and Manzanares eventually caught up with her. Furthermore, after Manzanares and defendant tracked down Navarro with her baby outside and defendant told Navarro she was going to kill her and Navarro's child, Manzanares told defendant that he would not let defendant kill Navarro because defendant had told him that that they were there for "something different" and Manzanares stated he was "not going to mess with a mother and a child." Given the overwhelming evidence of a conspiracy between defendant and Manzanares to kill Martinez, we conclude there is not a reasonable probability that the jury would have returned a different verdict had Manzanares been identified in the jury instructions as defendant's co-conspirator rather than a mere instruction that an agreement must be reached with at least one other person. *See State v. Fletcher*, 370 N.C. 313, 325 (2017) (" '[I]n giving jury instructions,' however, 'the court is not required to follow any particular form,' as long as the instruction adequately explains 'each essential element of the offense.' ") (quoting *State v. Walston*, 367 N.C. 721, 731 (2014)).

¶ 16 Moreover, the State's evidence focused on defendant and Manzanares's interactions and their agreement to murder Martinez. The State's closing argument also focused entirely on establishing that defendant conspired with Manzanares. The State argued to the jury during closing arguments that "defendant and at least one other person entered into an agreement. In this case that's [Manzanares], the guy in the yellow shirt. That the agreement was to commit murder." The State later reiterated that defendant "formed an agreement with at least one person, that guy (indicating image of [Manzanares] on screen), to kill [Martinez]." This further supports that there is not a reasonable probability that the jury would have returned a different verdict had Manzanares been identified in the jury instructions as defendant's co-conspirator.

IV. Conclusion

¶ 17 To demonstrate that a trial court committed a plain error, a defendant must show "that after examination of the entire record, the error 'had a probable impact on the jury's finding that the defendant was

guilty.' " *Lawrence*, 365 N.C. at 518 (quoting *Odom*, 307 N.C. at 660). In this case, given that the evidence of defendant's guilt of the conspiracy to commit first-degree murder charge was "overwhelming and uncontroverted," *id.* at 519, defendant cannot show that the error had a probable impact on the jury's finding that she was guilty. Accordingly, we reverse the decision of the Court of Appeals. As to the other issues which were not brought forward to this Court, the decision of the Court of Appeals remains undisturbed.

REVERSED.

STATE OF NORTH CAROLINA
v.
JOHN FITZGERALD AUSTIN

No. 461A20

Filed 13 August 2021

1. Judges—impermissible expression of opinion—in presence of jury—preservation—standard of review

Defendant's argument that the trial court improperly expressed an opinion on the evidence in violation of N.C.G.S. §§ 15A-1222 and 15A-1232 while instructing the jury was preserved by operation of law due to the mandatory nature of the statutory prohibitions, and thus the alleged error was subject to review for prejudicial error pursuant to N.C.G.S. § 15A-1443(a).

2. Judges—impermissible expression of opinion—in presence of jury—prejudice analysis—jury instructions and evidence

In a trial for assault on a female, even assuming that the trial court violated N.C.G.S. §§ 15A-1222 and 15A-1232 by improperly expressing its opinion during jury instructions that defendant assaulted the victim, defendant could not show prejudice where the trial court's instructions as a whole made clear that only the jury could make the factual determination of whether defendant assaulted the victim and where the State's evidence satisfied the elements of the crime.

Justice EARLS dissenting.

STATE v. AUSTIN

[378 N.C. 272, 2021-NCSC-87]

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 273 N.C. App. 565, 849 S.E.2d 307 (2020), finding no error after appeal from a judgment entered on 8 May 2019 by Judge Todd Burke in Superior Court, Forsyth County. Heard in the Supreme Court on 17 May 2021.

Joshua H. Stein, Attorney General, by Chris D. Agosto Carreiro, Assistant Attorney General, for the State-appellee.

Jarvis John Edgerton, IV for defendant-appellant.

BERGER, Justice.

¶ 1 On May 8, 2019, a Forsyth County jury found defendant John Fitzgerald Austin guilty of assault on a female and habitual misdemeanor assault. That same day, defendant pleaded guilty to attaining habitual felon status, and he was sentenced to 103 to 136 months in prison. Defendant appealed, arguing that the trial court impermissibly expressed an opinion during jury instructions concerning facts to be decided by the jury. A divided panel of the Court of Appeals upheld defendant's conviction. *State v. Austin*, 273 N.C. App. 565, 849 S.E.2d 307 (2020). Defendant appeals to this Court pursuant to N.C.G.S. § 7A-30(2).

I. Factual and Procedural Background

¶ 2 On January 6, 2018, Claudette Little and Scheherazade Bonner went to a Winston-Salem night club. Shortly after they arrived, Little received a phone call from defendant. Little and defendant were in a dating relationship at the time. Little testified that defendant called her because defendant did not believe her about her location.

¶ 3 Approximately thirty minutes later, defendant arrived at the night club with David Harris. Defendant asked Little to leave with him, but Little refused. Defendant left the night club around 1:30 a.m. on January 7, 2018. Little later left the night club with Bonner and Willis Williams and returned home. Defendant was not at the home when they arrived. Both Bonner and Williams subsequently left Little's residence, and Little went to sleep.

¶ 4 Little was then awakened by defendant standing over her and yelling at her. Defendant assaulted Little multiple times, demanded that Little take off her clothes, and ordered her to perform oral sex on him. When defendant went to sleep, Little put on her clothes and ran out of the apartment. Little made contact with her daughter by phone and met

her daughter on the side of the road. Little's daughter testified that her mother was not properly dressed for a cold January morning.

¶ 5 That same day, Little and her daughter went to the magistrate's office and sought a warrant against defendant for assault on a female. Defendant was subsequently indicted for assault on a female, habitual misdemeanor assault, and attaining habitual felon status.

¶ 6 On May 6, 2019, defendant's matter came on for trial. Following the presentation of the evidence, the trial court instructed the jury on the charges of assault on a female and habitual misdemeanor assault. During the initial instruction on the charge of assault on a female, the trial court stated, in part:

> For you to find the defendant guilty of this offense, the State must prove three [things] beyond a reasonable doubt:
>
> First, that the defendant intentionally assaulted the alleged victim. It has been described in this case by the prosecuting witness that the defendant hit her upon her head, that he hit her on her arms, about her body.
>
> You are the finders of fact. You will determine what the assault was, ladies and gentlemen. The Court is not telling you what it is, I'm just giving you a description. And there was also testimony by the witness that the defendant asked her to perform, by force, another act, which could be considered an assault. But you will determine what the assault was. I'm not telling you what it is. And if what I'm saying is the evidence and your recollection is different from what I say, you still should rely upon your recollection of the evidence, as to what the assault is that has been testified to in this case.

¶ 7 The next day, following a request from the jury, the trial court reinstructed the jury on the charge of assault on a female:

> You requested specifically the substantive instructions for assault on a female and habitual misdemeanor[ ] assault.
>
> Ladies and gentlemen, I will define, again, first. An assault does not necessarily have to involve contact,

> it could be putting someone in fear or imminent apprehension of contact, threatening contact. . . . In this case the particular assault has been described as hitting the prosecuting witness, Ms. Claudette Little, about her body multiple times. Yesterday I mentioned some other act based upon the testimony at the trial, that she stated that she was forced to perform. But for purposes of this trial, you do not have to consider that, just that it is alleged that she was hit about her body multiple times. Whether that—whatever part of the body that may be, head, face, torso, arms, legs, that will be for you to determine as you are the finders of fact.

¶ 8 Defendant did not object to any of the trial court's jury instructions at trial. Defendant was found guilty of assault on a female and habitual misdemeanor assault, and he pleaded guilty to attaining habitual felon status.

¶ 9 In the Court of Appeals, defendant argued that the trial court had improperly expressed its opinion during jury instructions that an assault had occurred. *Austin*, 273 N.C. App. at 568, 849 S.E.2d at 310. The Court of Appeals found no error and upheld defendant's conviction. *Id.* at 575, 849 S.E.2d at 314. Based on a dissenting opinion, defendant appealed to this Court, arguing that the trial court's comments were improper expressions of opinion which prejudiced defendant. We disagree.

II. Standard of Review

¶ 10 **[1]** Initially, we note that both parties failed to cite the proper standard of review in their briefs. Defendant contends that we should utilize a de novo standard of review, relying on a Court of Appeals' opinion in *Staton v. Brame*, 136 N.C. App. 170, 523 S.E.2d 424 (1999), a civil case that bears no relation to the issues in this case. The State argues that the appropriate standard of review is plain error. However, plain error review is available under Rule 10(a)(4) only when a defendant specifically argues plain error for an unpreserved instructional or evidentiary error. N.C. R. App. P. 10(a)(4); *see generally State v. Lawrence*, 365 N.C. 506, 723 S.E.2d 326 (2012).

¶ 11 Rule 10 of the North Carolina Rules of Appellate Procedure provides, in part:

> 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) (emphasis added).

¶ 12 Thus, pursuant to Rule 10(a)(1), an alleged error may only be preserved by either a party's timely objection or by operation of rule or law. Rule 10 "generally require[s] that parties take some action to preserve an issue for appeal." *State v. Meadows*, 371 N.C. 742, 746, 821 S.E.2d 402, 405 (2018) (citing N.C. R. App. P. 10(a)(1)). However, when a party fails to note a timely objection to an alleged error, yet later raises the issue on appeal, we must determine whether the alleged error is deemed preserved by operation of rule or law. *See* N.C. R. App. P. 10(a)(1).

¶ 13 A statute will automatically preserve an issue for appellate review if the statute "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[.]" *In re E.D.*, 372 N.C. 111, 121, 827 S.E.2d 450, 457 (2019) (cleaned up).

¶ 14 Section 15A-1222 and Section 15A-1232 of the General Statutes of North Carolina specifically prohibit a trial court judge from expressing an opinion during trial and when instructing the jury. Accordingly, "[w]henever a defendant alleges a trial court made an improper statement by expressing an opinion on the evidence in violation of N.C.G.S. §§ 15A-1222 and 15A-1232, the error is preserved for review without objection due to the mandatory nature of these statutory prohibitions." *State v. Duke*, 360 N.C. 110, 123, 623 S.E.2d 11, 20 (2005) (citation omitted).

¶ 15 When an alleged statutory violation by the trial court is properly preserved, either by timely objection or, as in this case, by operation

of rule or law, we review for prejudicial error pursuant to N.C.G.S. § 15A-1443(a). *See Lawrence*, 365 N.C. at 512, 723 S.E.2d at 330 (citing N.C.G.S. § 15A-1443(a) and stating that "if the [preserved] error relates to a right not arising under the United States Constitution, . . . review requires the defendant to bear the burden of showing prejudice.").

¶ 16 N.C.G.S. § 15A-1443(a) provides,

> A defendant is prejudiced by errors relating to rights arising other than under the Constitution of the United States 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. The burden of showing such prejudice under this subsection is upon the defendant.

N.C.G.S. § 15A-1443(a) (2019).[1]

¶ 17 When reviewing alleged improper expressions of judicial opinion under this standard, we utilize a totality of the circumstances test to determine whether the trial court's "comments cross[ed] into the realm of impermissible opinion." *State v. Larrimore*, 340 N.C. 119, 155, 456 S.E.2d 789, 808 (1995). Pursuant to N.C.G.S. § 15A-1443(a), a defendant must also show that the comments had such a prejudicial effect that there is a reasonable possibility of a different result absent the error.[2]

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1. While the right to a fair trial does implicate constitutional concerns, defendant's argument is based upon statutory violations of N.C.G.S. §§ 15A-1222 and 15A-1232. Therefore N.C.G.S. § 15A-1443(a) applies and not N.C.G.S. § 15A-1443(b).

2. We have applied the prejudicial error standard set forth in N.C.G.S. § 15A-1443(a) in a variety of cases and have consistently held that judicial error does not automatically warrant a new trial unless the defendant shows the error was prejudicial by demonstrating a reasonable possibility that, absent the error, a different result would have been reached. *See State v. Corey*, 373 N.C. 225, 237, 835 S.E.2d 830, 838 (2019) (holding that trial court's failure to comply with N.C.G.S. § 15A-1231(b) before submitting the issue of whether an aggravating factor existed in the case was not materially prejudicial under N.C.G.S. § 15A-1443(a)); *State v. Mumma*, 372 N.C. 226, 242, 827 S.E.2d 288, 298–99 (2019) (holding that trial court's error in allowing the jury to review graphic photographs of the murder victim over the defendant's objection was not prejudicial error under N.C.G.S. § 15A-1443(a)); *State v. Malachi*, 371 N.C. 719, 821 S.E.2d 407 (2018) (holding that trial court's error in instructing the jury that it could find the defendant guilty of possession of a firearm based on constructive possession did not prejudice the defendant under N.C.G.S. § 15A-1443(a)); *State v. Starr*, 365 N.C. 314, 319, 718 S.E.2d 362, 366 (2011) (holding that the trial court's denial of the jury's request to review trial transcript did not prejudice the defendant under N.C.G.S. § 15A-1443(a)).

See, e.g., *Larrimore*, 340 N.C. at 155, 456 S.E.2d at 808; *State v. Anthony*, 354 N.C. 372, 402, 555 S.E.2d 557, 578 (2001); *State v. Berry*, 235 N.C. App. 496, 508, 761 S.E.2d 700, 708 (2014), *rev'd per curiam*, 368 N.C. 90, 773 S.E.2d 54 (2015).

III. Analysis

¶ 18 **[2]** On appeal, defendant argues that the trial court violated N.C.G.S. §§ 15A-1222 and 15A-1232 by improperly expressing its opinion during jury instructions and that this violation requires a new trial. Section 15A-1222 states, "[t]he judge may not express during any stage of the trial, any opinion in the presence of the jury on any question of fact to be decided by the jury." N.C.G.S. § 15A-1222 (2019). Section 15A-1232 states, "[i]n instructing the jury, the judge shall not express an opinion as to whether or not a fact has been proved and shall not be required to state, summarize or recapitulate the evidence, or to explain the application of the law to the evidence." N.C.G.S. § 15A-1232 (2019). Accordingly, when read together, the plain language of the statues makes it improper for a trial judge to insert his opinion into any portion of the trial, including jury instructions.

¶ 19 Moreover, N.C.G.S. §§ 15A-1222 and 15A-1232 also impose "[t]he duty of absolute impartiality . . . on the trial judge." *State v. Best*, 280 N.C. 413, 417, 186 S.E.2d 1, 4 (1972) (citing N.C.G.S. § 1-180 (repealed in 1977 and superseded by N.C.G.S. §§ 15A-1222 and 15A-1232)); *see State v. Hewett*, 295 N.C. 640, 643–44, 247 S.E.2d 886, 888 (1978) (recognizing the implicit embodiment of N.C.G.S. § 1-180 in N.C.G.S. §§ 15A-1222 and 15A-1232). However, while this duty prohibits any expression of judicial opinion at trial, not every "impropriety by the trial judge . . . result[s] in prejudicial error." *State v. Blackstock*, 314 N.C. 232, 236, 333 S.E.2d 245, 248 (1985).

¶ 20 "A remark by the court is not grounds for a new trial if, when considered in the light of the circumstances under which it was made, it could not have prejudiced defendant's case." *State v. King*, 311 N.C. 603, 618, 320 S.E.2d 1, 11 (1984). "[A]n alleged improper statement will not be reviewed in isolation, but will be considered in light of the circumstances in which it was made." *State v. Jones*, 358 N.C. 330, 355, 595 S.E.2d 124, 140 (2004) (quoting *State v. Weeks*, 322 N.C. 152, 158, 367 S.E.2d 895, 899 (1988)). "The bare possibility . . . that an accused may have suffered prejudice from the conduct or language of the judge is not sufficient to overthrow an adverse verdict." *State v. Carter*, 233 N.C. 581, 583, 65 S.E.2d 9, 10–11 (1951) (citing *State v. Jones*, 67 N.C. 285 (1872)).

¶ 21 Here, during the trial court's initial instruction to the jury for the assault on a female charge, the trial court stated:

> You are the finders of fact. You will determine what the assault was, ladies and gentlemen. The Court is not telling you what it is, I'm just giving you a description. . . . But you will determine what the assault was. I'm not telling you what it is. And if what I'm saying is the evidence and your recollection is different from what I say, you still should rely upon your recollection of the evidence, as to what the assault is that has been testified to in this case.

¶ 22 The trial court subsequently also instructed the jury:

> The law requires the presiding judge to be impartial. You should not infer from anything I have done or said that the evidence is to be believed or disbelieved, that a fact has been proved or what your findings ought to be. It is your duty to find the facts and to render a verdict reflecting the truth.

¶ 23 After a request by the jury, the trial court provided the following instruction:

> Ladies and gentlemen, I will define, again, first. An assault does not necessarily have to involve contact, it could be putting someone in fear or imminent apprehension of contact, threatening contact. But the facts of this case have demonstrated that the—there was actual contact, that's a touching of some form that is nonconsensual and unwanted by the other party. In this case the particular assault has been described as hitting the prosecuting witness, Ms. Claudette Little, about her body multiple times. . . . But for purposes of this trial, you do not have to consider that, just that it is alleged that she was hit about her body multiple times. Whether that—whatever part of the body that may be, head, face, torso, arms, legs, that will be for you to determine as you are the finders of fact.

¶ 24 Further, the trial court again instructed on the charge of assault on a female at the jury's request. During this instruction, the trial court stated the following:

> And just for you—I already told you this, no matter what I said, it's for you to determine what happened, not me. The facts are not what the attorneys say. The facts are not what I say. You determine what happened in this case. I'm just merely describing what has been alleged, and that is that the defendant is accused of hitting the prosecuting witness about her body multiple times.

¶ 25 Even if we assume the trial court violated the statutory prohibitions against the expression of opinion, defendant cannot show a reasonable possibility of a different result.

¶ 26 Here, for the charge of assault on a female, the State was required to prove that (1) defendant intentionally assaulted Little, (2) Little was a female person, and (3) defendant was a male person at least eighteen years of age. N.C.G.S. § 14-33(c)(2) (2019). Little testified in detail at trial concerning defendant's criminal conduct. Little testified that defendant wrapped a belt around his hand and struck her several times in her head, face, and arm. The State entered into evidence photographs which showed numerous bruises to Little's face and arm. In addition, the State also presented evidence through the testimony of other witnesses which corroborated Little's testimony. Specifically, testimony from Bonner and Little's daughter corroborated Little's timeline of events leading up to and following the assault.

¶ 27 The State presented evidence at trial which satisfied the elements of the predicate assault, and the trial court's instruction made clear that the jury alone was responsible for making this determination. After reviewing the totality of the circumstances including the instructions provided by the trial court and the evidence presented at trial, we conclude that defendant received a fair trial free from prejudicial error, and the decision of the Court of Appeals is affirmed.

AFFIRMED.

Justice EARLS dissenting.

¶ 28 When the presiding judge speaks during a trial, we presume the jury listens. As the most visible representative of our legal system, "[t]he trial judge occupies an exalted station." *State v. Carter*, 233 N.C. 581, 583 (1951). To eliminate the risk that a jury will convict (or fail to convict) a defendant based upon its perception of the judge's opinion of what the evidence proves (or does not prove)—rather than the jury's own

examination of the evidence presented by the parties—North Carolina law prohibits a trial judge from "express[ing] during any stage of the trial, any opinion in the presence of the jury on any question of fact to be decided by the jury." N.C.G.S. § 15A-1222 (2019); *see also* N.C.G.S. § 15A-1232 (2019) ("In instructing the jury, the judge shall not express an opinion as to whether or not a fact has been proved . . . ."). The majority in this case fails to give proper weight to this statutory mandate by refusing to engage meaningfully in a prejudice analysis and instead ignoring any impact the judge's instructions had on the jury.

¶ 29 The defendant here, John Fitzgerald Austin, did not object to the trial judge's improper expressions of opinion at the time they were communicated to the jury. However, as the majority correctly explains, Austin's claim that the trial judge impermissibly expressed an opinion in violation of N.C.G.S. §§ 15A-1222 and 15A-1232 is preserved by operation of law. Where I depart from the majority is in its treatment of the merits of Austin's claim. I would hold that the trial judge violated N.C.G.S. §§ 15A-1222 and 15A-1232 by impermissibly communicating to the jury his opinion regarding the events underlying Austin's conviction and that Austin was prejudiced thereby.

¶ 30 The majority assumes without deciding that the trial judge "violated the statutory prohibitions against the expression of opinion."[1] However, we should have no difficulty concluding from the transcript of the trial in this case that the trial judge erred in phrasing instructions to the jury which presupposed the veracity of the complaining witness's allegation that Austin assaulted her, a fact necessary to support Austin's conviction for the offense of assault on a female. Recognizing the seriousness of the error is an important part of assessing whether the error was prejudicial.

¶ 31 The trial judge improperly communicated his opinion that this alleged fact had been proven on no less than three occasions. Moreover, these were not statements made in passing, but rather all were made

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1. In a recent article, one scholar argued that the practice of disposing of cases by finding no prejudice, without examining the merits of a criminal defendant's underlying claim that his or her procedural rights were violated, both "seriously diminishes the incentives of trial judges, prosecutors, and relevant organizational and systemic entities to abide by procedural law" and "stymies the vital process of norm clarification." Justin Murray, *Policing Procedural Errors in the Lower Criminal Courts*, 89 Fordham L. Rev. 1411, 1430 (2021). Although I do not doubt that all actors in our judicial system are doing their level best to rigorously adhere to all procedural requirements intended to ensure that criminal defendants are treated fairly, I share Professor Murray's concern that too frequently disposing of cases in this manner leaves these actors—and criminal defendants—bereft of important guidance regarding the scope of the procedural rights afforded to defendants by the people of North Carolina through our Constitution and statutes.

during jury instructions when the jury's focus was exclusively on the trial judge. First, the trial judge informed the jury that its task was to "determine *what the assault was*, ladies and gentlemen." (Emphasis added.) Second, the trial judge explained to the jury that "*the facts of this case have demonstrated that the—there was actual contact*, that's a touching of some form that is nonconsensual and unwanted by the other party." (Emphasis added.) Third, the trial judge instructed the jury that "it is alleged that [the complaining witness] was hit about her body multiple times. Whether that—*whatever part of the body that may be*, head, face, torso, arms, legs, that will be for you to determine as you are the finders of fact." (Emphasis added.) Each of these statements presumes Austin actually assaulted the complaining witness. And because the only three facts necessary to sustain a conviction under N.C.G.S. § 14-33(c)(2) are (1) that the victim was female, (2) that the perpetrator was a male person at least 18 years of age, and (3) that the male perpetrator assaulted the female victim, N.C.G.S. § 14-33(c)(2) (2019), these statements effectively communicated the trial judge's opinion that Austin was guilty as charged.

¶ 32 Whether Austin actually assaulted the complaining witness as that witness alleged was a question for the jury to decide on the basis of the evidence presented at trial. An appropriate instruction would have informed the jury of its obligation to determine *if* Austin had assaulted the complaining witness. Instead, the trial judge's comments communicated that there was no disputing that Austin had committed an assault and, by extension, that there was no other verdict the jury could reach but to find Austin guilty. Even if the State's evidence was uncontroverted, it was still for the jury to decide if the State had proven beyond a reasonable doubt that Austin violated N.C.G.S. § 14-33(c)(2), not the trial judge.

¶ 33 In addition to arguing that the trial judge's statements were not improper, the State also contends that even if they were, any improper expression of judicial opinion was "cured" by the delivery of instructions properly charging the jury with deciding Austin's guilt or innocence. The majority concludes that any allegedly improper expression of opinion could not be prejudicial in part because "the trial court's instruction made clear that the jury alone was responsible for making th[e] determination" of Austin's guilt. However, a boilerplate recitation of the jury's ultimate responsibility to decide which facts have been proven does not erase the prejudicial effect of the trial judge repeatedly instructing the jury that an assault has occurred, a key fact in this case. The question of whether a trial judge has properly instructed the jury on the jury's role as the factfinder in a criminal trial is distinct from the

question of whether the trial judge has improperly weighed in by communicating his or her view of what the facts are. Even if the jury knows it is its responsibility alone to find the facts, the risk is that it will discharge this responsibility improperly influenced by the understanding that the trial judge believes the defendant is guilty.

¶ 34 The majority does not cite any case law in its cursory analysis of the trial judge's allegedly improper expressions of opinion. Our precedents make clear that the trial judge's statements in this case violated N.C.G.S. §§ 15A-1222 and 15A-1232. In the cases where we have rejected a defendant's claim that a trial judge violated N.C.G.S. §§ 15A-1222 and 15A-1232, we have held that the trial judge's comments could not be understood as expressions of opinion when read in context. We examined the totality of the circumstances and concluded the trial judge did not improperly express an opinion. We did not conclude an error was not prejudicial merely because "the State presented evidence at trial which satisfied the elements of the predicate assault, and the trial court's instruction made clear that the jury alone was responsible for making this determination."

¶ 35 For example, in *Young*, the trial judge instructed the jury that "[t]here is evidence in this case which tends to show that the defendant confessed that he committed the crime charged in this case." 324 N.C. at 494. The defendant claimed that the trial judge's "instructions concerning evidence 'tending to show' that he had 'confessed' to the crime charged, together with its subsequent statement that he was accused of first degree murder, amounted to an expression of opinion on the evidence in violation of the statutes." *Id.* at 495. We disagreed, explaining that "[t]he use of the words 'tending to show' or 'tends to show' in reviewing the evidence does not constitute an expression of the trial court's opinion on the evidence." *Id.* We also explained that the use of the term "confessed" "did not amount to an expression of opinion by the trial court that the defendant in fact had confessed." *Id.* at 498. Instead, we reasoned that the portions of the jury instructions the defendant challenged, when read in context, were not improper expressions of opinion because they "made it clear that, although there was evidence tending to show that the defendant had confessed, the trial court left it entirely for the jury to determine whether the evidence showed that the defendant in fact had confessed." *Id.*

¶ 36 Similarly, in other cases, we have held that the trial judge did not communicate an opinion when the challenged language was read in context, not that the trial judge's improper expression of opinion was remedied by a subsequent clarification or the existence of some evidence

proving the elements of the charged offense. Thus, in *State v. Meyer*, we concluded that the trial judge's explanation during the sentencing phase of a capital trial that an alleged aggravating circumstance "applies equally to both murders" did not improperly suggest the aggravating factor had been proven because, read in context, the trial judge was "merely reiterat[ing] its previous admonition that 'the law as to both of the counts is generally the same since you will be considering the same aggravating and mitigating circumstances.' " 353 N.C. 92, 107 (2000).

¶ 37 Indeed, this case is largely indistinguishable from decisions in which we have held that a trial judge prejudicially erred in conveying his or her opinion regarding how the jury should resolve an important factual issue. For example, in *State v. McEachern*, we held that the trial judge erred when he asked the prosecuting witness in a rape case whether she was "in the car when you were raped." 283 N.C. 57, 59–62 (1973). We reasoned that although the trial judge did not explicitly state an opinion regarding the defendant's commission of the alleged criminal offense, the way the trial judge framed the inquiry communicated this view because it "[a]ssumed that defendant had raped [the complaining witness]." *Id.* at 62. In *State v. Oakley*, we held that the trial judge erred when he asked a witness if the witness had "tracked *the defendant* to [a] house," despite the witness testifying only that he tracked some unknown individual to the house. 210 N.C. 206, 211 (1936) (emphasis added). Although the trial judge immediately clarified that he "didn't mean to say the defendant," we reasoned that the question improperly revealed a belief regarding an issue of such critical importance to the jury's deliberations that an immediate clarification was insufficient to guarantee the defendant a fair trial. *Id.*

¶ 38 As in *McEachern* and *Oakley*, the trial judge in this case assumed the existence of a fact which had not yet been decided by the jury and, in doing so, illustrated for the jury his opinion that the State had met its burden of proving an essential fact beyond a reasonable doubt.

¶ 39 I would also conclude that the trial judge's impermissible expressions of opinion prejudiced Austin. In examining whether the trial judge's violations of N.C.G.S. §§ 15A-1222 and 15A-1232 were prejudicial, we should consider (1) how suggestive the trial judge's comments were, (2) how important the issue on which the trial judge expressed an opinion was to the jury's ultimate determination of guilt, and (3) the strength of the evidence supporting the defendant's conviction. In this case, all three factors indicate the trial judge's comments were extremely prejudicial.

¶ 40 First, the trial judge's comments implicitly, but unmistakably, informed the jury that in the trial judge's opinion, the complaining witness's narrative of events was true and there was no question as to whether Austin had assaulted her. Second, the comments addressed the sole disputed factual predicate the State needed to prove in order to obtain Austin's conviction. Third, the evidence of Austin's guilt—while uncontroverted—was not overwhelming. The only direct evidence the State presented at trial was the complaining witness's testimony, which was not entirely consistent with the statements she initially provided to law enforcement. The State also presented testimony from acquaintances of the complaining witness who, in broad strokes, corroborated the timeline of events on the night Austin purportedly committed the assault but who did not witness any part of the alleged altercation, and the State presented a photograph of the witness's injuries which she took herself, purportedly at some unspecified time after the assault occurred. Although this evidence was not directly called into dispute, it is not so convincing as to exclude the possibility that the alleged assault either did not occur or did not unfold in the manner the complaining witness described. The majority's statement of facts describes a violent sexual offense, yet Austin was tried for misdemeanor assault on a female. This is precisely the kind of case, dependent on the testimony of a single witness, where a trial judge's communication of his belief in the defendant's guilt can tip the scales for the jury.

¶ 41 "Jurors entertain great respect for [the trial judge's] opinion, and are easily influenced by any suggestion coming from him [or her]." *Carter*, 233 N.C. at 583. In this case, the trial judge repeatedly conveyed his opinion that Austin perpetrated an assault on the complaining witness. Given just how suggestive the trial judge's statements were—and given that the statements cut to the core of the State's case against Austin—I conclude that the trial judge's expressions of opinion both violated N.C.G.S. §§ 15A-1222 and 15A-1232 and had such a prejudicial effect that there is a reasonable possibility of a different result absent the error. Accordingly, I respectfully dissent.

STATE v. ALLEN

[378 N.C. 286, 2021-NCSC-88]

STATE OF NORTH CARLOLINA
v.
SCOTT DAVID ALLEN

No. 115A04-3

Filed 13 August 2021

1. Constitutional Law—effective assistance of counsel—summary dismissal of claims—factual disputes—evidentiary hearing required

Where defendant's post-conviction claims that he received ineffective assistance of counsel in his trial for first-degree murder, for which defendant was convicted and sentenced to death, raised factual disputes, the trial court erred by summarily dismissing those claims because defendant presented facts that, if true, would entitle him to relief. Defendant presented evidence that his counsel's decision not to investigate the crime scene evidence, from which different interpretations could be drawn, was not a reasonable strategic choice, and that he was prejudiced by being deprived of the opportunity to rebut the main witness's account of how the victim was killed. The matter was remanded for an evidentiary hearing with instructions for the trial court, if it concluded counsel's performance was deficient, to consider how any deficiencies prejudiced defendant when considered both individually and cumulatively.

2. Constitutional Law—false and misleading testimony—State's witness—MAR claim

Defendant was not entitled to post-conviction relief (after being convicted and sentenced to death for first-degree murder) on his claim that the State violated his constitutional rights by knowingly presenting false testimony through the main prosecution witness, because even assuming the claim was not procedurally barred for having been raised on direct appeal, there was nothing in the record to show the State knew the witness's testimony was false.

3. Constitutional Law—Brady violation—materiality—additional prior convictions of prosecution witness

Defendant was not entitled to post-conviction relief (after being convicted and sentenced to death for first-degree murder) on his claim that the State committed a *Brady* violation by failing to turn over a complete criminal record of a prosecution witness prior to trial, because the omitted prior convictions were not material. The

jury was already informed of the witness's prior convictions for more serious crimes, and, for the murder being prosecuted, that the witness had initially provided false statements to law enforcement and had been charged as an accessory after the fact.

4. Criminal Law—post-conviction relief—short-form indictment —first-degree murder—issue procedurally barred

Defendant's post-conviction claim that a short-form indictment was insufficient to confer jurisdiction on the trial court for his first-degree murder trial was procedurally barred where he raised the issue on direct appeal.

5. Constitutional Law—courtroom restraints—issue raised in MAR—record insufficient—evidentiary hearing required

On defendant's post-conviction claim that his constitutional rights were violated when he was shackled during his trial for first-degree murder (for which he was convicted and sentenced to death), the trial court erred by summarily dismissing the issue as procedurally barred. Since the record was devoid of information establishing that defendant was actually restrained in the courtroom, that the shackles were visible to the jury, and that defense counsel was aware that the restraints were visible to the jury, an evidentiary hearing was required to develop the necessary factual foundation before the claim could be resolved.

6. Criminal Law—post-conviction relief—access to medical records—limited evidentiary hearing—dismissal of claim

The trial court properly dismissed defendant's post-conviction claim seeking relief (after being convicted of first-degree murder) for his counsel being denied access to certain prior treatment records of the main prosecution witness. The trial court's conclusion, made after a limited evidentiary hearing, that defendant could not demonstrate prejudice—because the records did not indicate the witness had a relevant mental health condition and they did not include evidence of substance abuse not already disclosed by the witness at trial—was supported by its findings of fact, which were in turn supported by evidence.

7. Constitutional Law—effective assistance of counsel—murder trial—sentencing phase

The trial court properly dismissed defendant's post-conviction ineffective assistance of counsel claims pertaining to the sentencing phase of his first-degree murder trial where, after the trial court conducted an evidentiary hearing, its findings were supported by

evidence and in turn supported its conclusion that defense counsel's performance was not deficient and, even if it was, defendant could not demonstrate he suffered prejudice.

Justice BERGER dissenting.

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

On writ of certiorari pursuant to N.C.G.S. § 7A-32(b) to review orders dismissing defendant's claims asserted in his motion for appropriate relief entered on 22 August 2016, 8 January 2018, and 6 February 2019 by Judge V. Bradford Long in Superior Court, Montgomery County. Heard in the Supreme Court on 26 April 2021.

Joshua H. Stein, Attorney General, by Nicholaos Vlahos, Assistant Attorney General, for the State-appellee.

Olivia Warren and Michael L. Unti for defendant-appellant.

EARLS, Justice.

¶ 1 This case involves numerous post-conviction claims raised by defendant Scott David Allen, who was found guilty of the first-degree murder of Christopher Gailey and sentenced to death in Montgomery County in 2003. Allen challenged his conviction and sentence on direct appeal, but this Court unanimously found no error. *State v. Allen*, 360 N.C. 297, 321 (2006). The Supreme Court of the United States denied certiorari. *Allen v. North Carolina*, 549 U.S. 867 (2006). Subsequently, Allen filed a motion for appropriate relief (MAR) in Superior Court, Montgomery County (MAR court), in July 2007. Six years later, and before the MAR court ruled on his MAR, Allen filed a supplemental motion for appropriate relief (SMAR) amending some of his previous claims and adding two additional claims. The MAR court's dismissal of these claims forms the basis of defendant's petition to this Court.

¶ 2 Of the twelve total claims raised in Allen's MAR and SMAR, five of them directly relate to his allegation that his trial attorneys rendered unconstitutionally ineffective assistance of counsel (IAC) during the guilt-innocence phase of his trial by failing to investigate, develop, and utilize various sources of exculpatory evidence. The evidence Allen presented in support of these claims includes affidavits from acquaintances

of Allen and the State's primary witness, Vanessa Smith, implicating Smith in Gailey's murder, as well as a report from a crime scene expert concluding that in light of the physical evidence discovered at the scene of Gailey's death, Smith's account of Gailey's killing was "unfathomable." Notwithstanding this evidence and the centrality of Smith's testimony to Allen's conviction, the MAR court dismissed Allen's guilt-innocence phase IAC claims without conducting an evidentiary hearing to resolve disputed issues of fact.

¶ 3 Based on well-established precedent, we conclude that Allen is entitled to an evidentiary hearing on his guilt-innocence phase IAC claims. Allen has "present[ed] assertions of fact which will entitle [him] to . . . relief . . . if resolved in his favor." *State v. McHone*, 348 N.C. 254, 258 (1998). Therefore, under the statutory framework governing post-conviction review of criminal convictions in North Carolina, the MAR court was obligated to conduct an evidentiary hearing prior to ruling on his MAR and SMAR claims, because "some of his asserted grounds for relief required the [MAR] court to resolve questions of fact." *Id.* (interpreting N.C.G.S. § 15A-1420(c)(1)). Accordingly, we vacate the portions of the MAR court's order summarily dismissing Allen's guilt-innocence phase IAC claims and remand to the MAR court to conduct a full evidentiary hearing.

¶ 4 In addition, we hold that the trial court erred in summarily ruling that Allen's claim alleging he was impermissibly shackled in view of the jury was procedurally barred. On this claim, we vacate the relevant portion of the MAR court's order and remand for an evidentiary hearing to obtain the facts necessary to determine whether his claim is procedurally barred and, if not, whether it has merit. We affirm the MAR court's disposition of all other claims raised in Allen's MAR and SMAR.

I. Factual Background

A. Gailey's death and Allen's trial.

¶ 5 In 1998, Allen escaped from a North Carolina Department of Corrections work release program. Shortly after fleeing, he reunited with Smith, with whom he had maintained an on-again, off-again romantic relationship. The couple drifted from hotel to hotel, living off settlement proceeds Smith received after her father's death. Allen and Smith regularly purchased and used large quantities of illegal drugs together. To evade detection, Allen obtained a friend's birth certificate and driver's license issued by the State of Washington. While travelling through Colorado, Allen became romantically involved with another woman, and Allen and Smith split up. The former couple returned to North Carolina

separately in the spring of 1999. That summer, they began living together in a mobile home owned by a friend, Robert Johnson, near the Uwharrie National Forest. Various friends and acquaintances lived in the mobile home while Smith and Allen resided in it, including Gailey, Allen's friend and sometimes drug dealer.

¶ 6 Sometime during the afternoon of 9 July 1999, Allen, Smith, and Gailey entered the Uwharrie National Forest. At some point that evening, somebody shot and killed Gailey. His body was later found by a passerby driving an all-terrain vehicle. Smith eventually told law enforcement Allen killed Gailey to steal his money and drugs. Both Allen and Smith were charged with murder.

¶ 7 Approximately two weeks before Allen was brought to trial, Smith—who by that time had spent approximately twenty-three months in jail—entered into an agreement with the State. In exchange for her testimony against Allen, the State would drop the murder charges against her, and she would plead guilty to a lesser offense. At trial, Smith testified that Allen was the sole person responsible for Gailey's death and that Allen acted in cold blood. According to Smith, Allen assassinated Gailey by shooting him from behind, unprovoked, as they walked along a path in the woods.

¶ 8 Because Allen did not testify, Smith provided the sole narrative of the events directly precipitating Gailey's death. As we explained in our decision resolving Allen's direct appeal, Smith was "a witness with less-than-perfect credibility." *Allen*, 360 N.C. at 306. She was a chronic heavy drug user who admitted to smoking marijuana shortly before Gailey's death. She was involved in a tumultuous romantic relationship with Allen which he had recently broken off. She accused Allen of Gailey's murder only after confronting him in Denver, Colorado, where Allen had reunited with a different ex-girlfriend. She testified at the trial pursuant to a deal with the State which significantly reduced her potential criminal liability.

¶ 9 According to Smith's account of events, on 9 July 1999, Allen told her and Gailey he had stashed weapons in a cabin in the Uwharrie National Forest, which he thought they could recover and trade for money and cocaine. The trio left together in Gailey's truck to retrieve the weapons sometime in the afternoon, while it was still light out. The party began walking along a path through the forest. Gailey was carrying a duffel bag and a .45-caliber handgun. Allen carried a sawed-off shotgun. During the walk, Gailey and Allen used powder cocaine. Smith smoked marijuana. Smith testified that after at least an hour of walking, the path narrowed,

and the three proceeded single file with Gailey leading the way, followed by Allen and then Smith.

¶ 10 At some point, Allen allegedly turned around, shoved Smith to the ground, and then without provocation began shooting at Gailey with the shotgun. Smith did not see Allen shoot Gailey, but she recounted hearing multiple gunshots. Smith and Allen then waited for "seven or eight hours" in a nearby cabin for Gailey to die. While they were waiting, Allen would periodically crawl towards Gailey's body and throw rocks at him to ascertain whether Gailey was still alive. When Allen and Smith finally left the cabin, they heard Gailey empty his .45-caliber handgun.

¶ 11 Allen and Smith left the forest together in Gailey's truck. Smith retrieved Gailey's wallet and their belongings from the mobile home. The two then drove to Shallotte and then to Albemarle in search of cocaine. However, by this point, Smith's memory had begun to deteriorate due to her drug use.

¶ 12 According to multiple witnesses, Smith and Allen ended up at a party at the home of one of Smith's friends, where they encountered a man named Jeffrey Lynn Page, who would later testify at Allen's trial. According to Page, who had never previously met Allen, Allen admitted that he had just shot a man in the Uwharrie National Forest and was looking to offload the dead man's truck. Allen told Page he had thrown rocks at Gailey's body to confirm he was dead because Allen knew Gailey was armed. Page bought Allen's truck at well below market value and then flipped it to a South Carolina junk dealer for a profit. Like Smith, Page was also charged in connection with Gailey's death—he was indicted for being an accessory after the fact to Gailey's murder—and testified at Allen's trial pursuant to an agreement with the State.

¶ 13 Sometime after selling Gailey's truck, Allen returned to Denver. Smith testified that one of her former romantic partners, who she reunited with shortly after Gailey's death, loaned her money and a car to travel to Denver[1] where she was able to track down Allen. Allen and Smith fought. Smith returned to North Carolina. Upon her return, Smith went to law enforcement to accuse Allen of murdering Gailey.

¶ 14 Law enforcement officers who examined the crime scene discovered the following evidence:

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1. The former romantic partner subsequently filed a police report and testified at Allen's trial that rather than loaning Smith the money and her car, Smith stole both items.

- A .45-caliber semi-automatic handgun between Gailey's feet, loaded with a magazine containing five live rounds, and one spent .45-caliber shell casing jammed in the receiver;
- A number of live rounds of .45-caliber ammunition next to Gailey;
- A magazine containing live rounds several feet from Gailey's head;
- A black t-shirt draped over a rock with another smaller rock on top of it, approximately four feet from Gailey's body;
- A nylon handgun holster;
- Five expended shotgun shells;
- A hunting knife located on top of a duffel bag;
- A yellow container with $1,944.00 in cash on Gailey's body.

According to the State's forensic pathologist, Gailey died from two gunshot wounds, one to the back of his right shoulder from close range and another to his right knee from a further distance. In the pathologist's opinion, Gailey probably lost consciousness "within a matter of minutes" of sustaining his injuries, and it was "extremely unlikely" Gailey survived for more than an hour or two after he was shot.

¶ 15 The State's case rested primarily on the testimony of Smith and Page. No fingerprint, DNA, or forensic evidence connecting Allen to the crime scene was ever produced, nor was the alleged murder weapon—Allen's sawed-off shotgun—ever located. The jury was instructed on the offense of first-degree murder and the lesser included offenses of second-degree murder and voluntary manslaughter. During closing argument, the State emphasized Smith's testimony that Allen had thrown rocks at Gailey's body while they waited for hours for Gailey to die in seeking to persuade the jury to convict on a theory of malice, premeditation, and deliberation. Eschewing Smith's initial theory that Allen murdered Gailey for his money, the State argued in closing that Allen killed Gailey "to keep him from ratting [Allen] out . . . [and] to keep [Allen] from being arrested for his year-long rampage." The jury found Allen guilty of first-degree murder.

¶ 16 During the sentencing phase, the State submitted three aggravating circumstances to the jury: (1) the murder was committed for the purpose of avoiding or preventing a lawful arrest; (2) the murder was committed for pecuniary gain; and (3) the murder was especially hei-

nous, atrocious, or cruel. Allen's trial counsel submitted one statutory mitigating circumstance and fourteen non-statutory mitigating circumstances. The jury determined the State had proven all three aggravating circumstances beyond a reasonable doubt. Allen established only two non-statutory mitigating circumstances—that he had been deeply affected by the death of his grandfather and that Allen's death would have a detrimental impact on his family. The jury found the mitigating circumstances insufficient to outweigh the aggravating circumstances and that the aggravating circumstances, when considered with the mitigating circumstances, were sufficiently substantial to call for the imposition of the death penalty. Allen was sentenced to death.

B. Allen's MAR and SMAR claims.

¶ 17 Allen filed his initial MAR on 2 July 2007. In his MAR, Allen asserted the following ten claims:

- Claim I: The State knowingly presented false and misleading evidence at trial in violation of Allen's rights under the Fourteenth Amendment to the Constitution of the United States.
- Claim II: Allen's trial counsel provided IAC during the guilt-innocence phase by failing to investigate and call defense witnesses who could have provided exculpatory evidence.
- Claim III: Allen's trial counsel provided IAC during the guilt-innocence phase by failing to effectively cross-examine the State's witnesses.
- Claim IV: The State failed to produce exculpatory material before trial in violation of *Brady v. Maryland*, 373 U.S. 83 (1963).
- Claim V: The trial court lacked jurisdiction to try, convict, and sentence Allen because the State's indictment for first-degree murder was fatally deficient.
- Claim VI: Allen's trial counsel rendered IAC during both the guilt-innocence and the sentencing phases of his trial by failing to object to the State's improper statements during closing arguments.
- Claim VII: Allen's trial counsel rendered IAC during the sentencing phase by failing to present testimony from a mental health expert.
- Claim VIII: Allen's trial counsel rendered IAC during the sentencing phase by failing to investigate and present available mitigation evidence.

- Claim IX: Allen's trial counsel rendered IAC during the sentencing phase by failing to adequately prepare Allen's witnesses to testify.
- Claim X: Allen's trial counsel rendered IAC based upon the cumulative effect of his counsel's various errors during both the guilt-innocence and sentencing phases of his trial.

In support of his MAR, Allen submitted statements and affidavits from individuals who interacted with Allen, Gailey, and Smith before and after Gailey's death, as well as from Allen's friends and family members. Allen also submitted affidavits from two mental health experts, Dr. John F. Warren III, a forensic psychologist, and Dr. Kristine M. Herfkens, a neuropsychologist.

¶ 18 On 19 September 2013, Allen filed his SMAR. In his SMAR, Allen supplemented and amended various claims he initially raised in his MAR based upon new affidavits and statements elicited during additional post-conviction investigation. Allen again submitted affidavits from acquaintances of Smith's who cast doubt on her version of events—including an affidavit from Smith's former boyfriend stating that Smith told him she had been the one who developed and carried out the plan to jump Gailey and take his cocaine and cash. Of particular note, Allen submitted an affidavit and report prepared by Gregory McCrary (the McCrary Report), a former agent with the Federal Bureau of Investigation, who examined the evidence law enforcement found at the crime scene and determined it was inconsistent with Smith's account of an unprovoked execution. Instead, McCrary concluded the evidence reflected a physical confrontation which had devolved into a shootout between Allen and Gailey.

¶ 19 Allen's SMAR also contained two new claims:

- Claim XI: Allen's trial counsel rendered IAC during the guilt-innocence phase by failing to investigate evidence implicating a third party in Gailey's murder.
- Claim XII: Allen was impermissibly shackled in the presence of the jury without the trial court conducting a hearing or entering findings of fact as to the need for restraints.

Allen sought a new trial and sentencing hearing or, in the alternative, an evidentiary hearing on his MAR and SMAR claims.

¶ 20 In response, the State answered and moved for summary dismissal of all claims. On 17 May 2016, the MAR court sent the parties

a Memorandum of Ruling asking the parties to draft proposed orders disposing of Allen's MAR and SMAR claims. Ultimately, the MAR court issued three separate orders.

¶ 21 The first order—the "Order Summarily Dismissing Certain Claims of Defendant's Motion for Appropriate Relief and Supplemental Motion for Appropriate Relief"—summarily dismissed Claims I, II, IV, V, VI, X, XI, and XII in their entirety and certain subparts of Claim III.[2] The second order concerned the trial court's decision to deny Allen access to some of Smith's sealed mental health and substance abuse treatment records during trial. In this order, the MAR court provided for a "limited evidentiary hearing" to determine if Allen had presented sufficient evidence of prejudice to warrant a full evidentiary hearing. After conducting this limited evidentiary hearing, the MAR court dismissed these sub-claims in its "Order Granting State's Motion to Dismiss Claims 3H, 3J, 3K and a Portion of 3I of Defendant's Supplemental Motion for Appropriate Relief." The third order—the "Order on State's Summary Denial Motion on Claims VII, VIII, and IX"—granted Allen an evidentiary hearing on his claims alleging IAC during the sentencing phase of his trial. After completing this full evidentiary hearing, the MAR court dismissed these claims in its "Order Granting State's Motion to Dismiss Claims [VII], [VIII], and [IX] of Defendant's Motion for Appropriate Relief and Supplemental Motion for Appropriate Relief."

¶ 22 On appeal, Allen challenges the MAR court's disposition of every claim raised in his MAR and SMAR. On the claims the MAR court summarily denied or denied after the limited evidentiary hearing—Claims I, II, III, IV, V, VI, X, XI, and XII—Allen asks us to vacate the orders dismissing those claims and remand for a full evidentiary hearing. On the claims the MAR court denied after a full evidentiary hearing—Claims VII, VIII, and IX—Allen seeks a reversal of the order dismissing those claims and a remand for a new sentencing proceeding. The State opposes and asks this Court to affirm the MAR court's orders dismissing all claims. We hold that the MAR court erred in summarily dismissing Allen's guilt-innocence phase IAC claims, as well as his impermissible shackling claim. We affirm the portions of the MAR court's orders dismissing all other claims.

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2. The MAR court and the parties use numbers and Roman numerals interchangeably throughout the proceedings below. For consistency, we use Roman numerals when referring to Allen's claims throughout this opinion.

II. Analysis

¶ 23 Our examination of the MAR court's disposition of Allen's MAR and SMAR claims necessarily begins with the statutes governing post-conviction review. Under N.C.G.S. § 15A-1420, a capital defendant who files an MAR within the appropriate time period "is entitled to a hearing on questions of law or fact arising from the motion and any supporting or opposing information presented unless the court determines that the motion is without merit." N.C.G.S. § 15A-1420(c)(1) (2019). When a capital defendant has properly filed an MAR, the trial court "must determine, on the basis of these materials and the requirements of this subsection, whether an evidentiary hearing is required to resolve questions of fact." *Id.* If the defendant's MAR and supporting materials create disputed issues of fact, then the MAR court is obligated to conduct an evidentiary hearing to resolve any disputed facts unless "the trial court can determine that the defendant is entitled to no relief even upon the facts as asserted by him." *McHone*, 348 N.C. at 257.[3] By contrast, when a defendant's MAR "presents only questions of law, including questions of constitutional law, the trial court *must* determine the motion without an evidentiary hearing." *Id.*

¶ 24 Thus, our analysis of Allen's challenge to the MAR court's summary dismissal of certain claims differs from our analysis of Allen's challenge to the MAR court's dismissal of other claims after conducting an evidentiary hearing. We review the MAR court's summary dismissal de novo to determine whether the evidence contained in the record and presented in Allen's MAR—considered in the light most favorable to Allen—would, if ultimately proven true, entitle him to relief. *McHone*, 348 N.C. at 258 ("Under subsection (c)(4), read in pari materia with subsection (c)(1), (c)(2), and (c)(3), an evidentiary hearing is required unless the motion presents assertions of fact which will entitle the defendant to no relief *even if resolved in his favor*.") (emphasis added); s*ee also State v. Jackson*, 220 N.C. App. 1, 6 (2012) ("[T]he ultimate question that must be addressed in determining whether [an MAR] should be summarily

3. When a non-capital defendant files an MAR pursuant to N.C.G.S. § 15A-1414(a)(1), which must be filed within ten days after entry of judgment, the trial court is not required to conduct an evidentiary hearing. Instead, as provided under N.C.G.S. § 15A-1420(c)(2), "[a]n evidentiary hearing is not required *when the motion is made in the trial court pursuant to [N.C.G.S. §] 15A-1414*, but the court *may* hold an evidentiary hearing if it is appropriate to resolve questions of fact." N.C.G.S. § 15A-1420(c)(2) (2019) (emphases added). Because Allen is a capital defendant who did not file his MAR pursuant to N.C.G.S. § 15A-1414, the trial court lacks discretion to refuse to conduct an evidentiary hearing if his MAR and supporting materials created disputed factual issues which, if resolved in his favor, would entitle him to relief.

denied is whether the information contained in the record and presented in the defendant's [MAR] would suffice, if believed, to support an award of relief.").[4] If answering this question requires resolution of any factual disputes, N.C.G.S. § 15A-1420(c)(1) requires us to vacate the summary dismissal order and remand to the MAR court to conduct an evidentiary hearing. *McHone*, 348 N.C. at 259 ("This Court is not the appropriate forum for resolving issues of fact . . . .").[5] At this stage, the MAR court is entitled to summarily dismiss claims that are irrelevant (e.g., claims that even if proven true, would not entitle the defendant to relief) and claims that are without any apparent evidentiary basis (e.g., unsupported assertions). When the factual allegations would entitle the defendant to relief if true, and the defendant's filings provide some evidentiary basis for the allegations, then the MAR court must conduct an evidentiary hearing to determine the facts necessary to resolve the claim on its merits. However, if the MAR court has already conducted an evidentiary hearing, our role is "to determine . . . whether the findings of fact support the conclusions of law, and whether the conclusions of law support the order entered by the trial court." *State v. Matthews*, 358 N.C. 102, 105–06 (2004) (quoting *State v. Stevens*, 305 N.C. 712, 720 (1982)). The MAR court's factual findings are "binding upon the [defendant] if they [a]re supported by evidence," even if the evidence is "conflicting," *Stevens*, 305 N.C. at 719–20, but the MAR court's conclusions of law are always reviewed de novo, *State v. McNeill*, 371 N.C. 198, 220 (2018).

¶ 25 We proceed by applying this legal framework to Allen's claims as follows: First, we review the portions of the MAR court's order summarily dismissing Allen's claims alleging he received IAC during the guilt-innocence phase of his trial. Second, we review the other claims

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4. To be clear, the MAR court only views the evidence presented in a defendant's MAR in the light most favorable to the defendant when making the initial determination as to whether the facts alleged by the defendant would entitle the defendant to relief if proven true. Nothing in this opinion alters the undisputed premise that the defendant ultimately bears the burden of proving by a preponderance of the evidence "the existence of the asserted ground for relief." N.C.G.S. § 15A-1420(c)(6).

5. The dissent erroneously states that "this Court did not remand *McHone* for an evidentiary hearing." *But see McHone*, 348 N.C. at 258–60 ("[D]efendant also contends in the present case that he was entitled to an evidentiary hearing before the trial court ruled on his motion for appropriate relief as supplemented because some of his asserted grounds for relief required the trial court to resolve questions of fact. We find this contention to have merit. . . . The trial court erred in denying defendant's supplemental motion without an evidentiary hearing. . . . [W]e reverse the trial court's order denying defendant's motion for appropriate relief and remand this case to that court for further proceedings."). Moreover, *McHone* is not the only authority for the disposition in this case. The MAR statute itself makes it clear that an evidentiary hearing is required in these circumstances.

addressed in the summary dismissal order which do not directly allege IAC. Third, we review the order dismissing certain subparts of Claim III relating to the trial court's refusal to grant Allen access to Smith's treatment records entered after the MAR court conducted a "limited evidentiary hearing." Finally, we review the order dismissing Allen's claims alleging IAC during the sentencing phase of his trial entered after the MAR court conducted a full evidentiary hearing.

A. Ineffective assistance of counsel during the guilt-innocence phase.

¶ 26 **[1]** Allen's argument that his attorneys rendered IAC during the guilt-innocence phase of his trial encompasses multiple interrelated claims. Because these claims substantially overlap both factually and legally—and because the MAR court disposed of these claims in a single summary dismissal order—we consider them together. Specifically, in this section, we consider in their entirety Claim II (trial counsel's failure to investigate and call certain witnesses), Claim VI (trial counsel's failure to object to improper statements during closing arguments), Claim X (cumulative prejudice arising out of trial counsel's multiple instances of deficient performance), and Claim XI (trial counsel's failure to investigate evidence of a third party's guilt). We also consider the subparts of Claim III (trial counsel's failure to effectively cross-examine the State's witnesses) which the MAR court resolved without conducting an evidentiary hearing. Although addressed in the same order, we separately address the claims which do not predominantly concern Allen's IAC allegations, namely Claim I (the State knowingly presented false and misleading evidence), Claim IV (the State failed to disclose exculpatory evidence before trial), Claim V (the trial court lacked jurisdiction because Allen's indictment was fatally deficient), and Claim XII (Allen was impermissibly shackled in view of the jury).

¶ 27 This Court has "expressly adopt[ed]" the two-part test articulated in *Strickland v. Washington*, 466 U.S. 668 (1984), as the "uniform standard to be applied to measure ineffective assistance of counsel under the North Carolina Constitution" and the Sixth Amendment to the Constitution of the United States. *State v. Braswell*, 312 N.C. 553, 562–63 (1985). Under the first prong of the *Strickland* test, a defendant must "establish that counsel's performance was deficient." *State v. Todd*, 369 N.C. 707, 710 (2017). To prove deficient performance, "the defendant must show that counsel's representation fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688. Under the second prong of the *Strickland* test, the "defendant must demonstrate that the deficient performance prejudiced [his] defense." *Todd*, 369 N.C. at 710–11. To prove prejudice, "[t]he defendant must show that there is

a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694.

¶ 28 We begin by examining Allen's assertion that his trial counsel unreasonably failed to investigate the crime scene evidence, which is contained within Claim III as supplemented and amended in his SMAR. This portion of Claim III is substantially based upon the evidence contained in the McCrary Report. McCrary was retained by Allen's post-conviction counsel to independently assess the evidence discovered by law enforcement at the scene of Gailey's death. Based upon his analysis of the crime scene evidence, McCrary concluded that portions of Smith's testimony were incompatible with the physical evidence and, in his judgment, "unfathomable." According to McCrary, the crime scene evidence "refute[s] Ms. Smith's assertion that Mr. Gailey was assassinated in cold blood, never having got his gun out." Instead, in McCrary's opinion, "the totality of the evidence at the [crime] scene is more consistent with a dispute that deteriorated into a gunfight and significantly contradicts and discredits Ms. Smith's story."

¶ 29 Allen alleges his trial counsel were deficient for failing to obtain information regarding the inconsistencies between Smith's testimony and the crime scene evidence prior to trial. In Allen's view, counsel's failure to adequately investigate the crime scene prejudiced his case in at least two ways. First, it deprived him of the opportunity to choose to present testimony based upon the crime scene evidence which would have directly rebutted Smith's account of Gailey's death. Second, it deprived his counsel of the capacity to effectively cross-examine Smith on the discrepancies between her account and the physical evidence. The MAR court did not conduct an evidentiary hearing on this claim, and Allen seeks only a remand for an evidentiary hearing. Therefore, the question at this stage is not whether Allen has proven that he received IAC. Instead, the question is whether he has stated facts which, if proven true, would entitle him to relief. We conclude that he has.

¶ 30 An attorney can render IAC by failing to conduct an adequate investigation of the physical evidence of a crime. *See, e.g.*, *Elmore v. Ozmint*, 661 F.3d 783, 864 (4th Cir. 2011) ("Because [the defendant] lawyers' investigation into the State's forensic evidence never started, there could be no reasonable strategic decision either to stop the investigation or to forgo use of the evidence that the investigation would have uncovered."). Here, Allen has presented evidence which could support factual findings which could, in turn, establish a successful IAC claim. He has presented

evidence supporting his contentions that (1) counsel were aware of the importance of the crime scene evidence before trial but unreasonably failed to follow up on these "red flags," *Rompilla v. Beard*, 545 U.S. 374, 392 (2005); (2) counsel did not perform an independent investigation of the crime scene evidence; (3) counsel's conduct was unreasonable when judged against prevailing professional norms in capital cases, including those outlined in the American Bar Association's guidelines; and (4) counsel's unreasonable failure to investigate was prejudicial. Given the centrality of Smith's testimony to the State's case, if each of these factual contentions were proven to be true, Allen would be entitled to a new trial. *See, e.g.*, *Elmore*, 661 F.3d at 870 ("Though perhaps the jury would have yet believed the [State's witnesses], there is a reasonable probability that the jury would have doubted the [witnesses'] account" had defense counsel presented contradictory forensic evidence); *Rompilla*, 545 U.S. at 376 ("The undiscovered . . . evidence, taken as a whole, might well have influenced the jury's appraisal of [the defendant's] culpability, and the likelihood of a different result had the evidence gone in is sufficient to undermine confidence in the outcome actually reached . . . ." (cleaned up) (first quoting *Wiggins v. Smith*, 539 U.S. 510, 538 (2003); then quoting *Strickland*, 466 U.S. at 694)). Thus, the MAR court erred in summarily dismissing Allen's guilt-innocence IAC claims.

¶ 31 The MAR court's reasoning in support of its decision to summarily dismiss these claims is critically flawed. According to the MAR court, Allen's counsel's failure to consult with or present testimony from a crime scene expert resulted from a "sound tactical decision." This "sound tactical decision" purportedly reflected the reasonable trial strategy of "focus[ing] on the doubt created by Smith's gaps in memory, addiction and use of controlled substances on the date of Gailey's death, and failure to maintain a cohesive timeline, rather than attempting to prove Defendant's innocence through the use of a crime scene analyst."

¶ 32 It is correct that in considering an IAC claim, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689. However, this presumption is rebuttable. Once a defendant presents evidence rebutting the presumption of reasonableness, the court is not at liberty to invent for counsel a strategic justification which counsel does not offer and which the record does not disclose. *See Wiggins*, 539 U.S. at 526–27 (rejecting "strategic" reasons that "the state courts and respondents all invoke to justify counsel's limited pursuit of mitigating evidence [as] resembl[ing] more [of] a *post hoc* rationalization of counsel's conduct than an accurate description of their deliberations prior to sentencing").

¶ 33 In this case, Allen has presented direct evidence indicating his trial counsel's decision not to adequately investigate the crime scene—and their resulting decision not to present evidence derived from an adequate investigation or use such evidence to impeach Smith's testimony—was not a reasonable strategic choice. His SMAR included an affidavit from one of his two trial attorneys explicitly stating that he "do[es] not recall [either himself or Allen's other attorney] making any strategic decisions to limit the cross-examination of the State's witnesses, including Vanessa Smith." This directly undercuts the MAR court's presently unsupported theory that counsel's failure to investigate resulted from a "tactical decision" to focus on Smith's lack of credibility due to her drug use.[6] If it is true that trial counsel's "failure to investigate thoroughly resulted from inattention, not reasoned strategic judgment," then counsel's performance was deficient. *Wiggins*, 539 U.S. at 526.

¶ 34 Even if trial counsel chose to pursue a "strategy" of focusing on Smith's lack of credibility, counsel's failure to adequately investigate the crime scene could still be unreasonable. *Strickland*, 466 U.S. at 690–91 ("[S]trategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation."). With the benefit of insights gleaned from the crime scene, counsel could have directly contradicted Smith's account of Gailey's death with tangible, extrinsic evidence, a tactic which would only serve a strategy centered around attacking Smith's credibility. To answer the question of whether Allen's counsel made a reasonable strategic judgment in foregoing a thorough investigation of the crime scene, the MAR court needed to resolve factual issues, a task our statutes do not permit it to undertake in these circumstances without first conducting an evidentiary hearing.

¶ 35 Alternatively, the MAR court rested its conclusion that Allen's counsel was not deficient on the following brief statement Allen made during a colloquy with the trial court regarding his rights as a criminal defendant:

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6. The dissent advances the curious and novel position that because Allen's trial counsel had represented other capital defendants without rendering IAC and had not been disciplined by the State Bar, Allen could not have received IAC at his trial or sentencing proceeding. The dissent cites no relevant authority for that proposition. The State never made this argument and we reject this contention. Obviously, the adequacy of an attorney's representation in one trial does not establish the adequacy of an attorney's representation in a different trial, nor does the IAC claim require that an attorney have been disciplined by the State Bar in order to demonstrate ineffective assistance. *See, e.g.*, *Strickland*, 466 U.S. at 687 (explaining that to prove IAC, a defendant must "show that counsel's performance was deficient" and "that the deficient performance prejudiced the defense").

> THE COURT: Knowing that you have the right to present evidence and you have the right not to, what is your desire about presenting evidence in this case?
>
> MR. ALLEN: Well, I don't know anything. I don't know what happened, so I have nothing to contribute to it.

According to the MAR court, this statement proves that "defense counsel['s] decision not to call any witnesses [during] the guilt[-innocence] phase of Defendant's trial was a tactical decision that was made after consultation with Defendant." Even if this perfunctory exchange could possibly support the conclusion that counsel's choices were strategic, it does not necessarily disprove Allen's contention that counsel's "tactical decision" was unreasonable, nor his argument that counsel could not reasonably make such an important "tactical decision" without first conducting an adequate investigation of the crime scene evidence.

¶ 36 The State's arguments in support of the MAR court's order are also unpersuasive. The State appears to argue that even if Allen's counsel were deficient, Allen could not have been prejudiced because the crime scene evidence in no way detracted from the State's overwhelming evidence of guilt. To begin with, Allen need not present evidence which, if believed, would entirely exculpate him of all criminal conduct relating to Gailey's killing. Allen was convicted of first-degree murder, which made him eligible to receive the death penalty. Yet the trial court also instructed on lesser included offenses for which he would not have been eligible to receive the death even if he were convicted. If counsel's conduct resulted in Allen being convicted of first-degree murder rather than second-degree murder or voluntary manslaughter, then Allen was prejudiced.

¶ 37 Regardless, the State's argument that Allen cannot prove prejudice rests on two erroneous premises. First, the State contends the McCrary Report cannot support Allen's IAC claim because it failed to account for the State's evidence indicating Allen shot Gailey "in the back at close range with a shotgun." This assertion is belied by the text of the McCrary Report, which explicitly acknowledges the State's medical examiner's conclusion that Gailey was shot from "quite close, within a matter of a foot or so" and also from "several yards away." McCrary's conclusion that "the totality of the evidence at the [crime] scene is more consistent with a dispute that deteriorated into a gunfight" reflects his interpretation of *all* of the crime scene evidence, including the evidence the State relied upon in support of Allen's conviction.

¶ 38 Second, the State argues that because there was evidence indicating Allen shot Gailey "in the back at close range with a shotgun," no rational juror could possibly conclude that Allen committed anything other than first-degree murder. As the State bluntly puts it, "[s]hooting someone in the back at close range with a shotgun is not a gunfight, it is premeditated and deliberated murder." This argument incorrectly suggests that Allen's intent has been established as a matter of law by the manner of Gailey's death. The State disregards more than a century of precedent explaining that "[w]hether an act is the result of premeditation and deliberation is a fact to be found by the jury, and not a conclusion of law to be drawn by the court." *State v. Daniels*, 134 N.C. 671, 674 (1904).

¶ 39 While the jury could have inferred that Allen acted with premeditation and deliberation based upon "the distance from which the shot was fired and . . . the weapon and ammunition used," *State v. Reece*, 54 N.C. App. 400, 406 (1981), these facts would not have precluded Allen from persuading the jury to draw a different inference, *see State v. Walker*, 332 N.C. 520, 533 (1992) (concluding that the "nature of the killing, a contact shot to the temple, *indicates* a premeditated and deliberate act of homicide . . . [which] *support[s] a reasonable inference*" of intent (emphases added)). The nature of Gailey's wounds is not necessarily inconsistent with the alternative theory propounded by McCrary of a drug-fueled confrontation that turned fatal, a theory Allen alleges is supported by physical evidence from the crime scene, such as the evidence demonstrating Gailey fired his weapon and the unexplained presence of a hunting knife.[7]

¶ 40 As described above, in addition to his argument based upon counsel's purported failure to adequately investigate the crime scene evidence, Allen raises other related IAC claims challenging other aspects of his trial counsel's performance during the guilt-innocence phase of his trial. Having already determined that the MAR court erred in summarily denying one of Allen's IAC claims, we need not address his other claims here without the benefit of a more fully developed factual record. Applying the two-prong *Strickland* test, we conclude that Allen has presented evidence supporting his contention that his attorneys provided IAC during the guilt-innocence phase of his trial, creating factual disputes which, if resolved in his favor, would entitle him to relief. At a minimum, he is entitled to further develop these claims during an

7. Further, if the evidence could only support the conclusion Allen had committed first-degree murder, the trial court would have had no reason to instruct on the lesser included offenses of second-degree murder and voluntary manslaughter, neither of which requires the State to prove the killing was committed with premeditation and deliberation.

evidentiary hearing. *Todd*, 369 N.C. at 712 (remanding for an evidentiary hearing because "the record before th[e] Court [was] not thoroughly developed regarding defendant's appellate counsel's reasonableness, or lack thereof, in choosing not" to pursue an argument).

¶ 41 Accordingly, we vacate the relevant portions of the MAR court's order summarily dismissing Allen's guilt-innocence IAC claims. Because "an evidentiary hearing *is required unless* the motion presents assertions of fact which will entitle the defendant to no relief even if resolved in his favor, or the motion presents only questions of law, or the motion is made pursuant to N.C.G.S. § 15A-1414," *McHone*, 348 N.C. at 258 (emphasis added), we remand to the MAR court to conduct an evidentiary hearing. At the evidentiary hearing, the MAR court will determine whether Allen's counsel were deficient and, if so, whether counsel's deficient performance was prejudicial.

¶ 42 If the MAR court reaches the question of prejudice, the MAR court must examine whether any instances of deficient performance at discrete moments in the trial prejudiced Allen when considered both individually and cumulatively. We reject the MAR court's erroneous conclusion that cumulative prejudice is unavailable to a defendant asserting multiple IAC claims. We have previously acknowledged cumulative prejudice IAC claims, *see*, *e.g.*, *State v. Thompson*, 359 N.C. 77, 121–22 (2004) (recognizing cumulative prejudice argument but dismissing IAC claim on other grounds), as has the United States Supreme Court in *Williams v. Taylor*, 529 U.S. 362, 396–98 (2000). Therefore, we adopt the reasoning of the unanimous Court of Appeals panel which recently concluded that "because [IAC] claims focus on the reasonableness of counsel's performance, courts can consider the cumulative effect of alleged errors by counsel." *State v. Lane*, 271 N.C. App. 307, 316, *review dismissed*, 376 N.C. 540 (2020), *review denied*, 851 S.E.2d 624 (N.C. 2020).[8] To be clear, only instances of counsel's deficient performance may be aggregated to prove cumulative prejudice—the cumulative prejudice doctrine is not an invitation to reweigh all of the choices counsel made throughout the course of representing a defendant.

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8. Our decision to recognize cumulative prejudice claims is based upon our own interpretation of *Strickland* and IAC doctrine, and is in accord with numerous federal and state appellate decisions (including the recent decision by our Court of Appeals), none binding on this Court, but which we find persuasive. *See*, *e.g.*, *Williams v. Washington*, 59 F.3d 673, 681 (7th Cir. 1995) ("In making this showing [of prejudice], a petitioner may demonstrate that the cumulative effect of counsel's individual acts or omissions was substantial enough to meet *Strickland's* test."); *Rodriguez v. Hoke*, 928 F.2d 534, 538 (2d Cir. 1991) ("Since [the defendant's] claim of ineffective assistance of counsel can turn on the cumulative effect of all of counsel's actions, all his allegations of ineffective assistance

¶ 43 We next address the portions of the "Order Summarily Dismissing Certain Claims of Defendant's Motion for Appropriate Relief and Supplemental Motion for Appropriate Relief" disposing of Claims I, IV, V, and XII.

1. Knowing presentation of false and misleading evidence.

¶ 44 **[2]** In Claim I of his MAR and SMAR, Allen alleges that the State violated his constitutional rights by allowing Smith to testify in a manner the State knew to be false and misleading. In support of his claim, Allen relies principally on post-conviction affidavits from individuals whose account of events surrounding Gailey's death differ from and conflict with Smith's recollection. The MAR court determined this claim was procedurally barred pursuant to N.C.G.S. § 15A-1419(a)(3), which provides in relevant part that it is "grounds for the denial of a motion for appropriate relief, including motions filed in capital cases . . . [if u]pon a previous appeal the defendant was in a position to adequately raise the ground or issue underlying the present motion but did not do so." In the alternative, the MAR court concluded this claim was meritless.

¶ 45 On direct appeal, Allen alleged that the State presented two portions of Smith's testimony which it knew to be false and misleading. *Allen*, 360 N.C. at 305. He argued that the State knew Smith's account of waiting hours for Gailey to die and hearing Gailey "empty his gun out" as she left the Uwharrie National Forest was false and misleading in light of the medical examiner's testimony that Gailey could not have survived more than a brief time after being shot. *Id.* We rejected this claim, noting the "difference between the knowing presentation of false testimony and knowing that testimony conflicts in some manner." *Id.*

¶ 46 Assuming without deciding that Claim I is not procedurally barred—and even if the facts alleged in his supporting affidavits were proven to be true—the same distinction we recognized on direct appeal controls our disposition of Allen's MAR claim. We must again conclude that "nothing in the record tends to show the [State] knew [Smith's] testimony was

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should be reviewed together."); *Ewing v. Williams*, 596 F.2d 391, 395 (9th Cir. 1979) ("[E]ven where, as here, several specific errors are found, it is the duty of the Court to make a finding as to prejudice, although this finding may either be 'cumulative' or focus on one discrete blunder in itself prejudicial."); *State v. Clay*, 824 N.W.2d 488, 500 (Iowa 2012) ("[W]e [ ] look to the cumulative effect of counsel's errors to determine whether the defendant satisfied the prejudice prong of the *Strickland* test."); *State v. Thiel*, 2003 WI 111, ¶ 4, 264 Wis. 2d 571, 581, 665 N.W.2d 305, 311 ("We conclude that counsel's performance was deficient in several respects and that the cumulative effect of the deficiencies prejudiced [the defendant's] defense to an extent that it undermines our confidence in the outcome of the trial.").

false." *Id.* at 306. Thus, Allen cannot meet his burden of proving that the State "knowingly and intentionally used" false and misleading testimony "to obtain his conviction." *State v. Williams*, 341 N.C. 1, 16 (1995). Accordingly, we affirm the portion of the MAR court's order summarily dismissing Claim I.

2. Failure to produce exculpatory material before trial in violation of Brady v. Maryland.

¶ 47 **[3]** In Claim IV of his MAR, Allen alleges that the State violated his constitutional rights as established in *Brady v. Maryland*, 373 U.S. 83 (1963). To establish a successful *Brady* claim, a defendant must prove that the State withheld evidence which would have been "favorable" to the defendant, either as impeachment evidence or exculpatory evidence, and that the evidence was "material," meaning "there is a 'reasonable probability' of a different result had the evidence been disclosed." *State v. Williams*, 362 N.C. 628, 636 (2008) (quoting *State v. Berry*, 356 N.C. 490, 517 (2002)).

> A defendant's burden . . . 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.

State v. Best, 376 N.C. 340, 349 (2020) (cleaned up) (quoting *United States v. Agurs*, 427 U.S. 97, 112 (1976)), *petition for cert. filed*, No. 20-1608 (U.S. May 18, 2021).

¶ 48 The basis for Allen's *Brady* claim was that the State provided an incomplete account of Page's criminal record prior to putting him on the stand to testify. Although the State did convey information regarding other of Page's prior criminal convictions, the State failed to disclose Page's two prior criminal convictions for misdemeanor injury to personal property.

¶ 49 We are persuaded that Allen cannot prove these omitted prior convictions were "material" within the meaning of *Brady*. When Page testified, the jury was made aware of the fact that Page had previously been convicted of other, more serious crimes, that he had been charged as an accessory after the fact to Gailey's murder, and that he had initially made false statements to law enforcement regarding his interactions with Allen. Informing the jury that Page had also committed two other

minor crimes could not have meaningfully altered the jury's perception of Page's credibility as a witness. Under these circumstances, where the withheld information is substantially similar to information properly disclosed to counsel and presented to the jury, we conclude that Allen cannot "show[ ] that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Kyles v. Whitley*, 514 U.S. 419, 435 (1995).

3. The trial court's jurisdiction to try, convict, and sentence Allen.

¶ 50 **[4]** In Claim V of his MAR, Allen alleges that his short-form indictment was constitutionally improper for failing to fully state the elements of first-degree murder and the aggravating circumstances to be submitted to the jury. Allen raised this exact claim on direct appeal, which we denied, explaining that this Court has "consistently ruled short-form indictments for first-degree murder are permissible under . . . the North Carolina and United States Constitutions." *Allen*, 360 N.C. at 316. Since Allen's direct appeal, there has been no retroactively effective change in the applicable law. Accordingly, we affirm the portion of the MAR court's order summarily dismissing this claim on the ground that it is procedurally barred pursuant to N.C.G.S. § 15A-1419(a)(2).

4. Impermissible shackling in view of the jury.

¶ 51 **[5]** In Claim XII of his SMAR, Allen alleged that he was impermissibly shackled in view of the jury without justification, in violation of his constitutional rights. In support of his claim, Allen produced an affidavit from one juror stating that she "know[s] that . . . Allen had some type of shackles or restraints on during the trial" and an affidavit from an alternate juror stating that he "noticed . . . Allen's appearance and demeanor in the courtroom . . . [and] saw that he had tattoos on his body and that he was wearing leg irons." In addition, Allen's post-conviction counsel disclosed to the MAR court that a different juror "told post-conviction investigators that [Allen] was shackled and 'there were deputies all around him' " but refused to sign an affidavit. The State argued, and the MAR court agreed, that Allen's claim was procedurally barred under N.C.G.S. § 15A-1419(a)(3). In the alternative, the MAR court concluded that even if Allen's shackling claim was not procedurally barred, it was meritless.

¶ 52 Under both the North Carolina Constitution and the Constitution of the United States, a defendant may not be visibly shackled in the courtroom in the presence of the jury unless there is a special need for restraints specific to the defendant. *See State v. Tolley*, 290 N.C. 349, 367–68

(1976); *see also Deck v. Missouri*, 544 U.S. 622, 626 (2005) ("The law has long forbidden routine use of visible shackles during the guilt phase; it permits a State to shackle a criminal defendant only in the presence of a special need."). Mirroring this constitutional rule, North Carolina law permits a trial court to order a defendant restrained in the courtroom only when doing so is "reasonably necessary to maintain order, prevent the defendant's escape, or provide for the safety of persons," and only after the trial court "[e]nter[s] in the record out of the presence of the jury and in the presence of the person to be restrained and his counsel, if any, the reasons for" imposing the restraints. N.C.G.S. § 15A-1031 (2019). The defendant must also be afforded an opportunity to be heard on the matter, and the trial court must instruct the jurors "that the restraint is not to be considered in weighing evidence or determining the issue of guilt." *Id.*; *see also Sigmon v. Stirling*, 956 F.3d 183, 202 (4th Cir. 2020) (noting the "longstanding" constitutional requirement "for the trial court to articulate a reason for [imposing] visible restraints on the record"). Typically, adherence to this mandatory statutory procedure ensures that evidence of a defendant's shackling appears in the record and transcript of trial, enabling the defendant to challenge the trial court's decision to impose restraints on direct appeal.

¶ 53 In this case, however, there is no evidence in the record and transcript suggesting Allen was restrained at all during trial. The trial court did not enter factual findings as would have been required prior to ordering Allen shackled pursuant to N.C.G.S. § 15A-1031. The record and transcript do not reflect that Allen entered an objection or otherwise noted that he was restrained in a manner visible to the jury at any point during trial. The record and transcript reflect that Allen did not request and the trial court did not give a jury instruction that his appearance in restraints was not to be considered as evidence of his guilt.

¶ 54 Consistent with the logic of our decision in *State v. Hyman*, 371 N.C. 363 (2018), we conclude that the MAR court erred in summarily dismissing Allen's shackling claim as procedurally barred. We reject the State's invitation to construe N.C.G.S. § 15A-1419(a)(3) broadly as a general prohibition on post-conviction review of any claim not raised on direct appeal. Instead, we agree with Allen that a claim is not procedurally barred when the record on appeal is completely silent as to dispositive facts necessary to prove or disprove the claim. Because the record does not reveal the information necessary to determine whether Allen's claim is procedurally barred, the MAR court erred in summarily concluding that Allen was "in a position to adequately raise the ground or issue underlying the [MAR claim]" on direct appeal within the meaning of N.C.G.S. § 15A-1419(a)(3).

¶ 55 In *Hyman*, we held that a defendant was not procedurally barred from raising an IAC claim on post-conviction review, even though he had not raised the claim on direct appeal. *Hyman*, 371 N.C. at 383. In that case, the defendant's IAC claim challenged his attorney's failure to withdraw from representing him during trial. *Id.* at 381. The attorney worked at a law firm that had previously represented a witness who was testifying at the defendant's trial and whose testimony inculpated the defendant. *Id.* at 367–68. During cross-examination, an exchange between counsel and the inculpating witness suggested that the witness had previously conveyed a different account of the events in question than the one the witness was offering at trial. *Id.* at 372. The defendant argued that his attorney should have withdrawn from the representation and testified regarding the content of this alleged prior conversation. *Id.* at 367.

¶ 56 In concluding that the *Hyman* defendant's claim was not procedurally barred, we explained that in order to prove that his attorney rendered IAC, the defendant was required to prove numerous facts, including that (1) the alleged pretrial conversation between the witness and the defendant's attorney had indeed occurred; (2) the witness made statements inconsistent with his trial testimony during said conversation; (3) the attorney did not have a strategic reason for failing to withdraw from representing the defendant; and (4) the testimony the attorney would have been able to deliver would have benefitted the defendant. *Id.* at 384–85. We reasoned that because "[t]he record developed at trial did not contain any information *affirmatively tending to show*" any of those facts, the record did not "contain[ ] sufficient information to permit the reviewing court to make all the factual and legal determinations necessary to allow a proper resolution of the claim in question." *Id.* at 383–84 (emphasis added). We thus held that the procedural bar set forth in N.C.G.S. § 15A-1419(a)(3) did not apply. *Id.* at 385.

¶ 57 This reasoning requires us to hold that the MAR court erred in summarily concluding that Allen's shackling claim was procedurally barred. To assess Allen's shackling claim, three threshold facts must first be established. First, Allen must show that he was indeed shackled in the courtroom. Second, he must establish that the shackles were visible to the jury. Third, he must establish whether or not his trial counsel was aware that he was shackled in a way that was visible to the jury in the courtroom. Only when these facts have been established is it possible for a reviewing court to ascertain (1) whether or not the claim is procedurally barred, and (2) whether or not the trial court imposed restraints under circumstances which undermined the fairness of the defendant's

trial and the validity of its outcome.[9] *See State v. Holmes*, 355 N.C. 719, 729 (2002) (holding that where shackles are not visible to the jury, "the risk is negligible that the restraint undermined the dignity of the trial process or created prejudice in the minds of the jurors by suggesting that defendant is a dangerous person").

¶ 58 The record and transcript from Allen's trial are devoid of any information which would allow a court to resolve these central factual questions. If Allen had brought his claim on direct appeal, the only way a reviewing court could assess his claim would be by guessing or presuming answers. This is precisely the kind of circumstance in which further factual development is necessary to reach an informed judgment of a defendant's claim. As *Hyman* illustrates, given the affidavits Allen filed which indicate he may be able to prove the facts necessary to prevail on his claim, the proper course is to analyze Allen's shackling claim after an evidentiary hearing to determine the central facts at issue, rather than ruling without receiving the necessary facts.

¶ 59 The State argues that we should ignore the impossibility of resolving Allen's claim on the existing record because the insufficiency of the record purportedly results from Allen's own failure to supply at trial or on appeal the necessary information. Yet this presumes that either Allen or his trial counsel possessed all of the information required to perfect the record on appeal. Even though Allen and his counsel would have known whether Allen was shackled at trial, they may not have known whether his shackles were visible to the jury or whether, in the absence of a hearing on the matter, he was legally compelled to be shackled in the courtroom. More facts are needed to ascertain whether Allen was in an adequate position to raise this claim on direct appeal.

¶ 60 The State argues in the alternative that Allen is precluded from raising his shackling claim on post-conviction review because he failed to object to his purported shackling at trial. This argument misses

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9. We do not have before us the question of whether counsel's failure to object to the imposition of visible restraints could form the basis of an IAC claim. *See, e.g.*, *Roche v. Davis*, 291 F.3d 473, 483 (7th Cir. 2002) (concluding that a capital defendant's counsel was deficient under *Strickland* because "not only did counsel fail to object to [the defendant's] shackling, he also failed to ensure that [the defendant's] shackles would not be visible to the jury while [the defendant] was sitting at counsel's table during the entire trial"); *Jackson v. Washington*, 270 Va. 269, 280 (2005) (concluding that "counsel's failure to object to [the defendant] being compelled to stand trial before the jury in jail clothes" rendered IAC). We leave it to the MAR court in the first instance to determine whether Allen should be permitted to again amend his MAR to include an allegation that he received IAC based upon a failure to object to his alleged shackling in view of the jury.

the mark. Subsection 15A-1419(a)(3) contains no language restricting post-conviction review to claims that were preserved at trial. Indeed, claims preserved at trial can always be brought on direct appeal and the statute would, construed in this way, effectively prevent post-conviction review of all claims. The legislature did not include any language suggesting that a defendant's failure to object at trial triggers application of the procedural bar. We reject the State's invitation to read into the statute an extra-textual requirement the legislature understandably did not see fit to include.

¶ 61 We have previously rejected and continue to disclaim any interpretation of N.C.G.S. § 15A-1419(a)(1)–(4) which imposes "a general rule that any claim not brought on direct appeal is forfeited on state collateral review." *State v. Fair*, 354 N.C. 131, 166 (2001) (quoting *McCarver v. Lee*, 221 F.3d 583, 589 (4th Cir. 2000), *cert. denied*, 531 U.S. 1089 (2001)). The rule is not that any claim not litigated on direct appeal cannot be brought in post-conviction proceedings. The rule is that such claims may be brought unless one or more of the procedural bars set forth in the relevant statutes applies and is not waived. On the present record, we are unable to conclude that Allen was "in a position to adequately raise the ground or issue underlying" his shackling claim on direct appeal but failed to do so. N.C.G.S. § 15A-1419(a)(3).

¶ 62 Having examined the facts and circumstances of Allen's shackling claim, we conclude that the trial court erred in summarily dismissing Allen's claim as procedurally barred because the record does not contain facts necessary to a fair resolution of the claim. Because Allen has presented sufficient evidence which would entitle him to an evidentiary hearing in the event that he can demonstrate his claim is not procedurally barred, we vacate the portion of the MAR court's order summarily dismissing Claim XII of his SMAR and remand to the trial court to conduct an evidentiary hearing to determine whether his shackling claim is procedurally barred and whether the claim has merit. *See McHone*, 348 N.C. at 258. At the hearing, as an initial matter, Allen will have the burden of proving by a preponderance of the evidence (1) that he was shackled, (2) that he was shackled in the courtroom in the presence of, and in a manner visible to, the jury, and (3) whether his counsel knew he was impermissibly shackled in the courtroom and in the view of the jury.

B. Claims regarding trial counsel's access to Smith's medical records.

¶ 63 **[6]** At trial, Allen's counsel sought access to records produced during Smith's stay at the Black Mountain Treatment Center in October 1993,

as well as records from a period of involuntary commitment she experienced in Stanley County. The trial court granted the order but provided that when the documents were produced, the court would review them in camera to determine whether they should be disclosed to counsel. After conducting this review, the trial court released only the records of Smith's involuntary commitment. The trial court withheld all records obtained from the Black Mountain Treatment Center on the grounds that they contained no evidence indicating Smith suffered from any pertinent mental health conditions (e.g., conditions which would affect her credibility as a witness), nor any evidence indicating substance abuse issues distinct from what Smith herself had admitted to at trial.

¶ 64 In his SMAR, Allen supplemented Claim III of his original MAR to include additional subclaims relating to the trial court's refusal to disclose the Black Mountain Treatment Center records.[10] While the precise nature and scope of the subclaims in Claim III vary, each is predicated on Allen's antecedent argument that the trial court violated his constitutional rights by failing to release the records to his counsel after conducting only an in camera review.[11]

¶ 65 After determining that Allen was not procedurally barred from pursuing these subclaims, the MAR court conducted a "limited evidentiary hearing to determine if Defendant suffered any sufficient prejudice to warrant a full evidentiary hearing on SMAR sub-claims 3H, 3J, 3K and that portion of sub-claim 3I that relates to the *in camera* examination of the sealed mental health and substance abuse records of State's trial witness Vanessa Smith." At this hearing, Allen presented testimony from Dr. Warren, one of his mental health experts. Dr. Warren testified that although Smith was not formally diagnosed with any pertinent mental health conditions at the Black Mountain Treatment Center, the records contained evidence that she suffered from borderline and antisocial personality disorders. He explained that he based his conclusion on the

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10. Although these allegations are contained within a broader claim alleging IAC during the guilt-innocence phase of trial, the MAR court conducted an evidentiary hearing solely on these subclaims.

11. Subclaim 3H contends that defendant's trial counsel were rendered ineffective by the trial court's unconstitutional refusal to reveal the Black Mountain Treatment Center records; Subclaim 3J contends that the trial court impermissibly refused Allen the opportunity to conduct voir dire of Smith and Dr. Warren regarding the importance of the records prior to the trial court's determination not to release the records to Allen; Subclaim 3K contends that Allen should have been allowed to submit extrinsic evidence of Smith's unreliability contained in the records; and the relevant portion of Subclaim 3I contends that Allen's counsel were ineffective because they cross-examined Smith without knowledge of the information contained in the records.

varying and conflicting statements Smith made to staff which were contained within the records, as well as the staff's description of Smith as "spiritually bankrupt," which he asserted was a term of art used by mental health professionals to refer to an individual who suffers from certain mental illnesses. The parties subsequently submitted post-hearing briefs. Ultimately, the MAR court entered an order containing numerous findings of fact in support of its conclusion of law that Allen "has failed to establish that he suffered any sufficient prejudice to warrant a full evidentiary hearing on [SMAR Subclaims 3H, 3J, 3K and the relevant portion of 3I]." The MAR court dismissed these subclaims.

¶ 66 There were two bases for the MAR court's conclusion that Allen could not have been prejudiced by the trial court's refusal to convey Smith's Black Mountain Treatment Center records. First, the MAR court found that the records were "bereft of any evidence to support an Axis II Personality B Complex Array diagnosis" and that Dr. Warren's attestations to the contrary were "wholly unpersuasive." Second, the MAR court found that Allen was permitted to "vigorously cross-examine Smith regarding her extensive abuse of several controlled substances, her abuse of alcohol, her early departure from a drug treatment facility, and several other topics meant to impugn her credibility."

¶ 67 We read the MAR court's findings of fact collectively as determining that (1) the Black Mountain Treatment Center records did not contain evidence indicating Smith suffered from a pertinent mental health condition, and (2) the records did not contain evidence regarding Smith's substance abuse that meaningfully differed from the information Smith herself disclosed to the jury during her testimony. In the MAR court's view, because the records did not supply an alternative basis for impeaching Smith's credibility (evidence of a pertinent mental health condition)—and because the other information the records contained was largely duplicative of Smith's testimony (evidence of her substance abuse disorders)—Allen could not have been prejudiced by the trial court's failure to release the records.

¶ 68 We reiterate that when the MAR court has entered findings of fact in support of its conclusions of law, our review is limited to "determin[ing] whether the findings of fact are supported by evidence, whether the findings of fact support the conclusions of law, and whether the conclusions of law support the order entered by the trial court." *Stevens*, 305 N.C. at 720. Our inquiry does not change when, as in this case, the MAR court chooses to bifurcate its proceedings and first conducts a limited evidentiary hearing on a single potentially dispositive issue, as opposed to immediately conducting a full evidentiary hearing on all issues associated

with a claim.[12] Examining the MAR court's findings of fact, we conclude that they are supported by the evidence, that the findings support the MAR court's conclusions of law, and that the conclusions of law in turn justify the order dismissing these subclaims.

¶ 69 Although Dr. Warren asserted that the treatment records contained information tending to show Smith suffered from a pertinent mental health condition, the MAR court was entitled to disbelieve his testimony. The MAR court's contrary inference is supported by the contents of the records themselves, which do not contain any reference to or diagnosis of any pertinent mental health disorder, even though Smith was examined by multiple physicians. Similarly, although the records contained information illustrating the severity and persistence of Smith's substance abuse issues, the transcript of Smith's cross-examination at trial supports the trial court's finding that the jury was already aware of the extent of her history of chronic substance abuse issues and that the medical records would have merely been cumulative documentation of an uncontested fact. These findings support the conclusion that Allen "has failed to establish that the trial court's withholding of the Black Mountain [Treatment Center] Records from his trial counsel and the State violated any of his constitutional rights or deprived Defendant of a fair trial." Accordingly, we affirm the Order Granting State's Motion to Dismiss Claims 3H, 3J, 3K, and a Portion of 3I of Defendant's Supplemental Motion for Appropriate Relief.

C. Ineffective assistance of counsel during the sentencing phase.

¶ 70 **[7]** Allen raised three distinct IAC claims regarding the sentencing phase of his trial. First, in Claim VII, Allen argued that his trial counsel were ineffective for failing to elicit testimony from a mental health expert to explain the significance of lay witness testimony and other evidence presented to the jury at sentencing. Second, in Claim VIII, Allen argued that his trial counsel were ineffective for failing to adequately

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12. Allen does argue that the MAR court erred by conducting a limited evidentiary hearing, instead of a full evidentiary hearing. However, Allen does not provide support for his contention that in conducting a limited hearing, the MAR court "deprived Allen of a full opportunity to support his factual allegations that he was entitled to a new trial." Nor does he identify how the limited evidentiary hearing—and the MAR court's subsequent request for post-hearing briefs and its allowance of the further offer of proof from Allen's post-conviction counsel regarding the records from another mental health expert, Dr. Herfkens—purportedly fell short of what is required under N.C.G.S. § 15A-1420(c)(1)–(4). Accordingly, we find no merit in his contention that the MAR court's handling of these subclaims violated his constitutional rights.

investigate and present available mitigation evidence, including by failing to meet with and present testimony from various friends, family members, and acquaintances of Allen. Third, in Claim IX, Allen argued that his trial counsel were ineffective for failing to adequately prepare witnesses to testify during the sentencing hearing. In dismissing each of these claims, the MAR court concluded as a matter of law that Allen's counsel were not deficient and that even if they were deficient, any deficient performance could not have been prejudicial.

¶ 71 The familiar two-part *Strickland* test also applies in examining Allen's sentencing-phase IAC claims. However, because the MAR court conducted an evidentiary hearing, our review of these claims is again limited to "determin[ing] whether the findings of fact are supported by evidence, whether the findings of fact support the conclusions of law, and whether the conclusions of law support the order entered by the trial court." *Matthews*, 358 N.C. at 105–06 (quoting *Stevens*, 305 N.C. at 720). Here, evidence in the record supports the MAR court's findings of fact on each claim. These findings in fact in turn support the conclusion of law that Allen did not receive IAC at sentencing.

¶ 72 Regarding Claim VII, we find dispositive the MAR court's finding of fact that in retaining two mental health experts who attempted to examine Allen and investigate his mental health by interviewing other sources, Allen's trial counsel

> made a reasonable investigation into Defendant's mental health and background, but Defendant's reluctance to complete psychological testing and refusal to fully comply with Dr. Warren's evaluation, coupled with the lack of evidence that Defendant suffered from a mental health disorder that would assist in his defense, led to [the experts] not being called as . . . mental health expert[s] at Defendant's capital sentencing proceeding. Under these circumstances, any decision trial counsel made not to call a mental health expert at Defendant's capital sentencing proceeding was reasonable.

A defendant's reluctance to cooperate with a mental health professional during sentencing does not absolve counsel of its duty to adequately investigate relevant mitigating circumstances. However, where the record contains no evidence tending to suggest the defendant suffers from a pertinent mental health condition and defendant's counsel has retained a mental health expert who diligently attempted to elicit

relevant information from both the defendant and the defendant's acquaintances, we cannot say that "no competent attorney" would fail to present evidence from the mental health expert at sentencing. *Premo v. Moore*, 562 U.S. 115, 124 (2011) (explaining that whether "no competent attorney would think a [foregone trial strategy] would have failed . . . is the relevant question under *Strickland*").

¶ 73 Regarding Claim VIII, we note the MAR court's finding that the additional witnesses Allen claims his counsel failed to present testimony from

> either (1) did not know Defendant very well, (2) had substantial character flaws that would have weakened Defendant's mitigation case, (3) would present only cumulative evidence, (4) did not present valid mitigating evidence, or (5) did not fit the mitigation strategy trial counsel chose to pursue at sentencing.

This finding is both supported by evidence in the record and is sufficient to sustain the conclusion that counsel's failure to call these witnesses could not have been prejudicial.

¶ 74 Finally, regarding Claim IX, the findings of fact support the conclusion of law that Allen cannot prove prejudice. We affirm the MAR court's conclusion that Allen failed to meet his "burden of proving by a preponderance of the evidence" that the "nature and extent of the testimony that" the testifying witnesses would have offered had they been better prepared for sentencing could reasonably have altered the outcome of his sentencing proceeding. *Hyman*, 371 N.C. at 386. Accordingly, we affirm the order dismissing Allen's claims alleging IAC during the sentencing phase.

III. Conclusion

¶ 75 We hold that the MAR court erred in summarily dismissing Allen's guilt-innocence phase IAC claims without an evidentiary hearing. Because Allen has presented evidence which, if proven true would entitle him to relief, Allen is entitled to an evidentiary hearing in accordance with the mandate of N.C.G.S. § 15A-1420(c)(1) and *McHone*, 348 N.C. at 258. We also hold that the MAR court erred in dismissing Allen's shackling claim as procedurally barred without conducting an evidentiary hearing to establish facts without which the claim could not fairly be resolved. Therefore, we vacate the portions of the MAR court's orders summarily dismissing Claims II, VI, X, XI, XII and the portions of Claim III not addressed during the limited evidentiary hearing, and we remand

to the MAR court to conduct an evidentiary hearing. We affirm the MAR court's order dismissing Allen's other claims and subclaims.

AFFIRMED IN PART; VACATED IN PART AND REMANDED.

Justice BERGER dissenting.

¶ 76 *State v. McHone* is the anchor to the majority's claim that it is compelled to remand this case to the trial court for an evidentiary hearing. Contrary to the majority's assertions, this Court did not remand *McHone* for an evidentiary hearing but rather for findings of fact based on materials contained in the record. *See State v. McHone*, 348 N.C. 254, 259, 499 S.E.2d 761, 764 (1998). *McHone*, in clear and unambiguous language, "*remand[ed] this case to that court in order that it may make findings of fact, inter alia*, as to whether defendant or defendant's counsel was served with a copy of the original proposed order." *Id.* (emphasis added). It is only by virtue of the majority's gross misreading of *McHone* that the stunning leap can be made from this language to the requirement of an evidentiary hearing in every motion for appropriate relief.

¶ 77 In addition, the majority claims that *McHone* compels review of motions for appropriate relief "in the light most favorable to the defendant." As discussed further herein, this language cannot be found in *McHone*, N.C.G.S. § 15A-1420, or the official commentary to that section.

¶ 78 The trial court here set forth detailed findings that Claims I, II, IV, V, VI, X, XI, and XII in defendant's motions for appropriate relief were without merit, and therefore, defendant was not entitled to an evidentiary hearing. In doing so, the trial court performed the gatekeeping function contemplated by the plain language of N.C.G.S. § 15A-1420(c) and discussed in *McHone*. The majority opinion, however, strips trial court judges of this important gatekeeping function. As a result, trial courts will now be forced to spend precious time and resources conducting evidentiary hearings on meritless post-conviction motions.

¶ 79 In addition, the majority breathes life into defendant's newly asserted claim that he was impermissibly shackled during his trial which occurred nearly eighteen years ago. The trial court correctly found that defendant's newly imagined claim was procedurally barred. The majority, however, grants defendant an evidentiary hearing even though there is no evidence that defendant was shackled during his trial, defendant never objected to being shackled at trial, and defendant failed to argue that he was impermissibly shackled in his original appeal.

¶ 80 Furthermore, the majority brings a new form of prejudice into North Carolina's jurisprudence on ineffective assistance of counsel claims: cumulative prejudice. Never has a cumulative prejudice standard been enunciated by this Court in this context, even though we frequently have addressed *Strickland* and ineffective assistance of counsel claims. At least here, however, the majority acknowledges that their "decision to recognize cumulative prejudice claims is based upon our own interpretation of *Strickland* and IAC doctrine[.]"

¶ 81 Because the majority misreads our precedent, misinterprets a straightforward statute, effectively rewrites post-conviction procedure by eliminating no-merit determinations by our trial courts, establishes a new standard by which any question of fact raised in a motion for appropriate relief would require a full evidentiary hearing, and introduces cumulative prejudice into our ineffective assistance of counsel jurisprudence, I respectfully dissent.

I. N.C.G.S. § 15A-1420 and *McHone*

¶ 82 Criminal defendants are not entitled to an evidentiary hearing on every claim set forth in a motion for appropriate relief. *See* N.C.G.S. § 15A-1420(c) (2019).

¶ 83 The majority misreads the unique procedural scenario in *McHone* to support its position that any factual dispute entitles a defendant to an evidentiary hearing. This Court in *McHone* did not grant the defendant an evidentiary hearing as the majority imagines. *McHone*, 348 N.C. at 259, 499 S.E.2d at 764. In *McHone*, the defendant made an oral supplemental motion for appropriate relief related to an order entered in a prior hearing on a motion for appropriate relief. *Id.* at 258, 499 S.E.2d at 763. The defendant contended that the State had engaged in ex parte contact with the trial court when it submitted a proposed order denying the prior motion for appropriate relief without forwarding a copy to defense counsel. *Id.* The defendant asserted that the ex parte communication violated his due process rights. *Id.* The State did not counter that allegation in the trial court. *Id.*

¶ 84 However, in response to the defendant's petition for a writ of certiorari with this Court, the State submitted an affidavit with a certified mail return receipt showing that the proposed order had been forwarded to defense counsel, countering the allegation raised by the defendant with conflicting evidence. *Id.* at 259, 499 S.E.2d at 763–64.

¶ 85 Thus, in *McHone*, the defendant made a meritorious claim in the trial court that his due process rights had been violated. The trial court,

without the benefit of the affidavit provided to this Court concerning service of the proposed order, only had before it the defendant's allegations concerning the purported ex parte communication. There was, therefore, a factual question, i.e., whether there was an ex parte communication concerning the order that could only be resolved at that time through hearing evidence from the State and the defendant. If the trial court had been presented with the affidavit from the State concerning service, the factual question could have been resolved without an evidentiary hearing.

¶ 86 This Court acknowledged that the trial court was not obligated to conduct an evidentiary hearing and remanded the case to the trial court, not for an evidentiary hearing but for the entry of findings of fact. *Id.* at 259, 499 S.E.2d at 764. The affidavit provided by the State in its response to the defendant's petition would allow the factual question to be resolved without an evidentiary hearing. The majority simply misapprehends what took place in *McHone*. This Court remanded the case to the trial court, not for an evidentiary hearing, but for entry of findings of fact. *See id.* ("This Court is not the appropriate forum for resolving issues of fact, even though the State's affidavit was filed here. We therefore reverse the order of the trial court and *remand this case to that court in order that it may make findings of fact*, *inter alia*, as to whether defendant or defendant's counsel was served with a copy of the original proposed order." (emphasis added)).

¶ 87 Further evidence that *McHone* does not support the majority's claim is found in the plain language of N.C.G.S. § 15A-1420(c), which establishes the framework by which trial courts determine whether an evidentiary hearing is appropriate. That section states:

> (1) Any party is entitled to a hearing on questions of law or fact arising from the motion and any supporting or opposing information presented *unless the court determines that the motion is without merit.* The court must determine, on the basis of these materials and the requirements of this subsection, whether an evidentiary hearing is required to resolve questions of fact. Upon the motion of either party, the judge may direct the attorneys for the parties to appear before him for a conference on any prehearing matter in the case.
>
> (2) An evidentiary hearing is not required when the motion is made in the trial court pursuant to

> G.S. 15A-1414, but the court may hold an evidentiary hearing if it is appropriate to resolve questions of fact.
>
> (3) The court must determine the motion without an evidentiary hearing when the motion and supporting and opposing information present only questions of law. The defendant has no right to be present at such a hearing where only questions of law are to be argued.
>
> (4) If the court cannot rule upon the motion without the hearing of evidence, it must conduct a hearing for the taking of evidence, and must make findings of fact. The defendant has a right to be present at the evidentiary hearing and to be represented by counsel. A waiver of the right to be present must be in writing.
>
> (5) If an evidentiary hearing is held, the moving party has the burden of proving by a preponderance of the evidence every fact essential to support the motion.
>
> (6) A defendant who seeks relief by motion for appropriate relief must show the existence of the asserted ground for relief. Relief must be denied unless prejudice appears, in accordance with G.S. 15A-1443.
>
> (7) The court must rule upon the motion and enter its order accordingly. When the motion is based upon an asserted violation of the rights of the defendant under the Constitution or laws or treaties of the United States, the court must make and enter conclusions of law and a statement of the reasons for its determination to the extent required, when taken with other records and transcripts in the case, to indicate whether the defendant has had a full and fair hearing on the merits of the grounds so asserted.

N.C.G.S. § 15A-1420(c) (emphasis added).

¶ 88 The official commentary to this section further clarifies that

> [i]t should be noted that the subsections provide for two types of hearings. One is the hearing based upon affidavits, transcripts, or the like, plus matters within the judge's knowledge, to comply with the parties' entitlement to a hearing on questions of law and fact. The

> other is an evidentiary hearing. G.S. 15A-1420(c)(3) provides that if the only question is a question of law then the matter is to be disposed of without an evidentiary hearing. On the other hand, subdivision (4) makes it clear that if it is necessary to take evidence the court must hold an evidentiary hearing at which the defendant has the right to be present and to be represented by counsel, and the judge must make findings of fact. . . .
>
> Pursuant to subsections (c)(5) and (6) the moving party has the burden of proof, by a preponderance of evidence, with regard to facts essential to support the motion. The defendant must show the existence of the ground and substantial prejudice must appear. The definition of prejudice is cross-referenced to G.S. 15A-1443, in the Appeal Article, where the State rule on prejudice and the federal constitutional error rule are set out.

N.C.G.S. § 15A-1420, Official Commentary (2019).

¶ 89 "It is well-established that the 'ordinary 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.' " *State v. Fuller*, 376 N.C. 862, 867, 855 S.E.2d 260, 265 (2021) (cleaned up) (quoting *Dunn v. Pac. Emps. Ins. Co.*, 332 N.C. 129, 134, 418 S.E.2d 645, 648 (1992)). Based on the plain language of N.C.G.S. § 15A-1420(c), trial court judges serve as gatekeepers for meritorious motions for appropriate relief. Subsection 15A-1420(c)(1) clearly states that a defendant is only entitled to a hearing on a motion for appropriate relief if the trial court determines there is merit to the motion. *See* N.C.G.S. § 15A-1420(c)(1) ("The court must determine, on the basis of these materials and the requirements of this subsection, whether an evidentiary hearing is required to resolve questions of fact.") However, a determination of merit alone does not guarantee an evidentiary hearing.

¶ 90 As stated in the official commentary, there are two types of hearings: one in which the trial court makes factual or legal determinations based upon the contents of the motion and supporting evidence; and the other, a full evidentiary hearing. The statute does not demand an evidentiary hearing merely because factual questions are presented in a defendant's motion. Rather, after the trial court has determined that the motion is meritorious, the statute and the official commentary contem-

plate that an evidentiary hearing is to be conducted only when the trial court determines such a hearing is necessary. *See* N.C.G.S. § 15A-1420(c); N.C.G.S. § 15A-1420, Official Commentary. Thus, an evidentiary hearing is only required when a party's motion (1) has merit, and (2) the trial court determines that it cannot resolve the factual questions based on the materials provided by the moving party.

¶ 91 Contrary to the majority's holding, the trial court here was not "obligated to conduct an evidentiary hearing[.]" The majority misreads the statute, skipping the merits determination and eliminating the ability for a trial court to resolve factual issues based upon the materials submitted without an evidentiary hearing. Instead, the majority merges the two inquiries required by the statute into one determination, holding that the statute requires an evidentiary hearing must be conducted "to resolve disputed issues of fact" regardless of merit.

¶ 92 Moreover, the phrase "disputed issues of fact" does not appear in N.C.G.S. § 15A-1420(c) or the official commentary because the statute and official commentary clearly set forth that merit determinations and hearings may be conducted by the trial court to resolve factual issues short of an evidentiary hearing. *See* N.C.G.S. § 15A-1420(c)(1) ("The court must determine, on the basis of these materials and the requirements of this subsection, *whether* an evidentiary hearing is required to resolve questions of fact." (emphasis added)).

¶ 93 Thus, a proper and complete reading of *McHone* clearly sets forth, consistent with the plain language of N.C.G.S. § 15A-1420(c), that a defendant's motion for appropriate relief may be dismissed without an evidentiary hearing on questions of law or fact if the trial court determines that the defendant is entitled to no relief, i.e., that the motion has no merit. The majority's misinterpretation of the statute and gross misreading of *McHone* impermissibly amends N.C.G.S. § 15A-1420(c) and alters the plain language of an otherwise straightforward statute.

II. Standard of Review

¶ 94 The majority's misreading of *McHon*e and N.C.G.S. § 15A-1420(c) also results in its application of an incorrect standard of review. By erroneously stating that the summary dismissal of a MAR is reviewed de novo, the majority ignores our precedent and eliminates all deference owed to the trial court.

¶ 95 The trial court's "findings of fact are binding on this Court if they are supported by competent evidence and may not be disturbed absent an

abuse of discretion. The lower court's conclusions of law are reviewed de novo." *State v. Lane*, 370 N.C. 508, 517, 809 S.E.2d 568, 574 (2018) (cleaned up) (quoting *State v. Gardner*, 227 N.C. App. 364, 365–66, 742 S.E.2d 352, 354 (2013)) (adopting the "analogous standard of review for a denial of a motion for appropriate relief" as the standard of review for denial of a motion for postconviction DNA testing "because the trial court sits as finder of fact in both circumstances."). Moreover, this Court must refrain from reweighing the evidence and should defer to the trial court's findings of fact which are "binding upon the [defendant] if they [a]re supported by the evidence," even if the evidence is conflicting. *State v. Stevens*, 305 N.C. 712, 719–20, 291 S.E.2d 585, 591 (1982) (citations omitted). Critically, where "findings are supported by the evidence in the record . . . it is not the duty of this Court to reweigh the evidence presented to the trial court." *State v. Johnson*, 371 N.C. 870, 881, 821 S.E.2d 822, 831 (2018).

¶ 96 However, the trial court's determination of merit under N.C.G.S. § 15A-1420(c) is reviewed de novo. *See Lane*, 370 N.C. at 517, 809 S.E.2d at 574.

¶ 97 The majority needlessly muddies the water by conflating our review of the trial court's factfinding with our review of the trial court's legal conclusion that a MAR is without merit. In doing so, the majority eliminates the great deference that must be afforded to the trial court's factual determinations. *See State v. Cummings*, 361 N.C. 438, 447, 648 S.E.2d 788, 794 (2007) ("A trial court abuses its discretion if its determination is manifestly unsupported by reason and is so arbitrary that it could not have been the result of a reasoned decision. In our review, we consider not whether we might disagree with the trial court, but whether the trial court's actions are fairly supported by the record." (cleaned up) (quoting *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985) and *Wainwright v. Witt*, 469 U.S. 412, 434 (1985))); *State v. Larrimore*, 340 N.C. 119, 134, 456 S.E.2d 789, 796 (1995) ("According, as we must, great deference to the findings of the trial court, we cannot find error in its findings of facts . . . ." (citations omitted)).

¶ 98 Here, the majority's broad application of de novo review ignores the nuance of our precedent and results in wholesale reweighing of the evidence. The majority further exacerbates this error by also holding that this evidence must be reweighed "in the light most favorable to the defendant[.]" This holding, as with the majority's application of de novo review, is without support in either our General Statutes or our caselaw.

¶ 99 Nowhere in N.C.G.S. § 15A-1420(c) is it stated that the evidence is to be viewed in the light most favorable to the defendant.[1] In fact, N.C.G.S. § 15A-1420(c)(6) states, "[a] defendant who seeks relief by motion for appropriate relief *must show* the existence of the asserted ground for relief." N.C.G.S. § 15A-1420(c)(6) (emphasis added). The official commentary further clarifies that

> [p]ursuant to subsections (c)(5) and (6) the moving party has the burden of proof, by a preponderance of evidence, with regard to facts essential to support the motion. The defendant must show the existence of the ground and prejudice must appear.

N.C.G.S. § 15A-1420, Official Commentary.

¶ 100 The majority contends that *McHone*, 348 N.C. at 258, 499 S.E.2d at 763, supports its "light most favorable to the defendant" language. The entire text of page 258 is set forth as follows:

> [T]he trial court may determine that the motion "is without merit" within the meaning of subsection (c)(1) and deny it without any hearing on questions of law or fact. Defendant's contention that he was entitled to a hearing and entitled to present evidence simply because his motion for appropriate relief was based in part upon asserted denials of his rights under the Constitution of the United States is without merit.
>
> However, defendant also contends in the present case that he was entitled to an evidentiary hearing before the trial court ruled on his motion for appropriate relief as supplemented because some of his asserted grounds for relief required the trial court to resolve questions of fact. We find this contention to have merit. N.C.G.S. § 15A-1420(c)(1) mandates that "[t]he court must determine . . . whether an evidentiary hearing is required to resolve questions of fact." If the trial court "cannot rule upon the motion without the hearing of evidence, it must conduct a hearing

1. Interestingly, the majority creates a standard far lower than summary judgment in civil procedure, even though here a jury has already determined defendant's guilt beyond a reasonable doubt. The invented "in the light most favorable to the defendant" standard for disputed factual issues is astoundingly low. This standard is on par with notice pleading in civil procedure. It will be the rare attorney who fails to meet this standard for his client.

> for the taking of evidence, and must make findings of fact." N.C.G.S. § 15A-1420(c)(4). Under subsection (c)(4), read *in pari materia* with subsections (c)(1), (c)(2), and (c)(3), an evidentiary hearing is required unless the motion presents assertions of fact which will entitle the defendant to no relief even if resolved in his favor, or the motion presents only questions of law, or the motion is made pursuant to N.C.G.S. § 15A-1414 within ten days after entry of judgment.
>
> At the 9 December 1996 hearing, defendant contended for the first time that in August 1996, the State had sent to the trial court a proposed order denying defendant's original motion for appropriate relief without providing defendant with a copy. This matter was not raised or referred to in defendant's original or supplemental motion for appropriate relief. During the 9 December 1996 hearing, the State acknowledged that it did send a proposed order to the trial court and that the trial court signed the State's proposed order dismissing defendant's original motion for appropriate relief. Defendant contended at the 9 December hearing that since neither he nor his counsel were served with a copy of the proposed order, the State had engaged in an improper *ex parte* communication with the trial court in violation of his rights to due process under the state and federal constitutions. Thus, during the 9 December 1996 hearing, defendant orally moved for the first time to have the August 1996 order denying his original motion for appropriate relief vacated because of the *ex parte* contact. The trial court summarily denied that motion and entered its 9 December 1996 order denying defendant's motion for appropriate relief as supplemented.

McHone, 348 N.C. at 257–58, 499 S.E.2d at 763 (second and third alterations in original) (citation omitted) (quoting N.C.G.S. § 15A-1420(c)(1) (1997)). As one can plainly see, there is no language or inference which could be drawn from this passage in *McHone* that supports the majority's assertion that we view the evidence in the light most favorable to the defendant when reviewing a summary denial of a MAR.

¶ 101 Additionally, the approach implemented by the majority deviates from other areas of our caselaw which mandate that when a party

makes a motion, we view the evidence in the light most favorable to the nonmoving party. *See State v. McNeil*, 359 N.C. 800, 804, 617 S.E.2d 271, 274 (2005) (stating that when a defendant makes a motion to dismiss, " '[t]he reviewing court considers all evidence in the light most favorable to the State, and the State receives the benefit of every reasonable inference supported by that evidence.' " (quoting *State v. Garcia*, 358 N.C. 382, 412–13, 597 S.E.2d 724, 746 (2004))); *Dalton v. Camp*, 353 N.C. 647, 651, 548 S.E.2d 704, 707 (2001) ("When considering a motion for summary judgment, the trial judge must view the presented evidence in a light most favorable to the nonmoving party." (citation omitted)); *State v. James*, 321 N.C. 676, 686, 365 S.E.2d 579, 586 (1988) ("In ruling upon a motion to dismiss, the trial court must consider the evidence in the light most favorable to the State, allowing every reasonable inference to be drawn therefrom." (citation omitted)).

¶ 102 The majority's improper application of de novo review eliminates the great deference that should be afforded to the trial court's factual determinations, and the majority's improper reweighing of the evidence nullifies the trial court's merit determination under N.C.G.S. § 15A-1420(c). Further, when combined with the majority's assertion that we must view the evidence in the light most favorable to the defendant, the majority runs afoul of the plain reading of N.C.G.S. § 15A-1420(c) by eliminating any burden for the defendant other than providing notice to the State.

III. Ineffective Assistance of Counsel

¶ 103 Defendant filed an MAR and SMAR asserting ineffective assistance of counsel (IAC), among other claims. The trial court found no merit pursuant to N.C.G.S. § 15A-1420 and denied defendant's claims of IAC without an evidentiary hearing. Defendant contends, and the majority agrees, that he was entitled to an evidentiary hearing on his IAC claims.

¶ 104 A defendant's claim for IAC must satisfy the two prongs of *Strickland v. Washington*, 466 U.S. 668 (1984). First, the defendant must show that counsel's performance was deficient. *Id.* at 687. "Deficient performance may be established by showing that counsel's representation fell below an objective standard of reasonableness." *State v. Allen*, 360 N.C. 297, 316, 626 S.E.2d 271, 286 (cleaned up) (quoting *Wiggins v. Smith*, 539 U.S. 510, 521 (2003)), *cert. denied*, 549 U.S. 867 (2006). Second, the defendant must show that counsel's deficient performance was prejudicial to his defense. *Strickland*, 466 U.S. at 692. "Generally, to establish prejudice, a defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceed-

ing would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Allen*, 360 N.C. at 316, 626 S.E.2d at 286 (cleaned up) (quoting *Wiggins*, 539 U.S. at 534). When assessing reasonableness, a reviewing court considers "whether counsel's assistance was reasonable considering all the circumstances." *Strickland*, 466 U.S. at 688.

¶ 105 Describing the hurdle that defendants must overcome to prevail on an IAC claim, this Court has stated that trial "[c]ounsel is given wide latitude in matters of strategy, and the burden to show that counsel's performance fell short of the required standard is a heavy one for defendant to bear." *State v. McNeill*, 371 N.C. 198, 218–19, 813 S.E.2d 797, 812 (2018) (alteration in original) (quoting *State v. Fletcher*, 354 N.C. 455, 482, 555 S.E.2d 534, 551 (2001)). Decisions concerning trial strategy "are not generally second-guessed by this Court." *State v. Prevatte*, 356 N.C. 178, 236, 570 S.E.2d 440, 472 (2002), *cert. denied*, 538 U.S. 986 (2003) (citation omitted).

¶ 106 Reading the majority opinion, defendant's brief, and listening to defendant's oral argument, one could easily conclude that defendant's two attorneys were grossly incompetent and ill-equipped to handle a murder trial. In reality, the two attorneys who represented defendant at trial, Carl Atkinson and Pierre Oldham, had represented at least twenty-five capital-eligible defendants prior to their representation of defendant. Neither attorney had ever been disciplined by the State Bar or found to have provided IAC.

¶ 107 Atkinson testified at the evidentiary hearing related to the sentencing phase that he frequently consulted with the Center for Death Penalty Litigation about defendant's case.[2] Atkinson stated that his purpose in "dealing with the Center for Death Penalty Litigation was to get any help [he] could in addressing [defendant's] case." Atkinson discussed potential experts with the capital defender, and Atkinson testified that "every time I needed a recommendation of that nature I went to the Center for Death Penalty Litigation." According to Atkinson, the Center for Death Penalty Litigation "basically believed that [defendant was] likely to be convicted" and that the attorneys should focus on mitigation at sentencing.

¶ 108 Atkinson also attended the "Capital College." According to Atkinson, this was a group of experts from the Center for Death Penalty Litigation

2. The Center for Death Penalty Litigation represents defendant, and they argue that the attorneys who sought their advice were ineffective at trial.

and the Academy of Trial Lawyers who met with attorneys handling capital cases. During four days of meetings, attorneys would "present . . . discovery information, all [the] materials to them," and the experts would "go through a process of developing [the] case." Atkinson presented defendant's case to this group of experts.

¶ 109 In addition, defendant attached to his motion for appropriate relief an affidavit from Oldham. Oldham's affidavit stated, in relevant part, the following:

> 3. After being assigned to the case, [co-counsel] and I pursued discovery from the District Attorney and law enforcement agencies. I recall that from the very beginning, we believed that the chief prosecution witness, Vanessa Smith, who claimed to be an eyewitness to the murder, was not telling the truth in her various statements to law enforcement. I also recall that the State's case was based almost entirely on her testimony.
>
> . . . .
>
> 5. *I do not recall* [co-counsel] and me making any strategic decisions concerning the evidence discussed in Claim II of the MAR and SMAR. For example, *I do not recall* an individual named Troy Spencer contacting either [co-counsel] or me prior to trial. If I had known, however, that he claimed that Vanessa Smith had confessed to planning the murder of Christopher Gailey, and that she had shot and killed him, I would have contacted him, conducted a thorough investigation of his statements, and considered calling him in the guilt phase of the trial.
>
> 6. Although I recall our private investigator looking for Mr. Allen's long-time friend, Christina Fowler, *I do not recall* that he ever found her, or that he learned from her that Scott Allen spent most of the night of the murder at her house. Had [co-counsel] and I known that, we would have conducted additional investigation of the alibi evidence andconsidered calling her as a defense witness in the guilt phase of the trial. *I do not recall* making any strategic decision not to call Ms. Fowler as a witness in either phase of the trial.

> 7. Similarly, *I do not recall* [co-counsel] and me making any strategic decisions to limit the cross-examination of the State's witnesses, including Vanessa Smith. . . . We did not have an expert crime scene analyst to assist our understanding of the crime scene, or to help us use that information to impeach Ms. Smith's story of the crime. . . .
>
> 8. *I have no recollection* of a strategic decision not to call a mental health expert to testify during either phase of the trial. . . .
>
> 9. *I also have no recollection* of making a strategic decision to limit our investigation of possible other suspects in the case. I do not recall the evidence of other suspects set forth in Mr. Allen's Claim XI, and do not recall anything about other individuals with a motive to harm Gailey, or their whereabouts on the night of the murder.

(Emphases added.)

¶ 110 The majority finds that Oldham's affidavit, littered with statements that he does not remember what took place, serves as "direct evidence" that "directly undercuts" the MAR court's finding that counsel made a strategic decision. However, Oldham's affidavit fails to shed *any* light on defendant's claim of ineffective assistance of counsel. The majority nevertheless uses this as the starting point for a chain of assumptions and speculation that it claims provides the factual predicate to an evidentiary hearing. This is in the face of the sworn testimony at trial and defense counsels' reasonable and clearly stated trial strategy of casting doubt on Vanessa Smith's credibility.

¶ 111 Defendant here had the benefit of two experienced attorneys at trial who made the reasonable decision to focus on the credibility of one of the State's witnesses. The attorneys sought advice on strategy and the use of expert witnesses from the Center for Death Penalty Litigation and experts in the field of capital litigation. These experts were confident that defendant would be convicted of capital murder and that defense counsels' best strategy to avoid a death sentence for defendant related to mitigation evidence during the sentencing phase.

¶ 112 Now, nearly eighteen years after his conviction, the Center for Death Penalty Litigation claims the attorneys they coached were ineffective

because they did not consult a crime scene expert. However, as the trial court found:

> 51. Defendant also contends that trial counsel was ineffective for failing to call an expert crime scene analyst to testify regarding alleged discrepancies between Smith's testimony and the physical evidence found at the location of Gailey's murder. (SMAR pp. 12–15) In support of this contention, Defendant presents the affidavit and report of Gregg O. McCrary ("McCrary"), a post-conviction crime scene analyst . . . . However, McCrary's report is based upon the assumption that "[t]he only link between Scott Allen and the murder of Christopher Gailey are the allegations made by Ms. Smith." (SMAR Ex. B of Ex. 41 p. 12) This assumption is faulty as belied by the record.
>
> 52. Several other witnesses corroborated Defendant's involvement in the murder. Absent from McCrary's analysis and report are the trial testimony of Harold Blackwelder ("Blackwelder"), Jeffrey Page ("Page"), and Coy Honeycutt ("Honeycutt"). (*See* SMAR Ex. 41) At Defendant's trial, Blackwelder testified that Defendant and Smith arrived at a cookout . . . on 10 July 1999. (T pp. 1748–49) As soon as Defendant and Smith arrived, Blackwelder went outside and saw a white pickup truck matching the description of Gailey's truck provided by Johnson earlier in the trial. (*See* T p. 1749–50; T pp. 1464–65) . . . .
>
> 53. . . . Defendant told Page that after Defendant shot the fellow, he "heard the boy groaning, and he also stated that he would throw a rock and when that rock would hit the ground the fellow thought that it was him and the fellow had a gun undoubtedly and went to shooting." (T p. 1781). . . . Also, Defendant told Page "that the reason he shot that boy [was] because he thought that boy was going to rat him off because he was an escapee from Troy prison." (T p. 1785) . . . .
>
> 54. . . . [A]ny alleged deficiency of trial counsel and prejudice resulting therefrom regarding counsel's failure to call a crime scene analyst must be viewed

> in light of Defendant's subsequent statements and actions that link him to Gailey's murder.
>
> . . . .
>
> 56. Here, the record supports the conclusion that trial counsels' apparent decision to focus on the doubt created by Smith's gaps in memory, addiction and use of controlled substances on the date of Gailey's death, and failure to maintain a cohesive timeline, rather than attempting to prove Defendant's innocence through the use of a crime scene analyst was a sound tactical decision. In light of the inculpatory statements Defendant made to Page . . . trial counsels' failure to call an expert crime scene analyst to testify was not an objectively unreasonable decision. Additionally, Defendant has failed to show that he suffered any prejudice from trial counsels' failure to call a crime scene analyst because Defendant's statements to Page, possession of Gailey's truck so soon after Gailey's demise, and willingness to sell the truck for a price far below the fair market value all tended to demonstrate evidence of Defendant's guilt. Therefore, Defendant has failed to show that trial counsel deficiently represented Defendant by committing an objectively unreasonable error or that trial counsels' representation so prejudiced the defense as to deprive Defendant of a fair trial whose result was reliable.

¶ 113 These findings of fact were supported by the evidence presented at trial. The majority gives greater weight to the contrary conclusion in the McCrary Report than it does to the sworn testimony provided at trial. In fact, at trial, Blackwelder testified that defendant arrived at a cookout with a white pickup truck matching the description of Gailey's truck. Defendant told Page that he shot someone in the Uwharrie National Forest and "heard the boy groaning, and he also stated that he would throw a rock and when that rock would hit the ground the fellow thought that it was him and the fellow had a gun undoubtedly and went to shooting." Defendant also told Page that "the reason he shot that boy [was] because he thought that boy was going to rat him off because he was an escapee from Troy prison." Page testified that defendant offered to sell him the truck, matching the description of Gailey's, at significantly less than fair market value.

¶ 114 Based upon this evidence presented at trial, we cannot say that the trial court erred in finding that "trial counsels' failure to call a crime scene analyst" was not an objectively unreasonable decision. *See Harrington v. Richter*, 562 U.S. 86, 106–07 (2011) (finding that counsel's decisions to forgo the use of experts can be reasonable because counsel was "entitled to formulate a strategy that was reasonable at the time and to balance limited resources in accord with effective trial tactics and strategies."). Accordingly, the trial court did not abuse its discretion by resolving the factual issues based upon the evidence presented by defendant and did not err in determining that defendant's IAC claim was without merit.

¶ 115 It should be noted that the majority states that they considered all of defendant's guilt-innocence claims in their entirety. In reality, the majority only considered the above crime-scene-investigation claim. Rather than addressing defendant's other four claims (Claims III, VI, X, and XI) to determine whether an evidentiary hearing is required, the majority simply states that "[h]aving already determined that the MAR court erred in summarily denying one of [defendant's] IAC claims, we need not address his other claims here[.]" Nowhere in N.C.G.S. § 15A-1420 or our caselaw is it stated that if an evidentiary hearing should have been held on one claim, it must be held on all other claims. It is curious that the majority holds that summary dismissal of defendant's claims was error, yet summarily grants an evidentiary hearing for defendant's claims without analysis and in the face of binding findings of fact by the trial court.

IV. Shackling Claim

¶ 116 In Claim XII of his SMAR, defendant alleged that he was impermissibly shackled in the presence of the jury without justification in violation of his statutory and constitutional rights. In support of his claim, defendant produced information from two jurors and from one alternate juror.

¶ 117 The State argued, and the MAR court agreed, that defendant's claim was procedurally barred under N.C.G.S. § 15A-1419(a)(3) because he was in an adequate position to raise the issue on direct appeal but failed to do so. In the alternative, the MAR court concluded that even if defendant's shackling claim was not procedurally barred, it was meritless.

¶ 118 Under both the North Carolina Constitution and the United States Constitution, a defendant may not be visibly shackled in the courtroom in the presence of the jury unless there is a special need for restraints specific to the defendant. *See State v. Tolley*, 290 N.C. 349, 367, 226 S.E.2d 353, 367 (1976); *see also Deck v. Missouri*, 544 U.S. 622, 626

(2005) ("The law has long forbidden routine use of visible shackles during the guilt phase; it permits a State to shackle a criminal defendant only in the presence of a special need."). Consistent with this constitutional rule, N.C.G.S § 15A-1031 permits a trial court judge to order a defendant restrained in court only when doing so is "reasonably necessary to maintain order, prevent the defendant's escape, or provide for the safety of persons[,]" and only then after the judge "[e]nter[s] in the record out of the presence of the jury and in the presence of the person to be restrained and his counsel, if any, the reasons for" imposing the restraints and after giving the defendant an opportunity to be heard on the matter. N.C.G.S. § 15A-1031 (2019). Typically, adherence to this mandatory statutory procedure ensures that evidence of a defendant's shackling appears in the record and transcript of trial, enabling the defendant to challenge the judge's decision to impose restraints on direct appeal.

¶ 119 In this case, there is no evidence in the record or transcript suggesting that defendant was restrained during trial. The trial court did not enter factual findings as would have been required prior to ordering defendant shackled under N.C.G.S § 15A-1031. Defendant did not object or otherwise note that he was restrained in a manner visible to the jury.

¶ 120 Relying principally on our decision in *State v. Hyman*, 371 N.C. 363, 817 S.E.2d 157 (2018), defendant contends that his failure to raise any objection to the purported shackling at trial does not preclude post-conviction review. He argues that the procedural bar does not apply when the record is completely silent as to whether the alleged shackling did or did not occur, because when the record is silent, the defendant is not "in a position to adequately raise the ground or issue underlying the [MAR claim]" within the meaning of N.C.G.S. § 15A-1419(a)(3).

¶ 121 This case is distinguishable from *Hyman*. In *Hyman*, we held that a defendant was not procedurally barred from raising an IAC claim on post-conviction review, even though he had not raised the claim on direct appeal. *Hyman*, 371 N.C. at 385, 817 S.E.2d at 171. The defendant's IAC claim challenged his attorney's failure to withdraw from representing him during trial. *Id.* at 367–68, 817 S.E.2d at 161. The attorney worked at a law firm that had previously represented a witness at the defendant's trial whose testimony inculpated the defendant. *Id.* During cross-examination, an exchange between counsel and the inculpating witness suggested the witness had previously conveyed a different account of the events in question than the one the witness was offering at trial. *Id.* at 365–66, 817 S.E.2d at 160. The defendant argued that his attorney should have withdrawn from the representation and testified

regarding the contents of this alleged conversation. *Id.* at 367–68, 817 S.E.2d at 161.

¶ 122 We explained that in order to prove his attorney rendered IAC, the defendant was required to prove numerous facts, including (1) that the alleged pretrial conversation between the witness and the defendant's attorney had in fact occurred, (2) that during the conversation the witness made statements inconsistent with his trial testimony, (3) that the attorney did not have a strategic reason for failing to withdraw from representing the defendant, and (4) that the testimony the attorney would have been able to deliver would have benefitted the defendant. *Id.* at 384–85, 817 S.E.2d at 170–71. Because "[t]he record developed at trial did not contain any information affirmatively tending to show" any of those facts, we concluded that the record did not "contain[ ] sufficient information to permit the reviewing court to make all the factual and legal determinations necessary to allow a proper resolution of the claim in question." *Id.* at 383–84, 817 S.E.2d at 170. We thus held that the procedural bar provided for in N.C.G.S. § 15A-1419(a)(3) did not apply. *Id.* at 385, 817 S.E.2d at 171.

¶ 123 The distinction between this case and *Hyman* is rooted in a basic difference between an impermissible shackling claim and an IAC claim. To prevail on an impermissible shackling claim, a threshold fact must first be established: that the defendant was shackled at trial. Absent some indication in the record or transcript that the defendant was shackled, it is appropriate to presume that the defendant was not shackled. In the rare case where the defendant is shackled at trial but the shackling is not reflected in the record—because the trial court has failed to adhere to the constitutionally necessary procedural safeguards codified in N.C.G.S § 15A-1031—the defendant possesses all of the information necessary to cure that deficiency, as the defendant knows whether he or she has been subjected to restraints during trial.

¶ 124 By contrast, the same is not true when a defendant brings an IAC claim on direct appeal. On direct appeal, even a fully developed record will generally fail to contain information without which the claim cannot be adjudicated. When that occurs, the defendant is typically not in a position to fill the necessary gaps in the record. Resolving an IAC claim frequently requires information that necessarily is not a part of the record at trial, namely whether trial counsel made a conscious choice to pursue a given strategy, why that strategy was chosen, and whether that choice was reasonable. Thus, "because of the nature of IAC claims, defendants likely will not be in a position to adequately develop many IAC claims on direct appeal." *State v. Fair*, 354 N.C. 131, 167, 557 S.E.2d 500, 525 (2001).

¶ 125 When presented with a "prematurely asserted" IAC claim, the court "shall dismiss those claims without prejudice to the defendant's right to reassert them during a subsequent MAR proceeding." *Id.*; *see also State v. Hyatt*, 355 N.C. 642, 668, 566 S.E.2d 61, 78 (2002) (dismissing without prejudice IAC claim that is "suggested by the record but [is] insufficiently developed for review"); *State v. Watts*, 357 N.C. 366, 378, 584 S.E.2d 740, 749 (2003) (concluding that defendant did not waive IAC claim because "there are evidentiary issues which may need to be developed before defendant will be in a position to adequately raise his potential IAC claim").

¶ 126 However, the nature of shackling claims renders them usually susceptible to direct review. Accordingly, *Hyman* is fully consistent with application of the procedural bar under the circumstances of this case. *See* N.C.G.S. § 15A-1415, Official Commentary (2019) ("It should also be taken into account with the latter consideration that additional finality has been added in G.S. 15A-1419 by making it clear that there is but one chance to raise available matters after the case is over, and if there has been a previous assertion of the error, or opportunity to assert the error, by motion or appeal, a later motion may be denied on that basis."); *see also* N.C.G.S. § 15A-1419, Official Commentary (2019) ("[O]nce a matter has been litigated or there has been opportunity to litigate a matter, there will not be a right to seek relief by additional motions at a later date. Thus, this section provides, in short, that if a matter has been determined on the merits upon an appeal, or upon a post-trial motion or proceeding, there is no right to litigate the matter again in an additional motion for appropriate relief. Similarly, if there has been an opportunity to have the matter considered on a previous motion for appropriate relief or appeal the court may deny the motion for appropriate relief.").

V. Cumulative Error

¶ 127 Next, defendant claims that his alleged IAC claims in his MAR and SMAR amount to cumulative error. The majority rejects our jurisprudence in this area, and the MAR court's conclusion that cumulative error does not apply to IAC claims. While the trial court correctly recognized that such a claim has never been sanctioned by this Court, the majority now proclaims that the "decision to recognize cumulative prejudice claims is based upon our own interpretation of *Strickland* and IAC doctrine."

¶ 128 While the majority cites to *State v. Thompson*, 359 N.C. 77, 604 S.E.2d 850 (2004); *Williams v. Taylor*, 529 U.S. 362 (2000); and *State*

v. Lane, 271 N.C. App. 307, 844 S.E.2d 32 (2020), those cases do not support the proposition that cumulative error applies to IAC claims.

¶ 129 Once again, the majority misreads our precedent. *Thompson* merely reiterated a single argument the defendant was attempting to make and did not recognize nor adopt the defendant's position on cumulative prejudice for IAC claims. *See Thompson*, 359 N.C. at 121–22, 604 S.E.2d at 880. Furthermore, the majority incorrectly asserts that the Supreme Court of the United States recognized cumulative prejudice for IAC claims in *Williams*. In *Williams*, the Supreme Court referred to the cumulation of "the totality of the available mitigation evidence . . . in reweighing it against the evidence in aggravation" and not, as the majority mistakenly asserts, to cumulative error in IAC claims. *Williams*, 529 U.S. at 397–98.

¶ 130 Lastly, the majority employs a North Carolina Court of Appeals case, *Lane*, for the proposition that "courts can consider the cumulative effect of alleged errors by counsel." *Lane*, 271 N.C. App. at 316, 844 S.E.2d at 40. However, Court of Appeals precedent is not binding upon this court. *See State v. Steen*, 376 N.C. 469, 497, 852 S.E.2d 14, 33 (2020) (Earls, J., concurring in result in part and dissenting in part) ("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.' " (quoting *Mazza v. Med. Mut. Ins. Co.*, 311 N.C. 621, 631, 319 S.E.2d 217, 223 (1984))). At no point in our precedent has this Court applied cumulative error to IAC claims, and we should decline to do so now.

VI. Conclusion

¶ 131 For the reasons stated herein, I respectfully dissent.[3]

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

3. As to those instances where the majority upholds the trial court's order, I concur in the result only.

STATE v. SHULER

[378 N.C. 337, 2021-NCSC-89]

STATE OF NORTH CAROLINA
v.
SHANNA CHEYENNE SHULER

No. 187PA20

Filed 13 August 2021

Constitutional Law—right to silence—notice of intent to raise affirmative defense—preemptive impeachment by State—unconstitutional

Defendant's pretrial notice of intent to raise the affirmative defense of duress, given in a methamphetamine trafficking prosecution to comply with N.C.G.S. § 15A-905(c)(1), did not cause the forfeiture of her Fifth Amendment right to silence, and the State should not have been permitted to preemptively impeach her—by asking a police detective whether defendant made any statements about another man who had just been arrested when she handed over the drugs—during its case-in-chief when she had not testified at that point in the trial.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 270 N.C. App. 799 (2020), finding no error after appeal from a judgment entered on 31 October 2018 by Judge William H. Coward in Superior Court, Haywood County. Heard in the Supreme Court on 18 May 2021.

Joshua Stein, Attorney General, by Brent D. Kiziah, Assistant Attorney General for the State-appellee.

W. Michael Spivey for defendant-appellant.

HUDSON, Justice.

¶ 1 Here we must decide whether a criminal defendant forfeits her Fifth Amendment right to silence when she gives pretrial notice of her intent to offer the affirmative defense of duress under N.C.G.S. § 15A-905(c)(1). We conclude that the defendant does not forfeit that right, and that regardless, the State may not preemptively impeach a defendant during its case-in-chief. Accordingly, we reverse and remand to the Court of Appeals.

I. Factual and Procedural Background

¶ 2 On 2 March 2017, Chief of Police Russell Gilliland and Detective Brennan Regner of the Maggie Valley Police Department responded to a reported disturbance at a motel involving people in a Ford Fusion. The officers located the car, approached a man standing next to the car, and learned that the man was Joshua Warren. After determining that there was an outstanding warrant for his arrest, they arrested him and searched him and he was transferred to the detention facility by another officer.

¶ 3 Chief Gilliland and Detective Regner then approached defendant, Shanna Cheyenne Shuler, who was the driver of the car and asked her for identification. They determined that she also had an outstanding warrant for her arrest. The officers asked defendant if she had "anything on her." She was hesitant, but upon being asked again, defendant pulled out a bag "containing a leafy substance." The officers asked again if she had any other substances and warned her that if she arrived at the detention facility in possession of illegal substances she could be charged with additional crimes. She then pulled a "clear baggie of crystal-like substance out of her bra."

¶ 4 Defendant was charged with felony trafficking in methamphetamine and with misdemeanor simple possession of marijuana. Prior to trial, defendant filed a notice of her intent to rely upon the affirmative defense of duress pursuant to N.C.G.S. § 15A-905(c)(1). In its entirety, the notice stated the following:

> Now comes the Defendant, by and through her attorney, Joel Schechet and, in accordance with N.C.G.S. § 15A-905(c), gives notice of the following defense:
>
> 1. Duress

¶ 5 At trial, Detective Regner testified for the State during its case-in-chief. The State asked Detective Regner if defendant made "any statements" about Joshua Warren when she handed over the substances in her possession. Defense counsel objected, and the trial court overruled the objection. Detective Regner then testified: "No, ma'am. She made no—no comment during that one time."

¶ 6 Defense counsel asked for the trial court to excuse the jury and then moved for a mistrial arguing that the State's question had "solicited an answer highlighting [defendant's] silence at the scene." The trial court conducted a voir dire to determine the admissibility of Detective

Regner's testimony. Ultimately, the trial court allowed the State to ask the question again when the jury returned.

¶ 7 After the State's case-in chief, defense counsel gave its opening statement. Defendant then took the witness stand to testify in her own defense. At the close of all the evidence, the trial court instructed the jury on the defense of duress. Ultimately, the jury found defendant guilty of both charges. Defendant appealed to the Court of Appeals.

¶ 8 The Court of Appeals unanimously found no error in the jury's verdicts or in the judgment concluding that because defendant gave notice of her intent to assert the affirmative defense of duress before she testified, the trial court did not err in admitting Detective Regner's testimony of defendant's silence during the State's case-in-chief. *State v. Shuler*, 270 N.C. App. 799, 805 (2020). Defendant petitioned our Court for discretionary review. We allowed her petition on 15 December 2020 to review the single issue presented by defendant in her petition and stated here:

> Did the Court of Appeals err by holding that a defendant who exercises their Fifth Amendment right to silence forfeits that right if they comply with N.C.G.S. § 15A-905(c)(1) and give notice of intent to offer an affirmative defense?

II. Standard of Review

¶ 9 "It is well settled that de novo review is ordinarily appropriate in cases where constitutional rights are implicated." *State v. Diaz*, 372 N.C. 493, 498 (2019) (quoting *Piedmont Triad Reg'l Water Auth. v. Sumner Hills Inc.*, 353 N.C. 343, 348 (2001)). Here, defendant's Fifth Amendment right to silence is implicated. Accordingly, we review the decision of the Court of Appeals de novo.

III. Analysis

¶ 10 Defendant argues that the Court of Appeals erred when it held that her compliance with N.C.G.S. § 15A-905(c)(1), which required her to give pre-trial notice of her intent to raise the affirmative defense of duress, resulted in her forfeiting her ability to assert her Fifth Amendment right to silence such that the State could offer evidence of her silence during its case-in-chief. The State argues that the testimony on defendant's silence elicited during its case-in-chief was admissible for the purposes of impeaching defendant's credibility as a witness.

¶ 11 This Court has said, "[t]he primary purpose of impeachment is to reduce or discount the credibility of a witness for the purpose of induc-

ing the jury to give less weight to [her] testimony." *State v. Ward*, 338 N.C. 64, 97 (1994) (quoting *State v. Looney*, 294 N.C. 1, 15 (1978)). At the time of Detective Regner's testimony, defendant's silence could not have achieved the purpose of impeaching defendant's credibility as a witness since defendant had not yet testified. The State cannot preemptively impeach a criminal defendant by anticipating that the defendant will testify because of defendant's constitutional right to decide not to be a witness.

¶ 12 During oral arguments before this Court, the State conceded that it found no authority for the proposition that a defendant may be impeached prior to testifying. Instead, the State argued that we should create an exception to the rule against preemptive impeachment. According to the State, because defendant here "clearly showed" that she intended to testify by giving pre-trial notice of a duress defense, Detective Regner's testimony was admissible for impeachment purposes prior to defendant's testimony. We disagree.

¶ 13 Giving pre-trial notice of a duress defense does not compel a defendant to testify on her own behalf, nor does it "clearly show[ ]" she intended to do so. A criminal defendant retains the right to choose whether or not to testify at all times up until she actually takes the stand. U.S. Const. amend. V ("No person . . . shall be compelled in any criminal case to be a witness against himself . . . ."); *see also* N.C. Const. art. I, § 23; N.C.G.S. § 8-54 (2019); *State v. Kemmerlin*, 356 N.C. 446, 481 (2002) ("A criminal defendant may not be compelled to testify . . . ." (quoting *State v. Bayman*, 336 N.C. 748, 758 (1994))). Permitting the State to introduce evidence to impeach defendant's credibility before she takes the stand would invariably put before the jury evidence that is probably prejudicial to defendant. That prejudicial evidence would never become admissible if defendant ultimately decided to invoke her Fifth Amendment right not to testify. The safest means of preventing the eventuality that the jury would hear prejudicial, inadmissible evidence is for this Court to hold that evidence offered to impeach a criminal defendant's credibility as a witness is not admissible until she actually testifies. The State's argument that we can presume from defendant's pretrial notice of her duress defense that defendant "clearly showed" an intent to testify such that impeachment evidence was admissible during the State's case-in-chief does not appropriately recognize or protect the defendant's Fifth Amendment right to choose whether or not to testify. Accordingly, we decline to adopt the State's proposed approach.

¶ 14 The State also argues extensively in its brief that because defendant's silence occurred before she was given the *Miranda* warning, evidence of her silence is admissible to impeach her credibility as a witness.

However, of the cases cited by the State in which evidence of a defendant's silence was admissible for impeachment purposes, the evidence was always used to impeach the credibility of a witness who had taken the stand to testify or to rebut testimony elicited by defense counsel on cross-examination. Because the evidence at issue here was offered to impeach a defendant who had not taken the stand and was not used for the purposes of rebuttal those cases do not apply.[1]

¶ 15 We hold that when defendant gave pre-trial notice of her intent to invoke an affirmative defense under statute, she does not give up her Fifth Amendment right to remain silent or her Fifth Amendment right to not testify, and the State was not permitted to offer evidence to impeach her credibility when she had not testified. Here, at the time the State elicited the impeachment testimony, defendant had not testified and retained her Fifth Amendment right not to do so. Thus, it was error to admit Detective Regner's testimony into evidence.

¶ 16 Defendant properly preserved this error by objecting to it and receiving a ruling from the trial court thereon. Therefore, on appeal, the reviewing court must determine whether such error was harmless beyond a reasonable doubt. N.C.G.S. § 15A-1443(b) (2019); *State v. Lawrence*, 365 N.C. 506, 512–13 (2012). The Court of Appeals did not address whether the error was harmless, and the parties did not thoroughly brief this issue to our Court. Therefore, we remand to the Court of Appeals to determine whether the erroneously admitted testimony was harmless beyond a reasonable doubt.

IV. Conclusion

¶ 17 In conclusion, we reverse the decision of the Court of Appeals and hold that a defendant does not forfeit their Fifth Amendment right to silence if they comply with N.C.G.S. § 15A-905(c)(1) and give notice of intent to offer an affirmative defense. Furthermore, the State may not preemptively impeach a defendant who has not testified.

REVERSED AND REMANDED.

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1. In one case, *State v. Booker*, 262 N.C. App. 290, 300–03 (2018), defense counsel cross-examined the State's witness about whether he was in contact with the defendant, which "opened the door" and allowed the State to ask the witness on redirect about the defendant's silence and lack of contact with the witness. It is unclear whether the defendant testified in that case and if the State was using the defendant's silence to impeach the witness or defendant herself.

WELLS FARGO BANK, N.A. v. STOCKS

[378 N.C. 342, 2021-NCSC-90]

WELLS FARGO BANK, N.A.
v.
FRANCES J. STOCKS, IN HIS CAPACITY AS THE EXECUTOR OF THE ESTATE OF LEWIS H. STOCKS AKA LEWIS H. STOCKS, III, TIA M. STOCKS, AND JEREMY B. WILKINS, IN HIS CAPACITY AS COMMISSIONER

No. 296A19

Filed 13 August 2021

1. Statutes of Limitation and Repose—three years—N.C.G.S. § 1-52(9)—mutual mistake—deed reformation

In an action for reformation of a deed of trust brought by a bank, the cause of action accrued when the bank should have discovered the drafting error (listing the wrong family member as the borrower), and its first opportunity to do so was after the borrower defaulted, even though the document was drafted with the error years earlier. Therefore, the three-year statute of limitations in N.C.G.S. § 1-52(9) applied because the action was to reform the instrument due to mutual mistake, and the bank's action was timely filed within three years of the default and the bank's subsequent investigation of the loan instruments to prepare for foreclosure.

2. Reformation of Instruments—admissions—attempt to contradict by affidavit—summary judgment

In an action by plaintiff bank for reformation of a deed based on mutual mistake, defendant property owner could not use her affidavit to contradict her binding admissions and thereby create an issue of material fact as to the parties' intent for the deed of trust to secure repayment of the promissory note executed during a refinance.

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. 228, 831 S.E.2d 378 (2019), reversing and remanding an order granting summary judgment for plaintiff entered on 25 April 2018 by Judge Henry W. Hight in Superior Court, Wake County. On 1 April 2020, the Supreme Court allowed plaintiff Wells Fargo Bank, N.A., and defendant Frances J. Stocks' respective petitions for discretionary review of additional issues. Heard in the Supreme Court on 28 April 2021.

The Law Office of John T. Benjamin, Jr., P.A., by John T. Benjamin, Jr., and Jake R. Garris, for plaintiff-appellant.

WELLS FARGO BANK, N.A. v. STOCKS

[378 N.C. 342, 2021-NCSC-90]

Howard, Stallings, From, Atkins, Angell & Davis, P.A., by Douglas D. Noreen and Rebecca H. Ugolick, for defendant-appellant Frances J. Stocks.

Janvier Law Firm, PLLC, by Kathleen O'Malley, for defendant-appellee Tia M. Stocks.

NEWBY, Chief Justice.

¶ 1 In this case we determine whether the trial court properly granted summary judgment for plaintiff reforming a deed of trust and allowing foreclosure. We first determine when a cause of action accrues for reformation of a deed of trust based on mutual mistake. Section 1-52(9) of the North Carolina General Statutes provides a three-year statute of limitations for relief based on a mistake, which begins running when the mistake is "discovered." A party "discovers" a mistake when that party knows of the mistake or should have known in the exercise of due diligence. Drafting a deed of trust with a mistake apparent on its face, without more, is insufficient to put a party on notice of a mistake. Here the document was drafted with an error in 2005. The first circumstance that would have led plaintiff to question the drafting of the document happened upon review of the document when default occurred. Thus, the claim accrued after default in January of 2015. As such, plaintiff's action was timely filed on 26 May 2017. Further, there is no genuine issue of material fact as to whether the parties intended the deed of trust to secure the defaulted promissory note. Therefore, plaintiff is entitled to summary judgment. The decision of the Court of Appeals is reversed.

¶ 2 Defendant Tia Stocks[1] is the sole record owner of certain real property located at 1504 Harth Drive in Garner, North Carolina (the Property). The Property has been her primary residence since 2002, when her late father, Lewis Stocks, helped her obtain financing to purchase it. On 22 March 2002, Lewis Stocks executed a limited power of attorney which appointed defendant as his attorney-in-fact to "execut[e] the Settlement Statement and loan documents on [his] behalf to effect the purchase" of the Property. On 27 March 2002, Lewis Stocks, through defendant as his attorney-in-fact, executed a promissory note in the amount of $87,300 to First Union National Bank (First Note). On the same day, defendant, together with Lewis Stocks—again through defendant as his attorney-in-

1. Frances J. Stocks, in his capacity as the executor of the estate of Lewis Stocks, is also named as a defendant. Because he argued in alignment with plaintiff at this Court, we only refer to Tia Stocks as defendant.

fact—executed a deed of trust (First Deed of Trust) to pledge the Property as collateral to secure the First Note. The First Deed of Trust defined the "Borrower" as both defendant and Lewis Stocks. The general warranty deed conveying the Property to defendant and the First Deed of Trust were recorded on 28 March 2002 in the Wake County Registry. Defendant then authorized First Union National Bank to draft monthly payments due under the First Note from a bank account in her name. Defendant made all the monthly payments, and Lewis Stocks, though the only named borrower on the First Note, did not make any payments.

¶ 3 In 2005, Lewis Stocks refinanced the loan with defendant's consent. On 12 January 2005, Lewis Stocks executed a promissory note in the amount of $83,034 to Wachovia Bank, N.A.[2] (Second Note). Like the First Note, the Second Note only defined Lewis Stocks as the "Borrower." Section 4(B) of the Second Note states that the Borrower "will be in Default under this Note . . . if [Borrower] fail[s] to make any payment." Section 5 of the Second Note states that "a separate Security Instrument[ ] on real property . . . described in the Security Instrument and dated the same date as this Note, protects the Note Holder from possible losses that might result." The proceeds of the Second Note were used to satisfy the First Note. On 28 January 2005, Wachovia Bank recorded a Certificate of Satisfaction, cancelling the First Deed of Trust.

¶ 4 On 19 January 2005, only defendant executed a deed of trust (Second Deed of Trust) intending to pledge the Property as collateral to secure the Second Note in the amount of $83,034. According to defendant, Lewis Stocks "called [defendant] into his medical office and told" her she needed to sign the Second Deed of Trust so that he could refinance the loan. No one from Wachovia was present when defendant signed the Second Deed of Trust. Though defendant was not listed as a "Borrower" on the Second Note, the Second Deed of Trust defines the "Borrower" as only defendant. The Second Deed of Trust states that "Borrower is indebted to [Wachovia Bank] in the principal sum of U.S. $83,034.00 which indebtedness is evidenced by Borrower's Note dated 01/12/05." Lewis Stocks, who is the only defined "Borrower" on the Second Note, did not execute the Second Deed of Trust, nor does the Second Deed of Trust list him as a borrower. By omitting Lewis Stocks, the Second Deed of Trust does not effectively reference the Second Note. The Second Deed of Trust was recorded on 4 February 2005 in the Wake County Registry.

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2. Before Lewis Stocks refinanced the loan, First Union National Bank merged with Wachovia Bank, N.A., which then became the holder of the First Note and the beneficiary under the First Deed of Trust.

¶ 5 Wachovia Bank drafted other documents in conjunction with the loan transaction that properly differentiated between Lewis Stocks as the borrower under the Second Note and defendant as the owner of the Property, which was intended to secure the Second Note. These documents included a Homeowner's Insurance Notice and a Clerical Error Authorization form. Defendant then authorized Wachovia Bank to draft monthly installment payments from her bank account and made all the payments due under the Second Note until 2015. Lewis Stocks did not make any payments due under the Second Note.

¶ 6 Lewis Stocks died on 23 May 2014, and defendant stopped making payments several months thereafter. Defendant's last payment to Wells Fargo Bank, N.A.[3] (plaintiff) under the Second Note was made on 13 December 2014, and default under the Second Note occurred in January of 2015. Plaintiff sent defendant a letter on 26 February 2015 stating that the Second Note was in default and that plaintiff may exercise its available rights against the Property. In accordance with its general business practices, plaintiff first referred the account to its attorneys in August of 2016 to commence foreclosure proceedings. While preparing for defendant's appeal of the clerk's non-judicial foreclosure order in January of 2017, plaintiff's counsel discovered that the Second Deed of Trust did not adequately describe the Second Note. After discovering the mistake, plaintiff commenced the present action for reformation and judicial foreclosure on 26 May 2017.

¶ 7 During discovery defendant filed responses to plaintiff's request for admissions, wherein she admitted that: (1) the collateral under the First Deed of Trust and Second Deed of Trust was to be the same; (2) the Property was to serve as collateral for the Second Note; (3) the purpose of the Second Deed of Trust was to secure repayment under the Second Note; (4) she understood the purpose of the Second Deed of Trust when she signed it; and (5) she consented to Lewis Stocks' plan to enter into the refinance transaction. In her admissions, however, defendant also stated that she "understood that by signing the [Second] Deed of Trust, [she] was acting as a surety and that [her] home was acting as collateral for the loan."

¶ 8 Plaintiff thereafter moved for summary judgment, first arguing that the Second Deed of Trust should be reformed to accurately describe the Second Note as the parties intended by stating that "Lewis

3. On 20 March 2010, Wachovia merged with Wells Fargo Bank, N.A., which then became the holder of the Second Note and the beneficiary under the Second Deed of Trust. For readability, our reference to "plaintiff" includes Wells Fargo and its predecessors-in-interest.

H Stocks is indebted to Lender in the principal sum of U.S. $83034.00 which indebtedness is evidenced by Lewis H Stocks' Note dated 01/12/05 and extensions, modifications and renewals thereof." Plaintiff also argued the Second Deed of Trust should define the "Borrower" as "Tia M Stocks and Lewis H Stocks," as the parties intended. Plaintiff further argued that it properly brought its claim within the applicable three-year statute of limitations.

¶ 9 In response defendant contested whether the parties intended the Second Deed of Trust to secure the Second Note. Defendant submitted the following in her affidavit:

> In 2005, my father (Dr. Lewis H. Stocks) applied for and obtained a second loan from the plaintiff-bank in the amount of $83,034. I was not a party to this loan, did not attend the loan closing, and was completely unaware that my father was obtaining a loan. I never applied for the loan, never signed a promissory note, nor did I receive the proceeds of the loan. I later learned the second loan was used by my father to pay off the first loan he obtained from the plaintiff-bank. In addition to not attending the loan closing, I was never provided with any RESPA documents, Truth-in-Lending documents, or a closing statement (HUD-1). The entire 2005 loan was conducted in secrecy and any documents having to do with the closing of this loan were kept from me. It later became apparent to me that the reason these documents were not made available to me was because the plaintiff-bank and my father wanted to conceal from me the true nature of this loan.

The trial court granted summary judgment in plaintiff's favor.

¶ 10 A divided panel of the Court of Appeals reversed. *Wells Fargo Bank, N.A. v. Stocks*, 266 N.C. App. 228, 236, 831 S.E.2d 378, 384 (2019). The Court of Appeals began its analysis by determining whether the ten-year statute of limitations in N.C.G.S. § 1-47(2) or the three-year statute of limitations in N.C.G.S. § 1-52(9) applies to plaintiff's claim for reformation. *Id.* at 232, 831 S.E.2d at 381. In doing so, the Court of Appeals cited the rule that "where two statutes deal with the same subject matter, the more specific statute *will prevail over* the more general one." *Id.* at 234, 831 S.E.2d at 382 (quoting *Fowler v. Valencourt*, 334 N.C. 345, 349, 435 S.E.2d 530, 532 (1993)). The Court of Appeals agreed with its

prior decision in *Nationstar Mortgage, LLC v. Dean*, which held that N.C.G.S. § 1-47(2) is more specific because it applies to claims involving a sealed instrument. *Stocks*, 266 N.C. App. at 234, 831 S.E.2d at 382 (quoting *Nationstar Mortgage, LLC v. Dean*, 261 N.C. App. 375, 384, 820 S.E.2d 854, 860 (2018)). Thus, the Court of Appeals held that N.C.G.S. § 1-47(2) applies to plaintiff's claim "to the exclusion of [N.C.G.S. §] 1-52(9)." *Stocks*, 266 N.C. App. at 234 n.2, 831 S.E.2d at 382 n.2.

¶ 11 Having decided that N.C.G.S. § 1-47(2) applies, the Court of Appeals then noted that N.C.G.S. § 1-47(2) does not include express language creating a discovery rule. *Stocks*, 266 N.C. App. at 235, 831 S.E.2d at 383. Thus, the Court of Appeals held that plaintiff's claim accrued, and the statute of limitations began to run, when the Second Deed of Trust was executed in January of 2005. *Id.* Because plaintiff filed its claim on 26 May 2017, outside the ten-year statute of limitations period, the Court of Appeals held that N.C.G.S. § 1-47(2) bars plaintiff's claim for reformation.[4] *Id.* As such, and because the unreformed Second Deed of Trust did not secure the Second Note, the Court of Appeals reversed the trial court's grant of summary judgment on plaintiff's claims for reformation and judicial foreclosure. *Id.* at 236, 831 S.E.2d at 384.

¶ 12 The dissent, however, would have applied N.C.G.S. § 1-52(9) to plaintiff's claim. *Id.* at 239–40, 831 S.E.2d at 385 (Arrowood, J., dissenting). The dissent noted that though "a cause of action based on fraud or mistake does not accrue until the aggrieved party discovers the [mistake]," under *Nationstar* such a claim "cannot be brought after ten years even if the underlying fraud or mistake would not have been reasonably discovered during that time." *Id.* at 238, 831 S.E.2d at 385. This interpretation, the dissent argued, contravenes "the importance of protecting defrauded parties, or those injured by a mistake." *Id.* Thus, the dissent concluded that it "runs counter to logic and our case law" to hold that an action for fraud or mistake is barred under N.C.G.S. § 1-47(2) "simply because the document at issue is a sealed instrument." *Id.* at 239, 831 S.E.2d at 385. Plaintiff appealed to this Court based on the dissenting opinion at the Court of Appeals. Plaintiff also filed a petition for discretionary review as to additional issues, which this Court allowed.

¶ 13 This Court reviews appeals from summary judgment de novo. *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008). Summary judgment is proper if "there is no genuine issue as to any material fact

4. Because the Court of Appeals found plaintiff's claim for reformation of the Second Deed of Trust was time-barred, the Court of Appeals did not address defendant's argument that she intended to pledge the Property as a surety for her father's loan.

and . . . any party is entitled to judgment as a matter of law." N.C.G.S. § 1A-1, Rule 56(c) (2019). "All facts asserted by the [nonmoving] party are taken as true and . . . viewed in the light most favorable to that party." *Ussery v. Branch Banking & Tr. Co.*, 368 N.C. 325, 334, 777 S.E.2d 272, 278 (2015) (quoting *Dobson v. Harris*, 352 N.C. 77, 83, 530 S.E.2d 829, 835 (2000)). Summary judgment is appropriate when the moving party establishes "the lack of any triable issue of fact." *Texaco, Inc. v. Creel*, 310 N.C. 695, 699, 314 S.E.2d 506, 508 (1984) (quoting *Kidd v. Early*, 289 N.C. 343, 352, 222 S.E.2d 392, 399 (1976)).

¶ 14 **[1]** Defendant first argues there is a genuine dispute of material fact as to whether plaintiff filed its claim within the applicable statute of limitations. Whether a cause of action is barred by the statute of limitations is a question of law "when the bar is properly pleaded and the facts are admitted or are not in conflict." *Pembee Mfg. Corp. v. Cape Fear Const. Co., Inc.*, 313 N.C. 488, 491, 329 S.E.2d 350, 353 (1985) (citing *Little v. Rose*, 285 N.C. 724, 208 S.E.2d 666 (1974); *Teele v. Kerr*, 261 N.C. 148, 134 S.E.2d 126 (1964)).

¶ 15 "If [a] deed or written instrument fails to express the true intention of the parties, it may be reformed . . . whe[n] the failure is due to mutual mistake of the parties . . . ." *Crawford v. Willoughby*, 192 N.C. 269, 271, 134 S.E. 494, 495 (1926) (citation omitted). N.C.G.S. § 1-52(9) applies to claims "for relief on the ground of . . . mistake," while N.C.G.S. § 1-47(2) applies to claims "[u]pon a sealed instrument or an instrument of conveyance of an interest in real property, against the principal thereto." To determine which statute of limitations applies, we must look to the purpose of the cause of action. If the purpose is to enforce a sealed instrument, then N.C.G.S. § 1-47(2) applies. But when, as here, the action is to reform an instrument because of fraud or mistake, N.C.G.S. § 1-52(9) applies. In *Nationstar*, the Court of Appeals cited the correct principle that the more specific statute controls over the more general statute of limitations. *Nationstar*, 261 N.C. App. at 383, 820 S.E.2d at 860 (citing *Fowler*, 334 N.C. at 349, 435 S.E.2d at 532). Nonetheless, it failed to examine the nature of the cause of action. *Nationstar*, 261 N.C. App. at 384, 820 S.E.2d at 860. Thus, the Court of Appeals' decision in *Nationstar* is overruled.

¶ 16 Under N.C.G.S. § 1-52(9), a "cause of action shall not be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud or mistake." N.C.G.S. § 1-52(9). A party "discovers" the mistake when the "mistake was known or should have been discovered in the exercise of ordinary diligence." *Peacock v. Barnes*, 142 N.C. 215, 218, 55 S.E. 99, 100 (1906). A mistake in the drafting pro-

cess alone is insufficient to place the drafting party on inquiry notice. *See Pelletier v. Interstate Cooperage Co.*, 158 N.C. 403, 407–08, 74 S.E. 112, 113–14 (1912) (citations omitted) (holding "that a party will not be affected with notice of a mistake existent in the deed" that is due to the "mistake of the draughtsman"); *Modlin v. Roanoke R. & Lumber Co.*, 145 N.C. 218, 227, 58 S.E. 1075, 1078 (1907) (citations omitted) (stating "that the registration of the deed, or knowledge of its existence . . . [is] not of itself sufficient notice of" a mistake); *Peacock*, 142 N.C. at 217, 55 S.E. at 101 (holding that erroneous description of land in a recorded deed was insufficient, without more, to put a party on inquiry notice). If an original drafting error were sufficient to place the drafter on notice, the discovery rule would be unnecessary because the statute of limitations would always begin to run on the date of the original error. *See id.* Rather, "there must be facts and circumstances sufficient to put the [drafting party] on inquiry which, if pursued, would lead to the discovery of the facts constituting the [mistake]." *Vail v. Vail*, 233 N.C. 109, 117, 63 S.E.2d 202, 208 (1951) (citations omitted).

¶ 17 Here the cause of action accrued when plaintiff should have discovered the error in the loan documents. The mistake itself, that the Second Deed of Trust refers to defendant as the borrower under the Second Note instead of Lewis Stocks, was a drafting error. Defendant argues the unusual circumstances surrounding the execution of the Second Deed of Trust should have put plaintiff on inquiry notice. Defendant notes that she executed the Second Deed of Trust one week after Lewis Stocks executed the Second Note, in Lewis Stocks' office at his direction, and without a representative from plaintiff present. Moreover, plaintiff drafted other documents that properly differentiated between Lewis Stocks as the borrower and defendant as the Property owner.

¶ 18 These circumstances may have raised a question regarding the execution of the documents. They do not, however, raise a question regarding the drafting. Had plaintiff reviewed the documents after they were executed, as defendant argues plaintiff should have, plaintiff would have found the execution was without error. In other words, since the signature matched the defined borrower on the face of the document, there was no reason to question the drafting of the Second Deed of Trust. As such, these facts and circumstances are insufficient to place plaintiff on inquiry notice of the drafting error.

¶ 19 Further, from March of 2005 to December of 2014, plaintiff received every payment due under the Second Note. Given the timely payments, there was no reason to investigate the loan instruments. Therefore, the

first circumstance that would have led plaintiff to question the validity of the Second Deed of Trust was the January 2015 default and the subsequent foreclosure action. In the exercise of due diligence, the earliest plaintiff should have discovered the drafting mistake was during this time. Having filed the lawsuit on 26 May 2017, the cause of action to reform the Second Deed of Trust was timely filed within the three-year statute of limitations period.

¶ 20 **[2]** Defendant next argues there is a genuine dispute of material fact as to whether the parties intended the Second Deed of Trust to secure repayment of the Second Note. "If [a] deed or written instrument fails to express the true intention of the parties, it may be reformed . . . whe[n] the failure is due to the mutual mistake of the parties . . . ." *Crawford*, 192 N.C. at 271, 134 S.E. at 495 (citations omitted). "The phrase 'mutual mistake' means a mistake common to all the parties to a written instrument and usually relates to a mistake concerning its contents or its legal effect." *State Tr. Co. v. Braznell*, 227 N.C. 211, 214–15, 41 S.E.2d 744, 746 (1947) (quoting *M. P. Hubbard & Co., Inc. v. Horne*, 203 N.C. 205, 208, 165 S.E. 347, 349 (1932)). Facts admitted in a request for admissions under Rule 36 of the North Carolina Rules of Civil Procedure are "conclusively established." N.C.G.S. § 1A-1, Rule 36(b) (2019). Therefore, such facts are "sufficient to support a grant of summary judgment." *Goins v. Puleo*, 350 N.C. 277, 280, 512 S.E.2d 748, 750 (1999) (citing *Rhoads v. Bryant*, 56 N.C. App. 635, 289 S.E.2d 637 (1982)). Moreover, a party's own affidavit "opposing summary judgment does not overcome the conclusive effect of [that party's] previous admissions." *Rhoads*, 56 N.C. App. at 637, 289 S.E.2d at 639.

¶ 21 Here defendant admitted that she understood the Property was to serve as collateral under the Second Deed of Trust to secure repayment of the indebtedness evidenced by the Second Note. Defendant cannot use her affidavit to contradict these binding admissions. Further, defendant's contention that she was acting as a surety for her father's loan does not overcome her admissions that she understood that the purpose of the Second Deed of Trust was to pledge the Property as collateral for the loan under a traditional deed of trust arrangement. *See Skinner v. Preferred Credit*, 361 N.C. 114, 120, 638 S.E.2d 203, 209 (2006) ("A deed of trust is a three-party arrangement in which the borrower conveys legal title to real property to a third party trustee to hold for the benefit of the lender until repayment of the loan." (citing 1 James A. Webster, Jr., *Webster's Real Estate Law in North Carolina* § 13-1, at 538 (Patrick K. Hetrick & James B. McLaughlin, Jr. eds., 5th ed. 1999))). Thus, there is

no genuine dispute of material fact as to whether the parties intended the Second Deed of Trust to secure repayment of the Second Note.

¶ 22 Because there is no genuine issue of material fact as to whether plaintiff's claim was timely filed or whether the Second Deed of Trust was intended to secure repayment of the Second Note, the Second Deed of Trust should be reformed to match the parties' intent. As such, the trial court properly granted summary judgment for plaintiff on its claims for reformation and judicial foreclosure. The decision of the Court of Appeals is reversed.

REVERSED.

ANDERSON CREEK PARTNERS, L.P.; ANDERSON CREEK INN, LLC; ANDERSON CREEK DEVELOPERS, LLC; FAIRWAY POINT, LLC; STONE CROSS, LLC D/B/A STONE CROSS ESTATES, LLC; RALPH HUFF HOLDINGS, LLC; WOODSHIRE PARTNERS, LLC; CRESTVIEW DEVELOPMENT, LLC; OAKMONT DEVELOPMENT PARTNERS, LLC; WELCO CONTRACTORS, INC.; NORTHSOUTH PROPERTIES, LLC; W.S. WELLONS CORPORATION; ROLLING SPRINGS WATER COMPANY, INC.; AND STAFFORD LAND COMPANY, INC.	)	
v.	)	Harnett County
COUNTY OF HARNETT	)	

No. 62P21

ORDER

Plaintiffs' petition for discretionary review is decided as follows: Allowed with respect to Issue Nos. 7 and 8; denied as to Issue Nos. 1-6.

By order of the Court in conference, this the 10th day of August 2021.

s/Berger, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 13th day of August 2021.

AMY FUNDERBURK
Clerk, Supreme Court of
North Carolina

s/Amy Funderburk
~~M.C. Hackney~~
~~Assistant~~ Clerk, Supreme Court of
North Carolina

IN RE C.H.

[378 N.C. 353 (2021)]

IN THE MATTER OF	)	
	)	
C.H. & J.H.	)	Currituck County
	)	

No. 176A21

ORDER

Appellees' motions to dismiss respondent-father's appeal are denied. Respondent-father's petition for writ of certiorari is allowed. Respondent-father's motion for a temporary stay of the briefing schedule or, in the alternative, an extension of time to file his initial brief is dismissed as moot. Respondent-father's initial brief will be due thirty (30) days from entry of this order and the remaining briefing will be due according to the North Carolina Rules of Appellate Procedure.

By order of the Court in Conference, this the 10th day of August, 2021.

s/Berger, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 13 day of August, 2021.

AMY FUNDERBURK
Clerk of the Supreme Court

s/Amy Funderburk
Clerk

IN THE MATTER OF CUSTODIAL	)	
LAW ENFORCEMENT RECORDING	)	From Guilford County
SOUGHT BY CITY OF GREENSBORO	)	

No. 364PA19

ORDER

In the absence of a brief on behalf of appellee, this Court on its own motion appoints Chris Edwards to appear as court-assigned amicus curiae in the above-captioned appeal. The court-assigned amicus curiae will present arguments in favor of upholding the decision of the Court of Appeals. This Court hereby allows amicus sixty (60) days from the entry of this order to file the brief. The remainder of the briefing schedule will proceed according to Rule 28(h) of the North Carolina Rules of Appellate Procedure.

By order of the Court in Conference, this 23rd day of June, 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 23rd day of June, 2021.

AMY L. FUNDERBURK
Clerk of the Supreme Court

s/Amy L. Funderburk

PF DEVELOPMENT GROUP, LLC	)	
	)	
v.	)	Harnett County
	)	
COUNTY OF HARNETT	)	

No. 63P21

ORDER

Plaintiff's petition for discretionary review is decided as follows: Allowed as to Issue Nos. 7 and 8; denied as to Issue Nos. 1-6.

By order of the Court in conference, this the 10th day of August 2021.

s/Berger, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 13th day of August 2021.

AMY FUNDERBURK
Clerk, Supreme Court of
North Carolina

s/Amy Funderburk

~~M.C. Hackney~~
~~Assistant~~ Clerk, Supreme Court of
North Carolina

STATE v. HARGROVE

[378 N.C. 356 (2021)]

STATE OF NORTH CAROLINA	)	
	)	
v.	)	Vance County
	)	
MARCUS TYRELL HARGROVE	)	

No. 220P21

ORDER

Defendant's Emergency Petition for Writ of Certiorari to Review Order of Superior Court, Vance County, is allowed; the orders entered by the trial court on 7 May 2021 and 14 June 2021 denying defendant's motions to continue are vacated; and this case is remanded to the Superior Court, Vance County, for the entry of an order allowing a reasonable continuance from the scheduled 2 August 2021 trial date, with the trial court having the discretion to set a new trial date that is at least ninety days after the termination of the current trial proceedings in *State v. Gregory* (Wake County File Nos. 15 CrS 219491, 219559-40, 219654-55), and further proceedings not inconsistent with this order.

By order of the Court in conference, this the 12th day of July 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 July 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

13 AUGUST 2021

17P13-6	State v. Ca'Sey R. Tyler	Def's Pro Se Petition for Writ of Habeas Corpus (COAP19-105)	Dismissed **07/26/2021** **Ervin, J., recused**
20P21	Radiator Specialty Company v. Arrowood Indemnity Company (as Successor to Guaranty National Insurance Company, Royal Indemnity Company, and Royal Indemnity Company of America); Columbia Casualty Company; Continental Casualty Company; Fireman's Fund Insurance Company; Insurance Company of North America; Landmark American Insurance Company; Munich Reinsurance America, Inc., (as Successor to American Reinsurance Company); Mutual Fire, Marine and Inland Insurance Company; National Union Fire Insurance Company of Pittsburgh, PA; Pacific Employers Insurance Company; St. Paul Surplus Lines Insurance Company; Sirius America Insurance Company (as Successor to Imperial Casualty and Indemnity Company); United National Insurance Company; Westchester Fire Insurance Company; Zurich American Insurance Company of Illinois	1. Plt's PDR Under N.C.G.S. § 7A-31 (COA19-507) 2. Def's (Fireman's Fund Insurance Company) PDR Under N.C.G.S. § 7A-31 3. Defs' (National Union Fire Insurance Company of Pittsburgh, PA, Landmark American Insurance Company, and Zurich American Insurance Company of Illinois) Conditional PDR Under N.C.G.S. § 7A-31 4. Plt's Motion to Admit Jonathan G. Hardin Pro Hac Vice 5. Defs' (Landmark American Insurance Company, National Union Fire Insurance Company of Pittsburgh, PA, and Zurich American Insurance Company of Illinois) Conditional PDR Under N.C.G.S. § 7A-31 6. Plt's Conditional PDR Under N.C.G.S. § 7A-31	1. Allowed 2. Allowed 3. Allowed 4. Allowed **04/14/2021** 5. Allowed 6. Allowed **Berger, J., recused**

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

13 AUGUST 2021

27A21	State v. Michael Devon Tripp	1. Def's PDR Under N.C.G.S. § 7A-31 (COA18-1286) 2. Def's Petition in the Alternative for Writ of Certiorari to Review Decision of the COA	1. Allowed 2. Dismissed as moot
29P21	The Umstead Coalition; Randal L. Dunn, Jr.; Tamara Grant Dunn; William Doucette; and TORC (a/k/a Triangle Off-Road Cyclists) v. Raleigh Durham Airport Authority and Wake Stone Corporation	Plts' PDR Under N.C.G.S. § 7A-31 (COA20-129)	Denied
32P21-2	State v. Jemar Bell	Def's Pro Se Motion to Review Decision of the COA (COA19-1147)	Dismissed **Berger, J., recused**
34A21	State v. William Brandon Coffey	1. Def's Notice of Appeal Based Upon a Dissent (COA19-445) 2. Def's PDR as to Additional Issues 3. State's Conditional PDR Under N.C.G.S. § 7A-31	1. --- 2. Denied 3. Dismissed as moot
37A21	In the Matter of M.R.J.	Petitioner's Motion for Leave to Amend Record on Appeal	Allowed
44P21-3	Reginald Anthony Falice v. State of North Carolina	Petitioner's Pro Se Motion for Notice of Confirmation & Repudiation	Dismissed
46P21-2	State v. Terry Lynn Best	Def's Pro Se Motion to Review Constitutional Rights	Dismissed **07/23/2021**

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

13 AUGUST 2021

47P21	Providence Volunteer Fire Department, Inc., a North Carolina non-profit corporation v. The Town of Weddington, a North Carolina municipal corporation, Peter William Deter, in his individual and official capacity as Mayor, and Wesley Chapel Volunteer Fire Department, Inc., a North Carolina non-profit corporation	Plt's PDR Under N.C.G.S. § 7A-31 (COA19-203)	Allowed
56P21	State v. Rashon Lenard Peay and Jashon Bernard Peay	Def's (Rashon Lenard Peay) PDR Under N.C.G.S. § 7A-31 (COA19-698)	Denied
59A21	In the Matter of C.C.G.	Petitioner's Motion to Supplement the Record on Appeal	Allowed
60P19-2	George Reynold Evans v. State of North Carolina and Ernie Lee, Onslow County District Attorney	1. Petitioner's Pro Se Motion of Appeal for Discretionary Review of Writ of Certiorari (COAP21-66) 2. Petitioner's Pro Se Petition in the Alternative for Writ of Certiorari	1. Dismissed 2. Dismissed

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

13 AUGUST 2021

62P21	Anderson Creek Partners, L.P.; Anderson Creek Inn, LLC; Anderson Creek Developers, LLC; Fairway Point, LLC; Stone Cross, LLC d/b/a Stone Cross Estates, LLC; Ralph Huff Holdings, LLC; Woodshire Partners, LLC; Crestview Development, LLC; Oakmont Development Partners, LLC; Wellco Contractors, Inc.; North South Properties, LLC; W.S. Wellons Corporation; Rolling Springs Water Company, Inc.; and Stafford Land Company, Inc. v. County of Harnett	1. Plts' Notice of Appeal Based Upon a Constitutional Question (COA19-533) 2. Plts' PDR Under N.C.G.S. § 7A-31 3. Pacific Legal Foundation and North Carolina Home Builders Association's Conditional Motion for Leave to File Amicus Brief 4. Def's Motion to Dismiss Appeal	1. --- 2. Special Order 3. Allowed 4. Allowed
63P21	PF Development Group, LLC v. County of Harnett	1. Plt's Notice of Appeal Based Upon a Constitutional Question (COA19-534) 2. Plt's PDR Under N.C.G.S. § 7A-31 3. Pacific Legal Foundation and North Carolina Builders Association's Conditional Motion for Leave to File Amicus Brief 4. Def's Motion to Dismiss Appeal	1. --- 2. Special Order 3. Allowed 4. Allowed
67P21	State v. Marcus Elliott and Tre Montrel Parker	1. Def's (Tre Montrel Parker) Notice of Appeal Based Upon a Constitutional Question (COA20-18) 2. Def's (Tre Montrel Parker) PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal 4. Def's (Marcus Elliott) Notice of Appeal Based Upon a Constitutional Question 5. Def's (Marcus Elliott) PDR Under N.C.G.S. § 7A-31 6. State's Motion to Dismiss Appeal	1. --- 2. Denied 3. Allowed 4. --- 5. Denied 6. Allowed

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72P12-2	State v. Michael Scott Sistler	1. Def's Pro Se Petition for Writ of Certiorari to Review Order of Superior Court, Johnston County 2. Def's Pro Se Motion to Appoint Counsel	1. Dismissed 2. Dismissed as moot
74P21-2	William Jernigan, Jr. v. Judge S. Bray	Plt's Pro Se Motion for Judicial Standards Complaint	Dismissed
85P20	State v. Tony Deshon Jones	Def's PDR Under N.C.G.S. § 7A-31 (COA19-281)	Allowed
93P21	Wilmington Savings Fund Society, FSB, d/b/a/ Christiana Trust, not in its individual capacity, but solely as trustee for BCAT 2014-10TT v. Theresa Hall and Substitute Trustee Services, Inc	1. Def's (Theresa Hall) Motion for Temporary Stay (COA20-176) 2. Def's (Theresa Hall) Petition for Writ of Supersedeas 3. Def's (Theresa Hall) PDR Under N.C.G.S. § 7A-31	1. Allowed **03/08/2021** Dissolved **08/10/2021** 2. Denied 3. Denied
105P21	In the Matter of K.M., K.M.	1. Petitioners' Petition for Writ of Certiorari to Review Decision of the COA (COA19-871) 2. Petitioner's Motion for Temporary Stay 3. Petitioner's Petition for Writ of Supersedeas	1. 2. Allowed **07/14/2021** 3.
107P21	State v. Major Earl Edwards, Jr.	Def's PDR Under N.C.G.S. § 7A-31 (COA19-615)	Denied
115A04-3	State v. Scott David Allen	1. Def's Petition for Writ of Certiorari to Review Order of Superior Court, Montgomery County 2. Def's Petition in the Alternative for Writ of Mandamus 3. Def's Motion to Seal Motion to Withdraw 4. Def's Motion to Withdraw Counsel and Allow IDS to Appoint Substitute Counsel	1. Allowed **09/25/2019** 2. Denied 3. Allowed **07/12/2021** 4. Allowed **07/12/2021**
118P21	State v. Breanna Regina Dezara Moore	1. Def's PDR Under N.C.G.S. § 7A-31 (COA20-85) 2. Def's Motion to Amend PDR	1. Denied 2. Allowed **04/08/2021**

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126P19-2	State v. Gregory Jerome Wynn, Jr.	Def's Pro Se PDR Under N.C.G.S. § 7A-31 (COA18-536-2)	Denied
126P20	State v. Isiah Boyd	1. Def's PDR Under N.C.G.S. § 7A-31 (COA19-543) 2. Def's Motion for Judicial Notice	1. Allowed 2. Allowed
130P21	State v. George Timothy Green	1. Def's PDR Under N.C.G.S. § 7A-31 (COA20-394) 2. Def's Motion to Strike Portion of PDR	1. Denied 2. Allowed
131P16-20	State v. Somchai Noonsab	1. Def's Pro Se Motion to Entertain Attacks on Discovery Rules 2. Def's Pro Se Motion for Verified Complaint to Amend the Rule of Law 3. Def's Pro Se Motion for Suit of 16 Billion Dollars	1. Dismissed 2. Dismissed 3. Dismissed
132P21	In the Matter of J.N. & L.N.	1. Respondent-Father's Notice of Appeal Based Upon a Constitutional Question (COA20-296) 2. Respondent-Father's PDR Under N.C.G.S. § 7A-31 3. Guardian ad Litem's Motion to Dismiss Appeal 4. Petitioner's Motion to Dismiss Appeal 5. Respondent-Father's Motion to Amend PDR	1. -- 2. Allowed 3. Allowed 4. Allowed 5. Allowed
134P21-2	In the Matter of B.M.P.	1. Respondent-Father's Pro Se Motion to Stay the Mandate Pending a Petition for Writ of Certiorari (COA20-794) 2. Respondent Father's Pro Se PDR Under N.C.G.S. § 7A-31	1. Dismissed **06/28/2021** 2. Denied **06/28/2021**
134P21-3	In the Matter of B.M.P.	1. Respondent-Father's Pro Se Motion to File Amended PDR (COA20-794) 2. Respondent-Father's Pro Se Motion to Stay the Mandate Pending a Petition for Writ of Certiorari 3. Respondent-Father's Pro Se PDR Under N.C.G.S. § 7A-31	1. Dismissed **07/01/2021** 2. Dismissed **07/01/2021** 3. Denied **07/01/2021**

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156A17-3	Christopher DiCesare, James Little, and Diana Stone, Individually and on behalf of all others similarly situated v. the Charlotte-Mecklenburg Hospital Authority, d/b/a/ Carolinas Healthcare System	1. Plts' Petition for Writ of Mandamus 2. Plts' Petition in the Alternative for Writ of Certiorari to Review Order of Business Court 3. Plts' Motion to Admit Adam Gitlin, Brendan P. Glackin, Miriam E. Marks, Daniel E. Seltz, and Benjamin E. Shiftan Pro Hac Vice 4. Plts' Motion for Limited Remand 5. Def's Motion to Dismiss Appeal 6. Plts' and Def's Joint Motion to Extend Time and Set Briefing Schedule	1. 2. 3. 4. 5. 6. Allowed **06/15/2021**
161P07-4	State v. Milton E. Lancaster	Def's Pro Se Motion for Grievance Complaint	Dismissed
161P21	State v. Anthony Davis	Def's PDR Under N.C.G.S. § 7A-31 (COA20-144)	Denied
163A21	Murphy-Brown, LLC and Smithfield Foods, Inc. v. Ace American Insurance Company; Ace Property & Casualty Insurance Company; American Guarantee & Liability Insurance Company; Great American Insurance Company of New York; Old Republic Insurance Company; XL Insurance America, Inc.; and XL Specialty Insurance Company	1. Plts' Motion to Admit Evan T. Knott Pro Hac Vice 2. Plts' Motion to Admit John D. Shugrue Pro Hac Vice 3. Def's (Ace American Insurance Company) Motion to Admit Marianne May Pro Hac Vice 4. Def's (Ace American Insurance Company) Motion to Admit Jonathan D. Hacker and Bradley N. Garcia Pro Hac Vice	1. Allowed **06/15/2021** 2. Allowed **06/15/2021** 3. Allowed **06/25/2021** 4. Allowed **06/25/2021**
164P21	State v. Terry Wayne Harris	Def's PDR Under N.C.G.S. § 7A-31 (COA19-1124)	Denied

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165A21	Rocky Dewalt, Robert Parham, Anthony McGee, and Shawn Bonnett, individually and on behalf of a class of similarly situated persons v. Erik A. Hooks, in his official capacity as Secretary of the North Carolina Department of Public Safety, and the North Carolina Department of Public Safety	1. Professors Sharon Dolovich, Alexander A. Reinert, Margo Schlanger, and John F. Stinneford's Motion to Admit Daniel Greenfield Pro Hac Vice 2. Professors Sharon Dolovich, Alexander A. Reinert, Margo Schlanger, and John F. Stinneford's Motion to Admit Kathrina Szymborski Pro Hac Vice 3. Professors Sharon Dolovich, Alexander A. Reinert, Margo Schlanger, and John F. Stinneford's Motion to Admit Bradford Zukerman Pro Hac Vice 4. Professors and Practitioners of Psychiatry, Psychology, and Medicine's Motion to Admit Benjamin I. Friedman Pro Hac Vice	1. Allowed **07/02/2021** 2. Allowed **07/02/2021** 3. Allowed **07/02/2021** 4. Allowed **07/19/2021**
166P14-2	State v. Donald Vernon Edwards	Def's Pro Se Motion for PDR (COAP20-153)	Denied
167A21	Inhold, LLC and Novalent, Ltd. v. PureShield, Inc.; Joseph Raich; and ViaClean Technologies, LLC	1. Plts' Motion to Dismiss Appeal 2. Defs' Motion to Admit Brian Paul Gearing, Ali H.K. Tehrani, and Joshua M. Rychlinski Pro Hac Vice	1. 2. Allowed **06/15/2021**
168P21	State v. Aaron Paul Holland	Def's Pro Se PDR Under N.C.G.S. § 7A-31 (COA20-493)	Denied
170A21	In the Matter of J.D.	Petitioner and Guardian ad Litem's Joint Motion in the Cause	Allowed **07/09/2021**
172P21	State v. Tommy Lovett	Def's PDR Under N.C.G.S. § 7A-31 (COA20-539)	Denied
173P21	State v. Aaron L. Stephen	Def's Pro Se Motion for Withdrawal of Counsel	Dismissed
176A21	In the Matter of C.H. & J.H.	1. Petitioner and Guardian ad Litem's Motion to Dismiss Appeal 2. Respondent-Father's Petition for Writ of Certiorari to Review Order of District Court, Currituck County 3. Respondent-Father's Motion for Temporary Stay for the Filing of the Briefs 4. Respondent-Father's Motion in the Alternative for Extension of Time to File Brief 5. Petitioner and Guardian ad Litem's Joint Motion to Dismiss Appeal	1. Special Order 2. Special Order 3. Special Order 4. Special Order 5. Special Order

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177P21	State v. Briana Leana Richmond	Def's PDR Under N.C.G.S. § 7A-31 (COA20-615)	Denied
179P20	TD Bank USA, N.A. v. Maxine H. Corpening	1. Def's Petition for Writ of Certiorari to Review Order of the COA (COA19-714) 2. Def's Petition for Writ of Certiorari to Review Decision of District Court, Wake County	1. Denied 2. Denied
182P21	State v. Jaquan Stephon Geter	Def's PDR Under N.C.G.S. § 7A-31 (COA20-706)	Allowed
187P21	State v. Dustin Allen Lewis	Def's PDR Under N.C.G.S. § 7A-31 (COA20-641)	Denied
189P21	Michael Buttacavoli v. Maris F. Buttacavoli	1. Plt's Pro Se Motion to Produce Records 2. Plt's Pro Se Motion to Remove Judge Dray 3. Plt's Pro Se Motion to Suspend Langley and Dray 4. Plt's Pro Se Motion to Censure Dietz, Hampson and Berger 5. Plt's Pro Se Motion to Disbar Langley, Suspend Judge Dray, Censor Judge Dietz, Hampson, and Berger	1. Dismissed 2. Dismissed 3. Dismissed 4. Dismissed 5. Dismissed **Berger, J., recused**
191A21	In the Matter of K.Q.	Respondent-Mother's Petition for Writ of Certiorari to Review Order of District Court, Cumberland County	Denied **07/23/2021**
197P21	State v. Charisse L. Garrett	1. Def's Motion for Temporary Stay (COA20-326) 2. Def's Petition for Writ of Supersedeas 3. Def's PDR Under N.C.G.S. § 7A-31	1. Allowed **06/07/2021** Dissolved **08/10/2021** 2. Denied 3. Denied
199P21	Todd Darren Hutchins and Angela Rentenbach Hutchins v. CVS Pharmacy, Inc., et al.	1. Plts' Motion for Certification of Issue of Pro Hac Vice Admission on Direct Appeal 2. Plts' Motion for Certification of I ssue of Pro Hac Vice Admission on Direct Appeal 3. Defs' Motion to Strike Motion for Certification of Issue of Pro Hac Vice Admission on Direct Appeal 4. Plts' Motion to Stay Briefing in the COA	1. Denied **07/07/2021** 2. Denied **07/07/2021** 3. Dismissed as moot **07/07/2021** 4. Dismissed as moot **07/07/2021**

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210A21	In the Matter of T.H.	Respondent-Mother's Motion to Withdraw and Dismiss Appeal	Allowed **07/23/2021**
211P21	Marvin Millsaps v. North Carolina Department of Public Safety	1. Petitioner's Pro Se Motion for Petition Motion 2. Petitioner's Pro Se Motion to Proceed *In Forma Pauperis*	1. Dismissed 2. Allowed
212P21	State v. Milton E. Lancaster	Def's Pro Se Motion for PDR (COAP21-182)	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 (COA19-283) 2. Defs' (Robert Patton Carroll and DHR Sales Corp. d/b/a Re/Max Community Brokers) Notice of Appeal Based Upon a Dissent 3. Defs' Motion to Extend Times for Argument	1. --- 2. --- 3. Allowed **07/23/2021**
218P21	Christopher D. Murray v. Deerfield Mobile Home Park, LLC, and Donald W. Lewis	1. Plt's PDR Under N.C.G.S. § 7A-31 (COA20-382) 2. Defs' Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 2. Dismissed as moot
220P21	State v. Marcus Tyrell Hargrove	1. Def's Motion to Stay Proceedings 2. Def's Emergency Petition for Writ of Certiorari to Review Order of Superior Court, Vance County 3. Def's Motion to Consider Supplemental Ex Parte Argument, Affidavit, and Transcript Related to Emergency Petition for Writ of Certiorari	1. Dismissed as moot **07/12/2021** 2. Special Order **07/12/2021** 3. Allowed **07/12/2021**
223P21	State v. Antwan Bernard Parker	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA20-291) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. Dismissed 2. Denied 3. Allowed

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225P21	North State Deli, LLC d/b/a Lucky's Delicatessen, Mothers & Sons, LLC d/b/a Mothers & Sons Trattoria, Mateo Tapas, L.L.C. d/b/a Mateo Bar de Tapas, Saint James Shellfish LLC d/b/a Saint James Seafood, Calamari Enterprises, Inc. d/b/a Parizade, Bin 54, LLC d/b/a Bin 54, Arya, Inc. d/b/a City Kitchen and Village Burger, Grasshopper LLC d/b/a Nasher Cafe, Verde Cafe Incorporated d/b/a Local 22, Floga, Inc. d/b/a Kipos Greek Taverna, Kuzina, LLC d/b/a Golden Fleece, Vin Rouge, Inc. d/b/a Vin Rouge, Kipos Rose Garden Club LLC d/b/a Rosewater, and Gira Sole, Inc. d/b/a Farm Table and Gatehouse Tavern v. The Cincinnati Insurance Company; The Cincinnati Casualty Company; Morris Insurance Agency Inc.; and Does 1 Through 20, Inclusive	1. Plts' PDR Prior to a Determination by the COA (COA21-293) 2. North Carolina Restaurant and Lodging Association's Motion for Leave to File Amicus Brief	1. Denied 2. Dismissed as moot
226P21	George Edward Mayes, Jr. v. Wayne County, District Court	Petitioner's Pro Se Petition for Writ of Mandamus	Dismissed
229P21	State v. Anthony Moses Arnold	Def's Pro Se Motion to Dismiss Charges	Dismissed
230P21	State v. Jordan Nathaniel Mitchell	1. Def's Pro Se Motion for Compensation on Civil Action 2. Def's Pro Se Motion for Immediate Relief	1. Dismissed **07/02/2021** 2. Denied **07/02/2021**

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232P21	Samuel Edward Hatcher Jr., Executor, Beneficiary & Trustee of Irrevocable Living Trust of Samuel Edward Hatcher, Sr., Plaintiff v. Nathan Tyler Montgomery, Defendant & Third Party Plaintiff v. Samuel Edward Hatcher, Jr., Individually, Third-Party	1. Plt's Pro Se Petition for Writ of Certiorari to Review Order of the COA (COAP21-34) 2. Plt's Pro Se Motion to Request for Indigent Status	1. Denied **07/07/2021** 2. Allowed **07/07/2021**
233P21	Darlene Cheek-Tarouilly v. Joshua Stanhiser	Def's PDR Under N.C.G.S. § 7A-31 (COA20-150)	Denied
235P20	In the Matter of O.L.	Respondent's PDR Under N.C.G.S. § 7A-31 (COA19-626)	Denied
238P21	State v. Shanion J. Donta Watson	Def's Pro Se Motion to Hold Case in Abeyance	Dismissed **07/08/2021**
239P21	State v. Lawrence Verline Wilder	Def's Pro Se Motion to Dismiss Charges	Dismissed
240P20	State v. Kenneth Earl Byrd, Jr.	1. Def's Petition for Writ of Certiorari to Review Order of Superior Court, Harnett County 2. Def's Pro Se Motion for Appointment of Counsel	1. Dismissed 2. Dismissed as moot
244P21	David Meyers v. Todd Ishee, Warden Denise Jackson, Governor Roy Cooper, Secretary of North Carolina Department of Public Safety Erik Hooks, Assistant Commissioner of Prisons of North Carolina of Public Safety Brandeshawn Harris	Petitioner's Pro Se Petition for Writ of Habeas Corpus	Denied **07/14/2021**
245P21	In the Matter of Kombiz Salehi	Petitioner's Pro Se Motion for Appeal	Dismissed

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246A09-2	State v. Michael Wayne Sherrill	Def's Motion to Terminate the Appeal	Allowed **08/06/2021**
246A21	State v. James Gregory Medlin	1. Def's Motion for Temporary Stay (COA20-563) 2. Def's Petition for Writ of Supersedeas	1. Allowed **07/15/2021** 2.
247P21	State v. Charles A. Fancher	Def's Pro Se Motion for Appropriate Relief	Dismissed **Berger, J., recused**
250P21	Department of Transportation v. Bloomsbury Estates, LLC; Bloomsbury Estates Condominium Homeowners Association, Inc.	1. Def's (Bloomsbury Estates Condominium Homeowners Association, Inc.) Motion for Temporary Stay (COA21-323) 2. Def's (Bloomsbury Estates Condominium Homeowners Association, Inc.) Petition for Writ of Supersedeas	1. Denied **07/20/2021** 2. Denied **07/20/2021**
252P21	State v. Roland Barrett aka Rollin Barrett	Def's Pro Se Motion for Dismissal	Denied **07/19/2021**
253P21	State v. Jimell M. Johnson	Def's Pro Se Motion for Immediate Release	Denied **07/19/2021**
256P21	Nafis Akeem-Alim Abdullah-Malik v. State of North Carolina	Def's Pro Se Motion to Intervene	Dismissed **07/21/2021**
257P21	State v. Maribel Gonzalez	1. Def's Motion for Temporary Stay (COA20-390) 2. Def's Petition for Writ of Supersedeas	1. Allowed **07/21/2021** 2.
259P21	El Maru Maurras d/b/a D Shaquielle Shackleford v. Susan Stephens d/b/a Manager at State Employees Credit Union/ Local Government Federal Credit Union Branch	1. Plt's Pro Se Motion for Due Notice of Motion 2. Plt's Pro Se Motion to Intervene with Special Injunction	1. Dismissed 2. Denied
260A20	State v. Marc Peterson Oldroyd	Def's Motion to Amend New Brief	Allowed **07/09/2021**

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263P20	Carlos J. Privette, D.D.S. v. North Carolina State Board of Dental Examiners	Petitioner's PDR Under N.C.G.S. § 7A-31 (COA19-1048)	Denied **Morgan, J., recused**
263P21	In the Matter of J.U.	1. State's Motion for Temporary Stay (COA20-812) 2. State's Petition for Writ of Supersedeas	1. Allowed 2.
264P21	State v. Isaiah Scott Beck	1. State's Motion for Temporary Stay (COA20-499) 2. State's Petition for Writ of Supersedeas	1. Allowed **07/26/2021** 2.
265P21	State v. Vinston Levi Kearney, Jr.	1. State's Motion for Temporary Stay (COA20-486) 2. State's Petition for Writ of Supersedeas	1. Allowed **07/26/2021** 2.
276A21	State v. Michael Steven Elder	1. State's Motion for Temporary Stay (COA20-215) 2. State's Petition for Writ of Supersedeas	1. Allowed **08/05/2021** 2.
278P21	State v. Fernando Alvarez	1. State's Motion for Temporary Stay (COA20-611) 2. State's Petition for Writ of Supersedeas	1. Allowed **08/06/2021** 2.
279A21	In the Matter of E.M.D.Y.	1. Respondent's Motion for Temporary Stay (COA20-685) 2. Respondent's Petition for Writ of Supersedeas	1. Allowed **08/06/2021** 2.
290P16-2	State v. Michael Eugene Hunt	Def's Pro Se Motion Referencing Conditions of Confinement and Compassionate Release (COAP16-493)	Dismissed **07/26/2021**

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297PA16-3	In the Matter of the Adoption of C.H.M., a minor child	1. Petitioners' Motion for Temporary Stay (COA21-196) 2. Petitioners' Petition for Writ of Supersedeas 3. Respondent-Father's Motion to File Under Seal 4. Respondent-Father's Motion to Take Judicial Notice	1. Allowed **07/07/2021** 2. 3. Allowed **07/09/2021** 4. Allowed **07/09/2021**
304P20-3	Clyde Junior Meris v. Guilford County Sheriffs	Plt's Pro Se Motion for Civil Action	Dismissed
306P18-5	Hunter F. Grodner v. Andrzej Grodner (now Andrew Grodner)	1. Def's Second Pro Se Motion to Clarify this Court's Dismissal Order From 10 March 2021 2. Def's Pro Se Motion to Clarify this Court's Denial of Def's Petition for Writ of Supersedeas Filed 5 March 2021 and Denied on 10 March 20	1. Dismissed 2. Dismissed
323A92-12	State v. Charles Alonzo Tunstall	1. Def's Pro Se Motion for Notice of Appeal (COAP18-823) 2. Def's Pro Se Motion for PDR 3. Def's Pro Se Petition in the Alternative for Writ of Certiorari to Review Order of the COA 4. Def's Pro Se Motion to Appoint Counsel	1. Dismissed 2. Dismissed 3. Dismissed 4. Dismissed as moot
325P14-2	State v. Doran Arthur Atkins	1. Def's Pro Se Motion for Reconsideration 2. Def's Pro Se Motion to Take Judicial Notice	1. Dismissed 2. Dismissed
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	Amicus Curiae's Motion to Admit Professor Marcus Gadson Pro Hac Vice	Allowed **07/06/2021** **Berger, J., recused**

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345PA19	Crazie Overstock Promotions, LLC v. State of North Carolina; and Mark Senter, in his official capacity as Branch Head of the Alcohol Law Enforcement Division	Plt's Petition for Rehearing	Denied **07/20/2021** **Berger, J., recused**
356P20	Steven C. George v. Lowe's Companies, Inc.; Lowe's Home Centers, LLC; and Lowe's Home Improvement, LLC	Plt's PDR Under N.C.G.S. § 7A-31 (COA19-958)	Denied
359A20	Bruce Allen Bartley v. City of High Point and Matt Blackman, in his Official Capacity as a Police Officer with the City of High Point, and Individually	1. Def's (Matt Blackman) Notice of Appeal Based Upon a Dissent (COA19-1127) 2. Def's PDR as to Additional Issues	1. --- 2. Denied

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368A20	Reynolds American Inc. v. Third Motion Equities Master Fund Ltd., Magnetar Capital Master Fund, Ltd., Spectrum Opportunities Master Fund Ltd., Magnetar Fundamental Strategies Master Funds Ltd., Magnetar MSW Master Fund Ltd., Mason Capital Master Fund, L.P., BlueMountain Credit Alternatives Master Fund L.P., BlueMountain Foinaven Master Fund L.P., BlueMountain Guadalupe Peak Fund L.P., BlueMountain Summit Trading L.P., BlueMountain Montenvers Master Fund SCA SICAV-SIF, and Barry W. Blank Trust and Anton S. Kawalsky, Trustee for the benefit of Anton S. Kawalsky Trust UA 9/17/2015, Canyon Blue Credit Investment Fund L.P., the Canyon Value Realization Master Fund, L.P., Canyon Value Realization Fund, L.P., Amundi Absolute Return Canyon Fund P.L.C., CanyonSL Value Fund, L.P., Permal Canyon IO Ltd., Canyon Value Realization Mac 18 Ltd.	1. Plt's (Reynolds American, Inc.) Motion to Admit Nicole D. Valente Pro Hac Vice 2. Defs' (Magnetar Capital Master Fund, Ltd., et al.) Motion to Admit J. Peter Shindel, Jr. Pro Hac Vice	1. Allowed **07/26/2021** 2. Allowed **07/30/2021**
405P18-2	In the Matter of E.W.P.	Respondent's PDR Under N.C.G.S. § 7A-31 (COA20-181)	Denied

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407P20-3	Archie M. Sampson v. Erik Hooks, Secretary of Department of Public Safety	1. Petitioner's Pro Se Motion for Complaint Claim 2. Petitioner's Pro Se Motion for Complaint Claim	1. Dismissed 2. Dismissed
415P19-3	State v. Scott Randall Reich	Def's Pro Se Motion for Review and Response	Dismissed **Berger, J., recused**
440P11-3	K^3 Asia Adventures v. Krispy Kreme Doughnut Corporation, and Krispy Kreme Doughnuts, Inc.	1. Plt's PDR Under N.C.G.S. § 7A-31 (COA19-314) 2. Plt's Motion to Admit Ben C. Broocks Pro Hac Vice 3. Defs' Conditional PDR Under N.C.G.S. § 7A-31 4. Barbara A. Jackson's Motion to Withdraw as Counsel 5. Barbara A. Jackson's Amended Motion to Withdraw as Counsel	1. Denied 2. Dismissed as moot 3. Dismissed as moot 4. Dismissed as moot 5. Dismissed as moot **Ervin, J., recused**
455PA20	State v. Michael Ray Waterfield	1. Pacific Legal Foundation's Motion for Leave to File Amicus Brief 2. Amicus Curiae's (Pacific Legal Foundation) Motion to Admit Oliver J. Dunford Pro Hac Vice	1. Allowed **06/17/2021** 2. Allowed **06/18/2021**
463P20	State v. Jason Eugene Bolton	Def's PDR Under N.C.G.S. § 7A-31 (COA19-1145)	Denied
468P20	State v. Vinson Shane-Hill	Def's PDR Under N.C.G.S. § 7A-31 (COA19-812)	Denied
479P20	State v. Marie Elizabeth Butler	1. Def's Motion for Temporary Stay (COA19-939) 2. Def's Petition for Writ of Supersedeas 3. Def's PDR Under N.C.G.S. § 7A-31	1. Allowed **11/18/2020** Dissolved **08/10/2021** 2. Denied 3. Denied **Berger, J., recused**

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

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487P20	State v. Kedar Aziz Muhammad	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA19-590) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. --- 2. Denied 3. Allowed
499P20	In the Matter of the Foreclosure of a Deed of Trust Executed by Noorullah Noori to William J. Barham, Trustee for Nabil Algafni Dated 01-14-2017 and Recorded 01-19 -2017 at Book 4897, Page 938, Johnston County Registry, Luther D. Starling, Jr., Substitute Trustee	1. Respondent's (Noorullah Noori) Pro Se Motion for PDR (COA20-728) 2. Lender's Motion for Sanctions	1. Denied 2. Denied
504P04-5	State v. Marion Beasley, Sr.	Def's Pro Se Motion for Writ of Supervisory Control	Dismissed
512P20	State v. Abu Bakr Rahman	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA19-928) 2. Def's PDR Under N.C.G.S. § 7A-31	1. Dismissed *ex mero motu* 2. Denied
524P20	State v. William Charles Melton	Def's PDR Under N.C.G.S. § 7A-31 (COA20-257)	Denied
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** Dissolved **08/10/2021** 2. Denied 3. Denied
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 as to Additional Issues	1. Allowed **12/31/2020** 2. Allowed 3. --- 4. Allowed **Berger, J., recused**

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

13 AUGUST 2021

629P01-9	State v. John Edward Butler	1. Def's Pro Se Motion for Writ of Mandamus	1. Denied
		2. Def's Pro Se Motion for Service Members Civil Relief Act	2. Dismissed
		3. Def's Pro Se Motion for Appointment of Counsel	3. Dismissed as moot
		4. Def's Pro Se Motion for Appeal Bond	4. Dismissed as moot
		5. Def's Pro Se Motion to Appeal Habeas Corpus	5. Denied
		6. Def's Pro Se Motion for Petition to Sue	6. Dismissed
		7. Def's Pro Se Motion to Appeal Cases from COA	7. Dismissed

IN RE A.C.

[378 N.C. 377, 2021-NCSC-91]

IN THE MATTER OF A.C.

No. 446A20

Filed 27 August 2021

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

After disregarding numerous findings of fact that were mere recitations of testimony or that did not accurately reflect the record evidence, the Supreme Court nevertheless affirmed the trial court's order terminating a mother's parental rights to her son based on neglect (N.C.G.S. § 7B-1111(a)(1)) where the remaining findings were supported by clear, cogent, and convincing evidence regarding the mother's limited progress on various aspects of her case plan, her continued contact with the child's father despite his acts of abusive behavior, and her inability to grasp or tendency to minimize the severity of the issues preventing reunification with her child. The trial court did not impermissibly shift the burden of proof to the mother, it adequately considered evidence of changed circumstances between the child's removal and the termination hearing, and it supported its conclusion that there was a likelihood of repetition of neglect with sufficient findings of fact.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from orders entered on 13 July 2020 by Judge Marion M. Boone in District Court, Stokes County. This matter was calendared for argument in the Supreme Court on 21 June 2021, but was determined on the record and briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

Jennifer Oakley Michaud for petitioner-appellee Stokes County Department of Social Services.

James N. Freeman, Jr., for appellee Guardian ad Litem.

Jeffrey L. Miller for respondent-appellant mother.

ERVIN, Justice.

IN RE A.C.

[378 N.C. 377, 2021-NCSC-91]

¶ 1 Respondent-mother Krissy M. appeals from the trial court's orders terminating her parental rights in A.C.[1] After careful review of the trial court's termination orders in light of the record and the applicable law, we conclude that those orders should be affirmed.

¶ 2 On 13 July 2018, the Stokes County Department of Social Services filed a petition alleging that Arty was a neglected juvenile. In its petition, DSS alleged that it had received a child protective services report on 29 June 2018 stating that Arty, who had just been born, was in the neonatal intensive care unit as the result of possible drug exposure and respiratory distress. According to DSS, respondent-mother had admitted to having taken Subutex, which she purchased "off the street," and was suffering from withdrawal symptoms that included being "jittery[,] [s]haky, [and] sweaty." After expressing concern that respondent-mother "may be using something else now," DSS stated that she was "taking Subutex in the hospital and it[']s now prescribed by a doctor." Although a drug test that respondent-mother had taken while hospitalized had produced negative results, DSS asserted that Arty's umbilical cord had tested positive for the presence of amphetamines and Subutex at the time of his birth. DSS further alleged that respondent-mother had told social workers "that she had been getting Subutex off the street for the last four years due to her 'getting hooked' on pain medication after a car accident" and that she had been taking Adderall to help with her depression despite the fact that she did not have a prescription authorizing her to use that substance. On the same date upon which the petition was filed, DSS obtained the entry of an order providing that Arty should be taken into nonsecure custody.

¶ 3 After a hearing held on 27 September 2018, Judge Gretchen H. Kirkman, with respondent-mother's consent, entered an order on 30 October 2018 determining that Arty was a neglected juvenile. On 30 October 2018, Judge Kirkman entered a separate dispositional order providing that Arty would remain in DSS custody and establishing a primary permanent plan for Arty of reunification with a parent and a concurrent permanent plan of guardianship. In addition, Judge Kirkman ordered that respondent-mother enter into a Family Services Case Plan and comply with its provisions. Finally, Judge Kirkman authorized respondent-mother to have four hours of supervised visitation with Arty each week on the condition that she provide negative drug screens.

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1. A.C. will be referred to throughout the remainder of this opinion as "Arty," which is a pseudonym used for ease of reading and to protect the juvenile's privacy.

¶ 4 After a review hearing held on 28 March 2019, Judge Thomas Langan entered an order on 10 May 2019 in which he found that respondent-mother was living with her own mother, that she was struggling with anxiety and depression, that these mental health difficulties were interfering with her efforts to satisfy the requirements of her case plan, that she had not been attending parenting classes or receiving mental health treatment since December 2018, and that she had not had a domestic violence assessment. As a result, Judge Langan ordered respondent-mother to comply with the requirements of her case plan and to cooperate with the drug screening process.

¶ 5 In the aftermath of a review hearing held on 8 August 2019, the trial court entered a permanency-planning order on 10 September 2019 in which it found that respondent-mother continued to live with her mother, continued to struggle with anxiety and depression, and had not attended parenting classes or mental health treatment since December 2018 until restarting treatment in May 2019. In addition, the trial court found that respondent-mother had refused to participate in the drug screening process, had failed to appear for the purpose of providing a sample to be screened in December and January, had not been screened for drugs from December 2018 through 22 March 2019, had failed to appear for a scheduled drug screen on 10 June 2019, and had admitted to having taken Adderall that was purchased unlawfully. The trial court further found that respondent-mother had failed to participate in a second psychological evaluation that she had been ordered to obtain after reporting that she had ceased making any effort to satisfy the requirements of her case plan as the result of anxiety and depression. Moreover, the trial court also found that respondent-mother had reported that she had been involved in an incident of domestic violence during which Arty's father had become violent and which had led her to obtain the entry of a domestic violence protective order against Arty's father. Finally, the trial court found that respondent-mother had failed to demonstrate that she was employed. As a result, the trial court changed Arty's primary permanent plan to one of adoption.

¶ 6 Following a permanency-planning hearing held on 10 October 2019, the trial court entered an order on 7 November 2019 determining that respondent-mother was obtaining housing with Arty's father, had completed a domestic violence support group, had completed parenting classes, and had obtained a psychological evaluation. On the other hand, the trial court also found that respondent-mother continued to either refuse to participate in the drug screening process or to fail to appear upon occasions when she was requested to provide a sample for screening and that she had tested positive for the presence of

Subutex and methamphetamines on 4 September 2019. In addition, the trial court found that respondent-mother had failed to attend Arty's medical appointments.

¶ 7 On 7 November 2019, DSS filed a motion seeking to have respondent-mother's parental rights in Arty terminated on the basis of neglect, N.C.G.S. § 7B-1111(a)(1) (2019); willful failure to make reasonable progress toward correcting the conditions that had led to Arty's removal from her care, N.C.G.S. § 7B-1111(a)(2); and dependency, N.C.G.S. § 7B-1111(a)(6). On 13 July 2020, the trial court entered an adjudicatory order determining that respondent-mother's parental rights in Arty were subject to termination on the basis of all three grounds for termination alleged in the termination motion and a separate dispositional order determining that the termination of respondent-mother's parental rights would be in Arty's best interests. As a result, the trial court terminated respondent-mother's parental rights in Arty.[2] Respondent-mother noted an appeal to this Court from the trial court's termination orders.[3]

¶ 8 As an initial matter, respondent-mother contends that the trial court erred by determining that her parental rights in Arty were subject to termination. A termination of parental rights proceeding consists of an adjudicatory stage and a dispositional stage. N.C.G.S. §§ 7B-1109, -1110 (2019); *In re Montgomery*, 311 N.C. 101, 110 (1984). At the adjudicatory stage, the petitioner bears the burden of proving by "clear, cogent, and convincing evidence" that one or more of the grounds for termination set out in N.C.G.S. § 7B-1111(a) exist. N.C.G.S. § 7B-1109(f). We review 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. at 111 (citing *In re Moore*, 306 N.C. 394, 404 (1982)). "[A]n adjudication of any single ground in N.C.G.S. § 7B-1111(a) is sufficient to support a termination of parental rights." *In re E.H.P.*, 372 N.C. 388, 395 (2019).

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2. Although the trial court terminated the parental rights of Arty's father as well, he did not note an appeal from the trial court's termination orders and is not a party to the proceedings before this Court.

3. The notice of appeal that respondent-mother filed in this case was directed to the Court of Appeals rather than this Court. In view of the seriousness of the consequences of the trial court's orders for both respondent-mother and Arty and the fact that neither DSS nor the guardian ad litem have objected to the sufficiency of respondent-mother's notice of appeal, we elect to treat the record on appeal as a certiorari petition and allow that petition in order to reach the merits of respondent-mother's challenge to the lawfulness of the trial court's termination orders. *Anderson v. Hollifield*, 345 N.C. 480, 482 (1997).

¶ 9 A parent's parental rights in a child are subject to termination pursuant to N.C.G.S. § 7B-1111(a)(1) in the event that the trial court concludes that the parent has neglected the juvenile within the meaning of N.C.G.S. § 7B-101. N.C.G.S. § 7B-1111(a)(1). A neglected juvenile is defined, in pertinent part, as a juvenile "whose parent, guardian, custodian, or caretaker does not provide proper care, supervision, or discipline; . . . or who lives in an environment injurious to the juvenile's welfare." N.C.G.S. § 7B-101(15) (2019). As we have recently explained,

> [t]ermination of parental rights based upon this statutory ground requires a showing of neglect at the time of the termination hearing or, if the child has been separated from the parent for a long period of time, there must be a showing of a likelihood of future neglect by the parent. When determining whether such future neglect is likely, the district court must consider evidence of changed circumstances occurring between the period of past neglect and the time of the termination hearing.

In re R.L.D., 375 N.C. 838, 841 (2020) (cleaned up) (first quoting *In re D.L.W.*, 368 N.C. 835, 843 (2016); then quoting *In re Z.V.A.*, 373 N.C. 207, 212 (2019).

¶ 10 In determining that respondent-mother's parental rights in Arty were subject to termination on the basis of neglect, the trial court took judicial notice of the file in the underlying juvenile neglect and dependency proceeding and found that Arty had been adjudicated to be a neglected juvenile on 27 September 2018. In addition, the trial court found that respondent-mother had agreed to a case plan on 19 September 2018 that required her to (1) attend and successfully complete an approved parenting class; (2) complete a parenting psychological evaluation, a mental health evaluation, a domestic violence assessment, and a substance abuse assessment and comply with all treatment-related recommendations; (3) participate in a random drug screening process; (4) communicate with DSS on a weekly basis; (5) maintain a legal and stable source of income for a period of at least three months; and (6) obtain and maintain stable housing for a period of at least three months. Although the trial court did find that respondent-mother had made some progress toward satisfying the requirements of her case plan, it also found, however:

> 36. That [respondent-mother] stated to Dr. Schaeffer during her psychological evaluation that she had

broken up with the father and that she didn't understand why he was listed as an aggressor in a report.

. . . .

38. That [respondent-mother] appears to have "broken up" with the father at least three different times throughout the time [Arty] has been in the care of Stokes DSS.

. . . .

42. That [respondent-mother] did not appear concerned that the father had not completed any domestic violence counseling.

. . . .

45. That although [respondent-mother] denie[d] drug use, the drug screens presented as Respondent's Exhibit 2 still list that [respondent-mother] is diagnosed with severe opioid use disorder.

. . . .

48. That [respondent-mother] began Mental Health services with The Neill Group two weeks after the Adjudication Hearing in this matter began on March 13th, 2020.

49. That the Court has not heard any evidence regarding any additional Mental Health or Domestic Violence counseling since the last [incidents] of Domestic Violence.

. . . .

54. That although [respondent-mother] states that she does not have a relationship with the father, it is extremely troubling to this Court that the mother is in continued contact with the father and is allowing visitation with her new baby.

. . . .

56. That the Court finds that [respondent-mother] has genuine love and affection for [Arty], but that she does not appear to grasp the severity of

the issues after all of the court hearings and all of the therapy that [she] has engaged in.

57. That [respondent-mother] minimizes her role in the issues leading up to today's hearing and what she needs to do to prevent problems of the past.

58. That even during [respondent-mother's] psychological evaluations the evaluators noted that [she] minimized issues and did not grasp why this was happening to her.

59. That Dr. Bennett specifically stated in [respondent-mother's] psychological evaluation that [respondent-mother] had minimized her mental health and substance abuse issues.

. . . .

65. That prior to March 13th, 2020, [respondent-mother] had missed approximately three months of visitation with [Arty].

. . . .

70. That the juvenile is a neglected juvenile, and that there is a reasonable likelihood of such neglect continuing in[to] the future. More specifically:

. . . .

b. [Respondent-mother] . . . ha[s] failed to show conditions were remedied since the time of removal of the juvenile and therefore it appears likely that such neglect would continue into the foreseeable future.

"Findings of fact not challenged by respondent are deemed supported by competent evidence and are binding on appeal." *In re T.N.H.*, 372 N.C. 403, 407 (2019).

¶ 11 As an initial matter, we consider respondent-mother's contention that many of the findings of fact contained in the trial court's adjudication order should be disregarded because they are nothing more than recitations of the testimony provided by various witnesses. According to well-established North Carolina law, "[r]ecitations of the testimony of each witness *do not* constitute *findings of fact* by the trial judge."

In re N.D.A., 373 N.C. 71, 75 (2019) (alteration in original) (*quoting Moore v. Moore*, 160 N.C. App. 569, 571–72 (2003)). In *In re N.D.A.*, the trial court found as a fact that the father had "*testified* that he had 'attempted to set up visits with the child but could not get any assistance in doing so.' " *Id.* (emphasis added). On appeal, the father argued that the quoted language did not constitute a valid finding of fact because it contained nothing more than a recitation of his own testimony, a contention with which this Court agreed given that the language in question failed to determine whether the relevant portion of the father's testimony was credible. *Id.* As a result, this Court disregarded the language in question in determining the validity of the trial court's termination order. *Id.*

¶ 12 A careful review of the trial court's adjudication order satisfies us that Finding of Fact Nos. 33, 35, 37, 39–41, 43–44, 46–47, 50–53, and 55 are nothing more than recitations of the testimony of various witnesses. Each of these findings states that a witness either "testified," "contends," or "indicated" that something was true. In light of the fact that, in the relevant findings of fact, the trial court simply recited the testimony of various witnesses rather than indicating what actually happened or describing a statement that might constitute an admission by a party or otherwise had relevance because that statement was actually made, these "findings" fail to satisfy the trial court's obligation to evaluate the credibility of the witnesses who testified at the adjudication hearing and to resolve any contradictions that existed in the evidence. As a result, our precedent compels us to disregard these findings of fact in ascertaining whether the trial court did or did not err in determining that respondent-mother's parental rights in Arty were subject to termination on the basis of neglect.

¶ 13 In addition to the findings of fact listed above, respondent-mother contends that Finding of Fact Nos. 54 and 59 should also be disregarded as mere recitations of witness testimony. However, we are not persuaded by respondent-mother's contentions with respect to these findings of fact.

¶ 14 In Finding of Fact No. 54, the trial court stated that, "although [respondent-mother] states that she does not have a relationship with the father, it is extremely troubling to this Court that the mother is in continued contact with the father and is allowing visitation with her new baby." Admittedly, the trial court did point out that respondent-mother had "state[d]" that she was no longer in a relationship with the father. In addition, however, the trial court determined in Finding of Fact No. 54 (1) that respondent-mother continued to have contact with the father and allowed him to have visitation with her new baby and (2) that

her conduct in this regard was "extremely troubling" to the trial court. In our view, both of these statements constitute actual findings of fact rather than simple recitations of witness testimony. *See In re Harris Teeter, LLC*, 271 N.C. App. 589, 611 (stating that "[a] finding of fact is a 'determination reached through logical reasoning from the evidentiary facts' ") (quoting *Barnette v. Lowe's Home Ctrs., Inc.*, 247 N.C. App. 1, 6 (2016))), *cert. denied*, 376 N.C. 544 (2020), *and aff'd on other grounds*, 2021-NCSC-80. As a result, the information contained in Finding of Fact No. 54 relating to respondent-mother's continued contact with Arty's father, her decision to allow Arty's father to visit with her new baby, and the trial court's concern about her conduct is appropriately considered in determining whether respondent-mother's testimony was credible and whether respondent-mother's parental rights in Arty were subject to termination on the basis of neglect.

¶ 15 A careful reading of the trial court's termination order persuades us that Finding of Fact No. 59 must be read in conjunction with Finding of Fact 58, which states "[t]hat[,] even during [respondent-mother's] psychological evaluations[,] the evaluators noted that [respondent-mother] minimized issues and did not grasp why this was happening to her." In stating in Finding of Fact No. 59 "[t]hat Dr. Bennett specifically stated in [respondent-mother's] psychological evaluation that [respondent-mother] had minimized her mental health and substance abuse issues," the trial court was simply pointing to the portion of the record that provided the evidentiary support for Finding of Fact No. 58. As a result, we decline to disregard the essential import of Finding of Fact Nos. 58 and 59, which is that respondent-mother tended to minimize the nature and extent of the difficulties that she faced in attempting to parent Arty.

¶ 16 In addition, respondent-mother attacks the validity of the finding in which the trial court judicially noticed the materials in the underlying neglect and dependency action and incorporated the "file and any findings of fact therefrom within the current order." In support of this contention, respondent-mother points out that "[t]he trial court made broad, general statements of judicial notice and incorporation without specifying precisely what it was using for any specific finding" and argues that "[m]erely incorporating documents by reference is not a sufficient finding of fact." We do not believe that the presence of this language in the trial court's adjudication order constitutes prejudicial error.

¶ 17 As an initial matter, we note that respondent-mother did not object to the trial court's decision to judicially notice the file in the underlying neglect and dependency proceeding. *See In re A.B.*, 272 N.C. App.

13, 16 (2020) (stating that "[a] respondent's failure to object to the trial court's taking judicial notice of the underlying juvenile case files waives appellate review of the issue" (cleaned up) (quoting *In re W.L.M.*, 181 N.C. App. 518, 522 (2007))). In addition, even if respondent-mother had properly preserved her objection to the trial court's decision to judicially notice the materials in the underlying neglect and dependency proceeding for purposes of appellate review, her objection to the trial court's action lacks substantive merit. As this Court has previously recognized, "[a] trial court may take judicial notice of findings of fact made in prior orders, even when those findings are based on a lower evidentiary standard because where a judge sits without a jury, the trial court is presumed to have disregarded any incompetent evidence and relied upon the competent evidence." *In re T.N.H.*, 372 N.C. at 410 (citing *Munchak Corp. v. Caldwell*, 301 N.C. 689, 694 (1981)). On the other hand, however, "the trial court may not rely solely on prior court orders and reports" and must, instead, "receive some oral testimony at the hearing and make an independent determination regarding the evidence presented." *Id.*

¶ 18 Although the trial court did take judicial notice of the record in the underlying neglect and dependency proceeding and incorporated "that file and any findings of fact therefrom within the [adjudication] order," it did not rely solely upon these materials in determining that respondent-mother's parental rights in Arty were subject to termination. Instead, the trial court also received oral testimony during the termination hearing from Katie Fulk, a social worker; respondent-mother; and Jodi Callahan, an addiction specialist employed by Novant Health, who counseled respondent-mother regarding her substance abuse issues. In addition, the trial court made independent factual determinations based upon the evidence admitted at the termination hearing that adequately addressed the matters at issue between the parties. As a result, since the trial court received evidence in the form of oral witness testimony at the adjudication hearing, fully considered this evidence, and made findings of fact delineating its independent evaluation of the record evidence in its adjudication order, we conclude that respondent-mother's challenge to the trial court's decision to take judicial notice of the record developed in the underlying neglect and dependency proceeding lacks merit.

¶ 19 Next, respondent-mother challenges the appropriateness of Finding of Fact Nos. 36 and 38 on the grounds that they lack "a nexus, an anchor in time, or relevance as support for a conclusion on the existence of any ground at the time of the hearing." According to respondent-mother, in light of the trial court's failure to "articulat[e] the connection between a finding and a ground, many [of its] findings are simply statements with

no support for a ground for termination." Once again, we fail to find respondent-mother's argument to be persuasive.

¶ 20 As an initial matter, we hold that both of the challenged findings of fact have ample evidentiary support. In Finding of Fact No. 36, the trial court stated that respondent-mother had told "Dr. Schaeffer during her psychological evaluation that she had broken up with the father and that she didn't understand why he was listed as an aggressor in a report." As the record reflects, respondent-mother acknowledged that DSS had expressed concern about her relationship with Arty's father and that she had told Dr. Schaeffer that Arty's father had a "bad temper" before stating that she did not "know why" Arty's father had been described as an "aggressor" in various reports. In Finding of Fact No. 38, the trial court found that respondent-mother "appears to have 'broken up' with the father at least three different times throughout the time the juvenile has been in" DSS care. According to the record, respondent-mother testified that she had "broke[n] up" with Arty's father right after Christmas in 2019, after previously having ended her relationship with him one year earlier. In addition, the record reflects that respondent-mother admitted that, in April 2019, Arty's father had intimidated her; that she had locked herself in a bathroom in response to his conduct; and that, after she had done so, Arty's father broke down the door and forced his way into the bathroom, causing her to obtain the entry of a domestic violence protective order against him. As a result, the relevant findings of fact are supported by clear, cogent, and convincing record evidence and appear to us to have been relevant to the issue of whether respondent-mother's parental rights in Arty were subject to termination on the basis of neglect given that they demonstrated the continued existence of contact between respondent-mother and Arty's father despite his abusive behavior, a fact that tends to show her failure to understand and to address the issue of domestic violence.

¶ 21 Similarly, respondent-mother challenges a number of other findings as lacking in sufficient record support. First, respondent-mother argues that the record fails to provide sufficient support for Finding of Fact No. 42, in which the trial court found that respondent-mother "did not appear concerned that the father had not completed any domestic violence counselling." The record contains ample support for an assertion that respondent-mother and Arty's father had a history of domestic violence. At the termination hearing, respondent-mother testified that, during the first year of her relationship with Arty's father and while she was pregnant with Arty, she "started noticing that he might have like some anger issues, . . . but I stayed with him in a chance to make our family work.

He's gotten worse over the time." In addition, as we have already noted, respondent-mother had reported an incident of domestic violence between herself and Arty's father that had occurred in April 2019 and that had (1) caused Arty's father to go on "a three-day high, which led to his being violent" and had (2) motivated respondent-mother to obtain the entry of a domestic violence protective order directed against Arty's father. In spite of this history of domestic violence, however, respondent-mother subsequently reconciled with Arty's father. At a permanency-planning hearing held on 10 October 2019, respondent-mother reported that she had established housing with Arty's father in Winston-Salem. In addition, respondent-mother acknowledged at the termination hearing that she continued to allow the father to visit with her new baby. When asked at the termination hearing whether, as a victim of domestic violence, she had concerns about the fact that Arty's father was having visits with her child, respondent-mother testified that her "only concern" was Arty's father's "substance abuse problems." As a result, the record contains ample support for Finding of Fact No. 42. *See In re D.L.W.*, 368 N.C. at 843 (stating that the trial judge is required to consider all of the evidence, to pass upon the credibility of the witnesses, and to determine the reasonable inferences to be drawn from the evidence).

¶ 22 In addition, respondent-mother challenges the sufficiency of the record support for Finding of Fact No. 45, which states that, "although [respondent-mother] denies drug use, the drug screens presented as Respondent's Exhibit 2 still list that the mother is diagnosed with severe opioid use disorder." In support of this contention, respondent-mother states that, since her drug screen results demonstrate that she had not engaged in improper drug use since July 2018, the fact that the drug screen summaries that were admitted into evidence at the termination hearing continued to "list" a diagnosis of severe opioid use disorder constitutes a misrepresentation of the evidence by implying that she has a new or ongoing substance abuse or disorder.

¶ 23 As the trial court's findings reflect, the drug screen summaries indicate that, throughout the relevant period of time, respondent-mother was diagnosed as having an "[o]pioid use disorder, severe." For that reason, the specific finding that the trial court actually made has sufficient evidentiary support. *In re D.L.W.*, 368 N.C. at 843. On the other hand, given the absence of any evidence tending to show what, if anything, the continued existence of this diagnosis reflects and what was necessary in order for this diagnosis to be deleted and the absence of any findings that respondent-mother had tested positive for the presence of unlawful drugs or exhibited a consistent pattern of attempting to evade the

required drug screening process in the period of time immediately prior to the termination hearing, we opt to refrain from considering Finding of Fact No. 45 in determining whether the trial court's findings support its conclusion that respondent-mother's parental rights in Arty were subject to termination on the basis of neglect. *See In re N.G.*, 374 N.C. 891, 900 (stating that this Court limits its review of findings of fact "to those challenged findings that are necessary to support the trial court's determination . . . that parental rights should be terminated").

¶ 24 Next, respondent-mother challenges the sufficiency of the record support for Finding of Fact No. 49, which states that "the Court has not heard any evidence regarding any additional Mental Health or Domestic Violence counseling since the last [incidents] of Domestic Violence." Although respondent-mother testified at the termination hearing that the last incident of domestic violence in which she was involved with Arty's father had occurred in April 2019, she also claims that, after this date, she had continued to participate in substance abuse counseling at Novant Health, had attended mental health treatment at Novant Health and the Neill Group, and had participated in group sessions that were intended to address domestic violence concerns. A careful review of the record satisfies us that respondent-mother did, in fact, receive mental health counseling at Novant Health after April 2019, with the Novant Health records that were admitted into evidence as Respondent's Exhibit 2 tending to show that respondent-mother saw a physician for treatment of major depressive disorder and panic disorder on 16 May 2019 and that she saw a provider at Novant Health for "[d]epression affecting pregnancy" on 3 October 2019. In addition, DSS concedes that respondent-mother sought domestic violence counseling after April 2019 given that the record contains a certificate of participation dated 9 October 2019 that shows that respondent-mother completed a domestic violence support group.[4] As a result, we will disregard Finding of Fact No. 49 in evaluating the lawfulness of the trial court's determination that respondent-mother's parental rights in Arty were subject to termination on the basis of neglect. *In re S.M.*, 375 N.C. 673, 684 (2020).

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4. DSS contends that, "given that the parents reconciled and separated again by December of 2019, it is not beyond imagining that further instances of domestic violence likely occurred around that time." Although the trial court does have the right to make reasonable inferences from the evidence, "[s]uch inferences, however, 'cannot rest on conjecture or surmise.' " *In re K.L.T.*, 374 N.C. 826, 843 (2020) (quoting *Sowers v. Marley*, 235 N.C. 607, 609 (1952)). The inference that DSS seeks to have us draw from the parents' reconciliation and subsequent separation does not strike us as a reasonable one.

¶ 25 Moreover, respondent-mother argues that Finding of Fact Nos. 57 through 59, which indicate that respondent-mother failed to "grasp" and tended to minimize the extent of her involvement in the difficulties that precluded her reunification with Arty, lack sufficient record support. Respondent-mother's argument to the contrary notwithstanding, however, the record reflects that Dr. Bennett specifically stated in his report that respondent-mother "minimized emotional and psychiatric issues"; that this tendency to minimize the problems that respondent-mother faced "extend[ed] to the potential for domestic violence as she does not appear to understand that the [April 2019] incident . . . would be considered domestic violence"; and that respondent-mother tended to minimize her substance abuse problems. Although respondent-mother points out that Dr. Bennett's report was the only evidence upon which these findings could possibly rest, the report in question provides ample support for the challenged portions of Finding of Fact Nos. 57 through 59, with it being the province of the trial court to evaluate the credibility of the evidence and to determine the reasonableness of the inferences that should be drawn from that evidence. *In re D.L.W.*, 368 N.C. at 843. Thus, we reject this aspect of respondent-mother's challenge to the lawfulness of the trial court's order.

¶ 26 Furthermore, respondent-mother contends that Finding of Fact No. 65, in which the trial court stated that, "[p]rior to March 13th 2020, [respondent-mother] had missed approximately three months of visitation with [Arty]," fails "to account for those reasonable and excusable justifications consistent with the missed visits." Respondent-mother does not, however, argue that she did not miss the visits in question. In addition, the trial court has the authority, in the exercise of its responsibility as the finder of fact, to refrain from accepting any justifications or explanations that respondent-mother offered for missing these visits. *See In re J.T.C.*, 273 N.C App. 66, 70 (2020) (stating that "[i]t is well-established . . . that '[c]redibility, contradictions, and discrepancies in the evidence are matters to be resolved by the trier of fact, here the trial judge, and the trier of fact may accept or reject the testimony of any witness' " (second alteration in original) (quoting *Smith v. Smith*, 89 N.C. App. 232, 235 (1988)), *aff'd per curiam*, 376 N.C. 642 (2021). As a result, the trial court did not commit any error of law in making Finding of Fact No. 65.

¶ 27 In Finding of Fact No. 71, the trial court stated that the allegations set out in the termination motion had "been proven by clear, cogent, and convincing evidence." Although respondent-mother appears to contend that the trial court erred by making Finding of Fact No. 71 on the

grounds that this finding involves an erroneous application of the legal principles governing the issue of judicial notice, the challenged finding of fact is nothing more than a statement of the applicable standard of proof. *See* N.C.G.S. § 7B-1109(f) (providing that, at the adjudicatory portion of a termination of parental rights proceeding, "[t]he burden . . . shall be upon the petitioner or movant and all findings of fact shall be based on clear, cogent, and convincing evidence"); *see also In re B.L.H.*, 376 N.C. 118, 127 (2020) (holding that, while the trial court failed to state the required standard of proof in the written termination order, its oral statement that its findings rested upon "clear, cogent, and convincing" evidence satisfied the requirements of N.C.G.S. § 7B-1109(f)).

¶ 28 Similarly, in Finding of Fact No. 72, the trial court stated that "any additional allegations of the Motion for Termination of Parental Rights not specifically laid out [in its previous findings were incorporated into its adjudicatory order] as Findings of Fact." According to respondent-mother, the trial court erred by making this finding of fact on the theory that the trial court is required to find the facts specifically rather than simply incorporating a large body of findings from some other document by reference and on the grounds that a trial court cannot make adequate findings of fact by simply reciting the allegations set out in a termination motion. *See In re Harton*, 156 N.C. App. 655, 660 (2003) (stating that, "[w]hen a trial court is required to make findings of fact, it must make the findings of fact specially" and, instead of "simply recit[ing] allegations," "must through processes of logical reasoning from the evidentiary facts find the ultimate facts essential to support the conclusions of law" (cleaned up) (first quoting N.C.G.S. § 1A-1, Rule 52(a)(1) (2001); then quoting *In re Anderson*, 151 N.C. App. 94, 96 (2002))). We do not find respondent-mother's argument to be persuasive.

¶ 29 As this Court has previously stated, "[t]he requirement for appropriately detailed findings is . . . 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 (1980) (quoting *Montgomery v. Montgomery*, 32 N.C. App. 154, 158 (1977)). A careful review of the trial court's adjudication order reveals that, rather than simply reciting the allegations set out in the termination motion, the trial court made "sufficient additional findings of fact which indicate the trial court considered the evidence presented at the hearing," *In re S.C.R.*, 217 N.C. App. 166, 169 (2011) (quoting *In re O.W.*, 164 N.C. App. 699, 702 (2004)), with this case being readily distinguishable from *In re S.C.R.*, in which the trial court erroneously made only "one additional

finding of fact beyond those incorporated from the petition," resulting in the entry of an order that was, as the Court of Appeals determined, insufficient to permit a "determin[ation] that the judgment is adequately supported by competent evidence." *Id.* at 170 (quoting *Montgomery*, 32 N.C. App. at 156–57). Instead, the trial court made over seventy findings of fact in the adjudication order that is at issue in this case. Even though, as we have already noted, a number of the trial court's findings were deficient for various reasons, the remaining findings are sufficient to permit meaningful appellate review. *Cf. In re K.R.C.*, 374 N.C. 849, 861 (2020) (concluding that this Court was "simply unable to undertake meaningful appellate review of the trial court's decision based upon a series of evidentiary findings which [were] untethered to any ultimate facts which undergird an adjudication pursuant to N.C.G.S. § 7B-1111(a) or to any particularized conclusions of law which would otherwise explain the trial court's reasoning"). *See also In re Z.D.*, 258 N.C. App. 441, 444 (2018) (stating that, in order for an appellate court to conduct a meaningful review, a "trial court must make *specific findings* of the ultimate facts established by the evidence, admissions and stipulations which are determinative of the questions involved in the action and essential to support the conclusions of law reached" (internal quotation marks omitted) (quoting *Quick v. Quick*, 305 N.C. 446, 452 (1982))); *In re A.B.*, 245 N.C. App. 35, 44–45 (2016) (stating that, "[a]lthough finding of fact 13 certainly includes some 'unoriginal prose [,]' . . . the trial court made 70 findings of fact" and "referred to the allegations from DSS's petitions by reference to subparagraphs a-k in one of seventy findings, so it is clear that the trial court made an independent determination of the facts and did 'more' than merely 'recit[e] the allegations' " (second and fourth alterations in original) (quoting *In re O.W.*, 164 N.C. App. at 702)). As a result, we reject respondent-mother's contention that the trial court erred by incorporating the allegations set out in the termination motion in its termination order.

¶ 30 Next, respondent-mother argues that Finding of Fact No. 70(b), which states that respondent-mother had "failed to show conditions were remedied since the time of removal of the juvenile and therefore it appears likely that such neglect would continue into the foreseeable future" improperly shifted the burden of proof from DSS to respondent-mother by requiring her to "show conditions" had been "remedied" since Arty had been removed from her home. Although respondent-mother is certainly correct in noting that the burden of proof at the adjudication stage of a termination of parental rights proceeding rests upon the petitioner or movant, *see* N.C.G.S. § 7B-1109(f) (stating that "[t]he burden in [an adjudicatory hearing on termination] shall be

upon the petitioner or movant and all findings of fact shall be based on clear, cogent, and convincing evidence"), we do not believe that Finding of Fact No. 70(b) indicates that the trial court impermissibly shifted the burden of proof from DSS to respondent-mother. Instead, we conclude that, "[w]hen viewed in the context of the entire termination order, the trial court's finding is merely an expression of its observation that respondent-mother failed to rebut petitioners' clear, cogent, and convincing evidence that the conditions of [removal had not been remedied]," *In re D.L.A.D.*, 375 N.C. 565, 570 (2020); *see also In re A.R.A.*, 373 N.C. 190, 196 (2019) (stating that "the district court did not improperly shift DSS' burden of proof onto respondent-mother" and had, instead, "simply observed that respondent-mother had failed to rebut DSS' clear, cogent, and convincing evidence that she and the father had not established safe and stable housing for the children"), when viewed in light of its earlier determinations that respondent-mother failed to fully grasp the extent of her mental health problems and the difficulties created by her continued relationship with Arty's father.[5] As a result, we hold that this aspect of respondent-mother's challenge to the trial court's adjudication order has no merit.

¶ 31 Finally, respondent-mother asserts that the record evidence and the trial court's findings of fact fail to support its determination that it was likely that Arty would be neglected in the event that he was returned to respondent-mother's care. We are unable to agree with respondent-mother's contention.

¶ 32 As we have already noted, the trial court erred by making a number of findings of fact that constituted nothing more than recitations of the testimony of various witnesses and by finding, in the absence of sufficient record support, that the record did not contain any indication that respondent-mother had participated in any mental health or domestic violence treatment after the April 2019 incident in which Arty's father committed acts of domestic violence against her. However, "[t]here is nothing impermissible about describing testimony, so long as the court ultimately makes its own findings, resolving any material disputes," *In re T.N.H.*, 372 N.C. at 408 (quoting *In re C.L.C.*, 171 N.C. App. 438, 446 (2005), *aff'd per curiam*, *in part*, *and disc. rev. improvidently*

5. Although respondent-mother challenges the lawfulness of Finding of Fact Nos. 41, 60, 61, and 68 as well, we need not address the arguments that she advanced in support of her contention that the trial court erred by making these findings on the grounds that the findings in question are not necessary to support a conclusion that the trial court's findings support its conclusion that respondent-mother's parental rights were subject to termination on the basis of neglect. *See In re N.G.*, 374 N.C. at 900.

allowed, *in part*, 360 N.C. 475 (2006)), and this Court simply disregards information contained in findings of fact that lack sufficient evidentiary support in determining whether the trial court's findings of fact support a determination that a parent's parental rights in a child are subject to termination. As a result, we will now examine the sufficiency of the trial court's properly made and supported findings of fact for the purpose of ascertaining whether they support a determination that respondent-mother's parental rights in Arty were subject to termination on the basis of neglect, including whether those findings sufficed to show a likelihood of future neglect in the event that Arty was to be returned to respondent-mother's care.

¶ 33 A careful review of the trial court's valid findings of fact establishes that, while respondent-mother made some progress in satisfying the requirements of her case plan, the progress that she did make was extremely limited; that respondent-mother had "broken up" with the father on at least three occasions during the pendency of the underlying neglect and dependency proceeding; that, in spite of her denial that she was still involved in a romantic relationship with Arty's father, respondent-mother continued to have contact with Arty's father and allowed him to visit her new baby; that respondent-mother was not concerned by the fact that Arty's father had failed to complete domestic violence counseling; that, in spite of the fact that respondent-mother had genuine love and affection for Arty, she did not grasp the severity of the difficulties that she faced in seeking to be reunited with him; that respondent-mother minimized the problems that she faced and the significance of the steps that she needed to take in order to prevent these past difficulties from recurring; that respondent-mother was completely dependent upon others for her housing and finances; that respondent-mother had never had stable housing or independent means of support during the pendency of the underlying neglect and dependency proceeding; that respondent-mother missed approximately three months of visitation with Arty; and that respondent-mother had failed to provide any financial support for Arty during the time that he was in DSS custody. In addition, the trial court found that Arty had been adjudicated to be a neglected juvenile in 2018; that respondent-mother had failed to show that the conditions that had led to Arty's removal from her care had been remedied; and that there was a likelihood that the neglect that Arty had experienced would recur in the event that he was returned to respondent-mother's care.

¶ 34 The trial court's properly made findings indicate that Arty had previously been found to be a neglected juvenile. In addition, by finding as a fact that respondent-mother had made some progress toward satisfying

the requirements of her case plan by submitting to psychological evaluations, completing parenting classes, obtaining a domestic violence assessment and completing domestic violence classes, maintaining some level of contact with DSS, participating in substance abuse treatment, participating in a number of drug screens, and submitting to a mental health evaluation, it is apparent that the trial court considered whether respondent-mother's situation had improved between the date upon which Arty entered DSS custody and the date of the termination hearing. *In re Z.V.A.*, 373 N.C. at 212. On the other hand, the trial court also found that future neglect was likely in the event that Arty was returned to respondent-mother's care. In reaching this conclusion, the trial court focused upon the fact that respondent-mother minimized the severity of her parenting-related problems and the extent to which her parenting deficiencies had contributed to Arty's removal from her care, with the trial court having expressed particular concern about the fact that respondent-mother continued to have contact with Arty's father, had reconciled with him on more than one occasion, and was allowing him to visit her new child in spite of his prior history of committing acts of domestic violence against her. *See In re M.C.*, 374 N.C. 882, 889 (2020) (concluding that "respondent's refusal to acknowledge the effect of domestic violence on the children and her inability to sever her relationship with [the father], . . . supports the trial court's determination that the neglect of the children would likely be repeated if they were returned to respondent's care"); *see also In re M.A.*, 374 N.C. 865, 870 (2020) (holding that, even though the father claimed to have made reasonable progress toward satisfying the requirements of his case plan, the trial court's findings relating to his failure to adequately address the issue of domestic violence, which had been the primary reason for the children's removal from the family home, sufficed, "standing alone, . . . to support a determination that there was a likelihood of future neglect"); *In re J.A.M.*, 259 N.C. App. 810, 816 (2018) (holding that, where domestic violence was one of the grounds for the child's removal from the parental home, the mother's denial that she needed help and her continued involvement with the father, who had committed acts of domestic violence against her, "constitute[d] evidence that the trial court could find was predictive of future neglect"). As a result, the trial court did not err by determining that there was a likelihood that the neglect that Arty had previously experienced would be repeated in the event that he was returned to respondent-mother's care and by concluding that respondent-mother's parental rights in Arty were subject to termination based upon neglect pursuant to N.C.G.S. § 7B-1111(a)(1).

¶ 35 A trial court's determination that a parent's parental rights in a child are subject to termination for neglect pursuant to N.C.G.S. § 7B-1111(a)(1) is sufficient, in and of itself, to support the termination of that parent's parental rights. *In re E.H.P.*, 372 N.C. at 395. For that reason, we need not determine whether the trial court erred by determining that respondent-mother's parental rights in Arty were subject to termination for willful failure to make reasonable progress toward correcting the conditions that had led to Arty's placement in DSS custody, N.C.G.S. § 7B-1111(a)(2), or dependency, N.C.G.S. § 7B-1111(a)(6). In addition, we note that respondent-mother has not challenged the lawfulness of the trial court's determination that the termination of her parental rights would be in Arty's best interests. *See* N.C.G.S. § 7B-1110(a). As a result, for all of these reasons, we affirm the trial court's orders terminating respondent-mother's parental rights in Arty.

AFFIRMED.

IN THE MATTER OF A.L.

No. 370A20

Filed 27 August 2021

1. Termination of Parental Rights—grounds for termination—failure to make reasonable progress—drug relapses

The trial court did not err in terminating a mother's parental rights to her daughter for willful failure to make reasonable progress to correct the conditions that led to the child's removal (N.C.G.S. § 7B-1111(a)(2)) based on evidence that the mother's substance abuse continued for at least three and a half years during the pendency of this case. Although the mother argued that relapses for addicts are common and therefore her limited progress was not unreasonable, the court's findings regarding the mother's inability to successfully complete rehabilitation or maintain sobriety for any significant amount of time supported its conclusion that her progress was not reasonable.

2. Native Americans—Indian Child Welfare Act—termination of parental rights order—failure to make proper inquiry

Where the trial court's order terminating a mother's parental rights to her child did not address whether it made the required

inquiry, pursuant to 25 C.F.R. § 23.107(a), regarding whether the child was an Indian child as defined by the Indian Child Welfare Act, and the inquiry did not appear in the record, the matter was remanded for compliance with the Act.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from order entered on 26 February 2020 by Judge William J. Moore in District Court, Robeson County. This matter was calendared in the Supreme Court on 21 June 2021 but determined on the record and briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

J. Edward Yeager, Jr. for petitioner-appellee Robeson County Department of Social Services.

Maggie D. Blair for appellee Guardian ad litem.

Anné C. Wright for respondent-appellant mother.

BERGER, Justice.

¶ 1 Respondent appeals from an order terminating her parental rights in A.L. (Arden).[1] While the trial court properly applied North Carolina law in terminating respondent's parental rights in Arden, this case should be remanded for further proceedings to ensure compliance with the Indian Child Welfare Act.

I. Background

¶ 2 Arden was born January 31, 2015. Arden's birth certificate listed respondent's race as "American Indian". On July 22, 2016, the Robeson County Department of Social Services (DSS) obtained nonsecure custody of Arden and filed a juvenile petition alleging her to be a neglected juvenile.

¶ 3 The petition alleged that DSS received a referral on December 18, 2015, which stated respondent's boyfriend "kicked her out" of the home after realizing she was using drugs. There were concerns that respondent went to her mother's house, where "they were smoking crack and snorting pills." There were also concerns of respondent having seizures because "she smoked so much dope" and of respondent having a seizure while caring for Arden. Respondent admitted to cocaine use twice a week and the use of a non-prescribed pill, Loracet, for back pain.

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

¶ 4 The petition further alleged that on February 16, 2016, respondent agreed to a case plan which required her to complete substance abuse counseling and to follow all recommendations. In late April 2016, respondent was accepted into a substance abuse program at Crystal Lake. By mid-July 2016, respondent had been removed from Crystal Lake's program. On July 18, 2016, respondent informed a DSS social worker that she had smoked "crack" with her mother, sold her food stamps for drugs, and used cocaine with her boyfriend while Arden "was with them but . . . asleep". On July 20, 2016, respondent also informed a DSS social worker that she paid her mother to watch Arden despite knowing that her mother was high. In an order issued July 22, 2016, the trial court found that Arden was a member of a State-recognized tribe and listed her race as "Indian" while ordering DSS to notify the tribe "of the need for nonsecure custody for the purpose of locating relatives or nonrelative kin for placement." The trial court reiterated that Arden was a member of a State-recognized tribe in orders dated August 31, 2016, September 1, 2016, and September 12, 2016.

¶ 5 Following a hearing on September 15, 2016, the trial court entered an order on November 9, 2016, adjudicating Arden to be a neglected juvenile. In a separate disposition order entered November 15, 2016, the trial court found that on August 31, 2016, respondent met with a DSS social worker and agreed to attend substance abuse treatment, participate and successfully complete the inpatient treatment services at Family Treatment Court, and participate in random drug screens. The permanent plan was set as reunification with a concurrent plan of adoption.

¶ 6 Following a permanency planning hearing on May 3, 2017, the trial court entered an order on July 6, 2017, finding that respondent had attended two separate facilities for substance abuse treatment during DSS's involvement. However, respondent had not successfully completed either program and was not seeing any provider to address her issues. The trial court further made findings of fact that respondent needed to address issues including housing, substance abuse, and parenting and mental health concerns.

¶ 7 Following a permanency planning hearing on November 1, 2017, the trial court entered an order on November 29, 2017, finding that on August 8, 2017, respondent entered treatment at Faith Home Recovery in South Carolina and graduated from its program on September 29, 2017. Thereafter, respondent entered residential treatment at Grace Court, and Arden was placed with respondent in a trial home placement.

¶ 8 Following a permanency planning hearing on February 7, 2018, the trial court entered an order on May 23, 2018, finding that on November

4, 2017, Grace Court staff informed a DSS social worker that respondent was testing negative on her random drug screens. On December 15, 2017, a DSS social worker made contact with Family Treatment Court and was informed that respondent was "doing well."

¶ 9 Following a permanency planning hearing on August 1, 2018, the trial court entered an order finding that Arden was placed in a licensed foster home. Respondent had been discharged from Grace Court for "insubordination" on April 6, 2018, and was receiving outpatient services at Southeastern Behavioral Health Services. On June 26, 2018, respondent was present for visitation with Arden at DSS, however, she was subsequently arrested for failure to appear for Family Treatment Court. On June 29, 2018, respondent was discharged from Family Treatment Court for noncompliance after testing positive for cocaine. On July 16, 2018, respondent informed a DSS social worker that she had "used crack . . . last Monday." The trial court changed the permanent plan to adoption with a concurrent plan of reunification with respondent.

¶ 10 On October 24, 2018, DSS filed a petition to terminate respondent's parental rights[2] pursuant to N.C.G.S. § 7B-1111(a)(1), (2), and (3).

¶ 11 Following a permanency planning hearing on February 20, 2019, the trial court entered an order on May 8, 2019, finding that although respondent had attended three inpatient facilities for substance abuse, she had not successfully completed any of the programs. The trial court also found that she was not consistent in attending outpatient services at Southeastern Behavioral Health Services. Respondent continued to admit to cocaine use. On February 1, 2019, respondent entered the Walter B. Jones Center and successfully completed the detox program. She was discharged on February 13, 2019, but she did not follow up with any services after completing the program. The trial court further found that respondent had not completed parenting classes, was not receiving mental health services, and did not have her own housing.

¶ 12 Following a permanency planning hearing on January 15, 2020, the trial court entered an order on March 11, 2020, finding that respondent was currently receiving inpatient treatment at Miracle Hill/Shepherd's Gate. Arden had been in her current foster home since April 6, 2018. Arden's therapist testified that after her monthly visitations with respondent, Arden would suffer from sleep disruption, breakdowns, and outbursts of anger. The trial court subsequently terminated respondent's visitations with Arden.

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2. DSS also sought to terminate the parental rights of Arden's alleged father, and his rights were terminated. But he is not a party to this appeal.

¶ 13 A hearing was held on the petition to terminate respondent's parental rights, and the trial court entered an order on February 26, 2020, concluding that grounds existed to terminate respondent's rights in Arden pursuant to N.C.G.S. § 7B-1111(a)(1), (2), and (3).[3] Despite the trial court's initial orders finding Arden to be a member of a State-recognized tribe, the trial court did not address the Indian Child Welfare Act in the Order on Adjudication, Order on Disposition, or the Order Terminating Respondent's Parental Rights. Respondent appeals.

¶ 14 On appeal, respondent challenges the trial court's determination that grounds existed to terminate her parental rights and argues that the trial court failed to comply with the Indian Child Welfare Act.

II. Discussion

A. Grounds for Termination

¶ 15 **[1]** Here, the trial court found grounds for termination under N.C.G.S. § 7B-1111(a)(1), (2), (3), and (6). Because only one ground is needed to support termination, we will only review termination under N.C.G.S. § 7B-1111(a)(2). *See* N.C.G.S. § 7B-1111(a) ("The court may terminate the parental rights upon a finding of one or more [grounds for termination.]").

¶ 16 "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)). 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)). "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). Unchallenged findings are deemed to be supported by the evidence and are binding on appeal. *In re Z.L.W.*, 372 N.C.

3. The trial court found grounds for termination existed under N.C.G.S. § 7B-1111(a)(6). However, there is no evidence in the record that DSS alleged grounds for termination under this subsection, or that respondent was given notice that termination would proceed pursuant to N.C.G.S. § 7B-1111(a)(6). Given that the petitioner makes no argument on appeal for the validity of this ground, and the lack of record support, we will disregard it during our analysis.

432, 437, 831 S.E.2d 62, 65 (2019). "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).

¶ 17 On appeal, respondent specifically challenges whether the trial court's findings of fact support its conclusion that, under N.C.G.S. § 7B-1111(a)(2), she willfully left Arden "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" had been made in correcting the conditions which led to Arden's removal. Respondent argues that she made reasonable progress to correct the conditions that led to Arden's removal from her home by consistently seeking and engaging in treatment. She asserts that relapses for addicts "are not uncommon or unique, and therefore not unreasonable under the circumstances" and that at the time of the termination hearing, she had been sober and successfully participating in treatment for seven months. Respondent has only challenged the determination that her progress was not reasonable and has not contested any of the underlying findings of fact, so they are binding on appeal. *In re Z.L.W.*, 372 N.C. at 437, 831 S.E.2d at 65.

¶ 18 N.C.G.S. § 7B-1111(a)(2) provides that a trial court may terminate parental rights if "[t]he parent has willfully left the juvenile in foster care or placement outside the home for more than 12 months without showing to the satisfaction of the court that reasonable progress under the circumstances has been made in correcting those conditions which led to the removal of the juvenile." N.C.G.S. § 7B-1111(a)(2) (2019). "[T]he willfulness of a parent's failure to make reasonable progress toward correcting the conditions that led to a child's removal from the family home 'is established when the [parent] had the ability to show reasonable progress, but was unwilling to make the effort.' " *In re L.E.W.*, 375 N.C. 124, 136, 846 S.E.2d 460, 469 (2020) (quoting *In re Fletcher*, 148 N.C. App. 228, 235, 558 S.E.2d 498, 502 (2002)).

¶ 19 This Court has recognized that "parental compliance with a judicially adopted case plan is relevant in determining whether grounds for termination exist pursuant to N.C.G.S. § 7B-1111(a)(2)[.]" *In re B.O.A.*, 372 N.C. at 384, 831 S.E.2d at 313. A trial court "should refrain from finding that a parent has failed to make reasonable progress" in correcting the conditions that led to the children's removal "simply because of his or her failure to fully satisfy all elements of the case plan goals." *Id.* at 385, 831 S.E.2d at 314 (citation and quotation marks omitted). However, "a trial court has ample authority to determine that a parent's 'extremely limited progress' in correcting the conditions leading to removal adequately

supports a determination that a parent's parental rights in a particular child are subject to termination pursuant to N.C.G.S. § 7B-1111(a)(2)[.]" *Id.* (citation omitted).

¶ 20 In its termination order, the trial court made numerous, unchallenged findings of fact to support termination under N.C.G.S. § 7B-1111(a)(2). The trial court found that on December 18, 2015, DSS received a referral regarding respondent's substance abuse and substance use while in Arden's presence. Respondent continued to abuse drugs until at least July 9, 2019, when she admitted to using crack cocaine. Respondent also showed a consistent inability to successfully complete rehabilitation programs over that same time period. Respondent's first attempt at rehabilitation ended on July 14, 2016, when she was kicked out for possessing an energy drink. More recently, in January 2019, she attended a substance abuse treatment group at Southeastern Behavioral Health Services. However, she was still on drugs at the time and admitted on January 22, 2019, that she had used cocaine "a few days ago".

¶ 21 The trial court's extensive findings also demonstrate that Arden was removed from respondent's home in July 2016 due to respondent's substance abuse and substance use while in Arden's presence. The trial court's November 9, 2016, order, which adjudicated Arden to be a neglected juvenile, indicated that respondent entered into a case plan in February 2016 in which she agreed to complete substance abuse counseling and to follow their recommendations.

¶ 22 While respondent entered numerous inpatient and residential programs to address her substance abuse issues up until the time of the termination hearing, she was unable to successfully complete the majority of the programs she entered, failed to maintain sobriety for any meaningful amount of time, and regularly admitted to DSS social workers that she was abusing substances. Her continued abuse of drugs and failure to complete the vast majority of rehabilitation programs she entered demonstrates extremely limited progress at best in correcting the conditions that led to Arden's removal.

¶ 23 As such, despite respondent's good intentions to seek help, respondent failed to improve her situation. *See In re J.S.*, 374 N.C. 811, 815, 845 S.E.2d 66, 71 (2020) (stating that a parent's consistent inability to improve their situation will support a finding of willfulness, regardless of good intentions). Accordingly, respondent's argument has no merit.

¶ 24 Therefore, we conclude that the trial court's unchallenged findings support its conclusion that respondent failed to make reasonable progress under the circumstances to correct the conditions that led to

Arden's removal and that the trial court did not err in determining that respondent's parental rights were subject to termination pursuant to N.C.G.S. § 7B-1111(a)(2). Because only one ground is necessary to support a termination of parental rights, we need not address respondent's challenges to the trial court's conclusion that grounds existed to terminate her parental rights under N.C.G.S. § 7B-1111(a)(1), (3), and (6). *See* N.C.G.S. § 7B-1111(a) ("The court may terminate the parental rights upon a finding of one or more [grounds for termination.]"). In addition, respondent does not challenge the trial court's determination that it was in Arden's best interests that respondent's parental rights be terminated.

B. Indian Child Welfare Act

¶ 25 **[2]** Respondent also contends the trial court erred in failing to comply with its statutory duties under the Indian Child Welfare Act (ICWA).

¶ 26 We recently addressed an argument to this effect in *In re M.L.B.*, 2021-NCSC-51, 377 N.C. 335. This Court recognized that for all child custody proceedings occurring after 12 December 2016, the ICWA imposes a duty on the trial court to "ask each participant . . . whether the participant knows or has reason to know that the child is an Indian child." *Id.* at ¶¶ 13–14 (quoting 25 C.F.R. § 23.107(a)). "Th[is] inquiry is made at the commencement of the proceeding and all responses should be on the record." 25 C.F.R. § 23.107(a). In this matter, as in *In re M.L.B.*, nothing in the record reflects the trial court making this inquiry or the participants' responses. *Id.* at ¶ 18. Therefore, the trial court did not comply with 25 C.F.R. § 23.107(a). Because the trial court did not comply with 25 C.F.R. § 23.107(a), the trial court could not comply with other requirements in the ICWA and could not determine whether the trial court had reason to know Arden is an Indian child. *See In re M.L.B.*, 2021-NCSC-51 ¶ 18; § 25 C.F.R. 23.107(c) ("A court, upon conducting the inquiry required in paragraph (a) of this section, has reason to know that a child involved in an emergency or child-custody proceeding is an Indian child if . . . .").

¶ 27 DSS and the Guardian ad Litem argue that the ICWA does not apply in this case as the ICWA addresses federally recognized tribes of which the Lumbee tribe in Robeson County is not. We disagree in part. The ICWA imposes a duty on the trial court to inquire of participants as set forth in 25 C.F.R. § 23.107(a) in all child-custody cases, but whether the other provisions of the ICWA apply are triggered by whether the trial court has reason to know that the child is an Indian child as defined in the ICWA. *See* 25 C.F.R. § 23.107. The ICWA defines Indian child to only include those eligible for membership in a tribe recognized for services by the Secretary of the Bureau of Indian Affairs of the United States.

25 U.S.C. § 1903(4), (8). DSS and the Guardian ad Litem are correct that the Lumbee tribe is not a tribe recognized for services by the Secretary of the Bureau of Indian Affairs of the United States. Indian Entities Recognized by and Eligible to Receive Services from the United States Bureau of Indian Affairs, 86 Fed. Reg. 7,554, 7,556 (Jan. 29, 2021). Thus, the trial court's non-compliance with 25 C.F.R. § 23.107(a) would not be prejudicial if Arden is only eligible for membership in the Lumbee tribe, which is a state-recognized but not a federally recognized tribe.

¶ 28 As the determination of whether there is reason to know that Arden is an Indian child cannot be made on the record before us, we remand to the trial court. On remand the trial court "must ask each participant . . . whether the participant knows or has reason to know that [Arden] is an Indian child" on the record and receive the participants' response on the record. *See* 25 C.F.R. § 23.107(a). If there is reason to know that Arden is an Indian child, the trial court must comply with 25 C.F.R. § 23.107(b) and conduct a new hearing on termination of respondent's parental rights. DSS must also comply with 25 U.S.C. § 1912(a) and 25 C.F.R. § 23.111(d) as the party seeking termination of parental rights. If there is not a reason to know that Arden is an Indian child, such as if Arden is only eligible for membership in the Lumbee tribe, then the trial court should enter an order to this effect and the termination of respondent's parental rights order to Arden signed February 25, 2020, remains undisturbed.

¶ 29 Accordingly, while we reject respondent's challenge to the termination-of-parental-rights order as the findings of fact support the conclusion of law that a ground for termination of parental rights exist, we hold that this case, given the inadequacy in the record, should be remanded to the trial court for compliance with the ICWA.

AFFIRMED IN PART AND REMANDED.

IN RE A.P.W.

[378 N.C. 405, 2021-NCSC-93]

IN THE MATTER OF A.P.W., A.J.W., H.K.W.

No. 418A20

Filed 27 August 2021

1. Child Abuse, Dependency, and Neglect—permanent plan—ceasing reunification efforts—statutory requirements—sufficiency of findings

The trial court did not err by eliminating reunification from the permanent plan for three children where, although the court's order did not use the precise language found in N.C.G.S. § 7B-906.1 and 7B-906.2, its findings—which detailed the parents' lack of progress and minimal engagement with their case plans—addressed the substance of those statutes and supported its determination that the return of the children to their parents would be contrary to the children's health, safety, and general welfare and that there were no realistic prospects for reunification. With regard to the father, additional findings contained in the orders terminating the parents' rights to their children cured any deficiency in the permanency planning order.

2. Termination of Parental Rights—grounds for termination—willful failure to pay a reasonable portion of cost of care—voluntary support agreement

The trial court did not err by terminating a mother's parental rights to her three children on the basis that she willfully failed to pay a reasonable portion of the cost of the children's care (N.C.G.S. § 7B-1111(a)(3)), where the mother signed a voluntary support agreement in which she agreed to pay $112.00 per month and she had past periods of employment, but during the determinative six-month period immediately preceding the filing of the termination petition, she was unemployed, paid nothing toward the cost of the children's care, and never moved to modify the support agreement.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) and on writ of certiorari pursuant to N.C.G.S. § 7A-32(b) from orders entered on 4 March 2019 by Judge David V. Byrd and on 30 June 2020 by Judge Jeanie R. Houston in District Court, Wilkes County. This matter was calendared in the Supreme Court on 21 June 2021 but determined on the record and briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

IN RE A.P.W.

[378 N.C. 405, 2021-NCSC-93]

Vannoy, Colvard, Triplett & Vannoy, P.L.L.C., by Daniel S. Johnson, for petitioner-appellee Wilkes County Department of Social Services.

Michelle FormyDuval Lynch for appellee Guardian ad Litem.

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

Anné C. Wright for respondent-appellant mother.

BERGER, Justice.

¶ 1 Respondent-mother and respondent-father appeal from the trial court's orders terminating their parental rights in the minor children "Ava," born on January 16, 2014, "Aiden," born on June 16, 2012, and "Hunter," born on February 14, 2011.[1] In an order entered on December 18, 2020, this Court also allowed respondents' joint petition for writ of certiorari to review the trial court's March 4, 2019 permanency planning order eliminating reunification from the children's permanent plan. *See* N.C.G.S. § 7B-1001(a1)(2), (a2) (2019); *see also* N.C. R. App. P. 21(a)(1) (authorizing certiorari review "when the right to prosecute an appeal has been lost by failure to take timely action[.]"). We now affirm the trial court's orders with regard to respondent-mother and respondent-father.

I. Procedural History

¶ 2 On January 2, 2017, the Wilkes County Department of Social Services (DSS) received a child protective services (CPS) report stating that Ava, Aiden, and Hunter's home lacked heat and running water and had holes in the floor. The same day, law enforcement came to the residence to investigate a reported robbery in which a man wearing a ski mask brandished a toy gun while attempting to steal medication belonging to a friend of respondent-mother. Officers found drug paraphernalia in the home, and two of the children identified respondent-father as the robber. Law enforcement reported finding used hypodermic needles in the home, raising "concerns about improper supervision and ongoing substance abuse." DSS was notified that day that "mom and the children resided in a home with no running water or heat and holes in the f1oor." In subsequent drug screens, respondent-mother tested positive for THC

1. We use these pseudonyms to protect the juveniles' identities and for ease of reading.

and benzodiazepine.[2] Respondent-father tested positive for methamphetamine and benzodiazepine.

¶ 3 On January 3, 2017, DSS obtained nonsecure custody of the children and filed petitions alleging they were neglected juveniles under N.C.G.S. § 7B-101(15) (2019). Specifically, the petitions alleged that the children were neglected because they did not receive proper supervision from their parents and lived in an environment injurious to their welfare. Because of this, respondent-mother was asked to find appropriate housing for the family, and she subsequently moved in with the children's paternal grandmother. Respondent-father "was asked to move out of the home due to inappropriate housing arrangements."

¶ 4 After a hearing on February 6, 2017, the trial court entered an order adjudicating the children neglected. In lieu of written findings, the trial court found that respondents had stipulated to the facts stated in the court summary prepared by DSS and incorporated the document into the order by reference. According to the court summary, respondents' CPS history began in 2013 when one child fell and hit his head while under respondent-mother's care, though the case was closed because neglect was not substantiated. Then, in 2016, there were concerns of "substance abuse by the parents and improper care of the children." Later that year, all three children underwent medical exams which showed medical or remedial neglect. Due to this, the family went into case management, and "[b]oth parents were substantiated on for improper medical/remedial care."

¶ 5 Per a separate disposition order, legal and physical custody of the juveniles was to remain with DSS. The trial court granted respondents semi-monthly, one-hour periods of supervised visitation, "contingent upon clean drug screens." The court ordered DSS to conduct a home study of the paternal grandmother.

¶ 6 Respondents each entered into a DSS case plan requiring them to provide DSS with a written statement of the reasons their children were placed in foster care. Further, both respondents had to obtain substance abuse assessments; complete parenting classes; obtain and maintain stable employment and appropriate housing; sign a voluntary support agreement requiring payment of timely child support; and attend regular visitation with the children, conditioned upon negative

2. Respondent-mother has a valid prescription for Xanax, a brand-name benzodiazepine.

drug screens. Respondent-father was also required to complete anger management classes.

¶ 7 At the initial review hearing on June 5, 2017, the trial court found respondent-mother had "completed most of the requirements of her family service case plan[,]" including substance abuse treatment and parenting classes. Respondent-mother had signed a voluntary support agreement and had a "small child support arrearage." She had submitted to random drug screens and regularly attended visitation with the children. However, while DSS was unable to inspect the interior of respondent-mother's home at that time, the exterior was found to be in poor condition. Respondent-father had "made practically no progress" on his case plan, and he was not attending visitations or maintaining regular contact with the social worker.

¶ 8 On December 4, 2017, the trial court held a permanency planning hearing and established a primary permanent plan of reunification with a concurrent plan of custody with a court-approved caretaker. At the time of the hearing, respondent-father was incarcerated for a probation violation and had made no child support payments despite entering into a voluntary support agreement. The trial court found that respondent-mother was unemployed and "behind in her child support[.]" Additionally, an inspection of respondent-mother's home revealed that the condition of her residence was unclean, "very cluttered[,]" and "not appropriate at this time." Respondent-mother was living with her boyfriend Thomas and their infant child. The trial court further found that Ava, Aiden, and Hunter had "indicated that they are afraid of [Thomas,]" and that respondent-mother had "advised the social worker that she will separate herself from [Thomas] if necessary to regain custody of her children."

¶ 9 Following a review hearing on September 18, 2018, the trial court entered a permanency planning order on March 4, 2019. This order eliminated reunification and changed the primary plan to adoption with the secondary plan being custody with an approved caretaker. The court relieved DSS of further reunification efforts while noting that "[e]ach parent, through counsel, preserves their right to appeal the Court's decision to cease reunification efforts." However, respondents failed to file written notice preserving their right to appeal the order eliminating reunification from the permanent plan, as required by N.C.G.S. § 7B-1001(a1)(2)which states

> (a1) In a juvenile matter . . . only the following final orders may be appealed directly to the Supreme Court:

. . . .

> (2) An order eliminating reunification as a permanent plan under G.S. 7B-906.2(b), if all of the following conditions are satisfied:
>
> a. The right to appeal the order eliminating reunification has been preserved in writing within 30 days of entry and service of the order.
>
> b. A motion or petition to terminate the parent's rights is filed with 65 days of entry and service of the order eliminating reunification and both of the following occur:
>
> (1) The motion or petition to terminate rights is heard and granted.
>
> (2) The order terminating parental rights is appealed in a proper and timely manner.

N.C.G.S. § 7B-1001(a1)(2) (2019).

¶ 10 DSS later filed petitions to terminate respondents' parental rights in Ava, Aiden, and Hunter. On June 9, 2020, the trial court held a hearing on the petitions, and on June 30, 2020, the trial court entered orders terminating respondents' parental rights.

¶ 11 In adjudicating grounds for termination, the trial court concluded respondents had: (1) neglected the children under N.C.G.S. § 7B-1111(a)(1); (2) willfully left the children in a placement outside the home for more than twelve months without making reasonable progress to correct the conditions that led to their removal under N.C.G.S. § 7B-1111(a)(2); and (3) willfully failed to pay a reasonable portion of the children's cost of care in DSS custody under N.C.G.S. § 7B-1111(a)(3). With regard to respondent-mother, the trial court further concluded the children were dependent juveniles under N.C.G.S. § 7B-1111(a)(6), because she was incapable of providing proper care and supervision for the children and lacked an appropriate alternative childcare arrangement. The trial court then considered the dispositional factors in N.C.G.S. § 7B-1110(a) and determined it was in the children's best interests that respondents' parental rights be terminated.

¶ 12 Respondents filed notice of appeal from the termination orders. By an order entered on December 18, 2020, this Court allowed respondents' joint petition for writ of certiorari to review the March 4, 2019, perma-

nency planning order eliminating reunification from the permanent plan as part of their appeal.

II. Order Eliminating Reunification from the Permanent Plan

¶ 13 **[1]** Respondents contend the trial court erred when it eliminated reunification from the children's permanent plan in the March 4, 2019, permanency planning order. We disagree.

A. Standard of review

¶ 14 > This Court's review of a permanency planning review order "is limited to whether there is competent evidence in the record to support the findings [of fact] and whether the findings support the conclusions of law." The trial court's findings of fact are conclusive on appeal if supported by any competent evidence."

In re H.A.J., 377 N.C. 43, 2021-NCSC-26, ¶ 14 (quoting *In re L.M.T.*, 367 N.C. 165, 168, 752 S.E.2d 453, 455 (2013)). Uncontested findings are binding on appeal. *Id.* ¶ 15.

¶ 15 The trial court's dispositional choices—including the decision to eliminate reunification from the permanent plan—are reviewed for abuse of discretion. *In re J.H.*, 373 N.C. 264, 267–68, 837 S.E.2d 847, 850 (2020). "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." *Id.* at 268, 837 S.E.2d at 850.

¶ 16 When this Court reviews an order eliminating reunification from the permanent plan with an order terminating parental rights, "we consider both orders together" as provided in N.C.G.S. § 7B-1001(a2). *In re L.M.T.*, 367 N.C. 165, 170, 752 S.E.2d 453, 457 (2013). Therefore, "incomplete findings of fact in the cease reunification order may be cured by findings of fact in the termination order."[3] *Id.*

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3. At the time of our decision in *In re L.M.T.*, the parent's right to appeal from a permanency planning order was triggered by the trial court's ceasing of reunification efforts, rather than its elimination of reunification from the permanent plan as in current N.C.G.S. §§ 7B-1001(a)(5) and (a1)(2) (2019). *In re L.M.T.*, 367 N.C. at 167–70, 752 S.E.2d at 455–57 (discussing former N.C.G.S. §§ 7B-507(b)(1) and 7B-1001(a)(5) (2011)). Section 7B-906.2 now directs the trial court to "order the county department of social services to make efforts toward finalizing the primary and secondary permanent plans" until permanence is achieved. N.C.G.S. § 7B-906.2(b). The elimination of reunification from the permanent plan thus implicitly relieves the department of its duty to undertake reunification efforts pursuant to N.C.G.S. § 7B-906.2(b).

¶ 17 As an initial matter, we note the record on appeal does not include a transcript of the September 18, 2018, permanency planning hearing or a narrative of the hearing testimony. *See* N.C. R. App. P. 9(a)(1)(e) (stating that the record on appeal shall contain information "necessary for an understanding of all issues presented on appeal.") Because respondents have failed to include a narration of the evidence, or a transcript of the trial court proceedings with the record, we presume the findings made by the trial court are supported by competent evidence. *See Summerlin v. Carolina & N.W. Ry. Co.*, 133 N.C. 550, 557, 45 S.E. 898, 901 (1903) (deciding that it is the responsibility of the appellant to assemble the record in such a way as to show error, otherwise the Court cannot presume error.); *see also In re A.R.H.B.*, 186 N.C. App. 211, 219, 651 S.E.2d 247, 253 (2007), *appeal dismissed*, 362 N.C. 235, 659 S.E.2d 433 (2008) (finding that in the absence of a transcript "[t]he longstanding rule is that there is a presumption in favor of regularity and correctness in proceedings in the trial court, with the burden on the appellant to show error." (citation and quotation marks omitted)). To the extent respondents challenge any of the findings in the March 4, 2019, permanency planning order on evidentiary grounds, those challenges cannot succeed.

B. Sufficiency of findings

¶ 18 Respondent-mother contends the permanency planning order lacks the findings required by N.C.G.S. § 7B-906.1(d)(3) (2019) and N.C.G.S. § 7B-906.2(b) (2019) to eliminate reunification from the children's permanent plan.

¶ 19 Subdivision 7B-906.1(d)(3) applies at all review and permanency planning hearings following an adjudication of abuse, neglect, or dependency. This statute requires the trial court to "make written findings regarding . . . [w]hether efforts to reunite the juvenile with either parent clearly would be unsuccessful or inconsistent with the juvenile's health or safety and need for a safe, permanent home within a reasonable period of time."[4] N.C.G.S. § 7B-906.1(d)(3).

4. Subsection 7B-906.1(d) includes seven subdivisions and provides that, "the court shall consider the following criteria and make written findings regarding those that are relevant[.]" N.C.G.S. § 7B-906.1(d). This Court has construed virtually identical language in N.C.G.S. 7B-1110(a) (2019)—which governs the dispositional stage of a termination of parental rights proceeding—"to require written findings only as to those factors for which there is conflicting evidence." *In re E.F.*, 375 N.C. 88, 91, 846 S.E.2d 630, 633 (2020) (citing *In re A.R.A.*, 373 N.C. 190, 199, 835 S.E.2d 417, 424 (2019)).

¶ 20 Subsection 7B-906.2(b) provides, in pertinent part, that reunification shall remain a part of the juvenile's permanent plan unless the trial court "made findings under . . . G.S. 7B-906.1(d)(3) . . . or the court makes written findings that reunification efforts clearly would be unsuccessful or would be inconsistent with the juvenile's health or safety."[5] N.C.G.S. § 7B-906.2(b). "The trial court's written findings must address the statute's concerns but need not quote its exact language." *In re L.M.T.*, 367 N.C. at 168, 752 S.E.2d at 455 (interpreting former N.C.G.S. § 7B-507(b)(1) (2011)).

¶ 21 The trial court made the following findings with regard to respondent-mother's progress and prospects for reunification:

> 5. The mother signed her case plan on February 27, 2017. She completed some of the items of her case plan. She completed substance abuse classes, parenting classes, and signed a voluntary support agreement. The mother has made a few child support payments. She has a child support arrearage in excess of $2,000.00. The mother's employment status is unclear. She has reported work at Lydall, Van Heusen, the Candle Company, and Tyson.
>
> 6. The condition of the mother's home has been a concern throughout the pendency of these cases. Each time the mother has moved she has failed to keep a suitable and clean residence.
>
> 7. The mother has lived with her boyfriend, Thomas . . ., throughout the pendency of these cases. The children have consistently indicated that they are afraid of [Thomas] and they have described, in detail, incidents of domestic violence perpetrated by [Thomas] against their mother. [Thomas] signed a case plan; however, he did not complete the plan with the exception of taking a few random drug screens.
>
> . . . .
>
> 9. Both parents have been allowed supervised visitation, twice monthly for one hour, contingent on

5. Subsection 7B-906.2(b) also allows the trial court to exclude reunification from the permanent plan if "the court made findings under G.S. 7B-901(c) or G.S. 7B-906.1(d)(3), [or] the permanent plan is or has been achieved . . . ." N.C.G.S. § 7B-906.2(b).

passing drug screens. The mother missed visits from April through July 2018. The mother's visits have been appropriate and she has done well with the children during her visits. . . .

10. The mother was ordered to undergo a psychological evaluation with Nancy Sizemore, MA, LPA. Ms. Sizemore submitted her report in August 2018. She diagnosed the mother with the following conditions:

- Borderline intelligence
- Attention deficit hyperactivity disorder ("ADHD")
- Generalized anxiety disorder
- Paranoid personality disorder
- Mild neurocognitive disorder

11. Ms. Sizemore opined that and the court finds the mother does not appear able to make appropriate decisions in the best interests of the children and reunification is not likely to be in the best interest of the children. The mother does not appear to learn from past mistakes and blames others for her situation. She does not appear capable to make the necessary changes in her life to provide a safe and secure environment for the children.

12. There are no appropriate relative placements for the children. . . .

13. It is not possible for the children to be returned to the home of a parent immediately or within the next six months and it would be contrary to the children's health and safety and their general welfare to be returned to the home of a parent. The parents have not completed their case plans. The mother is unable to appropriately parent the children. The mother has not separated herself from Thomas. . . . Neither parent has demonstrated such stability which would warrant the children being returned to their care. As a result, the Court finds that the permanent plan should be changed from reunification to a primary permanent plan of adoption and a secondary plan of custody with an approved caretaker. DSS should

> be relieved of any further obligation to attempt to reunify the children with a parent.

¶ 22 We find no merit to respondent-mother's argument. Although the trial court did not use the precise language of N.C.G.S. §§ 7B-906.1(d)(3) and -906.2(b) in its findings, the court addressed the substance of both statutes' concerns. *See In re L.M.T.*, 367 N.C. at 168, 752 S.E.2d at 455 ("The trial court's written findings must address the statute's concerns, but need not quote its exact language."). The trial court also found sufficient evidentiary facts that demonstrate the basis for its findings of fact: "[i]t is not possible for the children to be returned to the home of a parent immediately or within the next six months *and it would be contrary to the children's health and safety and their general welfare to be returned to the home of a parent*." (emphasis added). Specifically, the trial court cited respondent-mother's failure to obtain stable and appropriate housing or employment, her continued cohabitation with Thomas despite the children's detailed accounts of his domestic violence against her, the unfavorable results of her psychological evaluation, and her apparent inability "to learn from past mistakes and . . . make the necessary changes in her life to provide a safe and secure environment for the children."

¶ 23 Respondent-mother insists the evidence and the trial court's findings show that "[r]eunification efforts between Ava, Aiden, Hunter and their mother would not have been clearly unsuccessful," given her progress in completing some components of her case plan. As explained above, however, the trial court's findings of fact support its conclusion of law that reunification with either parent would be "contrary to the children's health and safety[.]" Accordingly, we affirm the order eliminating reunification from the permanent plan as to respondent-mother.

¶ 24 Respondent-father claims the trial court failed to make sufficient findings to comply with N.C.G.S. § 7B-906.2(d)(1)–(4) (2019) in eliminating reunification from the children's permanent plan. Subsection 7B-906.2(d) requires the trial court to

> make written findings as to each of the following, which shall demonstrate the [parent's] degree of success or failure toward reunification:
>
> (1) Whether the parent is making adequate progress within a reasonable period of time under the plan.
>
> (2) Whether the parent is actively participating in or cooperating with the plan, the department, and the guardian ad litem for the juvenile.

> (3) Whether the parent remains available to the court, the department, and the guardian ad litem for the juvenile.
>
> (4) Whether the parent is acting in a manner inconsistent with the health or safety of the juvenile.

N.C.G.S. § 7B-906.2(d)(1)–(4). While the findings need not track the statutory language, they "must make clear that the trial court considered the evidence in light of whether reunification would be futile or would be inconsistent with the juvenile's health, safety, and need for a safe, permanent home within a reasonable period of time." *In re L.E.W.*, 375 N.C. 124, 129–30, 846 S.E.2d 460, 465 (2020). Moreover, as previously noted, "incomplete findings of fact in the cease reunification order may be cured by findings of fact in the termination order." *In re L.M.T.*, 367 N.C. at 170, 752 S.E.2d at 457.

¶ 25 Here, the permanency planning order includes the following findings regarding respondent-father's progress and prospects for reunification:

> 8. The father signed a case plan on April 6, 2017. He has been in and out of prison and treatment for substance abuse. As a result of his incarceration and treatment the father has only had three visits with the children since they have been in DSS custody. He signed a voluntary support agreement and has a child support arrearage in excess of $5,000.00
>
> 9. Both parents have been allowed supervised visitation, twice monthly for one hour, contingent on passing drug screens. . . . As noted above, the father has only had three visits with the children during the time that they have been in DSS custody.
>
> . . . .
>
> 12. There are no appropriate relative placements for the children. . . .
>
> 13. It is not possible for the children to be returned to the home of a parent immediately or within the next six months and it would be contrary to the children's health and safety and their general welfare to be returned to the home of a parent. The parents have not completed their case plans. . . . Neither parent has demonstrated such stability which would warrant the

> children being returned to their care. As a result, the Court finds that the permanent plan should be changed from reunification to a primary permanent plan of adoption and a secondary plan of custody with an approved caretaker. DSS should be relieved of any further obligation to attempt to reunify the children with a parent.

¶ 26 In its three orders terminating respondents' parental rights, the trial court listed the requirements of respondent-father's case plan and made the following additional findings regarding the N.C.G.S. § 7B-906.2(d) criteria:[6]

> 25. The Respondent-Father was incarcerated from November 2017 until January 2018.
>
> 26. The Respondent-Father failed to complete his anger management assessment.
>
> 27. The Respondent-Father signed a voluntary support agreement in 2017 to pay child support in the amount of $295.00 per month. . . . At the time of the termination hearing, [he] had a child support arrearage of approximately $10,000.00.
>
> . . . .
>
> 29. The Respondent-Father participated in a substance abuse assessment and went through an inpatient treatment program in the DART program.
>
> 30. The Respondent-Father suffered a substance abuse relapse in September 2019. On September 23, 2019, the Respondent-Father was ordered to submit a drug screen by the Court. This drug screen was positive for methamphetamine.
>
> 31. The Respondent-Father has not consistently submitted himself for drug screening requested by DSS. He was asked to submit to forty-one (41) drug screens but only took twelve (12) during the pendency of the underlying juvenile action.

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6. The trial court entered a separate termination order for Ava, Aiden, and Hunter. The three orders contain virtually identical findings of fact and conclusions of law, altered only to account for the name, age, and sex of the child at issue.

> 32. The Respondent-Father also refused to take some drug screens. . . .
>
> 33. The Respondent-Father has not consistently participated in visitation with the minor child[ren]. During the pendency of the underlying juvenile action, the Respondent-Father could have participated in forty (40) supervised visits with the child[ren] but only had five (5) visits.
>
> 34. The Respondent-Father did not complete parenting classes.
>
> . . . .
>
> 45. . . . Neither parent made any appreciable progress in their case plan. Neither Respondent has shown that they could serve as a responsible custodian for the child. Neither parent has maintained stable and appropriate housing.

As respondent-father does not contest any of these findings, they are binding on appeal.

¶ 27 Respondent-father first contends that the trial court's bare finding that he "ha[d] not completed" his case plan at the time of the permanency planning hearing is insufficient to address the criteria required by N.C.G.S. § 7B-906.2(d)(1). However, the trial court made additional findings that satisfy N.C.G.S. § 7B-906.2(d)(1). Specifically, the trial court found that respondent-father: had been "in and out of prison and treatment for substance abuse" since signing his case plan on April 6, 2017; had visited the children just three times in the twenty months since they entered DSS custody; had accumulated "a child support arrearage in excess of $5,000.00"; and had not "demonstrated such stability which would warrant the children being returned to [his] care." Additional findings in the termination orders include that, although he obtained a substance abuse assessment and attended inpatient treatment through the DART program, respondent-father: failed to complete an anger management assessment or parenting classes; failed to secure stable housing; attended fewer than one-third of the drug screens requested by DSS and refused to submit to other screens; and made no "appreciable progress" on his case plan even at the time of the termination hearing in June 2020. *See generally In re L.M.T.*, 367 N.C. at 170, 752 S.E.2d at 457 (concluding that "incomplete findings of fact in the cease reunification order may be

cured by findings of fact in the termination order"). Accordingly, these findings more than satisfy the requirements of N.C.G.S. § 7B-906.1(d)(1).

¶ 28 Respondent-father further asserts the trial court made "no findings" addressing the remaining criteria in N.C.G.S. § 7B-906.2(d)(2)–(4). We disagree.

¶ 29 While not utilizing the statutory language, the trial court's findings "address the necessary statutory factors by showing that the trial court considered the evidence in light of whether reunification would be futile or would be inconsistent with the juvenile's health, safety, and need for a safe, permanent home within a reasonable period of time[.]" *In re H.A.J.*, 377 N.C. 43, 2021-NCSC-26, ¶ 16 (cleaned up). The findings depict respondent-father's minimal degree of engagement with his case plan and cooperation with DSS, specifically with DSS's requests for drug screens. In addition to noting respondent-father's attendance at the hearing, the trial court found respondent-father had been "in and out of prison," undergone "treatment for substance abuse," and "ha[d] not consistently submitted himself for drug screening requested by DSS[.]" These findings reflected respondent-father's less-than-consistent availability to the court and DSS.

¶ 30 With regard to N.C.G.S. § 7B-906.2(d)(4), the trial court found that respondent-father was incarcerated from November 2017 to January 2018; that he failed to address the anger management and parenting skills components of his case plan; that he either failed to attend or refused to participate in most of the requested drug screens requested by DSS; that he failed to obtain stable housing; and that "it would be contrary to the children's health and safety and their general welfare to be returned to" his care. Therefore, the trial court addressed the purpose of N.C.G.S. §7B-906.2(d)(4).

¶ 31 Respondent-father next argues the trial court failed to make the conclusions of law required by N.C.G.S. § 7B-906.2(b)—i.e., "that reunification efforts clearly would be unsuccessful or would be inconsistent with the juvenile[s'] health or safety." However, the trial court satisfied the substance of N.C.G.S. § 7B-906.2(b) by finding that "[i]t is not possible for the children to be returned to the home of a parent or within the next six months *and it would be contrary to the children's health and safety and their general welfare to be returned to the home of a parent*." (emphasis added). *See In re L.M.T.*, 367 N.C. at 169, 752 S.E.2d at 456 (holding that "[w]hile [the] findings of fact do not quote the precise language [the statute], the order embraces the substance of the statutory provisions requiring findings of fact that further reunification

efforts "would be futile" or "would be inconsistent with the juvenile's health, safety, and need for a safe, permanent home within a reasonable period of time.").

¶ 32 To the extent respondent-father separately contends the trial court's evidentiary findings focus solely on his "completion of a case plan" and, therefore, do not support its findings of fact under N.C.G.S. § 7B-906.2(b), we conclude the court's findings adequately explain the basis for its determination that there were no realistic prospects for reunification. At the time of the permanency planning hearing, the children had been in DSS custody for more than twenty months, and respondent-father had been afforded more than nineteen months to remedy the conditions leading to their adjudication as neglected in February 2017. Respondent-father continued to engage in activities resulting in his incarceration,[7] repeatedly refused to submit to drugs screens, and had made no meaningful effort to engage with his case plan by attaining personal stability or providing support for the children. These facts fully support a determination that returning the children to respondent-father at any time in the foreseeable future would be contrary to their health, safety, and general welfare. *See In re L.R.L.B.*, 377 N.C. 311, 2021-NCSC-49 ¶ 25 (stating that the "trial court thus made the finding required by N.C.G.S. § 7B-906.2(b) to eliminate reunification from the permanent plan" by finding "[t]hat further reasonable efforts to prevent or eliminate the need for placement of the juvenile are clearly futile or inconsistent with the juvenile's need for a safe, permanent home within a reasonable period of time.").

¶ 33 Finally, respondent-father claims the trial court failed to make the findings required by N.C.G.S. § 7B-906.2(c) (2019), which provides:

> (c) Unless reunification efforts were previously ceased, at each permanency planning hearing the court shall make a finding about whether the reunification efforts of the county department of social services were reasonable. In every subsequent permanency planning hearing held pursuant to G.S. 7B-906.1, the court shall make written findings about the efforts the county department of social services has made toward the primary permanent plan and any secondary permanent plans in effect prior to the hearing. The court shall make a conclusion about whether

7. Although respondents have not provided this Court with a transcript of the permanency planning hearing, the record suggests respondent-father had been incarcerated for violating his probation.

efforts to finalize the permanent plan were reasonable to timely achieve permanence for the juvenile.

¶ 34 The trial court's orders refer to DSS's efforts with respondent-father, DSS's consideration of relative placements for the children, visitations by respondent-father, and the voluntary support agreement entered with DSS. The termination order includes additional findings of fact detailing DSS's efforts, including efforts relating to the development and implementation of a case plan tailored to assist respondent-father and respondent-mother in correcting the conditions that led to Ava, Aiden, and Hunter's removal in order to facilitate reunification; home inspections of respondent-mother's residence; offering respondent-mother's boyfriend the opportunity to participate in a case plan; requests for drug screens offering forty supervised visitations for respondent-father; providing transportation for supervised visitations for respondent-father; and attempts to and verification of respondent-father's reported residences. The orders which detail the efforts made by DSS to reunify the children with respondent-father, in addition to other findings related to efforts with respondent-mother, include "written findings about the efforts the county department of social services has made toward the primary permanent plan and any secondary permanent plans in effect prior to the hearing," N.C.G.S. § 7B-906.2(c).[8] While the trial court's orders lack an express finding using the term "reasonable" or "reasonableness" regarding DSS's efforts, this Court has recognized that in regard to other statutory requirements for findings in a trial court order, "[t]he trial court's written findings must address the statute's concerns, but need not quote its exact language." *In re L.M.T.*, 367 N.C. at 168, 752 S.E.2d at 455 (addressing sufficiency of findings to satisfy former N.C.G.S. § 7B-507(b)(1) (2011)); *see also In re H.A.J.*, 377 N.C. 43, 2021-NCSC-26, ¶ 16 (addressing sufficiency of findings to satisfy N.C.G.S. § 7B-906.2(d)).

8. The trial court's findings also state that a written report submitted by the DSS social worker is "incorporated herein as Findings of Fact." However, that report is not included in the record on appeal. Although the document's absence does not affect our ruling here as the trial court made the necessary findings of fact as to DSS's efforts, we reiterate the appellant's burden of assembling a record on appeal that affirmatively demonstrates the errors asserted in the appeal.

As the trial court may consider such materials as the written report submitted by a DSS social worker at a permanency planning hearing, this report likely set forth additional details concerning DSS's efforts that the trial court found relevant. *See* N.C.G.S. § 7B-906.1(c) (2019) ("The court may consider any evidence, including hearsay evidence as defined in G.S. 8C-1, Rule 801, or testimony or evidence from any person that is not a party, that the court finds to be relevant, reliable, and necessary to determine the needs of the juvenile and the most appropriate disposition."). To the extent the report was submitted to the trial court and is germane to his appeal, it was incumbent upon respondent-father to make it a part of the appellate record.

We conclude that the trial court's findings of fact address the statutory concern of N.C.G.S. § 7B-906.2(c).

¶ 35 Our conclusion is further supported by the failure of respondent-father to identify how DSS's efforts for reunification were not reasonable. Respondent-father claims that "the efforts of DSS toward reunification were not reasonable, particularly with unreasonable limits on the children's time with respondent-father," but we find no merit to his complaint. Pursuant to N.C.G.S. § 7B-905.1, it is the trial court's duty to "provide for visitation that is in the best interests of the juvenile consistent with the juvenile's health and safety, including no visitation." N.C.G.S. § 7B-905.1(a) (2019). It was not DSS, but the trial court that made respondents' visitation with the children "contingent upon clean drug screens" as part of its initial "Juvenile Disposition Order" entered on February 14, 2017. The trial court maintained this condition in each subsequent order. Whatever actions DSS must undertake to meet the "reasonable efforts" standard, it is not obliged to defy the trial court's orders. It was also the trial court that established that DSS was not "required to provide visits to any incarcerated parent[,]" and significantly, there is no indication that respondent-father requested visitation with the children while incarcerated and only exercised five out of forty supervised visitations offered by DSS. Accordingly, we reject respondent-father's assignment of error by the trial court or DSS.

III. Orders Terminating Respondents' Parental Rights

¶ 36 **[2]** Respondent-mother contends the trial court erred in adjudicating the existence of grounds for the termination of her parental rights under N.C.G.S. § 7B-1111(a). Respondent-father does not raise any claims of error with regard to the termination orders.

A. Standard of Review

¶ 37 Under this Court's well-established standard of review,

> 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. Findings of fact not challenged by respondent are deemed supported by competent evidence and are binding on appeal. The trial court's conclusions of law are reviewable de novo on appeal.

In re B.T.J., 377 N.C. 18, 2021-NCSC-23, ¶9 (cleaned up). This Court has also held that "an adjudication of any single ground for terminating

a parent's rights under N.C.G.S. § 7B-1111(a) will suffice to support a termination order. 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 S.R.F.*, 376 N.C. 647, 2021-NCSC-5 ¶ 9 (quoting *In re J.S.*, 374 N.C. 811, 815, 845 S.E.2d 66, 71 (2020)).

¶ 38 We will address the trial court's adjudication that respondent-mother willfully failed to pay a reasonable portion of the children's cost of care under N.C.G.S. § 7B-1111(a)(3). Under this provision, the trial court may terminate the rights of a parent whose child is in DSS custody if "the parent has for a continuous period of six months immediately preceding the filing of the petition or motion willfully failed to pay a reasonable portion of the cost of care for the juvenile although physically and financially able to do so." N.C.G.S. § 7B-1111(a)(3). The determinative six-month period in this case is October 23, 2018, to April 23, 2019, the day DSS filed its petitions to terminate respondents' parental rights.

¶ 39 The trial court made the following findings of fact pertinent to its adjudication under N.C.G.S. § 7B-1111(a)(3) and to respondent-mother's arguments on appeal:

> 3. From the preliminary hearing held before the trial of this action, the petitioner presents the following issues for adjudication:
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> . . . .
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> c. The minor children have been in the care and custody of DSS for a continuous period of six (6) months or more next preceding the filing of these petitions. During this period, the Respondents have willfully failed to pay a reasonable portion of the costs of care for the minor children, although each of the parents has been physically and financially able to do so N.C.G.S. § 7B-1111(a)(3);
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> . . . .
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> 6. The minor children have been in the legal and physical custody of DSS at all times since January 10, 2017.
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> . . . .

> 21. The Respondent-Mother does not have a valid driver's license and relies on her mother and Thomas . . . for transportation.
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> . . . .
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> 23. The Respondent-Mother has not maintained stable employment. At the time of the termination hearing, she was unemployed. The Respondent-Mother has reported past work at Sonic restaurant and Lydall Manufacturing. She has also reported work as a babysitter.
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> 24. The Respondent-Mother signed a voluntary support agreement to pay child support for all of her children in the amount of $112.00 per month. The Respondent-Mother has failed to consistently pay child support and currently has a child support arrearage of $3,953.00. The Respondent-Mother's last child support payment was made on October 15, 2018.
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> . . . .
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> 38. DSS has expended significant funds providing for the cost of care for the minor children since they have been in care. DSS has expended the sum of $1,564.00 per month per child since the children have been in custody beginning in January 2017.
>
> 39. The Respondents have failed to pay a reasonable portion of the cost of care for the minor children. Each of the Respondents has had the physical ability to engage in employment and to provide support for the minor child.
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> . . . .
>
> 46. Each Respondent has willfully failed to pay a reasonable portion of the cost of care for the minor children while they have been in the care and custody of DSS.

¶ 40 Based on these findings, the trial court concluded as follows:

> 2. The Petitioner has proven the following statutory grounds for terminating the Respondent-Mother's parental rights by clear, cogent, and convincing evidence:

. . . .

> c. The Respondent-Mother has willfully failed to pay a reasonable portion of the cost of care for the juveniles, although she has had the ability to do so, while the children have been in the custody of DSS N.C.G.S. § 7B-1111(a)(3).

¶ 41 Respondent-mother challenges the trial court's finding that her nonpayment of support was willful in Finding of Fact 46 and Conclusion of Law 2(c). "The willfulness of a parent's actions is a question of fact for the trial court." *In re K.N.K.*, 374 N.C. 50, 53, 839 S.E.2d 735, 738 (2020).

¶ 42 Respondent-mother acknowledges having paid nothing toward the children's cost of care during the six months at issue. However, she contends the trial court's order fails to support a finding of willfulness because "there are no findings that address [her] income, employment, or capacity for the same during the six-month period relevant to [N.C.G.S. §] 7B-1111(a)(3)." We disagree.

¶ 43 "A parent is required to pay that portion of the cost of foster care for the child that is fair, just and equitable based upon the parent's ability or means to pay." *In re S.E.*, 373 N.C. 360, 366, 838 S.E.2d 328, 332 (2020) (quoting *In re Clark*, 303 N.C. 592, 604, 281 S.E.2d 47, 55 (1981)). Here, the parents signed a voluntary support agreement. A voluntary support agreement has "the same force and effect as an order of support entered by that court, and shall be enforceable and subject to modification in the same manner as is provided by law for orders of the court in such cases." N.C.G.S. § 110-132(a3) (2019).

¶ 44 The evidence and the trial court's findings show respondent-mother paid nothing toward the children's cost of care during the six-month period immediately preceding DSS's filing of the petitions to terminate her parental rights, despite having agreed to pay $112.00 per month in support and having demonstrated an ability to work by multiple reported periods of employment. Respondent-mother never moved to modify or nullify the voluntary agreement, and she was thus subject to a valid order "that established her ability to financially support for her children." *In re J.M.*, 373 N.C. 352, 359, 838 S.E.2d 173, 178 (2020).

¶ 45 Accordingly, we hold the trial court did not err in finding respondent-mother's nonpayment to be willful and in concluding that grounds existed to terminate her parental rights under N.C.G.S. § 7B-1111(a)(3). Therefore, we need not review the court's additional grounds for termination under N.C.G.S. § 7B-1111(a)(1), (2), and (6).

¶ 46 Respondent-mother does not separately challenge the trial court's conclusion at the dispositional stage of the termination proceeding that terminating her parental rights is in the children's best interests. Accordingly, we affirm the termination orders as to respondent-mother.

IV. Conclusion

¶ 47 In both respondent-mother's and respondent-father's appeal, we affirm the trial court's order eliminating reunification from the permanent plan and the orders terminating their parental rights in Ava, Aiden, and Hunter.

AFFIRMED.

IN THE MATTER OF A.S.D.

No. 489A20

Filed 27 August 2021

Termination of Parental Rights—grounds for termination—failure to make reasonable progress—findings—evidentiary support

The trial court did not err by terminating a mother's parental rights to her daughter based on the mother's willful failure to make reasonable progress to correct the conditions which led to the child's removal (N.C.G.S. § 7B-1111(a)(2)) where there was clear, cogent, and convincing evidence, in addition to the mother's stipulations, regarding the mother's extensive history of substance abuse for which she received inadequate treatment, her refusal to submit to drug screens on multiple occasions, her incomplete mental health treatment, her housing instability, and her lack of consistent employment.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from an order entered on 7 August 2020 by Judge Wesley W. Barkley in District Court, Caldwell County. This matter was calendared for argument in the Supreme Court on 21 June 2021 but determined on the record and briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

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

Matthew P. McGuire for appellee Guardian ad Litem.

David A. Perez for respondent-appellant mother.

MORGAN, Justice.

¶ 1 Respondent, the mother of the juvenile A.S.D. (Amanda),[1] appeals from the trial court's order terminating her parental rights. After careful review, we affirm.

I. Factual Background and Procedural History

¶ 2 On 4 December 2018, the Caldwell County Department of Social Services (DSS) filed a petition alleging that Amanda, who was less than two weeks old, was a neglected and dependent juvenile. DSS stated that it was currently involved with Amanda's half-brother, D.D., who was in DSS custody. DSS claimed that respondent-mother had an extensive history of mental illness, had been diagnosed with several mental health disorders, and had a history of "polysubstance abuse." DSS additionally alleged that respondent-mother did not have safe, stable housing and that respondent-mother had reported to hospital staff that she had been ousted from the home that she shared with Amanda's father and had nowhere to stay. DSS also claimed that respondent-mother had been involved in "multiple violent relationships" and had several criminal convictions. DSS stated that respondent-mother had placed Amanda in a kinship placement in the same home as D.D.

¶ 3 On 6 March 2019, the trial court adjudicated Amanda to be a neglected and dependent juvenile based upon respondent-mother's stipulations to the allegations contained within the juvenile petition. In a separate dispositional order, the trial court ordered that custody of Amanda be placed with DSS and that DSS have the authority to arrange a placement for the juvenile. The trial court further ordered respondent-mother to enter into an Out-of-Home Safety Agreement as her case plan and allowed respondent-mother to engage in supervised visitation with Amanda for one hour each week.

¶ 4 The trial court entered a permanency planning order on 30 May 2019 in which it found that respondent-mother was not consistently attending mental health or substance abuse treatment and did not have stable

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

housing. The trial court set the primary permanent plan as reunification with a secondary plan of adoption.

¶ 5 In a permanency planning review order entered on 3 October 2019, the trial court found as fact that respondent-mother had not attended mental health services since January 2019. The trial court additionally found that respondent-mother was not receiving substance abuse treatment and that respondent-mother refused to submit to hair follicle drug screens because she "believes that such may result in the use of Black Magic on her hair." The trial court also found as fact that respondent-mother still did not have stable housing.

¶ 6 On 5 March 2020, the trial court filed a permanency planning review order in which the trial court found that DSS had made numerous attempts to administer drug screens to respondent-mother, but that such attempts were often unsuccessful—such as on 25 November 2019 and 7 February 2020 when respondent-mother refused to come to the door on both occasions. The trial court also found that respondent-mother was living in a mobile home with her boyfriend, and that respondent-mother was unemployed because her boyfriend did not want respondent-mother to work and was paying respondent-mother $100 per week to complete chores around the home rather than have her to seek employment. The trial court further found as fact that respondent-mother had not visited with the juvenile since respondent-mother had refused a drug screen on 14 October 2019. The trial court changed the primary permanent plan for Amanda to adoption and the secondary plan to guardianship with an approved caretaker.

¶ 7 On 12 March 2020, DSS filed a motion in the cause to terminate respondent-mother's parental rights pursuant to N.C.G.S. § 7B-1111(a)(1), (2), and (9), based on neglect, willful failure to make reasonable progress, and the fact that respondent-mother's parental rights with respect to another child had been terminated involuntarily and respondent-mother lacked the ability or willingness to establish a safe home. N.C.G.S. § 7B-1111(a)(1), (2), (9) (2019). On 7 August 2020, the trial court entered an order in which it determined that grounds existed to terminate respondent-mother's parental rights as alleged in the motion. The trial court further concluded that it was in Amanda's best interests that respondent-mother's parental rights to Amanda be terminated. Accordingly, the trial court terminated respondent-mother's parental rights.[2] Respondent-mother appeals.

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2. The trial court's order also terminated the parental rights of Amanda's father. He is not a party to the proceedings before this Court.

II. Analysis

¶ 8 Respondent-mother argues that the trial court erred by concluding that grounds existed to terminate her parental rights. A termination of parental rights proceeding consists of an adjudicatory stage and a dispositional stage. N.C.G.S. §§ 7B-1109, -1110 (2019); *In re Montgomery*, 311 N.C. 101, 110 (1984). At the adjudicatory stage, the petitioner bears the burden of proving by "clear, cogent, and convincing evidence" the existence of one or more grounds for termination under subsection 7B-1111(a) of our General Statutes. N.C.G.S. § 7B-1109(e), (f). We review a trial court's adjudication "to determine whether the findings are supported by clear, cogent and convincing evidence and the findings support the conclusions of law." *In re Montgomery*, 311 N.C. at 111 (citing *In re Moore*, 306 N.C. 394, 404 (1982)).

¶ 9 "[A]n adjudication of any single ground in N.C.G.S. § 7B-1111(a) is sufficient to support a termination of parental rights." *In re E.H.P.*, 372 N.C. 388, 395 (2019). We begin our analysis with the consideration of whether grounds existed to terminate respondent-mother's parental rights pursuant to N.C.G.S. § 7B-1111(a)(2).

¶ 10 Pursuant to N.C.G.S. § 7B-1111(a)(2), a trial court may terminate parental rights if "[t]he parent has willfully left the juvenile in foster care or placement outside the home for more than 12 months without showing to the satisfaction of the court that reasonable progress under the circumstances has been made in correcting those conditions which led to the removal of the juvenile." N.C.G.S. § 7B-1111(a)(2). "[T]he willfulness of a parent's failure to make reasonable progress toward correcting the conditions that led to a child's removal from the family home 'is established when the [parent] had the ability to show reasonable progress, but was unwilling to make the effort.' " *In re L.E.W.*, 375 N.C. 124, 136 (2020) (second alteration in original) (quoting *In re Fletcher*, 148 N.C. App. 228, 235 (2002)).

¶ 11 In support of its adjudication of grounds pursuant to N.C.G.S. § 7B-1111(a)(2)[3], the trial court made the following findings of fact:

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3. We note that Finding of Fact 14 and its subparts were in reference to the grounds to terminate respondent-mother's parental rights for neglect pursuant to N.C.G.S. § 7B-1111(a)(1), but the findings also demonstrate respondent-mother's failure to make reasonable progress in correcting the conditions which led to Amanda's removal, which supports the trial court's determination that grounds existed to terminate respondent-mother's parental rights pursuant to N.C.G.S. § 7B-1111(a)(2).

14. . . .

a. Respondent[-]mother has an extensive history of substance abuse for which she has received inadequate treatment. She received an updated Comprehensive Clinical Assessment (CCA) on January 27, 2020. She was recommended to complete 90 hours of Substance Abuse Intensive Outpatient Treatment (SAIOP). She has only attended a few classes.

b. Respondent[-]mother has submit[ted] to urine drug screens as requested by the Movant on 5/1/19, 5/15/19, and 6/19/19. She refused to submit to a hair follicle drug screen on 9/5/19 and again in January of 2020. She has on numerous other occasions not made herself available for drug screens. She has never had a consistent six (6) month period of negative drug screens.

c. Respondent[-]mother completed a psychological evaluation with Dr. Jennifer Cappelletty. Dr. Cappelletty diagnosed Respondent[-]mother with Schizoaffective Disorder, Bipolar Type; Cannabis Use Disorder; Stimulant Use Disorder –Amphetamine Type; and Opioid Use Disorder. Dr. Cappelletty made the following recommendations for Respondent[-]mother: (a) participate in psychotherapy; (b) participate in a psychiatric evaluation and comply with all recommendations; (c) participate in the Assertive Community Treatment Team (ACTT) program; (d) refrain from use of non-prescribed substances; and (e) participate in Vocational Rehabilitation Services. Respondent[-]mother has refused to take any prescription medication to address her mental health issues. In addition to the psychological evaluation by Dr. Cappelletty, Respondent[-]mother has completed 4 or 5 other mental health assessments. She has not addressed any of the issues identified by Dr. Cappelletty. She has not completed any mental health treatment. She did not participate in the ACTT program. She did not participate in Vocational Rehabilitation Services.

> d. Respondent[-]mother has lived a transient lifestyle during the course of her involvement with the Movant up until the last few months. She has moved at least six (6) times since the birth of the juvenile. She currently lives with a boyfriend and is totally dependent upon him. She is unemployed and has had only sporadic employment during her involvement with the Movant. She exhibited no consistency from February 2019 to March 2020. The brief period of stability during the last few months does not outweigh the year of instability during which her environment shifted on a monthly basis.
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> e. Respondent[-]mother has not visited with the juvenile since October 14, 2019, due to her refusal to submit to drug screens.
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> f. Respondent[-]mother has a history of domestic violence for which she has received no treatment.
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> . . . .
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> 16. Grounds exist to terminate the parental rights of Respondent[-]mother pursuant to N.C.G.S. § 7B-1111(a)(2). The juvenile has been willfully left in foster care or placement outside the home for more than 12 months without showing to the satisfaction of the Court that outside of consideration of poverty, reasonable progress under the circumstances has been made [in] correcting the conditions which led to the removal of the juvenile. Specifically, Respondent[-]mother has not completed any of the objectives of her case plan with [DSS] or complied with the prior orders of the court in order to reunify with the juvenile. She demonstrated no consistency for a period in excess of a year.

"Findings of fact not challenged by respondent are deemed supported by competent evidence and are binding on appeal." *In re T.N.H.*, 372 N.C. 403, 407 (2019). Furthermore, this Court limits its review of findings of fact "to those challenged findings that are *necessary* to support the trial court's determination that . . . parental rights should be terminated." *In re N.G.*, 374 N.C. 891, 900 (2020) (emphasis added).

¶ 12 Respondent-mother challenges several of the trial court's findings of fact. First, respondent-mother disputes Finding of Fact 14(a), arguing that there was no evidence to show that substance abuse was a continuing issue at the time of the termination of parental rights hearing.[4] We are not persuaded by this argument. In this finding, contrary to respondent-mother's assertion, the trial court did not purport to determine that respondent-mother was continuing to use drugs at the time of the hearing; rather, the trial court found that respondent-mother had an extensive history of substance abuse for which she received inadequate treatment. This finding is supported by the evidence of record. We note that respondent-mother stipulated to the allegations in the juvenile petition that she had "an extensive history of polysubstance abuse [and] a long history of using methamphetamines, benzodiazepines, opiates, and marijuana, as well as other substances." Additionally, a DSS social worker testified at the termination hearing that respondent-mother had an extensive history of substance abuse and that respondent-mother did not complete the required substance abuse treatment. The trial court also observed that respondent-mother was referred to intensive outpatient treatment but attended only a few classes. Respondent-mother does not challenge this finding of fact on appeal, and therefore it is deemed to be binding on this Court. *In re T.N.H.*, 372 N.C. at 407. Furthermore, we recognize that Dr. Cappelletty stated in her psychological evaluation of respondent-mother that, in her opinion, "the combination of [respondent-mother's] severe and chronic mental illness *and her history of substance abuse* has combined in such a way as to have a significant impact on her capacity to maintain stability and effectively parent." Also, on several occasions, respondent-mother refused drug screens and hair follicle tests. Thus, there is clear, cogent, and convincing evidence to support Finding of Fact 14(a).

¶ 13 Next, respondent-mother contends that the portion of Finding of Fact 14(b) that she had "on numerous other occasions not made herself available for drug screens" is not supported by the evidence. We disagree with this contention. The DSS social worker testified that respondent-mother refused to participate in drug screens on 1 May, 15 May, 19 June, and 14 October 2019. Additionally, respondent-mother refused to participate in hair follicle tests on 5 September 2019 and 6 January 2020. Consequently, we conclude that clear, cogent, and convincing evidence supports this finding of fact.

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4. Respondent-mother makes additional arguments regarding Finding of Fact 14(a), but we do not address them because they are not relevant to grounds for termination under N.C.G.S. § 7B-1111(a)(2). *In re N.G.*, 374 N.C. 891, 900 (2020).

¶ 14 Respondent-mother further contends that Finding of Fact 14(d), which states that she exhibited "no consistency from February 2019 to March 2020," is erroneous. As support for her stance, respondent-mother cites the testimony of the DSS social worker that respondent-mother had maintained stable housing since December 2019, and that her "home was appropriate, clean and had space for Amanda were she to be returned." Respondent-mother does not challenge, however, the portions of the trial court's Finding of Fact 14(d) that respondent-mother had lived a "transient lifestyle" during the course of the case and had moved at least six times since Amanda was born, that respondent-mother was unemployed and only had sporadic employment during the course of the case, and that respondent-mother lived with her boyfriend and was "totally dependent" upon him. Furthermore, the evidence of record showed that respondent-mother had moved multiple times during the course of the case, was not employed at the time of the termination of parental rights hearing, and had not been employed since losing her job in June 2019. Respondent-mother also acknowledged at the termination hearing that she was completely dependent upon her boyfriend. The trial court favorably noted that respondent-mother had exhibited a "brief period of stability during the last few months," but nonetheless still assessed that this positive stint did not "outweigh the year of instability during which her environment shifted on a monthly basis." We conclude that the trial court's finding that respondent-mother did not exhibit consistency from February 2019 to March 2020 was a permissible inference available to the trial court based upon the evidence and unchallenged findings of fact. *See In re D.L.W.*, 368 N.C. 835, 843 (2016) (stating that it is the trial court's duty to consider all the evidence, pass upon the credibility of the witnesses, and determine the reasonable inferences to be drawn therefrom); *see also Scott v. Scott*, 157 N.C. App. 382, 388 (2003) (stating that when the trial court sits as fact-finder, it is the sole judge of the credibility and weight to be given to the evidence, and it is not the role of the appellate court to substitute its judgment for that of the trial court).

¶ 15 Respondent-mother maintains that Finding of Fact 14(e) is erroneous because she visited with Amanda in March 2020. Respondent-mother claims that she was eligible to visit earlier but could not do so because Amanda was out of town. We agree with respondent-mother on this point. The DSS social worker testified that respondent-mother had not visited with Amanda since October 2019 because respondent-mother "had to pass two [drug] screens" before she would be permitted visitation. The social worker further went on to testify, however, that respondent-mother passed drug screens in January 2020 and was eli-

gible to visit with the juvenile during that month but could not do so because Amanda went with her "foster family . . . on a trip to California." The trial court's Finding of Fact 14(e) does not properly reflect the evidence submitted at the termination of parental rights hearing, and hence we disregard this finding of fact. *See In re S.M.*, 375 N.C. 673, 684 (2020).

¶ 16 We next consider respondent-mother's representation that a segment of Finding of Fact 16 is erroneous in its establishment that she had not completed any objectives of her case plan or complied with the prior orders of the trial court in order to reunify with Amanda, and that respondent-mother had demonstrated no consistency for a period in excess of twelve months. We begin by recalling that we have already determined that there was sufficient evidence to support Finding of Fact 14(d) that respondent-mother exhibited "no consistency from February 2019 to March 2020," and likewise conclude that the same evidence supports the trial court's similar finding regarding respondent-mother's lack of consistency in Finding of Fact 16.

¶ 17 As for the balance of Finding of Fact 16, we conclude that there was clear, cogent, and convincing evidence to support the trial court's finding. First, respondent-mother admitted at the termination of parental rights hearing that she did not do anything toward completing her case plan other than working, and that she was unemployed by the time of the termination hearing. Second, we have found that there was sufficient evidence to sustain the trial court's findings of fact that respondent-mother did not always make herself available for drug screens, that she did not complete substance abuse treatment, and that she did not complete any mental health treatment. Furthermore, while the trial court acknowledged that at the time of the termination of parental rights hearing respondent-mother had a brief period of stability with regard to housing, nonetheless she had previously been transient, and the trial court thereupon determined that respondent-mother's short period of stability did not outweigh her lengthy period of instability. Therefore, Finding of Fact 16 is properly supported by the record.

¶ 18 Respondent-mother argues that the trial court erroneously concluded that grounds existed pursuant to N.C.G.S. § 7B-1111(a)(2) to terminate her parental rights. Although respondent-mother concedes that she was slow to address many components of her case plan, respondent-mother contends that she made reasonable progress and rectified the issues which led to Amanda's removal from respondent-mother's care by the time of the termination of parental rights hearing. We are not persuaded by these representations of respondent-mother.

¶ 19 This Court has recognized that "parental compliance with a judicially adopted case plan is relevant in determining whether grounds for termination exist pursuant to N.C.G.S. § 7B-1111(a)(2)." *In re B.O.A.*, 372 N.C. 372, 384 (2019). A trial court should refrain from finding that a parent has failed to make reasonable progress in correcting the conditions that led to the child's removal "simply because of his or her 'failure to fully satisfy all elements of the case plan goals.' " *Id.* at 385 (quoting *In re J.S.L.*, 177 N.C. App. 151, 163 (2006)). However, "a trial court has ample authority to determine that a parent's 'extremely limited progress' in correcting the conditions leading to removal adequately supports a determination that a parent's parental rights in a particular child are subject to termination pursuant to N.C.G.S. § 7B-1111(a)(2)." *Id.*

¶ 20 Here, respondent-mother admits that Amanda has resided in foster care or placement outside of the home for more than twelve months. However, respondent-mother asserts that she made reasonable progress toward correcting the conditions which led to Amanda's removal from her care. This contention is without merit. Respondent-mother's case plan was directed at resolving her issues concerning substance abuse, mental health, and instability. The case plan also aimed at addressing respondent-mother's lack of stable, safe housing. The evidence in the record, which yielded the trial court's supported findings of fact, demonstrates that respondent-mother largely failed to comply with her case plan. Significantly, although it was recommended that respondent-mother complete ninety hours of intensive outpatient substance abuse treatment, she only attended a few classes and failed to complete the treatment. Respondent-mother also failed to complete mental health treatment and refused to take any prescription medication to address her mental health issues. In like manner, respondent-mother demonstrated continued instability during most of the course of this case; she was consistently transient and unable to maintain stable employment. Respondent-mother remained completely dependent upon her boyfriend, even up to the time of the termination hearing. Although respondent-mother cites progress made by her just prior to the termination of parental rights hearing, it was within the trial court's authority to decide that these improvements were insufficient in light of the historical facts of the case. *See In re T.M.L.*, 2021-NCSC-55, ¶ 32 (concluding that while the respondent "made some last-minute attempts to comply with the case plan by the time of the termination hearing . . . [his] partial steps—undertaken after DSS had filed petitions to terminate his parental rights and two years or more after the children's removal from the home—[were] insufficient to constitute reasonable progress under N.C.G.S. § 7B-1111(a)(2)"); *see also In re O.W.D.A.*, 375 N.C. 645, 654

(2020) (concluding that, with respect to grounds to terminate parental rights under N.C.G.S. § 7B-1111(a)(1), that although the respondent may have made some recent, minimal progress, "the trial court was within its authority to weigh the evidence and determine that these eleventh-hour efforts did not outweigh the evidence of his persistent failures to make improvements . . . and to conclude that there was a probability of repetition of neglect."). Consequently, we hold that the trial court did not err by concluding that grounds existed pursuant to N.C.G.S. § 7B-1111(a)(2) to terminate respondent-mother's parental rights.

III. Conclusion

¶ 21 The trial court's conclusion that a ground for termination existed pursuant to N.C.G.S. § 7B-1111(a)(2) is sufficient in and of itself to support termination of respondent-mother's parental rights. *In re E.H.P.*, 372 N.C. at 395. As such, we do not need to address her arguments regarding N.C.G.S. § 7B-1111(a)(1) and (9). Respondent-mother does not challenge the trial court's conclusion that termination of her parental rights was in Amanda's best interests. *See* N.C.G.S. § 7B-1110(a). Accordingly, we affirm the trial court's order terminating the parental rights of respondent-mother.

AFFIRMED.

IN THE MATTER OF D.M. & A.H.

No. 473A20

Filed 27 August 2021

Termination of Parental Rights—no-merit brief—elimination of reunification from permanent plan—failure to make reasonable progress

The elimination of reunification with the father from his child's permanent plan and the subsequent termination of the father's parental rights on the grounds of failure to make reasonable progress were affirmed where the father's counsel filed a no-merit brief, the order eliminating reunification comported with the requirements of N.C.G.S. § 7B-906.2(b), and the termination order was supported by clear, cogent, and convincing evidence and based on proper legal grounds.

IN RE D.M.

[378 N.C. 435, 2021-NCSC-95]

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1)–(2), (a2) from orders entered on 26 August 2019 and 5 August 2020 by Judge Amber Davis in District Court, Dare County. This matter was calendared for argument in the Supreme Court on 21 June 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 for petitioner-appellee Dare County Department of Health & Human Services, Division of Social Services.

No brief for appellee Guardian ad Litem.

Garron T. Michael for respondent-appellant father.

EARLS, Justice.

¶ 1 Respondent-father appeals from the trial court's order terminating his parental rights in the minor children "David" and "Allison."[1] *See* N.C.G.S. § 7B-1001(a1)(1) (2019). Pursuant to N.C.G.S. § 7B-1001(a1)(2) and (a2), respondent-father also appeals from the permanency-planning order that eliminated reunification with respondent-father from the children's permanent plan. The children's mother has relinquished her parental rights and is not a party to this appeal. We affirm.

¶ 2 On 1 May 2018, the Dare County Department of Health and Human Services, Division of Social Services (DSS), obtained nonsecure custody of six-year-old David and five-year-old Allison and filed juvenile petitions alleging they were neglected juveniles. After a hearing, the trial court entered an order on 9 August 2018 adjudicating the children as neglected juveniles based on respondents' stipulation to the following facts:

> 9. On April 30, 2018, [the children's mother] left the juveniles at her home with two persons who are not appropriate caregivers. [Her] neighbors called the police because the juveniles were yelling out of the upstairs windows that they were hungry and afraid to go downstairs.
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> 10. Police performed a welfare check at [the children's mother's] home on April 30, 2018 after receiving calls from her neighbors. . . . Once the

1. We use these pseudonyms to protect the juveniles' identities and for ease of reading.

juveniles were secured, police searched [the] home. They found two small bags with a white powdery substance they believed to be cocaine in the juveniles' clothes and toy boxes. They found drug paraphernalia, including two burned pipes and two burned spoons. They also found about six grams of a powdery substance they believed to be cocaine in the freezer.

11. [The children's mother] failed to properly feed the juveniles. The home she provided for the juveniles was filthy, unkempt, and unsafe. There was moldy food in the kitchen, garbage throughout the home, and no suitable beds for the juveniles to sleep on.

12. When [the children's mother] arrived home, she told police that she had been on a date and had paid one of the individuals in the home $20.00 to watch the kids. She told police she had been gone for two hours and did not know who had been in her home. [She] was arrested and charged with possession of cocaine and possession of drug paraphernalia.

13. [Respondent-father] had limited contact with the juveniles before the Juvenile Petition was filed. He has willingly left the juveniles in the care of [the children's mother].

14. Neither [the children's mother] nor [respondent-father] have provided a safe, appropriate home for the juveniles.

15. [The children's mother] and [respondent-father] have failed to provide proper care and supervision for the juveniles. They have exposed the juveniles to unsafe, injurious environments.

16. The juveniles require more adequate care and supervision than [the children's mother] or [respondent-father] can provide in their homes.

¶ 3 In a disposition order entered on 6 November 2018, the trial court maintained the children in DSS custody and awarded respondent-father one hour per week of supervised visitation. The court found respondent-father had visited the children on two occasions since their placement in nonsecure custody but was arrested on 20 June 2018 and was facing

"serious" felony drug and weapons charges in Pitt County, which could result in "a substantial prison sentence." The court ordered respondent-father to enter into a visitation plan with DSS "to establish a regular, consistent visitation schedule"; submit to random drug screens as requested by DSS and abstain from all intoxicating substances; obtain a substance abuse assessment and comply with all treatment recommendations; and keep DSS apprised of his whereabouts and address.

¶ 4 At the initial permanency-planning hearing held on 6 February 2019, the trial court established a primary permanent plan for the children of reunification with the children's mother or respondent-father with a secondary plan of guardianship with a relative. The court maintained these primary and secondary plans at the next permanency-planning hearing held on 8 May 2019 and up to the permanency-planning hearing held on 7 August 2019.

¶ 5 However, in its permanency-planning order entered on 26 August 2019, the trial court changed the primary permanent plan to adoption, established a secondary plan of reunification with the children's mother, and relieved DSS of further reunification efforts with respondent-father. The court found that respondent-father had yet to enter into a case plan or visitation plan with DSS; he had submitted to a drug screen after a court appearance on 6 February 2019 and tested positive for marijuana and cocaine; he had scheduled an appointment for substance abuse treatment at PORT New Horizons but failed to attend the appointment; and he had been incarcerated since May 2019 for assaulting "his young paramour." The court also noted that respondent-father's felony drug and weapons charges in Pitt County remained pending. Respondent-father filed a timely notice to preserve his right to appeal the order eliminating reunification with him from the children's permanent plan. *See* N.C.G.S. § 7B-1001(a1)(2)(a), (b) (2019).

¶ 6 DSS filed a motion to terminate respondent-father's parental rights on 11 December 2019. The trial court held a hearing on the motion on 3 June and 1 July 2020 and entered its "Termination of Parental Rights Order" on 5 August 2020. In its order, the court adjudicated the existence of grounds to terminate respondent-father's parental rights for neglect, lack of reasonable progress, and dependency. *See* N.C.G.S. § 7B-1111(a)(1)–(2), (6) (2019). The trial court further concluded that termination of respondent-father's parental rights was in both children's best interests. *See* N.C.G.S. § 7B-1110(a) (2019). Respondent-father filed timely notices of appeal from the termination order and from the order eliminating reunification with him from the permanent plan. *See* N.C.G.S. § 7B-1001(a1)(1)–(2), (b).

¶ 7 Counsel for respondent-father has filed a no-merit brief on his client's behalf under Rule 3.1(e) of the North Carolina Rules of Appellate Procedure. Counsel advised respondent-father of his right to file pro se written arguments on his own behalf and provided him with the documents necessary to do so. *See* N.C. R. App. P. 3.1(e). Respondent-father has not submitted written arguments to this Court.

¶ 8 This Court independently reviews issues identified by counsel in a no-merit brief filed pursuant to Appellate Rule 3.1(e). *In re L.E.M.*, 372 N.C. 396, 402 (2019). Respondent-father's counsel has identified issues that could arguably support an appeal in this case while also explaining why, based on a careful review of the record, these issues lack merit.

¶ 9 With regard to the order eliminating reunification from the permanent plan, counsel for respondent-father acknowledges that competent evidence supports the trial court's findings of fact and that the findings support the court's conclusion that further efforts to reunify David and Allison with respondent-father "would clearly be unsuccessful or inconsistent with the juveniles' need for a permanent pla[cement] within a reasonable period of time." *See* N.C.G.S. § 7B-906.2(b) (2019). At the time of the permanency-planning hearing respondent-father had made no meaningful steps toward reunification; he was incarcerated for a recent act of domestic violence; he had submitted to just one drug screen, which was positive for marijuana and cocaine; and he had failed to attend a scheduled appointment to begin substance abuse treatment. The trial court's ceasing of reunification efforts with respondent-father thus comports with the requirements of N.C.G.S. § 7B-906.2(b).

¶ 10 Turning to the termination order, counsel for respondent-father concedes that "the existence of a single ground for termination suffices to support the termination of a parent's parental rights in a child," *In re J.S.*, 2021-NCSC-28, ¶ 24, and that the evidence and the trial court's findings support a conclusion under N.C.G.S. § 7B-1111(a)(2) that respondent-father willfully left the children in a placement outside the home for more than twelve months without making reasonable progress to correct the conditions leading to their removal. Respondent-father's failure to comply with the court's orders or address his substance abuse issues, as well as his continued involvement in criminal conduct and resulting incarceration, evinced a lack of reasonable progress since the children were removed from the children's mother's custody in May 2018. *See In re Z.K.*, 375 N.C. 370, 373 (2020). The trial court did not err in adjudicating the existence of grounds for termination pursuant to N.C.G.S. § 7B-1111(a)(2).

¶ 11 Finally, the trial court made written findings addressing each of the factors relevant to disposition under N.C.G.S. § 7B-1110(a). As counsel for respondent-father admits, the findings provide a rational basis for the trial court's assessment that terminating respondent-father's parental rights was in the children's best interests in that it will facilitate the children's adoption by their maternal aunt and uncle. We further note these findings are supported by competent evidence presented at the termination hearing. Accordingly, we conclude the trial court did not abuse its discretion during the dispositional stage of the proceeding by choosing to terminate respondent-father's parental rights. *In re Z.K.*, 375 N.C. at 373, 847 S.E.2d at 749.

¶ 12 Having considered the entire record and the issues identified in the no-merit brief, we affirm the trial court's order eliminating reunification from the permanent plan and the trial court's order terminating respondent-father's parental rights.

AFFIRMED.

IN THE MATTER OF J.E.H., J.I.H., K.T.B., Q.D.B., I.T.B.

No. 449A20

Filed 27 August 2021

Termination of Parental Rights—no-merit brief—termination on multiple grounds

The termination of a mother's parental rights on the grounds of neglect, failure to make reasonable progress, failure to pay a reasonable portion of the cost of care, and dependency was affirmed where the mother's counsel filed a no-merit brief and the termination order was supported by clear, cogent, and convincing evidence and was based on proper legal grounds.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from an order entered on 6 August 2020 by Judge William F. Helms III in District Court, Union County. This matter was calendared for argument in the Supreme Court on 21 June 2021 but determined on the record and briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

IN RE J.E.H.

[378 N.C. 440, 2021-NCSC-96]

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

No brief for appellee Guardian ad Litem.

Richard Croutharmel for respondent-appellant mother.

EARLS, Justice.

¶ 1 Respondent-mother appeals from the trial court's order terminating her parental rights to J.E.H. (Jerry), J.I.H. (Jimmy), K.T.B. (Kenny), Q.D.B. (Quentin), and I.T.B. (Iris).[1] Counsel for respondent-mother has filed a no-merit brief under Rule 3.1(e) of the North Carolina Rules of Appellate Procedure. We conclude the issues identified by counsel as arguably supporting the appeal are meritless and therefore affirm the trial court's order.

¶ 2 On 19 June 2018, the Union County Division of Social Services (DSS) filed juvenile petitions alleging that Jerry and Jimmy, who are twins, were neglected and dependent juveniles. The petitions alleged that on 17 June 2018, respondent-mother took Jimmy to the emergency department and he was admitted to the hospital, where he was diagnosed with failure to thrive. The petition noted that hospital employees were concerned about respondent-mother's ability to care for the twins. The petition further noted earlier reports to DSS that respondent-mother received no prenatal care while pregnant with the twins, who were born prematurely; she was diagnosed with postpartum depression soon after their birth; and she did not have adequate supplies such as diapers, formula, and clothing for the twins. The petition alleged DSS supplied the children with formula and diapers, but respondent-mother continued to fail to provide those items. Later juvenile petitions concerning the other children noted that a social worker reportedly observed the children being fed Carnation evaporated milk instead of formula.

¶ 3 On 18 June 2018, a Child and Family Team Meeting was held, and respondent-mother indicated she was unable to care for the children.[2] She consented to the children's placement with family or in foster care.

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

2. The narratives attached to the juvenile petitions for Jerry and Jimmy refer to the neglect and dependent status of three other children of respondent-mother, none of whom are the subject of this appeal.

DSS obtained nonsecure custody of Jerry and Jimmy on 19 June 2018. Following Jimmy's discharge from the hospital, he and Jerry were placed in a licensed foster home.

¶ 4 On 11 July 2018, respondent-mother entered into a case plan to facilitate reunification with Jerry and Jimmy, which identified her needs in the areas of employment, housing and basic needs, emotional and mental health, and parenting and life skills. On 30 July 2018, respondent-mother entered into an In-Home Service Agreement to address her needs as they related to her other children, Kenny, Quentin, and Iris, who resided with their father.

¶ 5 Following a hearing on 22 August 2018, the trial court entered an order on 20 September 2018 that adjudicated Jerry and Jimmy as neglected and dependent juveniles. Respondent-mother was allowed one hour of supervised visitation weekly. She was ordered to (1) sign releases to allow her service providers to share information with DSS and the guardian ad litem, (2) maintain monthly contact with DSS, (3) submit to random drug screens, (4) complete a global mental health assessment and comply with all recommendations, (5) complete parenting classes, (6) secure safe and stable housing, and (7) maintain legal income.

¶ 6 On 18 October 2018, DSS filed juvenile petitions alleging the neglect and dependency of Kenny, Quentin, and Iris. The petitions alleged respondent-mother had failed to address the needs identified in her In-Home Service Agreement, as the children were not being provided necessary school uniforms and supplies; respondent-mother lost her job and was still without housing; respondent-mother was not scheduling medical and dental appointments for the children; respondent-mother failed to attend her scheduled mental health sessions and parenting classes; and respondent-mother was left unsupervised with Kenny and Quentin in violation of the safety plan.

¶ 7 Following a hearing on 14 November 2018, the trial court entered an order on 18 December 2018 that adjudicated Kenny, Quentin, and Iris as neglected and dependent juveniles. The court ordered that the children remain with their father in the home of their paternal grandmother. Respondent-mother was allowed visitation supervised by the children's father or their paternal grandmother. She was required to comply with her case plan and attend parenting classes; attend medication appointments; transport Iris to school on time; and address the children's well-being, needs, and recommended services.

¶ 8 Before the adjudication order was entered, on 5 December 2018, DSS filed additional juvenile petitions, again alleging that Kenny, Quentin,

and Iris were neglected and dependent juveniles. The petitions alleged that during a home visit on 25 October 2018, a social worker observed a gun lying on the couch in the living room where Kenny was playing. It was undetermined whether the gun was loaded, though the owner of the gun asserted it was not. The petitions also noted a report to DSS on 3 December 2018 that indicated the children were often seen outside running across the road with no parental supervision, respondent-mother was seen outside yelling at and physically disciplining Iris, respondent-mother was at risk of being evicted from her apartment due to complaints to management, and it was believed respondent-mother was with the children unsupervised at the apartment. The petitions also alleged respondent-mother remained noncompliant with her case plan requirements, noting her failure to complete mental health treatment and parenting classes and to schedule medical visits for the children. Further, when a social worker arrived at the home to transport the family to a Child and Family Team Meeting, she was refused entry to the home, the family did not attend the meeting, and neither respondent-mother nor the children's father contacted the social worker regarding the missed meeting. DSS sought and obtained nonsecure custody of the children on 5 December 2018.

¶ 9 Following a hearing on 9 January 2019, the trial court entered an order on 21 February 2019, again adjudicating Kenny, Quentin, and Iris as neglected and dependent juveniles. The court ordered custody of the children to remain with DSS. Respondent-mother was allowed a minimum of one hour of supervised visitation a week, and she was ordered to comply with her case plan, sign releases with her service providers, maintain monthly contact with DSS, and submit to random drug screens.

¶ 10 Following a permanency-planning hearing on 12 June 2019, the trial court entered an order on 11 July 2019 setting the primary permanent plan for Jerry, Jimmy, Kenny, Quentin, and Iris as adoption, with a secondary concurrent plan of guardianship with a relative or court-approved caretaker. On 6 August 2019, DSS filed a termination-of-parental-rights petition for all five children. The grounds alleged to terminate respondent-mother's parental rights were (1) her neglect of each of the children, (2) her leaving Jerry and Jimmy in foster care or a placement outside the home for more than twelve months without a showing of reasonable progress to correct the conditions that led to their removal, (3) her failure to pay a reasonable portion of the cost of care for all five children in the preceding six months, and (4) her inability to provide proper care and supervision of all the children rendering them dependent juveniles. *See* N.C.G.S. § 7B-1111(a)(1)–(3), (6) (2019).

¶ 11 Following a hearing on 1 and 2 July 2020, the trial court entered an order on 6 August 2020 adjudicating the existence of the grounds alleged in the termination petition. The court also concluded that it was in the children's best interests to terminate respondent-mother's parental rights and ordered that her rights in all five children be terminated.[3] Respondent-mother appeals.

¶ 12 Respondent-mother'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 certain issues relating to the adjudication and disposition portions of the termination proceeding that could arguably support an appeal, including whether the trial court properly found grounds existed for the termination of respondent-mother's parental rights and whether the trial court abused its discretion by determining that termination of respondent-mother's parental rights was in the children's best interests, but explained why he believed the issues lacked merit. Counsel also advised respondent-mother of her right to file pro se written arguments on her own behalf and provided her with the documents necessary to do so. Respondent-mother, however, has not submitted any written arguments to this Court.

¶ 13 This Court independently reviews issues identified by counsel in a no-merit brief filed pursuant to Rule 3.1(e) to see if the issues have potential merit. *In re L.E.M.*, 372 N.C. 396, 402 (2019). After careful review of the issues identified in the no-merit brief in this matter in light of the record and applicable law, we are satisfied that the 6 August 2020 order is supported by clear, cogent, and convincing evidence and is based on proper legal grounds. Accordingly, we affirm the trial court's order terminating respondent-mother's parental rights.

AFFIRMED.

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3. The parental rights of the children's fathers—known, putative, and unknown—were also terminated. They are not parties to this appeal.

IN RE J.L.F.

[378 N.C. 445, 2021-NCSC-97]

IN THE MATTER OF J.L.F.

No. 451A20

Filed 27 August 2021

Termination of Parental Rights—no-merit brief—multiple grounds for termination—record support

The termination of a father's parental rights to his son based on five separate statutory grounds was affirmed where the father's counsel filed a no-merit brief, the father did not file any written arguments, the termination order's findings of fact had ample record support, and there was no error in the trial court's determination that the father's parental rights were subject to termination and that termination would be in the son's best interest.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from order entered on 23 July 2020 by Judge Ellen M. Shelley in District Court, McDowell County. This matter was calendared in the Supreme Court on 21 June 2021, but was determined on the record and briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

Aaron G. Walker for petitioner-appellee McDowell County Department of Social Services.

Daniel Heyman for appellee Guardian ad Litem.

Leslie Rawls for respondent-appellant father.

PER CURIAM.

¶ 1 Respondent-father William F. appeals from the trial court's order terminating his parental rights in his minor child J.L.F.[1] Respondent-father's appellate counsel has filed a no-merit brief on his client's behalf pursuant to N.C. R. App. P. 3.1(e). After careful consideration of the record in light of the applicable law, we conclude that the issues identified by respondent-father's appellate counsel as potentially supporting an award of relief from the trial court's termination order lack merit and affirm the trial court's order.

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

¶ 2 On 17 September 2018, the McDowell County Department of Social Services filed a petition alleging that Jacob was a neglected and dependent juvenile and obtained the entry of an order taking Jacob into nonsecure custody.[2] In its petition, DSS alleged that, while Jacob remained in the neo-natal intensive care unit following his birth, it had received a child protective services report on 6 August 2018 that expressed concerns relating to substance abuse, domestic violence, and the existence of an injurious environment. According to the child protective services report, the mother, Heather D., was afraid of respondent-father, who was reputed to be Jacob's father even though he had not been mentioned on Jacob's birth certificate,[3] and had obtained the entry of a restraining order, which she later "dropped," against respondent-father for the purpose of preventing him from learning of her current location and the fact of Jacob's birth. In addition, the child protective services report asserted that both the mother and respondent-father used methamphetamine.

¶ 3 DSS further alleged that, after the receipt of the child protective services report, the mother and respondent-father had met with agency representatives on 8 August 2018. At that time, the mother and respondent-father denied having used methamphetamine, acknowledged that they did not have an appropriate place to live, and agreed to comply with the terms of a safety plan that required them to obtain comprehensive clinical assessments and refrain from using illegal substances.

¶ 4 In addition, DSS alleged in the juvenile petition that Jacob had been discharged from the hospital into the care of his paternal grandparents on 11 August 2018. Subsequently, however, DSS determined that Jacob would not be safe in this placement after the grandmother reported that the grandfather "had taken off with [Jacob] without a car seat" and indicated that she could no longer care for Jacob given her concerns about the grandfather's temper and her fears for her own safety and that of Jacob. Moreover, DSS alleged that, even though they had been allowed to visit with Jacob while he was in his grandparents' care, the mother and respondent-father had only visited Jacob on a single occasion for approximately one hour during that period of time. Finally, DSS alleged that neither the mother nor respondent-father had attempted to contact DSS since the 8 August 2018 meeting; that its attempts to contact the mother and respondent-father had been unsuccessful; and that the

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2. An amended juvenile petition and nonsecure custody order in which the juvenile's last name was corrected were, respectively, filed and entered on 28 September 2018.

3. On 30 October 2018, respondent-father submitted to a paternity test, the results of which concluded that there was a 99.99% probability that he was Jacob's father.

mother and respondent-father were understood to be living in their vehicle, with their exact whereabouts being unknown.

¶ 5 After a hearing held on 29 November 2018, Judge C. Randy Pool entered an order on 7 December 2018 determining that Jacob was a neglected and dependent juvenile, placing Jacob in DSS custody, allowing the mother and respondent-father to have separate supervised visitation sessions with Jacob, and ordering the mother and respondent-father to comply with their case plans. In his case plan, respondent-father was required to obtain a comprehensive clinical assessment and comply with any resulting recommendations; complete intensive outpatient substance abuse treatment, abstain from the use of illegal substances, and submit to random drug screens; complete the Batterer's Intervention Program and refrain from "abus[ing], manipulat[ing], control[ling], or exert[ing] power over the [mother]"; complete parenting classes; participate in visitation; and obtain and maintain stable, safe, and independent housing and stable employment.

¶ 6 The underlying juvenile proceeding came on for an initial review and permanency planning hearing on 14 February 2019, by which time respondent-father had been sentenced to five consecutive terms of six to seventeen months imprisonment for violating the terms and conditions set out in earlier probationary judgments. In an order entered on 22 April 2019, Judge Pool found that the mother had been making progress toward satisfying the requirements of her case plan while respondent had been incarcerated. Judge Pool established a primary permanent plan of reunification and a secondary plan of custody or guardianship.

¶ 7 After another permanency planning hearing held on 16 May 2019, Judge Pool entered an order on 31 May 2019 maintaining the primary permanent plan of reunification in light of the fact that the mother continued to make progress toward satisfying the requirements of her case plan. After another permanency planning hearing held on 29 August 2019 hearing, however, Judge Robert K. Martelle entered an order changing the primary plan for Jacob to one of adoption, with a secondary plan of reunification, based upon determinations that the mother had entered into a new romantic relationship and was living with a man who had failed to comply with his own DSS case plan and that she intended to remain in that relationship after being informed that her persistence in such conduct created an obstacle to her reunification with Jacob. Although respondent-father remained incarcerated, he had been present for each of these permanency planning hearings while displaying little interest in Jacob and appearing to be focused upon the mother's alleged involvement with other men. At the time of the final permanency planning

hearing, which was held before Judge Martelle on 21 November 2019, respondent-father asked to be allowed to leave the courtroom, was granted permission to do so, and threatened the mother while departing from that location.

¶ 8 On 27 November 2019, the mother executed a relinquishment of her parental rights in order to allow Jacob to be adopted by his foster mother, with whom Jacob had been placed since the date upon which he had been taken into DSS custody. On 4 March 2020, DSS filed a motion seeking to have respondent-father's parental rights in Jacob terminated on the basis of neglect, N.C.G.S. § 7B-1111(a)(1); willful failure to make reasonable progress toward correcting the conditions that had led to Jacob's removal from the family home, N.C.G.S. § 7B-1111(a)(2); failure to legitimate Jacob, N.C.G.S. § 7B-1111(a)(2)(5); dependency, N.C.G.S. § 7B-1111(a)6); and willful abandonment, N.C.G.S. § 7B-1111(a)(7) (2019). After a termination hearing held on 9 July 2020, the trial court entered an order on 23 July 2020 in which it established respondent-father's paternity and terminated respondent-father's parental rights in Jacob. More specifically, the trial court determined that respondent-father was Jacob's biological father, that respondent's-father's parental rights in Jacob were subject to termination on the basis of each of the grounds for termination alleged in the termination motion, and that the termination of respondent-father's parental rights would be in Jacob's best interests. Respondent-father noted an appeal to this Court from the trial court's termination order.[4]

¶ 9 As we have already noted, respondent-father's appellate counsel has filed a no-merit brief on his client's behalf as authorized by N.C. R. App. P. Rule 3.1(e). In her no-merit brief, respondent-father's appellate counsel identified certain issues relating to the adjudication and dispositional portions of the termination proceeding that could potentially support an

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4. The record on appeal as settled by the parties reflects that respondent-father did not sign the notice of appeal that was filed on his behalf in this case as required by N.C.G.S. § 7B-1001(c) (2019) and N.C. R. App. P. 3.1(b). On the other hand, however, respondent-father's trial counsel did attach a letter that he had received from respondent-father, who remained in the custody of the Division of Adult Correction, in which respondent-father indicated that he wished to note an appeal from the trial court's termination order. Although a parent's failure to sign the relevant notice of appeal has been held to constitute a jurisdictional defect, *see In re L.B.*, 187 N.C. App. 326, 332 (2007), *aff'd per curiam*, 362 N.C. 507 (2008), we conclude that the decision by respondent-father's trial counsel to attach respondent-father's letter to the notice of appeal resulted in substantial compliance with the signature requirement delineated in N.C.G.S. § 7B-1001(c) and N.C. R. App. P. 3.1(b), particularly given that neither DSS nor the guardian ad litem have sought to have respondent-father's appeal dismissed.

award of appellate relief, including whether the trial court had lawfully found that respondent-father's parental rights in Jacob were subject to termination and whether the trial court had abused its discretion by determining that termination of respondent-father's parental rights would be in Jacob's best interests before explaining why these potential issues lacked merit. In addition, respondent-father's appellate counsel advised respondent-father of his right to file pro se written arguments on his own behalf and provided him with the documents necessary to do so. Respondent-father has not, however, submitted any written arguments for our consideration in this case.

¶ 10 This Court independently reviews issues identified by counsel in a no-merit brief filed pursuant to N.C. R. App. P. 3.1(e) for the purpose of determining if any of those issues have potential merit. *In re L.E.M.*, 372 N.C. 396, 402 (2019). After a careful review of the issues identified in the no-merit brief filed by respondent-father's appellate counsel in this case in light of the record and applicable law, we are satisfied that the findings of fact contained in the trial court's termination order have ample record support and that the trial court did not err in the course of determining that respondent-father's parental rights in Jacob were subject to termination and that the termination of respondent-father's parental rights would be in Jacob's best interests. As a result, we affirm the trial court's order terminating respondent-father's parental rights in Jacob.

AFFIRMED.

IN RE K.N.

[378 N.C. 450, 2021-NCSC-98]

IN THE MATTER OF K.N. & K.N.

No. 459A20

Filed 27 August 2021

1. Termination of Parental Rights—subject matter jurisdiction—UCCJEA—home state—record evidence

The trial court had subject matter jurisdiction to terminate the parental rights of a father who was living out of state where, although the court did not make an explicit finding that it had jurisdiction under the Uniform Child Custody Jurisdiction and Enforcement Act (N.C.G.S. § 50A-201), the record established that the Act's jurisdictional requirements were satisfied. The children's home state was North Carolina at the time the termination proceedings commenced, and the children had been living in North Carolina with their foster parents for more than six consecutive months immediately preceding the commencement of the proceedings.

2. Termination of Parental Rights—grounds for termination—neglect—failure to make reasonable progress—evidence before and after the termination petition

In determining that a father's parental rights were subject to termination pursuant to N.C.G.S. § 7B-1111(a)(1) (neglect) and (a)(2) (failure to make reasonable progress), the trial court properly considered the totality of the evidence—both before and after the filing of the termination petition, despite the father's argument to the contrary on appeal—and determined that the events occurring after the petition's filing were unpersuasive and inadequate to overcome evidence supporting termination.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from an order entered on 29 July 2020 by Judge William J. Moore in District Court, Robeson County. This matter was calendared in the Supreme Court on 21 June 2021 but determined on the record and briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

J. Edward Yeager, Jr., for petitioner-appellee Robeson County Department of Social Services.

Michelle FormyDuval Lynch for appellee Guardian ad Litem.

Benjamin J. Kull for respondent-appellant father.

IN RE K.N.

[378 N.C. 450, 2021-NCSC-98]

NEWBY, Chief Justice.

¶ 1 Respondent-father appeals from an order terminating his parental rights to K.N. and K.N. (Kevin and Kimberly)[1]. For the reasons set forth herein, we affirm the order terminating his parental rights.

¶ 2 Kevin was born in February 2012 and Kimberly was born in August 2015. The Robeson County Department of Social Services (DSS) first became involved with the family in 2015 after it received information that Kevin, Kimberly, respondent, and the children's mother were homeless and living in their car. The family thereafter obtained housing.

¶ 3 On 31 May 2017, DSS again received a neglect referral alleging that the family was homeless and that respondent was inappropriately disciplining the children. On 21 June 2017, DSS learned that the family had been kicked out of the homeless shelter where they were staying and went to stay with relatives in a home that had no running water. On 21 June 2017, a child and family team meeting was held with the family to discuss placement options, but the parents were unable to provide relatives or family friends to assist in serving as a safety resource for the family.

¶ 4 Thereafter, on 22 June 2017, DSS obtained nonsecure custody of Kevin and Kimberly[2] and filed juvenile petitions alleging them to be neglected juveniles. On 12 July 2017, the nonsecure custody order was dismissed, and the children were placed back into the home of respondent and mother.

¶ 5 On 6 September 2017, however, DSS again obtained nonsecure custody of the children and filed amended juvenile petitions based upon unstable, inadequate, and unsuitable housing for the children and their observing respondent engaging in violence. Thereafter, on 12 October 2017, respondent and mother entered into family services case plans. Specifically, respondent's plan intended to address issues of mental health, parenting, substance abuse, housing, and employment. Subsequently, respondent and mother obtained housing for four months because the Southeastern Family Violence Center paid the rent during that time. After the Center stopped paying rent, however, respondent and mother were evicted in the spring of 2018 because they could not pay.

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

2. DSS also obtained nonsecure custody of Kevin and Kimberly's younger sibling and filed a juvenile petition alleging that he was a neglected juvenile. That child, however, is not a subject of this appeal.

¶ 6 On 26 February 2018, the trial court entered an order adjudicating Kevin and Kimberly to be neglected juveniles. In a separate disposition order, the trial court ordered respondent to submit to a psychological evaluation, mental health assessment, and substance abuse assessment. Custody of the children remained with DSS. The permanent plan was set as reunification with mother, with a concurrent plan of adoption. The parents received bi-weekly visitation with the children.

¶ 7 In March of 2018, the trial court found that respondent alleged that he had obtained work but could not provide proof of income. Respondent stated that though he was employed, he had not been working much. Respondent completed a substance abuse assessment but only sporadically engaged in the required services and missed multiple visitations. At the hearing, the trial court told respondent and mother that if they did not become compliant on their case plans, the court would look at focusing efforts on a primary plan of adoption.

¶ 8 On 12 April 2018, respondent and mother informed DSS that they were thinking about moving to Michigan. Thereafter, DSS made several attempts to locate respondent before he eventually contacted DSS in mid-May. Respondent informed DSS that he and mother were living in Michigan, searching for employment and housing, and planning to begin classes at Community Mental Health. In July of 2018, DSS learned that respondent and mother were receiving substance abuse counseling.

¶ 9 On 31 July 2018, however, respondent pled guilty and thereafter was convicted of domestic violence and assault in Michigan based upon domestic violence between respondent and mother. In August of 2018, DSS received an email from St. Clair County DSS in Michigan reporting that mother was residing at a women's shelter and respondent was in the St. Clair County Jail.

¶ 10 On 5 September 2018, the trial court held a hearing and subsequently entered an order finding that respondent had moved to Michigan and had not made himself available to work on any plan to remove his children from foster care. The trial court ordered DSS to "primarily focus its efforts" on the plan of adoption and established a concurrent plan of reunification with respondent and mother.

¶ 11 On 11 September 2018, DSS received a call from mother, who reported that she was four months pregnant and that she had been to the clinic at the women's shelter, though she had not seen an OB/GYN. Respondent was released from jail on 18 September 2018.

¶ 12 Based on all of the incidents above, on 24 October 2018, DSS filed a petition to terminate respondent's parental rights in Kevin and Kimberly.[3] DSS alleged that respondent had neglected the children, *see* N.C.G.S. § 7B-1111(a)(1) (2019), willfully left the children in DSS custody for over twelve months without making reasonable progress to correct the conditions that led to their removal, *see* N.C.G.S. § 7B-1111(a)(2), and willfully failed to pay a reasonable portion of the cost of care for Kevin and Kimberly although physically and financially able to do so, *see* N.C.G.S. § 7B-1111(a)(3).

¶ 13 Several months after the petition was filed, respondent contacted DSS and stated that he was working, had completed parenting classes and substance abuse treatment, and was looking for housing. Respondent and mother came to North Carolina for a court hearing on 7 March 2019 and provided certificates verifying completion of services. They had one visit with the children that day. On 20 March 2019, however, DSS learned that Michigan DSS had filed a non-secure order and taken custody of respondent and mother's newborn due to neglect.

¶ 14 In July of 2019, respondent contacted DSS and alleged that he had completed inpatient therapy. On 8 October 2019, however, a social worker from Michigan DSS reported that respondent had not completed parenting classes and had missed four drug screens. During the spring of 2020, DSS learned that Michigan DSS had received permission to file for termination of parental rights for respondent and mother's newborn.

¶ 15 Following a hearing on 25 June 2020, the trial court entered an order on 29 July 2020 concluding that grounds existed to terminate respondent's parental rights in Kevin and Kimberly pursuant to N.C.G.S. § 7B-1111(a)(1)–(3). The trial court also concluded that it was in Kevin and Kimberly's best interests that respondent's parental rights be terminated. Thus, the trial court terminated respondent's rights. Respondent appeals.

¶ 16 On appeal respondent contends that the trial court failed to include a jurisdictional finding in its order terminating his parental rights. He also contends that in terminating his rights pursuant to N.C.G.S. § 7B-1111(a)(1) (neglect) and (2) (willfully leaving the children in DSS custody for over twelve months without making reasonable progress to correct the conditions that led to their removal), the trial court failed to consider evidence that occurred after the petition filing date. Finally, respondent argues that there was insufficient evidence to support terminating his

3. DSS also terminated mother's parental rights, but she is not a party to this appeal.

rights under N.C.G.S. § 7B-1111(a)(3) (failing to pay a reasonable portion of childcare costs).

¶ 17 "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)). "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). Unchallenged findings are deemed to be supported by the evidence and are binding on appeal. *In re Z.L.W.*, 372 N.C. 432, 437, 831 S.E.2d 62, 65 (2019).

I. Subject Matter Jurisdiction

¶ 18 **[1]** Respondent contends the trial court lacked subject matter jurisdiction to terminate his parental rights. Respondent acknowledges that the record supports jurisdiction under the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) because North Carolina is the "home state" for Kevin and Kimberly. *See* N.C.G.S. § 50A-201 (2019). Nonetheless, respondent contends the trial court failed to comply with the requirements of N.C.G.S. § 7B-1101 (2019) by not making an explicit finding that it had jurisdiction under N.C.G.S. § 50A-201. Thus, respondent contends that the termination order is void.

¶ 19 "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. 343, 345, 677 S.E.2d 835, 837 (2009). Parties may challenge subject matter jurisdiction at any time. *In re T.R.P.*, 360 N.C. 588, 595, 636 S.E.2d 787, 793 (2006). Notably, however,

> "where the trial court has acted in a matter, every presumption not inconsistent with the record will be indulged in favor of jurisdiction . . . ." Nothing else appearing, we apply "the *prima facie* presumption of

> rightful jurisdiction which arises from the fact that a court of general jurisdiction has acted in the matter." As a result, "[t]he burden is on the party asserting want of jurisdiction to show such want."

In re N.T., 368 N.C. 705, 707, 782 S.E.2d 502, 503–04 (2016) (first quoting *Cheape v. Town of Chapel Hill*, 320 N.C. 549, 557, 359 S.E.2d 792, 797 (1987), then quoting *Williamson v. Spivey*, 224 N.C. 311, 313, 30 S.E.2d 46, 47 (1944), and then quoting *Dellinger v. Clark*, 234 N.C. 419, 424, 67 S.E.2d 448, 452 (1951)).

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

> [t]he 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 the filing of the petition or motion. . . . 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 non-resident 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). N.C.G.S. § 50A-201 and N.C.G.S. § 50A-203 (2019) are provisions of the UCCJEA. Relevant to this matter, subparagraph (a)(1) of N.C.G.S. § 50A-201 provides:

> (a) . . . a court of this State has jurisdiction to make an initial child-custody determination only if:
>
> (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). N.C.G.S. § 50A-203 provides the limited circumstances where "a court of this State may . . . modify a child-custody determination made by a court of another state." N.C.G.S. § 50A-203.

¶ 21 While respondent argues the trial court failed to comply with N.C.G.S. § 7B-1101 by not making an explicit finding that it had jurisdiction under N.C.G.S. § 50A-201, this Court has previously considered and rejected this argument. We have determined that "[t]he trial court is not required to make specific findings of fact demonstrating its jurisdiction under the UCCJEA, but the record must reflect that the jurisdictional prerequisites of the Act were satisfied when the court exercised jurisdiction." *In re L.T.*, 374 N.C. 567, 569, 843 S.E.2d 199, 200–01 (2020); *see also In re A.S.M.R.*, 375 N.C. 539, 545–46, 850 S.E.2d 319, 323–24 (2020) ("Here, as in *In re L.T.*, the lack of explicit findings establishing jurisdiction under the UCCJEA does not constitute error because the record unambiguously demonstrates that 'the jurisdictional prerequisites in the Act were satisfied.' " (quoting *In re L.T.*, 347 N.C. at 569, 843 S.E.2d at 201)).

¶ 22 Here the trial court made the finding that "the Court has jurisdiction over the parties and the subject matter herein pursuant to Article 11 of Chapter 7B of the North Carolina General Statutes." Notably, the record supports this determination. The record establishes that respondent moved to Michigan several months before the filing of the termination petition. The children's home state, however, is North Carolina and has been since the commencement of termination proceedings; Kevin and Kimberly lived with their foster parents for more than six consecutive months immediately preceding the filing of the termination petition. *See* N.C.G.S. § 50A-201(a)(1) (2019); N.C.G.S. § 50A-102(7) (defining "home state" under the UCCJEA as "the state in which a child lived with a parent or a person acting as a parent for at least six consecutive months immediately before the commencement of a child-custody proceeding"); *In re N.P.*, 376 N.C. 729, 2021-NCSC-11, ¶ 13 (concluding that where the juvenile was born in North Carolina and lived with foster parents in the state for the six months immediately preceding the termination petition filing, the trial court's determination that North Carolina was the home state was consistent with the UCCJEA and N.C.G.S. § 50A-201(a)(1)). Accordingly, the trial court had jurisdiction over this case.

II. Grounds for Termination

¶ 23 **[2]** Next respondent challenges the trial court's determination that grounds existed to terminate his parental rights.

A. N.C.G.S. § 7B-1111(a)(1)–(2)

¶ 24 Respondent contends the trial court erred by terminating his parental rights under N.C.G.S. § 7B-1111(a)(1) (neglect) and (2) (willfully leaving the children in DSS custody for over twelve months without making reasonable progress to correct the conditions that led to their removal) because it "operated under a misapprehension of law that post-petition facts were irrelevant and unnecessary." Respondent does not challenge any findings of fact as unsupported but instead contends that the trial court may have reached a different conclusion if it had correctly understood the significance of assessing events that occurred after the termination petition's filing. Respondent directs our attention to an objection made by counsel for DSS during the cross-examination of DSS Supervisor Vanessa McKnight. DSS counsel objected to testimony about evidence that occurred after the date the termination petition was filed, stating that the standard for termination was to look at what "happened prior to the date of the filing of the action." The trial court disagreed, however, allowing McKnight to testify.

¶ 25 Respondent also believes the trial court failed to consider any evidence after the petition was filed because DSS's only witness for the first part of the hearing was McKnight, who testified that she stopped supervising respondent's case on 24 October 2018 and thus could not provide information after that date. Respondent concedes, however, that the trial court received into evidence and considered DSS's "Termination of Parental Rights Timeline," which recounted numerous events that occurred after the filing of the termination petition. Nonetheless, respondent argues that, because the trial court did not require any other witnesses to testify, "the trial court clearly signaled that it did not anticipate or see the need for" evidence of events following 24 October 2018. Thus, respondent contends that he was prejudiced since "[t]here is simply no way to know what determinations the trial court may have made had it correctly understood the legal significance of that progress." Therefore, respondent requests that the termination order be vacated and remanded so that the trial court can conduct a new hearing considering the facts following the termination petition's filing date.

¶ 26 A trial court may terminate parental rights if it concludes the parent has neglected the juvenile within the meaning of N.C.G.S. § 7B-101. N.C.G.S. § 7B-1111(a)(1) (2019). A neglected juvenile is defined in pertinent part as a juvenile "whose parent, guardian, custodian, or caretaker does not provide proper care, supervision, or discipline; or who has been abandoned; . . . or who lives in an environment injurious to the juvenile's welfare." N.C.G.S. § 7B-101(15). "To terminate parental rights

based on neglect, 'if the child has been separated from the parent for a long period of time, there must be a showing of past neglect and a likelihood of future neglect by the parent.' " *In re D.L.A.D.*, 375 N.C. 565, 567, 849 S.E.2d 811, 814 (2020) (quoting *In re D.L.W.*, 368 N.C. 835, 843, 788 S.E.2d 162, 167 (2016)). In this situation, "evidence of neglect by a parent prior to losing custody of a child—including an adjudication of such neglect—is admissible in subsequent proceedings to terminate parental rights," but "[t]he trial court must also consider any evidence of changed conditions in light of the evidence of prior neglect and the probability of a repetition of neglect." *In re Ballard*, 311 N.C. 708, 715, 319 S.E.2d 227, 232 (1984).

¶ 27 Pursuant to N.C.G.S. § 7B-1111(a)(2), a trial court may terminate parental rights if "[t]he parent has willfully left the juvenile in foster care or placement outside the home for more than 12 months without showing to the satisfaction of the court that reasonable progress under the circumstances has been made in correcting those conditions which led to the removal of the juvenile." N.C.G.S. § 7B-1111(a)(2) (2019). "[T]he willfulness of a parent's failure to make reasonable progress toward correcting the conditions that led to a child's removal from the family home 'is established when the [parent] had the ability to show reasonable progress, but was unwilling to make the effort.' " *In re L.E.W.*, 375 N.C. 124, 136, 846 S.E.2d 460, 469 (2020) (quoting *In re Fletcher*, 148 N.C. App. 228, 235, 558 S.E.2d 498, 502 (2002)). "[T]he nature and extent of the parent's *reasonable progress* . . . is evaluated for the duration leading up to the hearing on the motion or petition to terminate parental rights." *In re J.S.*, 374 N.C. 811, 815, 845 S.E.2d 66, 71 (2020) (quoting *In re A.C.F.*, 176 N.C. App. 520, 528, 626 S.E.2d 729, 735 (2006)). This Court has recognized that "parental compliance with a judicially adopted case plan is relevant in determining whether grounds for termination exist pursuant to N.C.G.S. § 7B-1111(a)(2)." *In re B.O.A.*, 372 N.C. at 384, 831 S.E.2d at 313.

¶ 28 Our case law clearly states that in determining whether future neglect is likely, the trial court must consider evidence of changed circumstances between the period of past neglect and the time of the termination hearing. *In re Z.A.M.*, 374 N.C. at 95, 839 S.E.2d at 797. Similarly, in evaluating the nature and extent of a parent's reasonable progress in correcting the conditions that led to the children's removal, the trial court must consider the parent's progress leading up to the termination hearing. *In re J.S.*, 374 N.C. at 815, 845 S.E.2d at 71. Though it appears that counsel for DSS misstated this law during her objection to McKnight's testimony, the trial court overruled the objection and al-

lowed McKnight to continue with her testimony. The record does not indicate that counsel's misstatement of the law impacted the trial court in any way.

¶ 29 Moreover, though McKnight's testimony at the hearing was limited to the time immediately preceding the filing of the termination petition, the record indicates that the trial court admitted post-petition evidence during the proceeding and considered post-petition evidence in making its findings of fact and conclusions of law. During the adjudicatory stage of the termination hearing, the trial court took judicial notice of the children's underlying file, which included several court orders from hearings conducted after the filing of the termination petition. In addition, DSS introduced and the trial court admitted into evidence, without objection from respondent's counsel, a "Termination of Parental Rights Timeline" exhibit, which the trial court stated that it relied upon in making its findings. The timeline, which was signed and submitted by McKnight and DSS Social Worker McKoy, detailed DSS's involvement with respondent from December 2012 until the time of the termination hearing in June 2020. This timeline addressed numerous events that occurred after the filing of the termination petition on 24 October 2018.

¶ 30 The trial court's unchallenged findings, which are binding on appeal, establish that Kevin and Kimberly entered DSS custody on 21 June 2017 based on the family's homelessness and allegations of inappropriate discipline by respondent. The children were subsequently adjudicated neglected based on these allegations and respondent and mother's repeated failure to secure housing. Respondent entered into a case plan in October 2017 in which he agreed to complete a substance abuse assessment and submit to random drug screens, locate housing, and obtain employment. Initially, respondent obtained housing for four months through funding paid by the Southeastern Family Violence Center. Once the Southeastern Family Violence Center discontinued paying the rent, however, respondent was evicted for failure to pay. In May of 2018, respondent informed a DSS social worker that he and mother had moved and were living in Michigan. Though respondent began receiving substance abuse counseling, in August of 2018 respondent was convicted of domestic violence and assault and was released from jail on 18 September 2018.

¶ 31 Moreover, the trial court made the following findings of fact related to events occurring after the 24 October 2018 termination petition filing:

> 21. On January 25, 2019, SWS Vanessa McKnight received a telephone call from [respondent].

> [Respondent] reported that he was working two jobs. [Respondent] reported that he was coming to court in March, 2019.
>
> 22. On February 26, 2019, Social Worker received a telephone call from [mother]. [Mother] reported that she and [respondent] have completed parenting classes and substance abuse treatment. [Mother] stated that they were in the process of obtaining housing.
>
> 23. On March 7, 2019, the parents were present for court and provided to the court, certificates verifying completion of services. The parents visited with the children on March 8, 2019 and this was the last time the parents had a face to face visit with their children.
>
> 24. On March 20, 2019, SWS Anthony Maynor received a telephone call from Ms. Amanda Temple in Michigan, stating that they had filed a non-secure order and taken custody of [the] newborn due to neglect.
>
> 25. On July 11, 2019, Social Worker received a call from [respondent] informing worker that he was discharged from inpatient treatment with Sacred Hearts in Richmond, Michigan. [Respondent] reported that he is scheduled to begin outpatient treatment that is being offered by Michigan Department of Social Services on July 26, 2019.
>
> 26. On October 8, 2019, Tim Aiello, Michigan Social Worker reported [mother] has completed parenting classes; however, [respondent] has not completed parenting classes. [Mr.] Aiello reported that [respondent] has missed four drug screens and [mother] has missed six screens.
>
> 27. [In March 2020,] Mr. Tim Aeillo, Michigan Social Worker reported to Social Worker that . . . they received permission from the Court to file the Termination of Parental Rights on [mother] and [respondent's] new baby.

¶ 32 From the trial court order, it is clear the court considered evidence after the date of the termination petition's filing but determined that such evidence was unpersuasive and inadequate to overcome evidence supporting termination under N.C.G.S. § 7B-1111(a)(1) and (a)(2). This

appears especially so given that Michigan DSS proceeded with terminating the rights to respondent and mother's youngest child. Notably, the trial court can determine what weight to give any evidence of events occurring after the termination petition is filed; it is not up to this Court to reweigh how the trial court balanced that evidence. *See In re Z.A.M.*, 374 N.C. 88, 100, 839 S.E.2d 792, 800 (2020) (noting that "the trial court, which is involved in the case from the beginning and hears the evidence, is in the best position to assess and weigh the evidence, find the facts, and reach conclusions based thereon"). Thus, the unchallenged findings support the conclusion that the trial court considered the totality of the evidence, both before and after the petition's filing, in determining that respondent's parental rights were subject to termination pursuant to N.C.G.S. § 7B-1111(a)(1) and (a)(2).

B. N.C.G.S. § 7B-1111(a)(3)

¶ 33 Respondent also argues that the trial court erred in terminating his rights under N.C.G.S. § 7B-1111(a)(3). Because the trial court properly terminated respondent's parental rights based on N.C.G.S. § 7B-1111(a)(1)–(2), we need not address this argument. *See In re Moore*, 306 N.C. 394, 404, 293 S.E.2d 127, 133 (1982) (holding that an appealed order should be affirmed when any one of the grounds of the trial court is supported by findings of fact based on clear, cogent, and convincing evidence); *see also* N.C.G.S. § 7B-1111(a) (2019) ("The court may terminate the parental rights upon a finding of one or more [grounds for termination.]"). Accordingly, we affirm the trial court's termination order.

AFFIRMED.

IN RE M.A.

[378 N.C. 462, 2021-NCSC-99]

IN THE MATTER OF M.A.

No. 218A20

Filed 27 August 2021

Termination of Parental Rights—grounds for termination—neglect—likelihood of future neglect—unstable housing and domestic violence

The trial court did not err by determining that a mother's parental rights were subject to termination on the grounds of neglect where the court's findings were supported by the evidence, which demonstrated that the mother was likely to repeat her prior neglect if the child were returned to her care, based on the mother's lack of stable housing and unresolved domestic violence issues. Although the mother had made some progress on her case plan, at the time of the hearing she was sharing a studio apartment with a male coworker and was not on the lease, and she had failed to demonstrate an understanding of her domestic violence issues and how to protect herself and her child in the future.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from an order entered on 27 February 2020 by Judge Shamieka L. Rhinehart in District Court, Durham County. This matter was calendared for argument in the Supreme Court on 21 June 2021 but determined on the record and briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

The Law Office of Derrick J. Hensley, PLLC, by Derrick J. Hensley, for petitioner-appellee Durham County Department of Social Services.

Carrie A. Hanger for appellee Guardian ad Litem.

Peter Wood for respondent-appellant mother.

HUDSON, Justice.

¶ 1 Respondent, the mother of M.A. (Mark)[1], appeals from the trial court's order terminating her parental rights on the grounds of neglect and willful failure to make reasonable progress to correct the conditions that led to the child's removal from the home. Because we hold the trial

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

court did not err in concluding that grounds existed to terminate respondent's parental rights under N.C.G.S. § 7B-1111(a)(1) based on neglect, we affirm the trial court's order.

I. Facts and Procedural History

¶ 2 On 1 June 2015, the Durham County Department of Social Services (DSS) obtained nonsecure custody of then ten-month-old Mark and his fifteen-year-old brother, J.M.[2], and filed a juvenile petition alleging they were neglected juveniles. In the petition, DSS alleged that respondent and the children were chronically homeless and had been staying "from place to place." The petition further alleged that on 21 May 2015, J.M. returned from school to the place where they had been staying and was unable to locate respondent. Respondent did not leave any information or instructions on where she could be found. After still not being able to find respondent that evening, J.M. went to his maternal grandmother's senior residential complex at 1:00 a.m. to have a place to stay. On 1 June 2015, the maternal grandmother informed DSS that J.M. could no longer stay with her as her residence did not allow children, and she was concerned about being evicted. DSS believed Mark was with respondent, however she had not been located at the time of filing the petition.

¶ 3 On 2 June 2015, respondent showed up at DSS's office with Mark. The social worker addressed the allegations and petition with respondent and explained that DSS had obtained legal custody of her children on 1 June 2015. Respondent left Mark in the custody of DSS, and he was placed in foster care.

¶ 4 On 20 August 2015, the trial court entered an order adjudicating the children as neglected juveniles based on stipulations by the parties. In order to correct the conditions that led to the children's removal, the trial court ordered respondent to complete a psychological evaluation with collateral contacts and objective testing, and follow any recommendations for mental health treatment; complete a parenting class and demonstrate and verbalize an understanding of the skills learned; obtain and maintain stable housing; obtain and maintain stable employment; demonstrate an ability and willingness to meet the children's needs; refrain from substance abuse; maintain contact with the social worker and provide current contact information; and maintain visitation with the children. The trial court granted respondent two hours of supervised visitation every other week.

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2. J.M. has reached the age of majority and is not a part of this appeal. Therefore, we discuss the facts primarily as they relate to Mark.

¶ 5 Following a review hearing held 17 November 2015, the trial court entered an order on 11 January 2016 continuing custody with DSS and placing Mark with his paternal great grandmother. The trial court found that respondent was employed and seeking housing, had started parenting classes, had completed a substance abuse assessment from which no services were recommended, and had completed a psychological evaluation.

¶ 6 In a review order entered on 7 June 2016, the trial court set the permanent plan for Mark as reunification with a secondary plan of guardianship. The trial court found that respondent had obtained a one-bedroom home through Housing for New Hope. DSS had assessed the home on 31 May 2016 and found it to be appropriate for Mark. The trial court further found that respondent was making progress and was not a safety risk to Mark during visits but that she still needed to complete the parenting course and obtain sufficient income to meet the needs of her children. The trial court allowed respondent unsupervised visitation with Mark with the possibility of transitioning to overnight visits. In addition to respondent's prior case plan requirements, the trial court ordered respondent to obtain a domestic violence assessment due to a history of domestic violence.

¶ 7 On 10 August 2016, Mark was placed in a foster home after the paternal great grandmother indicated she could no longer care for him due to her health. On 8 September 2016, respondent was awarded overnight unsupervised visits on the condition that the father not be present.

¶ 8 In a 2 May 2017 permanency-planning-review order, the trial court continued the permanent plan of reunification but changed the secondary plan to adoption. The trial court found that respondent completed a domestic violence assessment in December 2016 which recommended mental health treatment and domestic violence counseling. Respondent completed a mental health assessment on 28 February 2017, and no treatment was recommended. However, DSS was concerned that respondent underreported her domestic violence history. Respondent completed an addendum to the initial assessment on 15 August 2017. However, the trial court found that respondent "continued to minimize her domestic violence history and its impact on her."

¶ 9 After another hearing, the trial court subsequently entered a permanency-planning-review order continuing the permanent plan of reunification with a secondary plan of adoption. The trial court found that respondent had housing and had been employed at the same company for the past eighteen months. However, the trial court found that

respondent's participation in domestic violence counseling had been "sporadic" and that respondent did not fully acknowledge the effects of her domestic violence history, nor did she fully understand the reasons the trial court was ordering her to engage in domestic violence counseling.

¶ 10 On 24 May 2018, DSS filed a motion to terminate respondent's parental rights to Mark alleging the grounds of neglect and willfully leaving the child in foster care for more than twelve months without making reasonable progress to correct the conditions that led to his removal from the home. *See* N.C.G.S. § 7B-1111(a)(1)–(2) (2019). DSS alleged that respondent failed to demonstrate a willingness and ability to meet Mark's needs due to respondent's "delays in scheduling and attending assessments and treatment, her sporadic attendance at treatment, incomplete disclosures regarding problems and failure to utilize all visitation opportunities with the child." DSS further alleged that respondent "exhibit[ed] a pattern of behavior of disengagement and lack of follow through" as she had "several older children for whom she failed to engage in services in order to safely parent th[o]se children."

¶ 11 Following a hearing on 20 and 23 July 2018, the trial court entered a permanency-planning-review order on 28 August 2018 changing the permanent plan to adoption with a secondary plan of guardianship. The trial court found that although respondent had stable housing, she had yet to complete the Parenting Capacity Assessment that was ordered in October 2017 which would address respondent's understanding of the impact of her domestic violence and her ability to keep Mark and herself safe. The trial court further found that respondent missed a permanency planning review meeting and failed to provide an explanation, and that respondent was not at her home when the social worker conducted a pop-in visit during Mark's unsupervised visitation. The trial court found that it is not possible for Mark to return to respondent's care within the next six months because she "has not completed her court ordered services, especially the Parenting Capacity Assessment, . . . and her sporadic attendance of domestic violence counseling."

¶ 12 The trial court conducted a termination-of-parental-rights hearing on 15 August, 9 and 15 October, 14 November, and 6 and 11 December 2019. On 27 February 2020, the trial court entered an order concluding that respondent's parental rights were subject to termination on the grounds of neglect and willful failure to make reasonable progress to correct the conditions that led to Mark's removal from the home. The trial court further concluded that termination of respondent's parental rights was in Mark's best interests. Accordingly, the trial court terminated respondent's parental rights. Respondent appealed.

II. Analysis

¶ 13 On appeal, respondent contends the trial court erred by adjudicating grounds for termination of her parental rights under N.C.G.S. § 7B-1111(a)(1) and (2). Because only one ground is necessary to terminate parental rights, we only address respondent's arguments regarding the ground of neglect. *See In re A.R.A.*, 373 N.C. 190, 194 (2019).

¶ 14 We review a trial court's adjudication "to determine whether the findings are supported by clear, cogent and convincing evidence and the findings support the conclusions of law." *In re Montgomery*, 311 N.C. 101, 111 (1984). 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). "Moreover, we review only those findings necessary to support the trial court's determination that grounds existed to terminate respondent's parental rights." *Id.* "The trial court's conclusions of law are reviewable de novo on appeal." *In re J.O.D.*, 374 N.C. 797, 801 (2020).

¶ 15 A trial court may terminate parental rights when 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 one "whose parent, guardian, custodian, or caretaker does not provide proper care, supervision, or discipline; . . . or who lives in an environment injurious to the juvenile's welfare." N.C.G.S. § 7B-101(15) (2019). In some circumstances, a trial court may terminate a parent's rights based on neglect that is currently occurring at the time of the termination hearing. *See, e.g.*, *In re K.C.T.*, 375 N.C. 592, 599–600 (2020) ("[T]his Court has recognized that the neglect ground can support termination . . . if a parent is presently neglecting their child by abandonment."). However, for other forms of neglect, the fact that "a child has not been in the custody of the parent for a significant period of time prior to the termination hearing" would make "requiring the petitioner in such circumstances to show that the child is currently neglected by the parent . . . impossible." *In re N.D.A.*, 373 N.C. 71, 80 (2019) (quoting *In re L.O.K.*, 174 N.C. App. 426, 435 (2005)). In this situation, "evidence of neglect by a parent prior to losing custody of a child—including an adjudication of such neglect—is admissible in subsequent proceedings to terminate parental rights[,]" but "[t]he trial court must also consider any evidence of changed conditions in light of the evidence of prior neglect and the probability of a repetition of neglect." *In re Ballard*, 311 N.C. 708, 715 (1984). After weighing this evidence, the trial court may find the neglect ground if it concludes the evidence demonstrates "a likelihood of future neglect by the parent." *In re R.L.D.*, 375 N.C. 838, 841 (2020) (quoting *In re D.L.W.*, 368 N.C. 835, 843 (2016)). Thus, even in the absence of current neglect,

the trial court may adjudicate neglect as a ground for termination based upon its consideration of any evidence of past neglect and its determination that there is a likelihood of future neglect if the child is returned to the parent. *In re R.L.D.*, 375 N.C. at 841 n.3.

¶ 16 Respondent acknowledges that Mark was previously adjudicated to be a neglected juvenile but challenges the trial court's finding as to the likelihood of a repetition of neglect.

A. Challenged Findings of Fact

¶ 17 Respondent first challenges the following findings of fact:

> 11. That at the time of this termination hearing, the Petitioner demonstrated by and through the evidence presented that conditions rising to the level of neglect existed during the pendency of the termination action in that the child lived in an environment injurious and that the parents did not provide proper care or supervision in that there continued to be unstable housing, unresolved issues of domestic violence, the father's abandonment and issues surrounding the parent's willingness and ability to provide proper supervision and care in the home.
>
> . . . .
>
> 64. The [c]ourt is aware that there has not been any reporting of any incidents of domestic violence since adjudication, but the [c]ourt is concerned that the mother has continued to underreport her history of domestic violence. Dr. Harris-Britt did state that the mother did not demonstrate an understanding of the skills she may have learned in her domestic violence counseling. The [c]ourt finds that the mother was unable to articulate the skills she learned in her domestic violence counseling with KKJ Services as testified to in this hearing.
>
> 65. The [c]ourt acknowledges the reasons [Mark] was neglected in the underlying adjudication and disposition; however, the [c]ourt must assess risk and harm. This [c]ourt does not believe that the mother could protect herself or [Mark] from being in a situation of domestic violence or being able to protect [Mark] if she found herself in that situation. The

[c]ourt finds that the mother has yet to progress with her understanding of domestic violence and how it could impact her and what she would need to do to protect herself and [Mark].

66. The [c]ourt also finds that the reason that [Mark] was removed was because of instability of housing. The [c]ourt looks at how differently the mother's housing status has changed from when [Mark] entered in the custody of DSS. At the time this case was adjudicated, the mother resided at Urban Ministries. The mother was able to locate a one-bedroom apartment and resided there for about three years. However, the mother moved in April of 2019 after having stable housing for a good period to move to a studio apartment with a co-worker where she is not on the lease. The mother reports that she moved to be closer to a better school; however, her housing situation remains unstable. The mother did not communicate to DSS that she had moved until September of 2019 when she requested that DSS look at her home so she could have overnight supervised visits. When [DSS] inquired as to who stayed with the mother, she did not provide a name of who stayed with her. It was not only until the hearing, that the mother revealed that she was staying with a roommate and the name of the roommate was given. Apparently, the mother's roommate is a male co-worker.

. . . .

68. The [c]ourt wonders where the visits were occurring during the time period where the mother was staying at her new residence that had not been approved for overnight weekend visits. The mother would have known that it was important to have been in place at the apartment that was approved for her visits so that the social worker could bring back to the [c]ourt information about how the visits were going. During this same timeframe, the mother was requesting drop off and pick up of [Mark] at various public places but not the residence that was approved for her visits.

. . . .

70. The [c]ourt finds that the fact that the mother was having unsupervised overnight weekend visits made her unmotivated in addressing the concerns of the court. The mother was ordered to complete the PCA in November of 2017 and it was not completed until November of 2018. The mother did not tell social worker Dearing that she had moved in April of 2019; the mother requested an assessment of her "new" home, approximately five months after she moved. The [c]ourt is baffled as to why the mother would not tell the social worker she had moved.

71. The [c]ourt finds that the mother has been working, but the [c]ourt still has concerns as to whether she can maintain her own household with her own efforts. The [c]ourt also finds that the mother has had the type of visitation she has had for a good period, but the court still finds that: 1) she still does not have stable housing and that she continues to struggle in maintaining a safe and functioning home for [Mark]; 2) the [c]ourt also is concerned because Dr. April Harris-Britt has made recommendations for an ACTT team and intensive mental health services along with her having domestic violence counseling and the mother still has yet focused and address[ed] the core issues of domestic violence about which the [c]ourt remains concerned. The [c]ourt is dubious of the mother's participation for services with KKJ Services and whether the mother's participation with this program will decrease the likelihood that [Mark] is returned to conditions resulting in his neglect given her lack of insight and her high level of distrust.

72. The [c]ourt also gives great weight to how long [Mark] has been in the care of DSS since 2015. He has been in the care of DSS for most of his life. The mother has had ample times to address these issues that continue to pose a risk if [Mark] were returned to her care. The mother lives in a small apartment with a man and pays half the rent and not paying the utilities. The [c]ourt does not know whether [Mark] was kept safe or properly supervised and cared for during these overnight visits. When the social worker would

go to the residence that was approved for her visits for unannounced pop-in visits, the mother and [Mark] were not there. The [c]ourt does not know what, if anything, [Mark] was exposed to and the mother knew that pop-in visits were required by . . . DSS.

. . . .

74. The [c]ourt finds that there is a likelihood of repetition of neglect if the juvenile was returned to the home of the Respondents[3] based upon the findings of fact herein and the underlying permanency planning orders relied upon and incorporated herein.

75. Respondents' failure to adequately and timely address the issues that led to the removal of the juvenile from the home constitutes neglect. That failure to adequately and timely address the neglectful behaviors, renders the Respondents incapable of providing adequate care and supervision of the juvenile. The probability that the neglect will be repeated and said incapability will continue in the future is high given the failure of the Respondents to address and alleviate the issues.

76. The Respondent Mother has demonstrated a settled pattern of neglect of the juvenile, and this pattern is likely to continue into the foreseeable future. The [c]ourt finds there is a reasonable probability that such neglect would be continued and repeated if the juvenile was to be returned to the care, custody, or control of the Respondents.

. . . .

81. The [c]ourt finds that, as of the time of the termination hearing, the Respondent Mother has not made reasonable progress under the circumstances to correct the conditions that led to the juvenile's removal in that while she did maintain housing for a period of time, she moved without notifying the social worker during a time when she was being allowed unsupervised overnight visitations. There were periods

3. Although M.A.'s father was a respondent in this case, he is not party to this appeal.

> of time when the social worker could not complete any pop-in visits to observe and monitor these visits. The mother stopped having drop-offs and pickups at her known residence. She then relocated to an apartment residence with an undisclosed male roommate and no lease. She failed to cooperate with the mental health recommendations. She did not participate in domestic violence treatment to the satisfaction of this [c]ourt. She failed to comp[l]ete the Parenting Capacity Assessment until a year after it was ordered and then failed to demonstrate the willingness and ability to comply with the recommendations from that assessment. These last two services were ordered by this [c]ourt in order to remedy the conditions which led to the juvenile's adjudication, namely [the] mother's homelessness and housing instability and the contributions [of] her history of Domestic Violence which the [c]ourt found was critical in the neglect of this juvenile. The Respondent Mother willfully failed and refused to substantially complete the services as ordered by the [c]ourt in a reasonable manner and timeframe.[4]

¶ 18 Respondent raises no specific evidentiary challenges to these findings but "disputes" them generally. After reviewing the record, including the testimony from the termination hearing and the unchallenged findings of fact, we hold the challenged findings are supported by competent evidence in the record. First, the social worker testified at the termination hearing regarding respondent's progress on her case plan over the four years that Mark had been in DSS custody, including testimony regarding respondent's housing situation, her participation in domestic violence treatment, and her visitations with Mark. The social worker testified that respondent no longer had stable housing and did not inform DSS that she had relocated until five months after she had moved, had not completed domestic violence treatment as recommended by her case plan, and was not always present at her home when the social worker attempted random pop-in visits during several of respondent's unsupervised visitation periods. The social worker also testified that respondent delayed in completing some services, including taking one year to complete the Parenting Capacity Assessment, which respondent was ordered to complete to address respondent's domestic violence issues.

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4. Although respondent challenges finding of fact 81 in her argument regarding grounds for termination under N.C.G.S. § 7B-1111(a)(2), the finding is also relevant to support the ground of neglect, so we address it here.

¶ 19 Furthermore, the psychologist who conducted the Parenting Capacity Assessment testified at the termination hearing that respondent had "extremely limited insight into how her own behaviors had impacted her children, why they were in care[,]" and that respondent's "inability to recognize or acknowledge the really important events that have happened for her as well as for her children will impact her ability to . . . benefit from services" and "ultimately will impact her ability to provide a safe and nurturing appropriate home for [Mark]." The Parenting Capacity Assessment, which was admitted into evidence at the termination hearing, stated that respondent "continues to display an unwillingness to accept accountability and a continuous lack of consistency in completing the actions necessary to meet the requirements of the court for reunification." The assessment also stated that, although respondent participated in domestic violence classes, "she did not demonstrate or verbalize understanding of the skills she may have received in [those] classes."

¶ 20 Finally, the trial court found in other unchallenged findings that respondent moved to a studio apartment without informing DSS and was unable to provide a lease to the apartment nor the name of the roommate that lived with her. As a result, DSS was not able to approve respondent's residence for overnight visitations. The trial court also found that respondent had not provided any documentation to DSS showing that she was participating in mental health counseling, as recommended by her domestic violence assessment, and that respondent informed the social worker that she was receiving domestic violence counseling at KKJ, where she "participates in support group sessions where the participants discuss outcomes for domestic violence." The trial court further found that although respondent was present at her home during some of DSS's pop-in visits during her visitations with Mark, there were at least ten times where respondent was not at her home with Mark. Because there is substantial evidence in the record to support the challenged findings, including testimony from the termination hearing and other unchallenged findings, we reject respondent's general challenge to the trial court's findings of fact.

¶ 21 Respondent also argues that findings of fact 64 and 65, which relate to respondent's domestic violence issues, are mere speculation by the trial court and based on "pure conjecture."[5] "The [trial] court has the responsibility of making all reasonable inferences from the evidence presented." *In re N.P.*, 374 N.C. 61, 65 (2020). "Such inferences, however,

5. Respondent also challenges finding of fact 68 for the same reasons, however, that finding is not necessary to support the ground of neglect.

cannot rest on conjecture or surmise. This is necessarily so because an inference is a permissible conclusion drawn by reason from a premise established by proof." *In re K.L.T.*, 374 N.C. 826, 843 (2020) (cleaned up) (quoting *Sowers v. Marley*, 235 N.C. 607, 609 (1952)).

¶ 22 We conclude the trial court's inferences in findings of fact 64 and 65 are not based merely on conjecture. The trial court could reasonably infer from the evidence presented that respondent would not be able to protect herself or Mark from being in a domestic violence situation or to protect Mark if she found herself in that situation. In the termination order, the trial court acknowledged that there had not been any reports of incidents of domestic violence since the adjudication in 2015. However, the trial court expressed concern that respondent was underreporting her domestic violence history. The trial court also found that respondent was unable to articulate the skills she learned in her domestic violence counseling and that she had not progressed with her understanding of domestic violence, how it could impact both her and Mark, and what she would need to do to protect herself and Mark. At the termination hearing, the psychologist that conducted respondent's Parenting Capacity Assessment testified that respondent was "extremely limited in her ability and willingness to share information about her domestic violence history" and "oftentimes" would underreport that information. The psychologist also testified that respondent's "inability to recognize or acknowledge" her history would impact her ability to benefit from services and ultimately impact her ability to provide a safe and nurturing home for Mark. The trial court could reasonably infer from this evidence that respondent would not be able to utilize the learned skills in order to protect herself and Mark from a domestic violence situation.

¶ 23 Respondent also "disputes the findings that she had failed to obtain stable housing." She contends that one move in over three years "is hardly unstable" and that the only issue with her housing "seemed to be that DSS had not had time to investigate her new residence or her new roommate." We disagree.

¶ 24 The evidence and findings support the trial court's conclusion that at the time of the termination hearing, respondent did not have stable housing. The trial court found that respondent had obtained stable housing for three years while she was residing in the one-bedroom home she had been renting that DSS found to be appropriate for Mark. However, around April of 2019, respondent moved to a studio apartment that she shared with a male coworker where she was not named on the lease. The trial court found that respondent did not inform DSS of the move until five months later when she requested a home assessment for over-

night visits, that respondent was not forthcoming about the move when questioned by the social worker, and that respondent failed to provide a name for her roommate until the termination hearing. Based on these findings, the trial court found that although respondent had obtained stable housing "for a good period[,]" at the time of the termination hearing "her housing situation remain[ed] unstable."

¶ 25 Although one relocation in a period of three years does not necessarily indicate instability, respondent moved from an approved one-bedroom home where she was the only tenant named on the lease to a shared studio apartment where she was not named as a tenant on the lease, and thus she has no legal right to remain in the home. Respondent testified at the termination hearing that she split the rent with her roommate but that the roommate paid for the utilities. Respondent also testified that she had moved to the apartment "several months ago" but she did not know the exact date and that she was "planning on finding a two-bedroom apartment or a house." Therefore, we conclude the trial court's findings that respondent did not have stable housing at the time of the termination hearing are sufficiently supported.

B. Repetition of Neglect

¶ 26 Respondent next argues the trial court erred in determining there was a likelihood of future neglect. Citing N.C.G.S. § 7B-903.1(c), respondent contends that the trial court's finding of a probability of future neglect is inconsistent with its determination that she continued to have unsupervised visits for the three years leading up to the termination hearing.

¶ 27 Subsection 7B-901.3(c) provides that

> [i]f a juvenile is removed from the home and placed in the custody or placement responsibility of a county department of social services, the director shall not allow unsupervised visitation with or return physical custody of the juvenile to the parent, guardian, custodian, or caretaker without a hearing at which the court finds that the juvenile will receive proper care and supervision in a safe home.

N.C.G.S. § 7B-903.1(c) (2019). The Juvenile Code defines a "[s]afe home" as "[a] home in which the juvenile is not at substantial risk of physical or emotional abuse or neglect." N.C.G.S. § 7B-101(19).

¶ 28 Respondent argues that because the trial court did not change her unsupervised visitation during the four-month period in which the

termination hearing was held, "the court must have determined that [respondent] had continued to provide a safe home free of neglect." She contends that although the trial court did not specifically find in the termination order that respondent had provided a safe home free of neglect for Mark, it "implicitly reached those conclusions when it continued to allow unsupervised visits." Therefore, respondent contends that the trial court's finding of a probability of neglect was "irreconcilably inconsistent" with allowing continued unsupervised visits. She further argues that even if the evidence could support neglect, allowing respondent to continue to exercise unsupervised visitation was "internally inconsistent" with a finding of a probability of future neglect. Respondent's arguments are misplaced.

¶ 29 Pursuant to Rule 58 of the North Carolina Rules of Civil Procedure, "a judgment is entered when it is reduced to writing, signed by the judge, and filed with the clerk of court." N.C.G.S. § 1A-1, Rule 58 (2019). Additionally, "a trial court's oral findings are subject to change before the final written order is entered." *In re A.U.D.*, 373 N.C. 3, 9–10 (2019). Thus, even assuming the trial court had determined that respondent provided a safe home during the termination hearing, the trial court's finding was subject to change until the final order was entered. Because the termination order does not continue respondent's unsupervised visitation, and in fact restricts respondent to supervised visitation, the trial court did not simultaneously find that respondent could provide a safe home for Mark and that there was a likelihood of repetition of neglect. Similarly, respondent's assertion that the trial court's findings are "internally inconsistent" is without merit. The trial court did not allow respondent to continue to exercise unsupervised visitation in the termination order in which it found a probability of future neglect.

¶ 30 Moreover, the fact that respondent was previously approved for unsupervised overnight visitation at a prior address did not preclude the trial court from later finding a likelihood of repetition of neglect when respondent's circumstances changed. At the time of the termination hearing, respondent was no longer residing at her approved one-bedroom home but was sharing a studio apartment with an unknown roommate, was not listed on the lease as a tenant, and was not paying utilities for the apartment. Respondent failed to inform DSS of the move for five months despite continuing to exercise her unsupervised overnight visitation. Therefore, we reject respondent's arguments.

¶ 31 Finally, respondent argues the evidence presented at the termination hearing did not support the trial court's finding of a probability of future neglect. We disagree.

¶ 32 "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 (2020) (quoting *In re M.J.S.M.*, 257 N.C. App. 633, 637 (2018)). However, "[a]s this Court has previously noted, a parent's compliance with his or her case plan does not preclude a finding of neglect." *In re J.J.H.*, 376 N.C. 161, 185 (2020) (citing *In re D.W.P.*, 373 N.C. 327, 339–40 (2020) (noting the 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")); *see also In re Y.Y.E.T.*, 205 N.C. App. 120, 131 (explaining that a "case plan is not just a check list" and that "parents must demonstrate acknowledgement and understanding of why the juvenile entered DSS custody as well as changed behaviors"), *disc. review denied*, 364 N.C. 434 (2010). Although respondent had made some progress on the requirements of her case plan, she had not addressed the conditions that resulted in Mark's placement in DSS custody.

¶ 33 The trial court found that Mark was removed from respondent's care and adjudicated to be a neglected juvenile primarily due to respondent's unstable housing and history of domestic violence. The trial court also found that conditions rising to the level of neglect existed during the pendency of the termination action due to respondent's continued unstable housing and unresolved issues of domestic violence. Respondent had over four years to address the conditions that led to Mark's removal but failed to do so. Although respondent attended some domestic violence counseling, the trial court found that she "did not participate in domestic violence treatment to [its] satisfaction" and that she did not demonstrate an understanding of her domestic violence issues, how they impacted her and Mark, and how to protect herself and Mark in a domestic violence situation. The findings also show that although respondent had obtained stable housing for a period of three years, at the time of the termination hearing respondent was sharing a studio apartment with a male coworker and was not on the apartment lease as a tenant. Respondent was not forthcoming about her move and did not inform DSS of the move or request an assessment of her new home until five months after she moved despite continuing to exercise her unsupervised visitation. The trial court also found that respondent "failed to comp[l]ete the Parenting Capacity Assessment until a year after it was ordered and then failed to demonstrate the willingness and ability to comply with the recommendations from that assessment." Finally, the trial court found that respondent's failure to adequately and timely address the issues that led to Mark's removal from her care constitutes neglect.

¶ 34 We hold the evidence and findings demonstrate that Mark is likely to be neglected again if returned to respondent's care due to her lack of stable housing and unresolved domestic violence issues and that they support the trial court's ultimate finding that there is a likelihood of repetition of neglect. *See In re M.A.*, 374 N.C. at 870 (holding that, although the respondent claimed to have made reasonable progress in addressing elements of his case plan, the trial court's findings regarding the respondent's failure to adequately address the issue of domestic violence, which was the primary reason that the children had been removed from the home, were, "standing alone, sufficient to support a determination that there was a likelihood of future neglect"). As a result, the trial court did not err by determining that grounds existed under N.C.G.S. § 7B-1111(a)(1) to terminate respondent's parental rights. Respondent does not challenge the trial court's dispositional determination that termination of her parental rights was in Mark's best interests. *See* N.C.G.S. § 7B-1110(a) (2019). Accordingly, we affirm the trial court's order terminating respondent's parental rights.

AFFIRMED.

IN THE MATTER OF M.J.M. AND A.M.M.

No. 494A20

Filed 27 August 2021

1. Termination of Parental Rights—subject matter jurisdiction—where child resides with guardian—underlying juvenile case

In a private termination proceeding, the trial court had subject matter jurisdiction to enter an order terminating a mother's parental rights to her child where the child's legal permanent guardian filed the termination petition in the county in which she resided with the child (Robeson), satisfying the jurisdictional requirements of N.C.G.S. § 7B-1101. A different county's jurisdiction over the child's underlying juvenile case did not prevent the Robeson County court from having jurisdiction over the termination petition.

2. Termination of Parental Rights—appointment of guardian ad litem—parent failed to file answer to petition—trial court's discretion

IN RE M.J.M.

[378 N.C. 477, 2021-NCSC-100]

Even assuming the issue was preserved for appellate review, in a private termination of parental rights proceeding where the mother failed to file an answer to the termination petitions but later decided to contest the matter, the record gave no indication that the trial court acted under a misapprehension of law or failed to exercise its discretion when it did not appoint a guardian ad litem for the children.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from orders entered on 20 August 2020 by Judge Brooke Clark in District Court, Robeson County. This matter was calendared for argument in the Supreme Court on 21 June 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.

Dorothy Hairston Mitchell for respondent-appellant mother.

HUDSON, Justice.

¶ 1 Respondent-mother appeals from the trial court's orders terminating her parental rights to the minor children M.J.M. (Mariel)[1] and A.M.M. (Audrey). Upon consideration of respondent-mother's arguments, we affirm.

I. Background

¶ 2 This is an appeal in private termination proceedings initiated by the children's paternal aunt (petitioner) to terminate the parental rights of respondent-mother and the children's father.[2] On 19 September 2019, petitioner filed a verified petition to terminate respondent-mother's parental rights to Mariel. The petition alleged that Mariel, who was born in June 2014, had resided with petitioner since October 2014 and that petitioner had been awarded guardianship of Mariel on 28 June 2016 in juvenile proceedings in the District Court in Wake County. The petition further alleged that grounds existed to terminate respondent-mother's

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

2. The father ultimately consented to petitioner's adoption of Mariel and Audrey, making it unnecessary for petitioner to proceed with the termination of his parental rights. Accordingly, he is not a party to this appeal, and this opinion does not discuss the allegations in the termination petitions related to the father.

parental rights to Mariel for failure to make reasonable progress, willful failure to pay a reasonable portion of Mariel's cost of care, and willful abandonment. *See* N.C.G.S. § 7B-1111(a)(2)–(3), (7) (2019). On 18 November 2019, petitioner filed a verified petition to terminate respondent-mother's parental rights to Audrey. The petition alleged that Audrey, who was born in May 2015, had resided with petitioner since May 2015. The petition further alleged that grounds existed to terminate respondent-mother's parental rights to Audrey for willful failure to pay a reasonable portion of Audrey's cost of care and willful abandonment. *See* N.C.G.S. § 7B-1111(a)(3), (7).

¶ 3 The termination petitions were served on respondent-mother by certified mail, and respondent-mother did not file answers to the petitions.

¶ 4 At a pre-adjudication hearing on the termination petitions on 17 February 2020, the trial court determined it had jurisdiction over the petitions and scheduled a termination hearing for 20 April 2020. The termination hearing was continued once upon a motion by respondent-mother, but the trial court denied respondent-mother's motion to further continue the matter and heard the termination petitions together on 29 June 2020. On 20 August 2020, the trial court entered orders terminating respondent-mother's parental rights to Mariel and Audrey. The trial court concluded that grounds existed to terminate respondent-mother's parental rights to both children for willful failure to pay a reasonable portion of their cost of care and willful abandonment, *see* N.C.G.S. § 7B-1111(a)(3) and (7), and it was in the children's best interests to terminate her parental rights. Respondent-mother appealed the termination orders.

II. Analysis

¶ 5 Respondent-mother argues on appeal: (1) the trial court lacked subject-matter jurisdiction to enter the order terminating her parental rights to Mariel, and (2) the trial court erred by failing to exercise its discretion to appoint a guardian ad litem for the children. Respondent-mother does not otherwise challenge the trial court's adjudication of the existence of grounds to terminate her parental rights or its determination that termination was in the children's best interests.

A. Jurisdiction

¶ 6 **[1]** We first address respondent-mother's argument that the trial court lacked subject-matter jurisdiction over the petition to terminate her parental rights to Mariel. "Whether or not a trial court possesses subject-matter jurisdiction is a question of law that is reviewed de novo.

Challenges to a trial court's subject-matter jurisdiction may be raised at any stage of proceedings, including for the first time before this Court." *In re A.L.L.*, 376 N.C. 99, 101 (2020) (cleaned up) (quoting *In re T.R.P.*, 360 N.C. 588, 595 (2006)).

¶ 7 Respondent-mother argues the District Court in Robeson County lacked subject-matter jurisdiction over the petition to terminate her parental rights to Mariel because the District Court in Wake County obtained and retained exclusive jurisdiction "over Mariel" in Mariel's underlying juvenile case, in which the District Court in Wake County granted petitioner guardianship of Mariel in June 2016. Respondent-mother thus asserts the order entered by the District Court in Robeson County terminating her parental rights to Mariel must be vacated. *See In re T.R.P.*, 360 N.C. at 590 ("Subject[-]matter jurisdiction is the indispensable foundation upon which valid judicial decisions rest, and in its absence a court has no power to act[.]"). We disagree.

¶ 8 This Court recently rejected a similar jurisdictional argument in *In re A.L.L.*, in which the respondent argued "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 [the] petitioners as [the juvenile's] legal permanent guardians." *In re A.L.L.*, 376 N.C. at 103. In that case, we recognized "[a] trial court's subject-matter jurisdiction over a petition to terminate parental rights is conferred by N.C.G.S. § 7B-1101." *Id.* at 104. That section provides,

> [t]he 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). This Court further explained,

> [i]t 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. 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. Thus, . . . 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. 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.

In re A.L.L., 376 N.C. at 105 (cleaned up) (quoting *In re E.B.*, 375 N.C. 310, 317 (2020)). Accordingly, we held the trial court had jurisdiction in *In re A.L.L.* when "the petitioners were [the juvenile's] legal permanent guardians who filed their petition in the district court in the county where they resided with [the juvenile], satisfying the requirements of N.C.G.S. § 7B-1101." *Id.*

¶ 9 In the present case, it is undisputed that petitioner was Mariel's legal permanent guardian and that petitioner filed the termination petition in the District Court in Robeson County, the county in which petitioner resided with Mariel. Therefore, the requirements of N.C.G.S. § 7B-1101 were satisfied so as to confer jurisdiction over the termination petition in the District Court in Robeson County. Accordingly, we overrule respondent-mother's argument that the District Court in Robeson County lacked subject-matter jurisdiction over the petition to terminate her parental rights to Mariel.

B. Guardian ad Litem

¶ 10 **[2]** We next address respondent-mother's argument that the trial court erred by failing to exercise its discretion to appoint a guardian ad litem (GAL) for the children. The appointment of a GAL for a juvenile in termination proceedings is governed by N.C.G.S. § 7B-1108. That section provides, in relevant part:

> (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 . . . .
>
> (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 . . . ; 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).

¶ 11 It is undisputed that respondent-mother did not file an answer or response to the termination petitions. Therefore, the trial court was not required to appoint a GAL pursuant to N.C.G.S. § 7B-1108(b). However, respondent-mother contends the trial court failed to exercise its discretion under N.C.G.S. § 7B-1108(c) to appoint a GAL absent an answer or response because the trial court was under a mistaken belief that it could not do so. Due to the trial court's alleged misapprehension of the law, respondent-mother contends the termination orders must be reversed and remanded in order for the trial court to exercise its discretion under N.C.G.S. § 7B-1108(c). Again, we disagree.

¶ 12 First, although the trial court considered appointing a GAL in deciding whether to grant respondent-mother's motion to further continue the termination hearing, no party moved for the trial court to appoint a GAL for the children, nor was there any objection to the lack of a GAL. Thus, respondent-mother failed to preserve this issue for appellate review. *See In re A.D.N.*, 231 N.C. App. 54, 65–66 (2013) (reiterating that "in order to preserve for appeal the argument that the trial court erred by failing to appoint the child a GAL, a respondent must object to the asserted error below" (citing *In re Fuller*, 144 N.C. App. 620, 623 (2001); *In re Barnes*, 97 N.C. App. 325, 326 (1990))), *disc. rev. denied*, 367 N.C. 321 (2014); *see also* N.C. R. App. P. 10(a)(1) ("In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion . . . .").[3]

¶ 13 Moreover, assuming arguendo the issue was preserved, the record does not "undoubtedly show the trial court mistakenly believed [it] could

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3. We note that respondent-mother asserts the matter should be reviewed on appeal despite her failure to raise the issue or an objection in the trial court. She relies on the Court of Appeals' decisions in *In re Fuller*, 144 N.C. App. 620 (2001), and *In re Barnes*, 97 N.C. App. 325 (1990). In those cases, however, the court did not hold that challenges to the trial court's failure to appoint a GAL were preserved for appellate review; the court instead invoked Rule 2 of the North Carolina Rules of Appellate Procedure to suspend the appellate rules in order to reach the issue of whether the trial court committed prejudicial error by failing to comply with the statutory mandate that a GAL shall be appointed when an answer is filed contesting a termination petition. *In re Fuller*, 144 N.C. App. at 623; *In re Barnes*, 97 N.C. App. at 326–27.

not appoint a guardian ad litem since an answer was not filed[,]" as asserted by respondent-mother. The transcript of the termination hearing shows that respondent-mother's attorney moved to continue the termination hearing for a second time when the matter was called on 29 June 2020 due to respondent-mother's absence. Although respondent-mother was not physically present, she participated by telephone. In considering the motion to continue, the trial court identified various considerations, including that respondent-mother indicated she was contesting termination of her parental rights despite her prior indecisiveness and failure to file an answer. The trial court indicated it believed it was better practice to have a GAL involved if respondent-mother was contesting the matter and acknowledged that the reason there was not yet a GAL involved was because respondent did not file an answer. However, the trial court indicated it wanted to hear from the parties before deciding how to proceed. The transcript shows that the trial court remained concerned about further delay in the proceedings after hearing from the parties, and the trial court ultimately denied the motion to continue and proceeded without appointing a GAL after respondent-mother indicated the only evidence she could offer was her own testimony, which the trial court allowed by telephone.[4] The record does not indicate the trial court was under a misapprehension of the law or failed to exercise its discretion. We overrule respondent's argument.

III. Conclusion

¶ 14 Having overruled respondent-mother's arguments that the trial court lacked subject-matter jurisdiction over the petition to terminate her parental rights to Mariel and that the trial court erred in failing to exercise its discretion to appoint a GAL for the children, and because respondent-mother does not challenge the trial court's adjudication of the existence of grounds to terminate her parental rights or determination that termination was in the children's best interests, we affirm the trial court's orders terminating respondent-mother's parental rights to Mariel and Audrey.

AFFIRMED.

4. Respondent-mother does not challenge the trial court's denial of her motion to continue.

IN RE S.C.L.R.

[378 N.C. 484, 2021-NCSC-101]

IN THE MATTER OF S.C.L.R.

No. 371A20

Filed 27 August 2021

1. Termination of Parental Rights—pleadings—sufficiency—private termination action—reference to court order

The petition in a private termination of parental rights action comported with statutory pleading requirements (N.C.G.S. § 7B-1104(2)) where the petition stated petitioners' names and address, alleged that custody had been granted to them, and referenced the custody order establishing that the child had resided with them for two years.

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

The Supreme Court rejected a mother's argument that the trial court failed to make any factual finding that her conduct was willful and therefore that the court erred by concluding her parental rights were subject to termination on the grounds of willful abandonment. Even though it was labeled as a conclusion of law, the trial court did make a finding that the mother had willfully abandoned the child. In addition, the Court rejected the mother's challenge to the sufficiency of the findings because the findings reflected that she had failed to do anything to express love, affection, and parental concern during the determinative period.

3. Termination of Parental Rights—grounds for termination—willful abandonment—failure to pay for care required by decree or custody agreement—sufficiency of findings

In a private termination of parental rights action, the evidence did not support the trial court's finding that the father, who was incarcerated during the relevant time period, had willfully abandoned his child where the father testified that he spoke with his daughter every other weekend and where the petitioner, who had custody of the child, testified that the father called on Christmas. Even if the father's testimony were found not credible, the petitioner's testimony did not establish willful abandonment. The evidence also did not support the trial court's finding that the father had willfully failed to pay for care, support, or education as required by a decree or custody agreement where there was no evidence of any decree or custody agreement making such a requirement.

Justice EARLS concurring in part and dissenting in part.

Justice ERVIN joins in this concurring in part and dissenting in part opinion.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) and on writ of certiorari pursuant to N.C.G.S. § 7A-32(b) to review an order entered on 21 May 2020 by Judge Larry J. Wilson in District Court, Cleveland County. This matter was calendared for argument in the Supreme Court on 21 June 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 for petitioner-appellees.

Sydney Batch for respondent-appellant father.

Jeffrey L. Miller for respondent-appellant mother.

BARRINGER, Justice.

¶ 1 Respondents appeal from the trial court's order terminating their parental rights to S.C.L.R. (Sue).[1] After careful review, we affirm the order as to respondent-mother and reverse the order as to respondent-father.

I. Background

¶ 2 Petitioners brought Sue home from the hospital after her birth in the spring of 2017. Petitioners came to provide for Sue through a friend of petitioners who worked with Sue's paternal grandmother. At the time of Sue's birth, both respondents were incarcerated, and the paternal grandmother wanted to find an alternative to foster care. Respondents assigned temporary custody of Sue to petitioners pursuant to a consent order entered on 15 May 2017. Permanent custody was granted by the trial court to petitioners in Cleveland County File No. 17-CVD-814 (the Custody Action) by order signed on 27 June 2019. Sue has been in petitioners' care and custody since they took her home from the hospital in May 2017.

¶ 3 Petitioners filed a verified petition to terminate respondent-mother's parental rights to Sue on 5 August 2019. Petitioners subsequently filed

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

an amended verified petition to terminate respondent-mother's and respondent-father's parental rights to Sue on 26 August 2019. Petitioners sought termination pursuant to N.C.G.S. § 7B-1111(a)(4) and (7).

¶ 4 The trial court held the termination-of-parental-rights hearing on 26 February 2020. Following the hearing, the trial court entered an order on 21 May 2020 in which it determined that grounds existed to terminate respondents' parental rights pursuant to the grounds alleged in the petition. The trial court further concluded it was in Sue's best interests that respondents' parental rights be terminated. Accordingly, the trial court terminated respondents' parental rights.

¶ 5 Respondents gave timely notice of appeal pursuant to N.C.G.S. § 7B-1001(a1)(1). Respondent-mother's notice of appeal, however, improperly designated the Court of Appeals as the court to which appeal was being taken. Respondent-mother filed an amended notice of appeal on 25 June 2020 in which she correctly designated this Court as the court to which appeal was being taken. On 22 September 2020, respondent-mother filed a petition for a writ of certiorari seeking review of the trial court's order terminating her parental rights. On 19 October 2020, we allowed respondent-mother's petition for writ of certiorari.

II. Compliance with N.C.G.S. § 7B-1104(2)

¶ 6 **[1]** Respondents first argue that the trial court lacked jurisdiction to terminate their parental rights because the verified petition fails to allege "facts sufficient to identify the petitioner or movant as one authorized by [N.C.]G.S. [§] 7B-1103 to file a petition or motion." N.C.G.S. § 7B-1104(2) (2019). Because we conclude that the allegations in the petition are sufficient to comply with N.C.G.S. § 7B-1104(2) and respondents do not dispute that petitioners in fact were persons authorized by N.C.G.S. § 7B-1103(a) to file a petition for termination of respondents' parental rights, we decline to address whether the legislature has limited the trial court's jurisdiction to petitions filed with allegations sufficient to comply with N.C.G.S. § 7B-1104(2).

¶ 7 Subsection 7B-1103(a) of the General Statutes of North Carolina provides the following:

> (a) A petition or motion to terminate the parental rights of either or both parents to his, her, or their minor juvenile may only be filed by one or more of the following:
>
> . . . .

> (5) Any person with whom the juvenile has resided for a continuous period of two years or more next preceding the filing of the petition or motion.

N.C.G.S. § 7B-1103(a) (2019).

¶ 8 A petition or motion to terminate parental rights shall state "[t]he name and address of the petitioner or movant and facts sufficient to identify the petitioner or movant as one authorized by [N.C.]G.S. [§] 7B-1103 to file a petition or motion." N.C.G.S. § 7B-1104(2).

¶ 9 Respondents have not challenged the trial court's finding in the termination-of-parental-rights order that Sue has resided with petitioners since she came home from the hospital after her birth in May 2017. Respondents also testified to this effect at the termination-of-parental-rights hearing. Unchallenged findings are deemed to be supported by the evidence and are binding on appeal. *See In re Z.L.W.*, 372 N.C. 432, 437 (2019). Thus, this appeal does not involve a dispute concerning whether petitioners are in fact persons "with whom the juvenile has resided for a continuous period of two years or more next preceding the filing of the petition or motion." N.C.G.S. § 7B-1103(a)(5). Consequently, whether petitioners were authorized by statute to file a petition for termination of respondents' parental rights is not at issue. Instead, this appeal only raises whether a statutory pleading requirement was met.

¶ 10 When we look at the petition, it is apparent that petitioners did provide their names and address but did not include an allegation using the specific language of N.C.G.S. § 7B-1103(a)(5). However, as N.C.G.S. § 7B-1104(2) does not require specific language for compliance, our analysis does not end here. *See* N.C.G.S. § 7B-1104(2).

¶ 11 Instead, we must consider whether the provision of petitioners' names, address, and other facts in the petition are "sufficient to identify . . . petitioner[s] as . . . one authorized by [N.C.]G.S. [§] 7B-1103 to file a petition [for termination of parental rights]." N.C.G.S. § 7B-1104(2). Among other things, the petition alleged "[t]hat custody was given to the [p]etitioners in Cleveland County File No.: 17-CVD-814 by Order of this [c]ourt dated February 12, 2019 that was subsequently filed June 24, 2019; that since prior to the entry of this Order, the respondents have not had any contact with the minor child." The petition also identified that Sue resides with petitioners in Cleveland County.

¶ 12 In the Custody Action, respondents are the defendants, and petitioners are the plaintiffs.[2] Petitioners commenced the Custody Action by complaint after Sue's birth when Sue remained in the hospital. Respondents accepted service, and petitioners and respondents consented to the entry of an order by the trial court in the Custody Action on 15 May 2017. The trial court found "[t]hat the parties agree that the minor child should be placed in the temporary legal and physical care, custody[,] and control of the [petitioners], subject to the [respondents] exercising supervised visitation upon their release [from incarceration]" and ordered "[t]hat the [petitioners] shall have the temporary legal and primary physical care, custody[,] and control of [Sue] subject to [respondents] exercising supervised visitation for a minimum of one hour each week upon [their] release." Later, upon petitioners' request, the parties were heard by the trial court on 12 February 2019. The trial court upon hearing the testimony of the parties and reviewing the evidence found that Sue "ha[d] been placed with [petitioners] since she was an infant," and petitioners "have provided excellent care for [Sue], since being vested with temporary custody." Thereafter, the trial court ordered that "[petitioners] shall have the permanent sole care, custody[,] and control of [Sue]." The order was signed on 27 June 2019.

¶ 13 Since the foregoing findings of fact and orders of the trial court in the file identified by the petition establish that petitioners have had Sue in their legal care, custody, and control since 15 May 2017 and the petition to terminate the parental rights of respondents was filed on 26 August 2019, we conclude the petition contains "facts sufficient to identify the petitioner or movant as one authorized by [N.C.]G.S. [§] 7B-1103 to file a petition or motion." N.C.G.S. § 7B-1104(2). Specifically, the aforementioned facts reflect that Sue "has resided [with petitioners] for a continuous period of two years or more next preceding the filing of the petition." N.C.G.S. § 7B-1103(a)(5). Thus, we find no merit in respondents' first argument.

III. Challenges to Findings of Fact and Conclusions of Law

¶ 14 Our Juvenile Code provides for a two-step process for the termination of parental rights—an adjudicatory stage and a dispositional stage. N.C.G.S. §§ 7B-1109, 1110 (2019). At the adjudicatory stage, the

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2. This Court has ordered that the Complaint, dated 15 May 2017; Acceptance of Service by respondent-mother, dated 15 May 2017; Acceptance of Service by respondent-father, dated 15 May 2017; Order, dated 15 May 2017; and Custody Order, dated 27 June 2019, from Cleveland County File No. 17-CVD-814 be added to the record on appeal, pursuant to Rule 9(b)(5)(b) of the North Carolina Rules of Appellate Procedure.

petitioner bears the burden of proving by clear, cogent, and convincing evidence the existence of one or more grounds for termination under N.C.G.S. § 7B-1111(a). N.C.G.S. § 7B-1109(e), (f). If the 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).

¶ 15 We review a trial court's adjudication under N.C.G.S. § 7B-1111 "to determine whether the findings are supported by clear, cogent and convincing evidence and the findings support the conclusions of law." *In re Montgomery*, 311 N.C. 101, 111 (1984). "The trial court's conclusions of law are reviewable de novo on appeal." *In re C.B.C.*, 373 N.C. 16, 19 (2019). Unchallenged findings are deemed to be supported by the evidence and are binding on appeal. *In re Z.L.W.*, 372 N.C. at 437.

¶ 16 As pertinent to both respondents' arguments on appeal, the trial court's termination-of-parental-rights order found that:

> 2. The [r]espondent[-mother] is a resident of Cleveland County, North Carolina.
>
> 3. The respondent[-father] is currently incarcerated in Piedmont Correctional Institut[ion] in Salisbury, North Carolina.
>
> . . . .
>
> 5. This action was filed on August 26, 2019 by the petitioners . . . .
>
> . . . .
>
> 7. The [c]ourt finds that custody was given to the [p]etitioners in Cleveland County File No.: 17-CVD-814 by Order of this [c]ourt dated February 12, 2019 that was subsequently filed June 24, 2019; that since prior to the entry of this Order, the respondents have not had any contact with the minor child, and since the time the child was taken into physical custody of the [p]etitioners[,] the child has resided with the [p]etitioners; that the minor child has resided with the petitioners since she initially came home from the hospital after her birth.
>
> 8. The [c]ourt would find that the [r]espondents have had no meaningful contact with the minor child;

> that neither respondent has . . . supported the minor child financially or emotionally and has not bonded with the minor child; that the respondent[-]father is currently incarcerated with a projected release date of February 2026; that given his length of incarceration along with the impossibility of him being an involved role in the minor child's life, the minor child needs stability; that he has abandoned the minor child and it is also in the minor[ ] child's best interests to have permanence with the [p]etitioners.
>
> 9. That the respondent[-]mother has struggled ongoing with substance abuse issues and has abandoned the minor child; that she has also failed to support the minor child's needs financially; she has not had any visitation with the minor child dating back to November of 2018, 12 months prior to the filing of this action. She testified to being gainfully employed but has not provided any financial support for the well-being of the minor child whatsoever.
>
> 10. That grounds pursuant to N.C.[G.S.] [§] 7B-1111(a)(4) and 7B-1111(a)(7) exist as evidenced by the testimony elicited and findings of fact set forth above.
>
> . . . .
>
> 12. The [c]ourt would find the grounds for abandonment and failure to provide support stated in the petition have been proven and would find therefore that grounds for termination of parental rights exists as alleged and proven.

¶ 17 The trial court then in conclusion of law three, concluded based on the aforementioned findings of fact that, "[a]t the time of the filing of this action, the respondent[-]father and respondent[-]mother have willfully abandoned the child for at least six consecutive months immediately preceding the filing of this petition; ha[ve] willfully failed without justification to pay for the care and support of the minor child; [and] that the respondents have neglected the minor child."

A. Respondent-mother's Arguments

¶ 18 **[2]** Respondent-mother challenges the trial court's conclusion that the ground of willful abandonment pursuant to N.C.G.S. § 7B-1111(a)(7)

existed by first arguing that there are no findings of fact indicating that respondent-mother's conduct was willful as none of the trial court's findings of fact contain the word "willful."

¶ 19 A trial court may terminate parental rights pursuant to this statutory ground when "[t]he parent has willfully abandoned the juvenile for at least six consecutive months immediately preceding the filing of the petition or motion." N.C.G.S. § 7B-1111(a)(7) (2019). The willfulness of a parent's conduct is a question of fact to be determined by the trial court from the evidence and is not a conclusion of law. *In re K.N.K.*, 374 N.C. 50, 53 (2020). Regardless of the label given by the trial court, this Court is "obliged to apply the appropriate standard of review to a finding of fact or conclusion of law." *In re J.S.*, 374 N.C. 811, 818 (2020). Thus, the trial court's placement of a finding of willfulness in its conclusions of law is immaterial to our analysis. *Id.*

¶ 20 Because the trial court did find that "[a]t the time of the filing of this action, the . . . respondent[-]mother ha[s] willfully abandoned the child for at least six consecutive months immediately preceding the filing of this petition," albeit labeled as a conclusion of law, respondent-mother's argument that the trial court's termination-of-parental-rights order lacked a finding of willfulness is without merit.[3]

¶ 21 Next, respondent-mother challenges portions of findings of fact 7, 8, and 9 on the basis that "[t]he dates and reasons for [respondent-mother's] lack of contact [with Sue] are not stated, explained, or resolved by the trial court in any manner." Respondent-mother does not challenge the findings of fact for lack of evidentiary support but rather asserts that "[t]here are potential explanations which could be made which would be inconsistent with a willful intent to abandon Sue."

¶ 22 As findings not challenged for their lack of evidentiary support are deemed to be supported by the evidence and are binding on appeal and because respondent-mother has not challenged the evidentiary basis for any of the findings of fact, we must consider all findings of fact binding on appeal as to respondent-mother. *See In re Z.L.W.*, 372 N.C. at 437. Yet, even if challenged by respondent-mother for lack of evidentiary support, the testimony at the termination hearing supports the trial court's findings.

¶ 23 Petitioner Mr. C. testified that the last contact respondent-mother had with Sue was 1 November 2018 and that respondent-mother had not

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3. Unlike respondent-father, respondent-mother did not challenge the evidentiary basis for a finding of willfulness, even as an alternative argument. Her argument on appeal as to willfulness is limited to the absence of a finding of willfulness.

reached out by telephone, social media, or any other type of contact to try to have contact with the child after that date. Respondent-mother also testified that she had not had any contact with Sue since 1 November 2018 and acknowledged that she knew where petitioners resided and did not file anything regarding visitation with Sue. Respondent-mother also testified that she had last reached out to petitioners regarding the minor child in August 2019, but then changed her story, later testifying that she had reached out by text every month since August 2019. When questioned, she conceded that she had no documentation or proof to support her claim of texting petitioners and admitted that she was served with the petition in this matter in August 2019.[4] Mr. C. testified that petitioners are the sole means of financial support for Sue and neither respondent has provided financial support or any other support. Respondent-mother agreed, testifying that she had not done anything to support the child, financially or otherwise, and acknowledged she had not sent any letters, cards, or anything else to Sue. Respondent-mother, however, had been and was gainfully employed.

¶ 24 Because the testimony provides clear, cogent, and convincing evidence to support the trial court's findings, if respondent-mother had challenged the evidentiary basis of the findings, the findings of the trial court would still be conclusive as to respondent-mother even though her testimony might sustain findings to the contrary. *See In re J.A.M.*, 370 N.C. 464, 466–67 (2018) (per curiam) (reversing the Court of Appeals decision for misapplying the standard of review for challenged findings of fact). It is the province of the trial court "to pass upon the credibility of the witnesses," determine "the weight to be given their testimony," and ascertain "the reasonable inferences to be drawn therefrom." *In re D.L.W.*, 368 N.C. 835, 843 (2016) (cleaned up).

¶ 25 Respondent-mother's argument, however, instead challenges the inadequacy of the findings of fact to support the trial court's conclusion of law that the ground for termination pursuant to N.C.G.S. § 7B-1111(a)(7) exists. We review de novo whether the findings of fact to which we are bound support the conclusion of law. *See, e.g.*, *In re C.B.C.*, 373 N.C. at 19; *In re Moore*, 306 N.C. 394, 404 (1982). To support termination pursuant

4. As the amended petition was filed on 26 August 2019, we consider for this matter the determinative period for assessing N.C.G.S. § 7B-1111(a)(7) to be 26 February 2019 to 26 August 2019. *See In re N.D.A.*, 373 N.C. 71, 77 (2019) ("[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." (quoting *In re D.E.M.*, 257 N.C. App. 618, 619 (2018))).

to N.C.G.S. § 7B-1111(a)(7), the trial court's findings of fact must show willful abandonment, which this Court has described as a determination to forego all parental duties and parental claims by withholding love, care, presence, filial affection, support, and maintenance, *see*, *e.g.*, *In re A.G.D.*, 374 N.C. 317, 319–20 (2020), during the six-month period immediately preceding the filing of the petition, N.C.G.S. § 7B-1111(a)(7).

¶ 26 In this matter, the trial court found that the respondent-mother "ha[d] *willfully* abandoned [Sue] for at least six consecutive months immediately preceding the filing of this petition," and further found that respondent-mother "ha[d] not had any contact with [Sue since prior to 12 February 2019]," "had no meaningful contact with [Sue]," "ha[d] not supported [Sue] financially or emotionally," "ha[d] not bonded with [Sue]," "[had] be[en] gainfully employed but ha[d] not provided any financial support for the well-being of [Sue] whatsoever," "ha[d] struggled ongoing with substance abuse issues," "ha[d] not had any visitation with [Sue] dating back to November of 2018, 12 months prior to the filing of this action," and "[was] a resident of Cleveland County, North Carolina" where petitioners with Sue also resided. (Emphasis added.)

¶ 27 Here, the trial court's findings of fact support the trial court's conclusion of law. *See In re C.B.C.*, 373 N.C. at 23 (affirming termination of parental rights for willful abandonment where the "findings demonstrate[d] that in the six months preceding the filing of the termination petition, respondent made no effort to pursue a relationship with [the juvenile]"). Willful abandonment is generally evidenced by conduct and, as in this case, a lack of conduct. *See Pratt v. Bishop*, 257 N.C. 486, 503 (1962) ("To constitute an abandonment within the meaning of the adoption statute[,] it is not necessary that a parent absent himself continuously from the child for the specified six months, nor even that he cease to feel any concern for its interest. If his conduct over the six months period evinces a settled purpose and a wil[l]ful intent to forego all parental duties and obligations and to relinquish all parental claims to the child[,] there has been an abandonment within the meaning of the statute."). "Abandonment is not an ambulatory thing the legal effects of which a delinquent parent may dissipate at will by the expression of a desire for the return of the discarded child." *Id.* at 502 (quoting *In re Blair's Adoption*, 141 A.2d 873, 879 (Pa. 1958)). Notably, respondent-mother "[b]y h[er] own admission . . . had no contact with [Sue] during the statutorily prescribed time period." *In re E.H.P.*, 372 N.C. 388, 394 (2019) (rejecting respondent's argument that his inaction was justifiable on account of a temporary custody judgment, "conclud[ing] that respondent's conduct me[t] the statutory standard for willful abandonment," and "affirm[ing]

the trial court's adjudication pursuant to N.C.G.S. § 7B-1111(a)(7)"). The trial court's findings of fact reflect that respondent-mother "failed to do anything whatsoever to express love, affection, and parental concern for [Sue] during the relevant six-month period." *In re A.G.D.*, 374 N.C. at 327.

¶ 28 Nevertheless, respondent-mother maintains that "[t]he dates and reasons for [respondent-mother's] lack of contact [with Sue we]re not stated, explained, or resolved by the trial court in any manner." This assertion is misplaced. The trial court need not have made any additional findings of fact, as contend by respondent-mother, to support a conclusion of law pursuant to N.C.G.S. § 7B-1111(a)(7) because the findings of fact do not "identif[y] multiple possible impediments to respondent-mother's ability to contact and provide support to [Sue]." *In re K.C.T.*, 375 N.C. 592, 601 (2020).[5] Here, the trial court resolved the reason for respondent-mother's lack of contact: it concluded that respondent-mother willfully abandoned Sue.

¶ 29 Since only one ground is necessary to support a termination of parental rights, we affirm the portion of the trial court's order terminating respondent-mother's parental rights pursuant to N.C.G.S. § 7B-1111(a)(7) as the findings of fact support the conclusion of law and decline to address

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5. In *In re K.C.T.*, this Court reversed and remanded for additional findings of fact by the trial court where the trial court's original findings of fact "identifie[d] multiple possible impediments to respondent-mother's ability to contact and provide support to [the juvenile]" but failed "to explore the interplay between these impediments and [the] respondent-mother's intent." 375 N.C. at 601–02. In that matter, the trial court had found that the respondent-mother "ha[d] been diagnosed with bipolar disorder, oppositional defiant disorder, attention deficit disorder, and mental retardation," "ha[d] an IQ in the range of 40–45," "lacked a driver's license," "relied on her family and public transportation for travel," "lived in a different county than petitioners," "was unemployed," and "relied on supplemental security income." *Id.* at 601. Similarly, exercising judgment anew, this Court in *In re N.D.A.*, 373 N.C. 71 (2019), vacated and remanded for proper findings of facts by the trial court where the trial court's findings of fact "consisted of nothing more than a recitation of the relevant portion of respondent-father's testimony without making any determination as to whether the relevant portion of respondent-father's testimony was credible." *Id.* at 78, 84. Significantly, the "respondent-father [had] testified that he had no relationship with petitioner sufficient to persuade him that he had the ability to contact her directly, that he believed that he was not permitted [to] do so, and that, even though he knew that petitioner lived in his community, he did not know her address and could not send [the juvenile] any cards, letters, or gifts for that reason." *Id.* at 79. The respondent-father's testimony was also unchallenged. *Id.* at 78.

Since, in this case, the findings of fact support the conclusion of law pursuant to N.C.G.S. § 7B-1111(a)(7) without the conflicts or disharmony in the findings of fact as present in the previously discussed matters, we affirm the termination of parental right's order as to respondent-mother rather than reversing and remanding for additional findings of fact.

respondent's remaining arguments concerning the trial court's conclusion pursuant to N.C.G.S. § 7B-1111(a)(4). *See* N.C.G.S. § 7B-1111(a).

B. Respondent-father's Arguments

¶ 30 **[3]** Respondent-father contends that parts of findings of fact seven, eight, ten, and twelve and conclusion of law three are not supported by competent evidence but only elaborates on the basis for his challenge for parts of findings of fact seven and eight and the finding of willfulness in conclusion of law three.

¶ 31 We agree that the challenged finding of willfulness as to respondent-father is not supported by clear, cogent, and convincing evidence. Mr. C., when asked whether "you all have contact with the [respondent-]father," responded that he called on Christmas morning. Mr. C. testified that Sue does not talk to respondent-father when he calls but that he does talk to him, and they communicate well. Mr. C. further explained that he communicates with respondent-father's mother and Sue visits with respondent-father's mother on occasion. Mr. C. acknowledged that respondent-father has been incarcerated since before Sue's birth and that Sue was almost three at the time of the termination-of-parental-rights hearing. When testifying, respondent-father explained that he asks about Sue's health and well-being when he calls petitioners and he speaks with Sue every other weekend when Sue is with his mother. Respondent-father testified at the termination hearing that a year ago he called his mom who put Sue on the phone and told Sue to tell respondent-father her Bible verse. Respondent-father stated that Sue, who would have been less than two at the time, responded, "For nothing shall be impossible with God." Even if we disregarded all of respondent-father's testimony as not credible, the testimony from Mr. C. concerning respondent-father does not provide clear, cogent, and convincing evidence of the willful intent during the determinative period needed for termination of respondent-father's parental rights. Mr. C.'s testimony that respondent-father, who he acknowledged has been incarcerated since before Sue's birth, called on Christmas and he got on well with respondent-father is not evidence that the respondent-father willfully determined to forego his parental duties during the determinative period of 26 February 2019 to 26 August 2019. Without a finding of willfulness sufficiently supported by the evidence, the trial court's conclusion of law that the ground for termination pursuant to N.C.G.S. § 7B-1111(a)(7) exists cannot stand.

¶ 32 As argued by respondent-father, the other ground for termination found by the trial court, under N.C.G.S. § 7B-1111(a)(4), also lacks

evidentiary support. Subsection 7B-1111(a)(4) of the General Statutes of North Carolina requires the "willful[ ] fail[ure] 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) (emphasis added). The testimony at the hearing did not reference a decree or custody agreement requiring payment for care, support, or education, and no exhibit to this effect was admitted at the termination hearing or attached to or referenced in the verified petition.

¶ 33 Since the testimony at the termination-of-parental-rights hearing does not provide clear, cogent, and convincing evidence supporting the challenged findings of fact of the trial court necessary to support the trial court's conclusions of law for any ground for termination as to respondent-father, we reverse the portion of the trial court's order terminating respondent-father's parental rights.

IV. Conclusion

¶ 34 For the reasons set forth in this opinion, we affirm in part and reverse in part the trial court's termination-of-parental-rights order, affirming the order as to the termination of respondent-mother's parental rights and reversing the order as to the termination of respondent-father's parental rights.

AFFIRMED IN PART; REVERSED IN PART.

Justice EARLS concurring in part and dissenting in part.

¶ 35 I join the portion of the majority opinion holding that the allegations in the termination petition were sufficient to comply with the requirements of N.C.G.S. § 7B-1104(2). I also join the portion of the majority opinion holding that there is not clear, cogent, and convincing evidence to support the findings of fact necessary to uphold the trial court's determination that grounds existed to terminate respondent-father's parental rights. However, I dissent from the portion of the majority opinion affirming the trial court's order terminating respondent-mother's parental rights.

¶ 36 The majority is correct that a trial court may only terminate a respondent-parent's parental rights pursuant to N.C.G.S. § 7B-1111(a)(7) upon a finding that the parent "willfully abandoned" his or her child. N.C.G.S. § 7B-1111(a)(7) (2019). Yet the majority ignores the requirement that in order to terminate parental rights pursuant to N.C.G.S. § 7B-1111(a)(7), "the trial court must make adequate evidentiary find-

ings to support its ultimate finding as to whether willful intent exists." *In re K.C.T.*, 375 N.C. 592, 601 (2020) (citing *In re N.D.A.*, 373 N.C. 71, 78 (2019)). Although the trial court did enter a conclusion of law that respondent-mother "willfully abandoned [Sue] for at least six consecutive months immediately preceding the filing of this petition," the trial court did not make any findings assessing whether respondent-mother's conduct towards Sue was willful. The only findings of fact the trial court entered relevant to this ground were either purely factual descriptions of respondent-mother's conduct or conclusory recitations of the legal standard:

> 7. The Court finds that . . . since prior to the entry of [the order granting custody of Sue to petitioners], the respondents have not had any contact with the minor child, and since the time the child was taken into physical custody of the Petitioners the child has resided with the Petitioners; that the minor child has resided with the petitioners since she initially came home from the hospital after her birth.
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> 8. The Court would find that the Respondents have had no meaningful contact with the minor child; that neither respondent has . . . supported the minor child financially or emotionally and has not bonded with the minor child . . . .
>
> 9. That the respondent mother has struggled ongoing with substance abuse issues and has abandoned the minor child; that she has also failed to support the minor child's needs financially; she has not had any visitation with the minor child dating back to November of 2018, 12 months prior to the filing of this action. She testified to being gainfully employed but has not provided any financial support for the well-being of the minor child whatsoever.
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> 10. That grounds pursuant to [N.C.G.S. §] 7B-1111(a)(4) and 7B-1111(a)(7) exist as evidenced by the testimony elicited and findings of fact set forth above.
>
> . . . .
>
> 12. The Court would find the grounds for abandonment and failure to provide support stated in the

> petition have been proven and would find therefore that grounds for termination of parental rights exists as alleged and proven.

There is no language in these findings suggesting that the trial court examined respondent-mother's circumstances and determined her conduct reflected 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) (cleaned up) (quoting *In re N.D.A.*, 373 N.C. at 79). Absent such language, the only way the majority can reach its legal conclusion that respondent-mother willfully abandoned her child is by "improperly find[ing] facts in this case, which is a job reserved for the trial court." *In re E.B.*, 375 N.C. 310, 325 (2020) (Newby, J., concurring in result only).

¶ 37 The majority attempts to rationalize its journey beyond the order the trial court actually entered by noting that there are no "conflicts or disharmony in the findings of fact." According to the majority, because the trial court did not make findings of fact indicating the existence of circumstances calling into question the willfulness of respondent-mother's conduct, then the trial court "need not have made any additional findings of fact" regarding willfulness. This tautological reasoning ignores the trial court's affirmative obligation to enter findings of fact supporting its legal conclusion that a respondent-parent acted willfully, an obligation which cannot be met by failing to make the necessary findings. Further, a trial court's order containing findings of fact which are not in "conflict[ ] or disharmony" is not the same as a trial court's order containing findings of fact supporting the conclusion of law that an alleged ground for terminating parental rights has been proven by clear, cogent, and convincing evidence. A parent's constitutional right to the care and custody of their child cannot be extinguished merely because the trial court has entered an internally coherent order if that order is devoid of the findings necessary to justify the exercise of the trial court's authority. In this case, although the findings of fact contained in the trial court's order are not mutually contradictory, they are also not sufficient to sustain its ultimate legal conclusion.

¶ 38 At most, the findings of fact in this case support the conclusion of law that respondent-mother failed to maintain an active relationship with her child. The findings of fact do not support the conclusion that her purported abandonment was willful. Abandonment alone—as opposed to willful abandonment—is not a statutorily enumerated ground for terminating parental rights. *See* N.C.G.S. § 7B-1111(a). This distinction is no mere technicality. It is necessary to assure adequate protection for a

parent's "fundamental liberty interest." *In re Montgomery*, 311 N.C. 101, 106 (1984) (quoting *Santosky v. Kramer*, 455 U.S. 745, 758–59 (1982)).

¶ 39 We have consistently enforced the requirement that a trial court make findings addressing willfulness. For example, we recently vacated an order which contained findings indicating that the respondent-father "had not had any contact with [the juvenile or the juvenile's guardian], had not visited with [the juvenile], had not provided any financial support for [the juvenile], and had not sent any cards, gifts, or tokens of affection to [the juvenile]" but which did not contain "any findings of fact concerning respondent-father's ability to visit with [the juvenile], to contact [the guardian] or [the juvenile], or to pay support during the relevant time period," because the order "fail[ed] to adequately address the extent to which respondent-father's acts or omissions were willful." *In re N.D.A.*, 373 N.C. at 78–79. The majority's unwillingness to do the same here is inconsistent with our precedents and disregards a "fundamental right" of "critical[ ] importan[ce]." *In re A.K.*, 360 N.C. 449, 457 (2006).

¶ 40 Having concluded that the trial court's findings of fact do not support the conclusion that respondent-mother willfully abandoned Sue, I would reach the trial court's determination that a ground existed to terminate respondent-mother's parental rights under N.C.G.S. § 7B-1111(a)(4) for failure to pay support. Here, the trial court's findings of fact do not support the legal conclusion that this ground for termination was established. A trial court is not entitled to find the existence of this ground for termination unless the record reflects that the petitioner is one of the juvenile's parents, there is an order requiring the payment of support, and the support order was "enforceable during the year before the termination petition was filed." *In re C.L.H.*, 2021-NCSC-1 ¶ 13 (2021) (cleaned up). A careful review of the record establishes that neither petitioner was one of the juvenile's parents. In addition, the record is devoid of any evidence tending to show that either parent was under an order to pay support to petitioners at any time, and it is devoid of evidence that respondent-mother "*willfully* failed without justification to pay for the care, support, and education of the juvenile." N.C.G.S. § 7B-1111(a)(4) (emphasis added). As a result, the trial court erred by terminating respondent-mother's rights pursuant to N.C.G.S. § 7B-1111(a)(4).

¶ 41 Because its findings do not establish the existence of every element of the two grounds asserted to justify terminating respondent-mother's parental rights, the trial court has failed to properly find that petitioners have met their burden of "prov[ing] the facts justifying the termination by clear and convincing evidence." N.C.G.S. § 7B-1111(b). As the major-

ity aptly explains in reversing the order terminating respondent-father's parental rights, "[w]ithout a finding of willfulness sufficiently supported by the evidence, the trial court's conclusion of law that the ground for termination pursuant to N.C.G.S. § 7B-1111(a)(7) exists cannot stand." In addition, the trial court's findings do not support the conclusion that the requirements for terminating parental rights pursuant to N.C.G.S. § 7B-1111(a)(4) have been met. Under these circumstances, our obligation is to reverse the trial court's insufficient order, not to create facts to fill in its deficiencies. As a result, I would reverse the trial court's order with respect to respondent-mother and remand this case to the District Court, Cleveland County, for further proceedings not inconsistent with this dissenting opinion, including the entry of a new order containing adequate findings of fact addressing the issue of whether respondent-mother willfully abandoned the juvenile. Therefore, I respectfully dissent from the portion of the majority opinion affirming the termination of respondent-mother's parental rights.

Justice ERVIN joins in this opinion concurring in part and dissenting in part.

IN THE MATTER OF Z.G.J.

No. 339A20

Filed 27 August 2021

1. Termination of Parental Rights—subject matter jurisdiction—standing—petition filed by department of social services

The trial court had subject matter jurisdiction to terminate a mother's parental rights where the county department of social services (DSS) had standing to file the termination petition because it had been given custody of the child by a court of competent jurisdiction (N.C.G.S. § 7B-1103(a)). The social worker's testimony that she was the petitioner, when considered in context, did not mean that the petition was filed in the social worker's individual capacity.

2. Termination of Parental Rights—adjudication evidence—sufficiency—adoption of allegations in petition—oral testimony

The trial court did not err, in determining whether grounds existed to terminate a mother's parental rights, when it relied on a social worker's oral testimony that adopted the allegations in the

termination petition. In so doing, the trial court did not improperly rely on the petition itself as the only adjudication evidence.

3. Termination of Parental Rights—grounds for termination—neglect—failure to make reasonable progress—dependency—determinative time period

The trial court erred in concluding that a mother's parental rights were subject to termination on the grounds of neglect, failure to make reasonable progress, and dependency where the trial court relied solely on evidence of circumstances existing more than a year before the hearing—a social worker's oral testimony adopting the allegations in the termination petition—in making its factual findings. There was no evidence from the determinative time period for each of the grounds for termination, and evidence presented during the disposition hearing could not cure the error.

4. Termination of Parental Rights—grounds for termination—failure to pay a reasonable portion of the cost of care—sufficiency of findings—determinative time period

The trial court erred in concluding that a mother's parental rights were subject to termination on the grounds of failure to pay a reasonable portion of the cost of care where the court's findings did not specifically address the six-month period immediately preceding the filing of the termination petition.

Justice BARRINGER concurring in part and dissenting in part.

Chief Justice NEWBY and Justice BERGER join in this concurring in part and dissenting in part opinion.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from orders entered on 30 April 2020 by Judge Christine Underwood in District Court, Iredell County. This matter was calendared in the Supreme Court on 9 June 2021 but determined on the record and briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

Lauren Vaughan for petitioner-appellee Iredell County Department of Social Services.

Stephen M. Schoeberle for appellee Guardian ad Litem.

Jeffrey L. Miller for respondent-appellant mother.

IN RE Z.G.J.

[378 N.C. 500, 2021-NCSC-102]

HUDSON, Justice.

¶ 1 Respondent appeals from the trial court's orders terminating her parental rights to her minor child Z.G.J. (Ann).[1] She raises four main arguments on appeal: (1) that the social worker who signed the termination of parental rights petition lacked standing to file the petition; (2) that the trial court improperly relied only on the termination petition when assessing whether grounds existed to terminate respondent's rights; (3) that the trial court's findings of fact do not support its determination that respondent's parental rights were subject to termination based on neglect, willfully leaving Ann in foster care or a placement outside the home for more than twelve months without making reasonable progress toward correcting the conditions that led to her removal, willfully failing to pay a reasonable portion of Ann's cost of care for the six months preceding the filing of the petition, and dependency; and (4) that respondent received ineffective assistance from her trial counsel. After review, we conclude the trial court's findings of fact do not support its conclusion that grounds for termination existed, and we reverse the termination orders.

I. Background

¶ 2 Petitioner Iredell County Department of Social Services (DSS) became involved with Ann's family beginning in August 2016 after DSS received a Child Protective Services (CPS) report alleging that Ann's parents were using a variety of drugs in front of Ann, engaging in domestic violence, and failing to supervise Ann, who was not yet two years old. DSS began providing services to the family but only received minimal cooperation with these services.

¶ 3 In the ensuing months, DSS received three more CPS reports which included more allegations of substance abuse and domestic violence by Ann's parents. The last of these reports was received on 14 February 2017 and reflected that respondent had overdosed and was found lying on the ground next to a vehicle where Ann was strapped into her car seat inside. Witnesses reported that both of Ann's parents had been shooting up heroin in the back of the vehicle. Both parents were charged with misdemeanor child abuse. The next day, DSS filed a petition alleging that Ann was an abused and neglected juvenile and obtained nonsecure custody.

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1. A pseudonym chosen by the parties is used to protect the identity of the minor child and for ease of reading.

¶ 4 On 21 March 2017, the parties entered into consent adjudication and disposition orders. Ann was adjudicated to be abused and neglected. In order to remedy the issues which led to Ann's removal, respondent was ordered to enter into and comply with a case plan, to cooperate with DSS and the guardian ad litem, to submit to substance abuse and domestic violence evaluations and comply with any resulting recommendations, to submit to random drug screens, to not use any illegal drugs and only use prescription medications in the manner prescribed, to not engage in domestic violence, and to not engage in criminal activity. Respondent was granted supervised visitation for two hours per week, with the opportunity for additional supervised visitation in the community if she submitted three consecutive negative drug screens.

¶ 5 The first permanency planning hearing was held on 12 September 2017. In the order that resulted, the trial court found that respondent was currently in jail awaiting trial on new criminal charges involving drug use and theft and that she had not made any progress on her case plan. The court established a primary permanent plan of guardianship, with a secondary plan of custody with a relative.

¶ 6 The next permanency planning hearing occurred on 5 December 2017. The parties agreed to a consent order which included findings that respondent had been released from jail and had begun to "lay some groundwork" for her case plan. The primary permanent plan was changed to reunification with a secondary plan of adoption.

¶ 7 The permanent plans remained unchanged through the 1 May 2018 permanency planning hearing. However, in its order from that hearing, the trial court found that respondent had tested positive for opiates and that she was not making adequate progress on her case plan within a reasonable period of time.

¶ 8 On 21 August 2018, DSS filed a petition to terminate respondent's parental rights on the grounds of neglect, willfully leaving Ann in foster care or a placement outside the home for more than twelve months without making reasonable progress toward correcting the conditions that led to her removal, willfully failing to pay a reasonable portion of Ann's cost of care for the six months preceding the filing of the petition, and dependency. *See* N.C.G.S. § 7B-1111(a)(1)–(3), (6) (2019). DSS social worker Toia Johnson verified the petition.

¶ 9 The trial court conducted a termination hearing on 24 September 2019. During the adjudication phase, Johnson was the only witness, and she testified that she would adopt the allegations in the termination petition as her testimony. There were no objections to entering the petition

into the record, and respondent's counsel declined to cross-examine Johnson. At the conclusion of the adjudicatory phase, the trial court rendered its decision that grounds existed to terminate respondent's parental rights. The case then proceeded to the dispositional phase.

¶ 10 Respondent did not arrive until midway through the disposition hearing. She was permitted to testify and recounted some of her progress, including her plan to enter into an in-patient substance abuse treatment program. On cross-examination, respondent admitted that she was addicted to heroin and that she had failed to satisfy many of the conditions of her case plan. After hearing the evidence and the arguments of counsel, the trial court rendered its determination that termination of respondent's parental rights was in Ann's best interest.

¶ 11 On 30 April 2020, the trial court entered two written orders terminating respondent's parental rights to Ann.[2] In its adjudication order, the court concluded that all four grounds for termination alleged by DSS existed, and in its disposition order, the court concluded that termination was in Ann's best interests. Respondent appeals.

II. Standing

¶ 12 **[1]** Respondent's first argument is that the trial court lacked subject matter jurisdiction to terminate her parental rights because the termination petition was not filed by a party with standing. "Standing is a necessary prerequisite to a court's proper exercise of subject matter jurisdiction." *In re A.S.M.R.*, 375 N.C. 539, 542 (2020) (cleaned up).

> The existence of subject matter jurisdiction is a matter of law and cannot be conferred upon a court by consent. A court's lack of subject matter jurisdiction is not waivable and can be raised at any time, including for the first time upon appeal. We review questions of law de novo.

In re N.P., 376 N.C. 729, 2021-NCSC-11, ¶ 5 (cleaned up). "This Court presumes the trial court has properly exercised jurisdiction unless the party challenging jurisdiction meets its burden of showing otherwise." *In re L.T.*, 374 N.C. 567, 569 (2020).

¶ 13 To have standing to file a termination of parental rights case, a petitioner or movant must fall within one of the seven categories set out in

2. The trial court's orders also terminated the parental rights of Ann's father, but he did not appeal the orders and is therefore not a party to this appeal.

N.C.G.S. § 7B-1103 (2019). Further, N.C.G.S. § 7B-1104 requires the petition or motion initiating a termination action to include "facts sufficient to identify the petitioner or movant as one authorized by G.S. 7B-1103 to file a petition or motion." N.C.G.S. § 7B-1104(2) (2019).

¶ 14 Section 7B-1103(a)(3) authorizes a termination petition to be filed by "[a]ny county department of social services, consolidated county human services agency, or licensed child-placing agency to whom custody of the juvenile has been given by a court of competent jurisdiction." The termination petition in this case alleged standing based on this provision:

> The petitioner is Toia Johnson, a social worker employed by the Iredell County Department of Social Services, whose address is Post Office Box 1146 / 549 Eastside Drive, Statesville, North Carolina 28687[.] The petitioner qualifies to bring this Petition to Terminate Parental Rights under N.C. Gen. Stat. §7B-1103(a)(3), as the Iredell County Department of Social Services has been given custody of the above-referenced juvenile by a court of competent jurisdiction, as set forth in the order attached hereto as "Exhibit #1" and incorporated herein by reference.

Johnson also executed a sworn verification of the petition, in which she identified herself as "Social Worker Iredell County Dept. of Social Services."

¶ 15 Respondent does not dispute that DSS had been given custody of Ann by a court of competent jurisdiction at the time the termination petition was filed. Instead, she argues that since "Ms. Johnson stated under oath that she was the petitioner in this matter[,]" the petition must have been filed in Johnson's individual capacity. As an individual, Johnson did not satisfy any of the categories in N.C.G.S. § 7B-1103(a) that provide standing to file a termination petition. Respondent contends the termination orders should therefore be vacated.

¶ 16 Respondent provides an untenable interpretation of Johnson's verified allegation describing the basis of her standing to file the termination petition. Her interpretation necessarily ignores the portions of the allegation where Johnson explicitly identified herself as "a social worker employed by the Iredell County Department of Social Services," where Johnson listed her address as that of DSS, and where Johnson alleged she had standing to file the petition under N.C.G.S. § 7B-1103(a)(3), which applies only to certain organizations such as departments of social services. Considering this additional context, the logical conclusion

is that Johnson filed the termination petition in her capacity as a representative of DSS. Since it is clear from the record that the termination petition was filed by DSS, an organization with standing under N.C.G.S. § 7B-1103(a)(3), respondent cannot meet her burden of showing that the trial court lacked subject matter jurisdiction to consider and rule upon the petition to terminate her parental rights.

III. Evidence Supporting Grounds for Termination

¶ 17 Respondent next raises a series of arguments regarding the evidence supporting the trial court's adjudication of grounds for termination. She contends that Johnson's oral adoption of the allegations from the termination petition resulted in the trial court improperly relying on the petition itself as the only adjudication evidence. Respondent further argues that the trial court's findings, to the extent they were supported by competent evidence, failed to support the existence of any of the four grounds for termination.

A. Adjudication Evidence Presented by DSS

¶ 18 **[2]** As part of any termination of parental rights proceeding, the trial court must adjudicate the existence of any of the grounds for termination alleged in the petition. At the adjudication hearing, the trial court must "take evidence [and] find the facts" necessary to support its determination of whether the alleged grounds for termination exist. N.C.G.S. § 7B-1109(e) (2019). "At the adjudicatory stage, the petitioner bears the burden of proving by 'clear, cogent, and convincing evidence' the existence of one or more grounds for termination under section 7B-1111(a) of the General Statutes." *In re A.U.D.*, 373 N.C. 3, 5–6 (2019).

¶ 19 The adjudication hearing in this case was brief. Johnson was called to the stand, and the DSS attorney began his direct examination:

> Q. Ms. Johnson, would you please state your name for the Court?
>
> A. Toia Johnson, former foster care social worker.
>
> Q. And were you in fact the social worker for [Ann]?
>
> A. Yes, I was.
>
> Q. And up to the filing of the petition, were you the social worker for [Ann]?
>
> A. Yes, I was.

> Q. And did you in fact sign a verification for the petition that was filed in this matter?
>
> A. Yes, I did.
>
> Q. And being that you've already signed a verification, have you in fact reviewed the contents of the juvenile petition to terminate parental rights–
>
> A. Yes, I have.
>
> Q. – for this child? And after reviewing the contents, are you satisfied that the contents are true and accurate to the best of your knowledge?
>
> A. Yes, they are.
>
> Q. Would you adopt those contents as your testimony for today?
>
> A. Yes, I would.

The DSS attorney then offered the petition into the record, and it was admitted without objection. The attorney next had Johnson verify the information in Ann's birth certificate before ending his questioning. Neither the trial court nor the other parties asked Johnson any further questions.

¶ 20 Respondent contends that DSS's proffer of evidence amounted to submitting the allegations from its verified petition as its only adjudication evidence. She notes that the Court of Appeals has repeatedly reversed juvenile orders that were based solely on documentary evidence and argues we should reach the same result here. *See, e.g.*, *Thrift v. Buncombe County DSS*, 137 N.C. App. 559, 562–64 (2000) (reversing a neglect adjudication that was based only on the verified allegations in the juvenile petition); *In re A.M.*, 192 N.C. App. 538, 542 (2008) (reversing a termination of parental rights order that was based "solely on the written reports of DSS and the guardian ad litem, prior court orders, and oral arguments by the attorneys involved in the case"); *In re N.G.*, 195 N.C. App. 113, 118 (2009) (reversing a termination order where DSS offered only a court report as evidence and "presented no oral testimony to carry its burden of proof").

¶ 21 Respondent's argument ignores the salient difference between the above Court of Appeals' cases and this case: here, DSS offered live witness testimony. The lack of oral testimony was a determinative factor in the prior Court of Appeals' holdings cited by respondent. As the court explained in *In re A.M.*:

> In the case *sub judice*, the trial court entered an order based solely on the written reports of DSS and the guardian *ad litem*, prior court orders, and oral arguments by the attorneys involved in the case. DSS did not present any witnesses for testimony, and the trial court did not examine any witnesses. We conclude, therefore, that the trial court failed to hold a proper, independent termination hearing. Consideration of written reports, prior court orders, and the attorney's oral arguments was proper; however, in addition the trial court needed some oral testimony. *See* [N.C.G.S.] § 1A-1, Rule 43(a). However, this opinion should not be construed as requiring extensive oral testimony. We note that the trial courts may continue to rely upon properly admitted reports or other documentary evidence and prior orders, as long as a witness or witnesses are sworn or affirmed and tendered to give testimony.

In re A.M., 192 N.C. App. at 542.

¶ 22 In this case, DSS called Johnson as a witness and tendered her to give testimony. While Johnson's testimony was not extensive, she orally reaffirmed, under oath, all of the allegations from the termination petition. Respondent was given the opportunity to cross-examine Johnson with respect to any of these allegations, and she declined to do so. In light of Johnson's testimony, the trial court conducted a proper adjudication hearing in accordance with N.C.G.S. § 7B-1109(e), and it did not err by relying on Johnson's testimony adopting the allegations in the termination petition when it entered its adjudication order.

B. Grounds for Termination

¶ 23 Respondent also contends that the trial court's findings of fact did not support its conclusions of law that four grounds for termination existed. Ultimately, we conclude that errors related to each of the four grounds require reversal.

¶ 24 When reviewing the trial court's adjudication of grounds for termination, we examine whether the court's findings of fact "are supported by clear, cogent and convincing evidence and [whether] 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)). Any unchallenged findings are "deemed supported by competent evidence

and are binding on appeal." *In re T.N.H.*, 372 N.C. 403, 407 (2019). The trial court's conclusions of law are reviewed de novo. *In re C.B.C.*, 373 N.C. 16, 19 (2019).

1. Neglect

¶ 25 **[3]** The first ground for termination found by the trial court was neglect under N.C.G.S. § 7B-1111(a)(1). This subsection allows for parental rights to be terminated if the trial court finds that the parent has neglected their child to such an extent that the child fits the statutory definition of a "neglected juvenile." N.C.G.S. § 7B-1111(a)(1) (2019). A neglected juvenile is defined, in relevant part, as a juvenile "whose parent, guardian, custodian, or caretaker does not provide proper care, supervision, or discipline; . . . or who lives in an environment injurious to the juvenile's welfare[.]" N.C.G.S. § 7B-101(15) (2019).

> Termination of parental rights based upon this statutory ground requires a showing of neglect at the time of the termination hearing or, if the child has been separated from the parent for a long period of time, there must be a showing of a likelihood of future neglect by the parent. 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 R.L.D., 375 N.C. 838, 841 (2020) (cleaned up).

¶ 26 In its termination order, the trial court concluded that the neglect ground existed because there was a likelihood of future neglect if Ann were returned to respondent's care. It is well established that when deciding whether future neglect is likely, "[t]he determinative factors must be the best interests of the child and the fitness of the parent to care for the child *at the time of the termination proceeding*." *In re Ballard*, 311 N.C. 708, 715 (1984).

¶ 27 However, the only evidence offered by DSS at adjudication was Johnson's testimony adopting the termination petition, which was filed on 21 August 2018. The termination hearing did not occur until more than thirteen months later, on 24 September 2019. Thus, the allegations in the petition do not shed any light on respondent's fitness to care for Ann at the time of the termination hearing, and the trial court erred by

relying on the stale information in the petition as its only support for this ground.[3] *See Ballard*, 311 N.C. at 715.

¶ 28 Both DSS and the guardian ad litem attempt to supplement the evidence presented during the adjudication hearing with respondent's testimony during the disposition hearing in order to salvage the trial court's adjudication of this ground. We reject this attempt, as we have previously held that dispositional evidence cannot be used to support the trial court's adjudicatory determinations. *See In re Z.J.W.*, 376 N.C. 760, 2021-NCSC-13, ¶ 17 ("In the event that the trial court relied upon this dispositional evidence as support for its adjudicatory finding[,] . . . we agree with longstanding Court of Appeals precedent that it was error to do so."). Respondent's testimony in this case occurred after the trial court had already rendered its adjudicatory decision and moved to the dispositional phase of the hearing, and as a result, the testimony could not provide competent evidence to support the already-rendered adjudication.

¶ 29 Since there was no competent evidence from which the trial court could determine respondent's fitness to care for Ann at the time of the adjudication hearing, the court's conclusion that "the probability of repetition of neglect is high should the minor child be returned to the care of" respondent is unsupported. Accordingly, the trial court's adjudication of the neglect ground must be reversed.

2. Willful Failure to Make Reasonable Progress

¶ 30 The trial court also found respondent's rights were subject to termination under N.C.G.S. § 7B-1111(a)(2), which permits the court to terminate parental rights if 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).

> Termination under this ground requires the trial court to perform a two-step analysis where it must determine by clear, cogent, and convincing evidence whether (1) a child has been willfully left by the

3. Respondent notes that, even though no evidence was admitted regarding circumstances after August 2018, many of the trial court's findings could be interpreted to "suggest events or facts occurring or existing after August 2018 . . . or at the time of the termination hearing[.]" We agree that all such findings are erroneous, and thus we disregard any finding that implicates post-petition evidence or events, as there is no competent evidence to support such findings. *See In re J.M.J.-J.*, 374 N.C. 553, 559 (2020) (disregarding adjudicatory findings of fact not supported by clear, cogent, and convincing evidence).

> parent in foster care or placement outside the home for over twelve months, and (2) the parent has not made reasonable progress under the circumstances to correct the conditions which led to the removal of the child.

In re Z.A.M., 374 N.C. 88, 95 (2020). A parent's reasonable progress "is evaluated for the duration leading up to the hearing on the motion or petition to terminate parental rights." *In re J.S.*, 374 N.C. 811, 815 (2020). Thus, this ground must fail for the same reason as the trial court's adjudication of the neglect ground. The most recent evidence of respondent's progress was more than thirteen months before the termination hearing. There was no competent evidence regarding respondent's progress for the period leading up to the termination hearing.[4] Accordingly, we reverse this ground for termination as well.

3. Dependency

¶ 31 As a third ground for termination, the trial court found that respondent's parental rights were subject to termination pursuant to N.C.G.S. § 7B-1111(a)(6). That subsection permits a parent's rights to be terminated upon a showing that (1) "the parent is incapable of providing for the proper care and supervision of the juvenile, such that the juvenile is a dependent juvenile within the meaning of G.S. 7B-101, and . . . there is a reasonable probability that such incapability will continue for the foreseeable future[,]" and (2) "the parent lacks an appropriate alternative child care arrangement." N.C.G.S. § 7B-1111(a)(6) (2019). Like the adjudication of grounds pursuant to subsections (a)(1) and (2), an adjudication of dependency as a ground for termination under subsection (a)(6) must be based on an examination of the parent's ability to care for and supervise their child at the time of the adjudication hearing. *See In re C.L.H.*, 376 N.C. 614, 2021-NCSC-1, ¶ 12 (reversing an adjudication under N.C.G.S. § 7B-1111(a)(6) because "the trial court made no finding of fact, and there was no evidence presented, that at the time of the termination hearing respondent suffered from any condition which rendered him incapable of providing proper care or supervision" to his child). As with the prior two grounds for termination, the only competent evidence presented to support the dependency ground was from at least thirteen months prior to the hearing, and thus, there was no evidence presented as to respondent's condition at the time of the termi-

4. As with neglect, the GAL cites a portion of respondent's dispositional testimony as support for this ground. We reiterate that dispositional evidence cannot be used to support the adjudication of termination grounds. *See In re Z.J.W.*, 376 N.C. 760, 2021-NCSC-13, ¶ 17.

nation hearing. Consequently, the trial court erred by adjudicating this ground for termination, and the trial court's adjudication of dependency is also reversed.

4. Willful Failure to Pay a Reasonable Portion of Ann's Cost of Care

¶ 32 **[4]** Finally, the trial court found that respondent's parental rights were subject to termination under subsection (a)(3), which provides:

> The juvenile has been placed in the custody of a county department of social services, a licensed child-placing agency, a child-caring institution, or a foster home, and the parent has for a continuous period of six months immediately preceding the filing of the petition or motion willfully failed to pay a reasonable portion of the cost of care for the juvenile although physically and financially able to do so.

N.C.G.S. § 7B-1111(a)(3) (2019). In this case, the termination petition was filed on 21 August 2018, and the relevant period for this ground was therefore 21 February through 21 August 2018.

¶ 33 The trial court made the following finding with respect to this ground:

> Respondent Mother has been employed at times during this case and always remained able bodied however she has paid zero dollars of child support for [Ann] since she came into care. Zero dollars is not a reasonable amount of child support based on Respondent Mother's actual income nor her ability to earn. Respondent Mother has willfully failed to pay a reasonable cost of care for the juvenile.

This finding is not adequately tailored to the relevant six-month period. In *In re K.H.*, we determined a similar finding failed to support an (a)(3) adjudication:

> In the TPR order, the trial court made factual findings that respondent "worked at Shoe Show as well as Cook Out in 2018 and has not paid any monies towards the cost of care for the juvenile"; that "at various points in time, [respondent] was employed, although that employment was part-time"; that "[respondent] is physically and financially able to pay a reasonable

> portion of the child's care, and thus has the ability to pay an amount greater than zero"; that "[respondent] has [not] made a significant contribution towards the cost of care"; and that "[t]he total cost of care for [Kaitlyn] through June 2018 is $14,170.35."
>
> However, none of these findings—nor any others related to this ground for termination—address the specific, relevant six-month time period from 8 February 2018 to 8 August 2018. Therefore, we conclude that the trial court's findings of fact are insufficient to support its conclusion of law that there were grounds to terminate respondent's parental rights under N.C.G.S. § 7B-1111(a)(3), which specifically requires that "the parent has for *a continuous period of six months immediately preceding the filing of the petition or motion* willfully failed to pay a reasonable portion of the cost of care for the juvenile although physically and financially able to do so." N.C.G.S. § 7B-1111(a)(3) (emphasis added). Accordingly, we reverse the trial court on this issue.

In re K.H., 375 N.C. at 616–17 (2020). Similarly, the trial court's finding in this case references respondent's sporadic employment "at times during this case," and this reference covers a period of more than eighteen months, from 15 February 2017, when the initial juvenile petition was filed, until 21 August 2018, when the termination petition was filed. The trial court's finding does not specifically address the six-month period prior to the filing of the termination petition and therefore fails to demonstrate that respondent "has for a continuous period of six months immediately preceding the filing of the petition or motion willfully failed to pay a reasonable portion of the cost of care for the juvenile although physically and financially able to do so." N.C.G.S. § 7B-1111(a)(3). Accordingly, this ground for termination is unsupported and must be reversed.[5]

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5. The dissent argues "the facts in *In re K.H.* are distinct from this case" and would distinguish the present case on the ground that "this case does not involve a minor parent." We need not delve into the "nuances in *In re K.H.*," namely that "the factual findings that the respondent was a minor and had lived with her child in the same foster care placement, both as minors," to conclude those facts were irrelevant to our holding. The trial court's findings were insufficient to support the conclusions of law because they failed to "address the specific, relevant six-month time period" required by G.S. § 7B-1111(a)(3), *In re K.H.*, 375 N.C. at 616. The respondent's status as a minor had no bearing upon the

IV. Conclusion

¶ 34 The termination of parental rights petition was filed by DSS through its representative, Johnson, and DSS had standing to file a petition under N.C.G.S. § 7B-1103(a)(3). The trial court did not err in relying upon the allegations in the termination petition when making its findings of fact, as the petition was introduced through the testimony of Johnson and was subject to cross-examination. However, by relying solely on the evidence from a termination petition that was filed thirteen months prior to the hearing, the trial court erred by concluding grounds for termination existed under subsections (a)(1), (2), and (6), since each of those grounds requires evaluating the evidence as of the time of the termination hearing. Moreover, the trial court's finding of fact with respect to subsection (a)(3) was insufficient to show that respondent willfully failed to pay an adequate portion of Ann's cost of care for a continuous period of six months immediately preceding the filing of the termination petition. In light of the foregoing, the orders terminating respondent's parental rights must be reversed.[6] Since we are reversing the termination orders, we need not address respondent's final argument, that she received ineffective assistance from her trial counsel.

REVERSED.

Justice BARRINGER concurring in part, dissenting in part.

¶ 35 While I concur with the majority's holdings that the termination-of-parental-rights petition was filed by the Iredell County Department of Social Services (DSS) through its representative, that DSS had standing to file a petition under N.C.G.S. § 7B-1103(a)(3), and that the trial court did not err in relying upon the allegations in the termination petition when making its findings of fact, I would affirm the trial court's order terminat-

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Court's decision to reverse, *see id.* at 616–17, and was, therefore, *obiter dicta*. *See Hayes v. City of Wilmington*, 243 N.C. 525, 537 (1956) ("Official character attaches only to those utterances of a court which bear directly upon the specific and limited questions which are presented to it for solution in the proper course of judicial proceedings. Over and above what is needed for the solution of these questions, its deliverances are unofficial." (cleaned up)).

6. Although respondent did not specifically challenge the trial court's disposition order, that order necessarily must be reversed since the adjudication order has been reversed. *See* N.C.G.S. § 7B-1110(a) ("*After an adjudication that one or more grounds for terminating a parent's rights exist*, the court shall determine whether terminating the parent's rights is in the juvenile's best interest." (emphasis added)).

ing respondent's parental rights pursuant to N.C.G.S. § 7B-1111(a)(3). Respondent's ineffective of assistance counsel claim is without merit, and the findings of facts support the trial court's conclusion of law concerning termination under N.C.G.S. § 7B-1111(a)(3). Therefore, I respectfully concur in part and dissent in part.

I. Background

¶ 36 DSS received reports that respondent, after shooting up heroin in the back of a vehicle, had overdosed and was found lying on the ground next to a vehicle where the juvenile, Ann, was strapped into her car seat inside. After receiving this report, DSS filed a petition alleging that Ann was an abused and neglected juvenile and obtained nonsecure custody. On 21 March 2017, respondent consented to the adjudication and dispositional order that adjudicated Ann to be an abused and neglected juvenile.

¶ 37 Over a year later, on 21 August 2018, DSS filed a verified petition to terminate respondent's parental rights. DSS alleged as grounds for termination N.C.G.S. § 7B-1111(a)(1)–(3) and (6). On 10 October 2018, respondent was personally served with the summons and the petition to terminate respondent's parental rights. Respondent never filed an answer or other responsive pleading.

¶ 38 At the termination hearing, Toia Johnson, a former foster care social worker for DSS, testified that she was the social worker for Ann up until the filing of the termination petition, that she had verified the termination petition, that she had reviewed the contents of the termination petition, that the contents of the termination petition were true and accurate to the best of her knowledge, and that she adopted the allegations in the termination petition as her testimony. Then, counsel for DSS introduced and moved to admit the termination petition into evidence. Counsel for respondent informed the trial court that she had no objection to the admission of the termination petition into evidence. No other party objected to the admission, and the trial court admitted the termination petition into evidence. DSS informed the trial court that this concluded its evidence for adjudication. After hearing from the respondent parents' trial counsel that as to the adjudication phase they were not tendering evidence or argument, the trial court found "by clear, cogent, and convincing evidence that grounds exist[ed] to terminate the parental rights of the [r]espondent [p]arents, specifically as alleged in the petition to terminate parental rights."

¶ 39 The trial court then ordered that the matter proceed to disposition. At the disposition stage of the termination hearing, the trial court heard the evidence, including respondent's testimony in which she admitted

that she was addicted to heroin, that she had failed to satisfy many of the conditions of her case plan, and that she was and had been continuously employed except for the brief time she spent in the county jail before making bond. Then, the trial court heard the arguments of counsel, including from respondent's trial counsel. Upon the conclusion of counsels' arguments, the trial court orally made findings of fact to be supplemented by a written order, concluded that termination was in the best interest of Ann, and terminated the rights of respondent to Ann.[1]

¶ 40 The trial court then signed written orders consistent with its oral holdings addressing adjudication and disposition. Respondent appealed.

II. Ineffective Assistance of Counsel

¶ 41 Respondent contends that she was denied the effective assistance of counsel because her trial counsel "failed to object to the introduction of the [termination] petition as evidence [at] the termination[-]of[-] parental[-]rights [hearing]."

> Parents have a right to counsel in all proceedings dedicated to the termination of parental rights. Counsel necessarily must provide effective assistance, as the alternative would render any statutory right to counsel potentially meaningless. To prevail on a claim of ineffective assistance of counsel, respondent must show that counsel's performance was deficient and the deficiency was so serious as to deprive him of a fair hearing. To make the latter showing, the respondent must prove that there is a reasonable probability that, but for counsel's errors, there would have been a different result in the proceedings.

In re G.G.M., 377 N.C. 29, 2021-NCSC-25, ¶ 35 (cleaned up).

¶ 42 Respondent alleges that the termination petition was inadmissible because a party may not introduce and have admitted into evidence its own pleading. Respondent also claims prejudice, asserting that the termination petition was the only evidence supporting the trial court's adjudication.

¶ 43 Respondent's argument of ineffective assistance of counsel fails to show that "there is a reasonable probability that, but for counsel's er-

1. The trial court's orders also terminated the parental rights of Ann's father, but he did not appeal the orders and is therefore not a party to this appeal.

rors, there would have been a different result in the proceedings." *In re G.G.M.*, ¶ 35. Here, Johnson, who verified the termination petition, testified. She testified that the contents of the termination petition were true and accurate to the best of her knowledge and adopted the allegations in the termination petition as her testimony. Johnson's testimony provides the same support for the trial court's adjudication as the admission of the termination petition, and respondent has not argued or shown Johnson's testimony to be improper. Therefore, respondent has failed to carry her burden to show that she received ineffective assistance of counsel.

III. Grounds for Termination

¶ 44 Respondent presents arguments for each of the grounds found by the trial court as a basis for termination of respondent's parental rights to Ann. However, as competent evidence supports the findings of fact, and the findings of fact support the trial court's conclusion of law for termination of respondent's parental rights to Ann pursuant to N.C.G.S. § 7B-1111(a)(3), I would affirm the termination-of-parental-rights order on this ground. To terminate parental rights, a finding of only one ground is necessary. N.C.G.S. § 7B-1111(a) (2019); *see also In re A.R.A.*, 373 N.C. 190, 194 (2019). Thus, respondent's remaining arguments concerning the other grounds need not be addressed.

¶ 45 When reviewing a trial court's adjudication under N.C.G.S. § 7B-1111, this Court "determine[s] whether the findings are supported by clear, cogent and convincing evidence and the findings support the conclusions of law." *In re Montgomery*, 311 N.C. 101, 111 (1984). "The trial court's conclusions of law are reviewable de novo on appeal." *In re C.B.C.*, 373 N.C. 16, 19 (2019). "Findings of fact not challenged by respondent are deemed supported by competent evidence and are binding on appeal." *In re T.N.H.*, 372 N.C. 403, 407 (2019) (citing *Koufman v. Koufman*, 330 N.C. 93, 97 (1991)).

¶ 46 Subsection 7B-1111(a)(3) of the General Statutes of North Carolina provides that a trial court may terminate the parental rights upon concluding that

> [t]he juvenile has been placed in the custody of a county department of social services, a licensed child-placing agency, a child-caring institution, or a foster home, and the parent has for a continuous period of six months immediately preceding the filing of the petition or motion willfully failed to pay a

> reasonable portion of the cost of care for the juvenile although physically and financially able to do so.

N.C.G.S. § 7B-1111(a)(3). "[I]rrespective of the parent's wealth or poverty," a parent is required "to pay a reasonable portion of the child's foster care costs." *In re Clark*, 303 N.C. 592, 604 (1981). "A parent is required to pay that portion of the cost of foster care for the child that is fair, just and equitable based upon the parent's ability or means to pay." *Id.*

¶ 47 Respondent first challenges finding of fact 24 as "insufficient on its face," stating that the last sentence is a conclusion of law, the term "child support" rather than "foster care" is used, and there is no mention of the six-month period preceding the filing of the termination-of-parental-rights petition. Second, respondent alleges that there is no evidence of a child support order, respondent's actual income, the dates of respondent's employment, or her place of employment or earnings during the six-month period preceding the filing of the termination-of-parental-rights petition.

¶ 48 Respondent's challenges are misplaced. This Court reviews findings of fact to determine whether they are supported by clear, cogent, and convincing evidence, and if they are, the findings of fact of the trial court are deemed conclusive. *In re J.A.M.*, 370 N.C. 464, 466–67 (2018) (per curiam) (reversing the Court of Appeals decision for misapplying the standard of review for challenged findings of fact). Appellate courts "are bound by the trial courts' findings of fact where there is some evidence to support those findings, even though the evidence might sustain findings to the contrary." *In re Montgomery*, 311 N.C. at 110–11.

¶ 49 Respondent's arguments do not dispute the sufficiency of the evidence for what the trial court found as facts. In paragraph 24 of the order on adjudication of the termination-of-parental-rights hearing, the trial court found by clear, cogent, and convincing evidence the following:

> Respondent [m]other has been employed at times during this case and always remained able bodied however she has paid zero dollars of child support for [Ann] since she came into care. Zero dollars is not a reasonable amount of child support based upon [r]espondent [m]other's actual income [ ]or her ability to earn. Respondent [m]other has willfully failed to pay a reasonable cost of care for the juvenile.

¶ 50 Respondent correctly observes that the trial court used the term "child support" but does not dispute the evidentiary basis for the finding

that respondent paid "zero dollars of child support." Respondent also correctly observes that the findings of fact do not refer to the relevant six-month period applicable to N.C.G.S. § 7B-1111(a)(3) but does not dispute the evidentiary basis for the finding that respondent "has paid zero dollars of child support for [Ann] since she came into care."

¶ 51 Additionally, respondent complains that there is no evidence of a court order requiring child support payments or a child support order and no evidence of respondent's numerical amount of income, place of employment, or dates of employment, during the relevant six-month period or otherwise. However, because the trial court did not find there was a court order or child support order or the specific figures, places of employment, or dates of respondent's employment, these are not challenges of the trial court's findings of fact and the evidentiary support for them.

¶ 52 Contrary to respondent's argument, it is also well established that "[t]he determination that respondent acted 'willfully' is a finding of fact rather than a conclusion of law." *In re J.S.*, 374 N.C. 811, 818 (2020) (citing *Pratt v. Bishop*, 257 N.C. 486, 501 (1962)). Thus, the last sentence of the trial court's finding of fact, finding willfulness, is reviewed as a finding of fact for the sufficiency of the evidence. *See id.* (applying the appropriate standard of review to a finding of willfulness even when mislabeled as a conclusion of law).

¶ 53 However, even if properly challenged, Johnson's testimony adopting the allegations in the petition supports the findings of fact made by the trial court in paragraph 24. Johnson's testimony, as also set forth in the verified petition concerning N.C.G.S. § 7B-1111(a)(3), was as follows:

> [t]he above-named juvenile has been placed in the custody of the Iredell County Department of Social Services and in a foster home, and the [r]espondent [m]other, for a continuous period of six months next preceding the filing of the petition, has willfully failed for such period to pay a reasonable portion of the cost of care for the juvenile although physically and financially able to do so.
>
> i. [The respondent parents had funds available to them to pay for services and treatments through respondent mother's reported employment and respondent father's disability benefits.]
>
> ii. [Ann] has been placed in the custody of the Iredell County Department of Social Services and in a foster home since February 15, 2017.

> iii. The total estimated cost of care for [Ann] from February 15, 2017 through July 31, 2018 is $24,933.84.
>
> iv. The [r]espondent [m]other has paid $0.00 in support for the benefit of [Ann].
>
> v. The [r]espondent [m]other is able-bodied and has reported being employed or searching for employment throughout the pendency of the underlying action.

¶ 54 Respondent's contention instead is best understood as arguing that for the reasons argued in her brief and previously summarized, the findings of fact are not sufficient to support the conclusion of law.

> This Court reviews de novo the issue of whether a trial court's adjudicatory findings of fact support its conclusion of law that grounds existed to terminate parental rights pursuant to N.C.G.S. § 7B-1111(a). Under a de novo review, the court considers the matter anew and freely substitutes its own judgment for that of the trial court.

In re T.M.L., 377 N.C. 369, 2021-NCSC-55, ¶ 15 (cleaned up).

¶ 55 This Court has already held that "[t]he absence of a court order, notice, or knowledge of a requirement to pay support is not a defense to a parent's obligation to pay reasonable costs, because parents have an inherent duty to support their children." *In re S.E.*, 373 N.C. 360, 366 (2020). Thus, the absence of a finding regarding a court order or child support order does not defeat a conclusion of law pursuant to N.C.G.S. § 7B-1111(a)(3).

¶ 56 Further, the use of the term "child support" is not confusing or inappropriate in the context presented in this termination-of-parental-rights order. While the trial court could have used the term "cost of foster care," we understand what the trial court found when it used the term "child support" in its finding of fact. *See generally* N.C.G.S. § 7B-1111(a)(3) (establishing that "willfully fail[ing] to pay a reasonable portion of the cost of care for the juvenile" is a ground for terminating parental rights).

¶ 57 Finally, as the majority cites, this Court in one case, *In re K.H.*, 375 N.C. 610 (2020) concluded that "the findings of fact [were] insufficient to support [the trial court's] conclusion of law that there were grounds to terminate respondent's parental rights under N.C.G.S. § 7B-1111(a)(3)"

because "none of these findings . . . address the specific, relevant six-month time period from 8 February 2018 to 8 August 2018." *Id.* at 617. However, the facts in *In re K.H.* are distinct from this case. This Court summarized the facts in *In re K.H.* as follows:

> In 2017 a sixteen-year-old mother and her nine-month-old baby were taken into custody by the Cabarrus County Department of Social Services (DSS) and placed in the same foster home. After six months together, the child was moved to a different foster home apart from her mother. Less than eight months later, DSS filed a motion to terminate respondent-mother's parental rights to her child.

Id. at 611.

¶ 58 One of the grounds for termination was N.C.G.S. § 7B-1111(a)(3). *Id.* at 612. In that matter, "the relevant six-month period of time during which the trial court [had to] determine whether respondent was able to pay a reasonable portion of the cost of [the child's] care but failed to do so was from 8 February 2018 to 8 August 2018." *Id.* at 616. The trial court had found that

> respondent worked at Shoe Show as well as Cook Out in 2018 and has not paid any monies towards the cost of care for the juvenile; that at various points in time, respondent was employed, although that employment was part-time; that respondent is physically and financially able to pay a reasonable portion of the child's care, and thus has the ability to pay an amount greater than zero; that respondent has not made a significant contribution towards the cost of care; and that the total cost of care for [the juvenile] through June 2018 is $14,170.35.

Id. at 616–17 (cleaned up).

¶ 59 The trial court in *K.H.* had also found that the respondent was a minor when the juvenile proceeding was initiated, that the respondent lived with her child in the same foster care placement, both as minors for a period in 2017 and in 2018, and that respondent turned eighteen years old only weeks before the termination hearing.

¶ 60 In contrast, as reflected in the trial court's findings of facts, this case does not involve a minor parent. Thus, the nuances of *In re K.H.*—the

factual findings that the respondent was a minor and had lived with her child in the same foster care placement, both as minors—are not before this Court. While the majority dismisses these factual findings as not determinative to this Court's holding in *In re K.H.*, construing the decision to *not* turn on these factual findings leads to an absurd result: findings by a trial court that a respondent, despite having the ability to pay cost of care, "has not paid any monies towards the cost of care for the juvenile" fails to satisfy N.C.G.S. § 7B-1111(a)(3). Inherently, a finding that a respondent has never paid monies for the cost of care would encompasses "[the] period of six months immediately preceding the filing of the petition or motion." N.C.G.S. § 7B-1111(a)(3). Thus, the findings of fact do "address the specific, relevant six-month time period from 8 February 2018 to 8 August 2018." *In re K.H.*, 375 N.C. at 617.

¶ 61 In this matter, the finding of fact that respondent had "always remained able bodied however she has paid zero dollars of child support for [Ann] since she came into care" covers the relevant six-month period. The trial court further found that the amount of zero was "not a reasonable amount of child support based upon [r]espondent-[m]other's actual income [ ]or her ability to earn" and that she "willfully failed to pay." While the trial court does not precisely name the relevant six-month period, nothing in N.C.G.S. § 7B-1111(a)(3) requires an express reference where the plain language and context of the trial court's findings of fact address and encompass the relevant six-month period. This Court has recognized this principle in *In re L.M.T.*, 367 N.C. 165 (2013) and *In re H.A.J.*, 377 N.C. 43, 2021-NCSC-26. A trial court's findings of fact need to "address the necessary statutory factors" but need not use "the precise statutory language." *In re H.A.J.*, ¶ 16 (addressing sufficiency of findings to satisfy N.C.G.S. § 7B-906.2(d)); *see also In re L.M.T.*, 367 N.C. at 168 (addressing sufficiency of findings to satisfy former N.C.G.S. § 7B-507(b)(1) (2011)); *cf. In re K.R.C.*, 374 N.C. 849, 861 n.7 (2020) ("Because the order *sub judice* lacks any ultimate findings addressing the gravamen of N.C.G.S. § 7B-1111(a), we need not consider the degree to which our holding in *In re L.M.T.* applies to an adjudicatory order entered pursuant to N.C.G.S. §§ 7B-1109(e) and -1110(c).").

¶ 62 Thus, exercising judgment anew, the binding findings of fact support the trial court's conclusion of law pursuant to N.C.G.S. § 7B-1111(a)(3). As respondent has not challenged the best interest determination, the termination of respondent's parental rights to Ann should be affirmed on the ground of N.C.G.S. § 7B-1111(a)(3).

IV. Conclusion

¶ 63 For the foregoing reasons, the decision of the trial court should be upheld on the ground for termination of N.C.G.S. § 7B-1111(a)(3). Accordingly, I respectfully dissent.

Chief Justice NEWBY and Justice BERGER join in this concurring in part and dissenting in part opinion.

IN RE B.J.H.

[378 N.C. 524, 2021-NCSC-103]

IN THE MATTER OF B.J.H. AND J.E.H.

No. 411A20

Filed 24 September 2021

1. Termination of Parental Rights—bifurcated hearing—adjudication phase—evidence of reasonable progress—necessary only up to adjudication

Where the trial court agreed to hold a bifurcated termination of parental rights hearing and the adjudication and disposition hearings were held several months apart, the court was not required, for purposes of the ground of failure to make reasonable progress (N.C.G.S. § 7B-1111(a)(2)), to make findings regarding respondent-mother's progress on her case plan in the several months between the two hearings. Since the court concluded the adjudication phase at the end of the first hearing date when it found that grounds for termination had been established, it was respondent's obligation to move to reopen the adjudication phase if she wanted to present additional adjudication evidence at the later hearing date before the court began the dispositional phase.

2. Termination of Parental Rights—grounds for termination—failure to make reasonable progress—findings and conclusion as to mother

The trial court properly terminated respondent-mother's parental rights to her two children on the basis that she willfully failed to make reasonable progress to correct the conditions that led to the children's removal (N.C.G.S. § 7B-1111(a)(2)) after making detailed findings, supported by the evidence, regarding respondent's noncompliance or lack of progress with her case plan, including aspects related to her substance abuse, mental health, housing, and employment. The trial court's determination that respondent's progress was extremely limited and not reasonable was amply supported by the facts.

3. Termination of Parental Rights—grounds for termination—failure to make reasonable progress—findings and conclusion as to father

The trial court properly terminated respondent-father's parental rights to his two children on the basis that his failure to make reasonable progress to correct the conditions that led to the children's removal (N.C.G.S. § 7B-1111(a)(2)) was willful where, although respondent did not sign the case plan prepared for him, he

orally agreed to its requirements and was on notice that he needed to address issues with substance abuse, mental health, housing, employment, and parenting, as evidenced by prior orders in the case. Any discrepancy between findings in permanency planning orders, of which the trial court took judicial notice, and testimony at the termination hearing were for the trial court to resolve. Sufficient evidence was presented to support the court's findings, which in turn supported the court's conclusion that respondent's lack of progress over twenty-seven months was grounds for termination.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from an order entered on 29 June 2020 by Judge William F. Brooks in District Court, Yadkin County. This matter was calendared for argument in the Supreme Court on 19 August 2021 but determined on the record and briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

James N. Freeman Jr. for petitioner-appellee Yadkin County Human Services Agency.

Paul W. Freeman Jr. for appellee Guardian ad Litem.

Christopher M. Watford for respondent-appellant father.

David A. Perez for respondent-appellant mother.

MORGAN, Justice.

¶ 1 Respondent-mother and respondent-father (together, respondents) appeal from the trial court's order terminating their respective parental rights to the juveniles "Ben" and "John."[1] Respondents challenge the evidentiary basis for certain findings of fact made by the trial court. Respondents also dispute the ability of the trial court's findings to support a conclusion that grounds existed to terminate their parental rights to the two juveniles. Because we conclude that the evidence is sufficient to yield findings of fact which amply support the ground for terminating the parental rights of both respondent-mother and respondent-father for willful failure to make reasonable progress under N.C.G.S. § 7B-1111(a)(2) (2019), we affirm the trial court's order terminating both respondents' parental rights.

1. We use pseudonyms to protect the juveniles' identities and to promote ease of reading.

I. Factual and Procedural Background

¶ 2 On 20 January 2017, Wilkes County Department of Social Services (WCDSS) received a Child Protective Services (CPS) referral alleging that respondents were homeless, that respondents were struggling to provide for their two minor children Ben and John, and that Ben had tested positive for Subutex[2] at the time of his birth. An investigation conducted by WCDSS confirmed that the family was homeless. While respondent-mother and the children stayed with relatives for a brief period of time during the pendency of the investigation, they were asked to leave when burn marks were discovered in the bedroom which was being occupied by respondent-mother. Respondent-mother entered into an In-Home Family Services Agreement with WCDSS on 5 April 2017. Pursuant to the terms of the agreement, respondent-mother was to obtain a substance abuse assessment, to submit to random drug screens, and to complete parenting classes. Respondent-mother tested positive for the presence of methamphetamine four times between 25 January 2017 and 12 April 2017, and she completed a substance abuse assessment which resulted in diagnoses of generalized anxiety disorder, panic disorder, attention-deficit/hyperactivity disorder, and amphetamine use disorder (severe).

¶ 3 WCDSS transferred respondents' case to Yadkin County Human Services Agency (YCHSA) in May 2017 after respondent-mother, Ben, and John began to reside with respondent-mother's grandmother. Although respondent-mother attended three substance abuse counseling sessions, she missed several appointments and continued to test positive for methamphetamine. Also, respondent-mother attended only four of the ten parenting classes which she was assigned to complete. WCDSS and YCHSA unsuccessfully attempted to contact respondent-father on at least thirty-eight occasions while providing services to the family. The efforts of the agencies to communicate with respondent-father included their request of respondent-mother to ask respondent-father to contact the agencies, due to respondents' contact with one another and the agencies' ongoing inability to contact respondent-father. During the course of the family's involvement with WCDSS and YCHSA, respondent-father did not provide care for Ben or John, contacted the children sporadically, and failed to contact the assisting agencies.

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2. Subutex is one of many brand names for buprenorphine, a drug used to treat opioid use disorders by preventing withdrawal symptoms caused by cessation of opioid use. *Buprenorphine*, Substance Abuse and Mental Health Servs. Admin., https://www.samhsa.gov/medication-assisted-treatment/medications-counseling-related-conditions/buprenorphine (May 14, 2021).

¶ 4 On 31 August 2017, respondent-mother admitted that she operated an automobile immediately after using methamphetamine and while Ben was in the vehicle, prompting YCHSA to file a juvenile petition on 1 September 2017 alleging that both Ben and John were neglected juveniles. The trial court held a hearing on the petition on 14 September 2017 and entered an order adjudicating the children to be neglected juveniles on 11 October 2017. The trial court found that both respondents were unemployed and "ha[d] not adequately addressed the conditions that led to the YCHSA filing its juvenile petition." The children were placed in YCHSA custody by the trial court, and the maternal great-grandmother of the juveniles was identified as an appropriate relative placement. Respondents were awarded one hour of biweekly supervised visitation with the children "contingent upon clean drug/alcohol screens and the parents not being incarcerated."

¶ 5 At the time of the ninety-day review hearing, respondent-mother was homeless and unemployed, but had entered into an Out-of-Home Family Services Agreement (OHFSA) with YCHSA on 17 October 2017 aimed at addressing issues of mental health, substance abuse, and parenting skills. Respondent-father was also homeless and claimed to be employed but had not provided proof of his employment. Respondent-father refused to sign an OHFSA but orally agreed to submit to substance abuse and mental health assessments and to complete parenting classes. The trial court noted that both respondents were attending visitations with the children, and respondents behaved appropriately during these interactions. In its review order entered on 25 January 2018, the trial court identified the following barriers to reunification:

> (1) [respondent-mother] is currently working through the requirements of her OHFSA; (2) [respondent-father] has not entered into an OHFSA with the YCHSA but needs to continue working through the items he orally agreed to complete; (3) the parents need to acquire suitable housing; and (4) one or both parents need to provide proof of an established means to support the minor children.

¶ 6 The trial court held an initial permanency planning hearing on 14 June 2018 and entered an order on 13 July 2018 in which it established a primary permanent plan of reunification for Ben and John with a secondary plan of guardianship with a relative or other approved caregiver. Reunification remained the children's primary permanent plan until a permanency planning order was entered on 7 March 2019, in which the trial court found that, despite YCHSA making reasonable efforts to

support a primary plan of reunification, both respondents had failed to "mak[e] adequate progress within a reasonable period of time" on their respective plans which were designed to eliminate the barriers to reunification between the children and respondents. The trial court changed the primary permanent plan to guardianship with a secondary plan of adoption and relieved YCHSA "of any obligation to make further reasonable efforts to reunify the respondents with the minor children."

¶ 7 Following a permanency planning hearing on 30 May 2019, the trial court changed the primary permanent plan to adoption with a secondary plan of guardianship and ordered YCHSA to initiate termination of parental rights proceedings. On 13 June 2019, YCHSA moved the children into a potential adoptive placement with licensed foster parents. YCHSA filed a motion to terminate respondents' parental rights to Ben and John on 8 August 2019, in which the agency asserted two statutory grounds for termination: (1) that respondents had neglected the children and that there was a substantial likelihood of future neglect if the children were returned to their custody pursuant to N.C.G.S. § 7B-1111(a)(1); and (2) that respondents had willfully left the children in a placement outside the home for more than twelve months without making reasonable progress to correct the conditions leading to their removal pursuant to N.C.G.S. § 7B-1111(a)(2).

¶ 8 Prior to the hearing on the motion to terminate parental rights, the trial court granted respondent-father's motion to bifurcate the adjudication and disposition phases of the proceedings. The adjudicatory hearing concluded on 7 February 2020, and the trial court announced that it found "by clear and convincing evidence that grounds exist for the termination of the parental rights" of both respondents for neglect and failure to make reasonable progress under N.C.G.S. § 7B-1111(a)(1) and (2). After rendering its adjudication, the trial court elected to "go forward with the disposition phase" and heard from YCHSA's witnesses as to disposition before adjourning for the day. The trial court reconvened the parties on the morning of 15 June 2020 to complete the dispositional hearing. At the conclusion of the hearing, the trial court considered each of the statutory dispositional factors contained within N.C.G.S. § 7B-1110(a) before concluding that it was in the best interests of both children to terminate the parental rights of each respondent.

¶ 9 On 29 June 2020, the trial court entered its order terminating the parental rights of respondent-mother and respondent-father. Consistent with its adjudication rendered in open court on 7 February 2020, the trial court concluded that YCHSA had proven the existence of both of its alleged grounds for termination—neglect and failure to make reasonable

progress—by clear, cogent, and convincing evidence. For its disposition under N.C.G.S. § 7B-1110(a), the trial court memorialized its conclusion that it was in the best interests of Ben and John that respondents' parental rights be terminated. Both respondents filed timely notices of appeal from the termination of parental rights order.

II. Analysis

¶ 10 Although respondent-mother and respondent-father filed separate appellate briefs, each of them challenge only the trial court's adjudication of grounds for terminating their respective parental rights under N.C.G.S. § 7B-1111(a)(1)–(2). Neither respondent contests the trial court's dispositional assessment of the children's best interests under N.C.G.S. § 7B-1110(a).

¶ 11 We review the trial 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 (2020) (extraneity omitted).

¶ 12 Because the determination of the existence of any statutory ground which is duly supported is sufficient to sustain a termination order, we elect to review the trial court's adjudication under N.C.G.S. § 7B-1111(a)(2), which authorizes the termination of parental rights if "[t]he parent has willfully left the juvenile in foster care or placement outside the home for more than 12 months without showing to the satisfaction of the court that reasonable progress under the circumstances has been made in correcting those conditions which led to the removal of the juvenile." This Court has explained that

> a finding that a parent acted willfully for purposes of N.C.G.S. § 7B-1111(a)(2) does not require a showing of fault by the parent. A respondent's prolonged inability to improve her situation, despite some efforts in that direction, will support a finding of willfulness regardless of her good intentions, and will support a finding of lack of progress sufficient to warrant termination of parental rights under section 7B-1111(a)(2).

In re J.S., 374 N.C. at 815 (extraneity omitted).

¶ 13 The trial court placed Ben and John in YCHSA custody pursuant to the adjudication of neglect and resulting disposition entered on 11 October 2017. Therefore, the children had been in a YCHSA placement outside of the parental home for nearly twenty-two months at the time that the motion to terminate respondents' parental rights was filed in August 2019. This passage of time exceeds the twelve-month requirement established in N.C.G.S. § 7B-1111(a)(2). *See id.* (noting that the juvenile must have been placed "outside the home pursuant to a court order for more than a year at the time the petition to terminate parental rights is filed." (extraneity omitted)). In assessing the reasonableness of respondents' progress in correcting the conditions which resulted in the removal of the children from their care, however, we consider their performance "for the duration leading up to the hearing on the motion or petition to terminate parental rights." *Id.* (citation omitted).

A. Respondent-Mother's Appeal

1. Findings of fact

¶ 14 Respondent-mother challenges many of the trial court's findings of fact, contending that they are either erroneous or otherwise unsupported by the evidence. The trial court made the following findings addressing respondent-mother's progress after the children entered YCHSA custody:

> 20. Respondent Mother entered into an Out of Home Family Services Agreement (hereinafter "Case Plan") with YCHSA on October 17, 2017. The components of Respondent Mother's Case Plan were: to successfully complete substance abuse treatment and refrain from abusing any substances; to undergo a psychological assessment and follow all recommendations; obtain and maintain stable housing and employment

for she [sic] and her children; complete parenting classes; and visitation with her children.

21. Respondent Mother went to Ann Adams for an initial substance abuse assessment on January 27, 2018. She reported that she had not used drugs since 09/27/2017. However, she tested positive for Amphetamines and Methamphetamines . . . on January 27, 2018. Respondent Mother then cancelled or no-showed on multiple follow up appointments . . . . On April 30, 2018, Adams wrote YCHSA that Respondent Mother needed Substance Abuse Intensive Outpatient Therapy to address her stimulant use. As of February 4, 2020, Respondent Mother had not returned to Adams for any therapy to address her addiction.

22. Respondent Mother went to Daymark for a Comprehensive Clinical Assessment on May 14, 2018. The diagnosis was amphetamine type substance abuse disorder-severe; opioid use disorder severe in early remission; general anxiety disorder; major depressive disorder. Respondent Mother tested positive for amphetamines at the Daymark assessment on May 14, 2018. She was recommended to engage in their long term recovery group beginning on May 24, 2018.

23. Respondent Mother went to Daymark for treatment in May, and some in July of 2018. She did not return to Daymark until the end of October, 2018, when they made her take another assessment because of the lapse of time. She then went one more time on 11/07/2018, and has not been back to Daymark since. Respondent Mother failed to successfully complete the substance abuse treatment she was recommended to do by two different clinicians.

24. The Respondent Mother tested positive for illegal substances or refused to screen on eight out of twelve screens attempted by YCHSA on her including testing positive for Methamphetamine and Amphetamine on May 21, 2019, and she

refused a screen on January 17, 2020, the last two drug screens attempted on her.

25. Respondent Mother did attend a Psychological assessment with Chris [Sheaffer], Ph. D., Psychologist with Tri-Care, P.A., on December 19, 2017[.]

26. Respondent Mother reported severe substance abuse including opioids and stimulants since prior to the birth of her first child.

27. Dr. [Sheaffer] diagnosed Respondent Mother as having severe untreated substance abuse issues and indicated she needed intensive outpatient treatment. He also diagnosed her with generalized anxiety disorder and recommended mental health treatment. Respondent Mother failed to follow any of the recommendations from Dr. [Sheaffer].

28. During the period [the juveniles] have been in the custody of YCHSA, Respondent Mother has provided proof of employment with Papa John's Pizza for approximately seven weeks during 2018. Besides that, she has not provided proof of any gainful employment.

29. Respondent Mother has not had stable housing. She and Respondent Father did have an apartment in Yadkinville with HUD assistance in 2018 until July, 2019, when she was taken off the lease. Respondent Father violated his HUD contract and lost the apartment in October of 2019. Respondent Mother has refused to provide her current address to YCHSA. Since at least the beginning of May, 2020, Respondent Mother has lived in a motel room with Respondent Father.

30. Respondent Mother did complete parenting classes and she did visit regularly.

. . . .

49. Respondent Mother never finished her substance abuse treatment and tested positive for illicit substances on a majority of the drug screens,

> including the last ones given to her where she either tested positive or refused to screen, which the [c]ourt deems a positive screen. She has made no improvement on her substance abuse issues from the date of the initial adjudication on September 14, 2017, to the present.
>
> . . . .
>
> 52. Respondent Mother took a psychological evaluation but failed to follow the recommendations.

¶ 15 The trial court also made several findings of fact addressing respondents' collective progress, as follows:

> 42. Neither the Respondent Mother nor the Respondent Father availed themselves of the opportunities and services to obtain permanence and stability for themselves and their children.
>
> 43. The Respondent Mother and the Respondent Father had the opportunity to correct the conditions that led to the removal of their children from their care, but the parents failed to do so.
>
> 44. The [c]ourt finds that Respondent Parents' actions were willful.
>
> . . . .
>
> 48. The conditions which caused the children to be adjudicated as neglected juveniles in September, 2017, and for which the children came into custody for; [sic] substance abuse by the parents and overall instability in housing and employment, still exist. . . .
>
> . . . .
>
> 51. Both Respondent Parents have been homeless, living with friends or in motel rooms for the majority of the time the juveniles have been in YCHSA custody, and are currently living in a room in the Welborn Motel.
>
> . . . .

> 53. Though the Parents did complete parenting classes and have visited regularly, this is extremely limited progress on their case plans and not reasonable progress.
>
> 54. The Respondent Parents did not make adequate progress in a reasonable time under their case plans.

¶ 16 **[1]** We begin by addressing respondent-mother's claim that certain findings of the trial court are unsupported by the evidence because the trial court heard evidence of her actions only up to the first day of the termination hearing on 7 February 2020, which failed to account for respondent-mother's progress between 7 February 2020 and the conclusion of the dispositional hearing on 15 June 2020. Since N.C.G.S. § 7B-1111(a)(2) requires an evaluation of the parent's progress "for the duration leading up to the hearing on the motion or petition to terminate parental rights[,]" *In re J.S.*, 374 N.C. at 815, respondent-mother contends that Findings of Fact 24, 27, 42, 43, 49, and 52 are erroneous inasmuch as YCHSA adduced "no evidence at all of what [respondent-mother] did or did not do . . . between February 7, 2020 and June 15, 2020."

¶ 17 We are not persuaded by respondent-mother's argument. It is well-established that

> [t]he termination of a parent's parental rights in a juvenile matter is a two-stage process consisting of an adjudicatory stage and a dispositional stage. *See* N.C.G.S. §[§] 7B-1109, -1110 (2019). "If during the adjudicatory sta[g]e, the trial court finds grounds to terminate parental rights under N.C.G.S. § 7B-1111(a), it proceeds to the dispositional stage where it must determine whether terminating the parent's rights is in the juvenile's best interest."

In re C.B., 375 N.C. 556, 559 (2020) (quoting *In re J.J.B.*, 374 N.C. 787, 791 (2020)). Although we have held that "a trial court is *not required to bifurcate the hearing* into two distinct stages[,]" *In re S.M.M.*, 374 N.C. 911, 915 (2020) (emphasis added), a trial court may exercise its discretion to hold separate adjudicatory and dispositional hearings in accordance with N.C.G.S. §§ 7B-1109 and 7B-1110.

¶ 18 In this case, respondent-father moved the trial court prior to the termination proceedings "that this matter be bifurcated into separate hearings regarding the adjudication and disposition." Hearing no objection, the trial court allowed the motion and announced, "It will

be bifurcated." On 7 February 2020, the trial court concluded the adjudicatory stage of the proceedings and stated its ruling that YCHSA had proven the existence of grounds to terminate respondents' parental rights under N.C.G.S. § 7B-1111(a)(1) and (2), before conducting a portion of the dispositional hearing by receiving testimony from two YCHSA witnesses on the issue of the children's best interests. No objection was lodged concerning this procedure, notwithstanding the trial court's earlier assent to respondent-father's request to bifurcate the proceedings.

¶ 19 When the parties reconvened on 15 June 2020, the trial court reviewed the status of the proceedings as follows:

> When we last left, the adjudication phase had been completed. We did in fact complete the adjudication phase, and I did find that there were grounds to exist for the termination of parental rights. And we had briefly gone into the disposition phase, and I believe [YCHSA] had presented your evidence on disposition.

Respondent-mother did not object to the trial court's characterization of the posture of the case. Nor did respondent-mother move to reopen the adjudicatory stage of the hearing for additional evidence or findings. While it is true, as respondent-mother observes, that "the termination hearing was not concluded until June 15, 2020," the transcript shows that the trial court concluded the adjudicatory portion of the hearing on 7 February 2020, and it did so with the full knowledge and consent of the parties.

¶ 20 The procedure that an adjudication under N.C.G.S. § 7B-1111(a)(2) requires the trial court and reviewing appellate courts to consider concerning the parent's progress "up to the hearing" date refers to the date of the *adjudicatory hearing* in cases where the proceedings are bifurcated, and necessarily precludes the requirement for the trial court to consider progress achieved by the parent which is made after the commencement of the proceedings. *In re J.S.*, 374 N.C. at 815. To conclude otherwise would effectively bar the trial court from scheduling sequential adjudicatory and dispositional hearings on different dates or, at a minimum, would require the trial court to save a portion of the adjudicatory hearing for the final day of the termination proceedings in the event that a parent happens to produce some evidence of the parent's claimed progress which was achieved between hearing dates. Such a result is inconsistent with the statutory framework established by N.C.G.S. §§ 7B-1109 and 7B-1110 and is not otherwise compelled by our case law.

¶ 21 Respondent-mother also emphasizes that there was no "order adjudicating grounds for termination entered before June 29, 2020." To the extent respondent-mother implies that YCHSA was obliged to prove her lack of reasonable progress up to the date of entry of the termination order, we do not agree. If such a requirement prevailed, then a movant or petitioner would fail to meet its burden of proof if the trial court did not enter its written order on the date of the hearing. Subsection 7B-1109(e) expressly provides the trial court a period of thirty days "following the completion of the termination of parental rights hearing" in which to enter the adjudicatory order. N.C.G.S. § 7B-1109(e) (2019). Therefore, N.C.G.S. § 7B-1111(a)(2) cannot be construed to require proof of the parent's progress, or lack thereof, as of the order's entry date.

¶ 22 If respondent-mother had wanted the trial court to receive additional evidence with regard to the adjudication phase on 15 June 2020—after the trial court had formally concluded the adjudicatory stage of the proceedings and had announced its ruling on 7 February 2020—it was incumbent upon respondent-mother to move to reopen the matter for the presentation of new evidence. *Cf. In re S.M.M.*, 374 N.C. at 915 ("Mere speculation that some facts may have changed in the eighteen months since the court originally heard the evidence is not sufficient to demonstrate that the trial court abused its discretion in denying respondent's motion to reopen the evidence on remand."). As respondent-mother did not move to reopen the adjudicatory stage of the proceedings, we overrule her exceptions to Findings of Fact 24, 27, 42, 43, 49, and 52 to the extent that they are based on the absence of evidence about her progress between 7 February 2020 and 15 June 2020.

¶ 23 **[2]** Respondent-mother also makes individualized evidentiary challenges to a number of the trial court's findings. For the reasons discussed below, we conclude that respondent-mother fails to show any prejudicial error in the trial court's findings of fact.

¶ 24 In contesting Finding of Fact 24, respondent-mother asserts that the trial court heard no evidence that she "refused" a drug screen on 17 January 2020. YCHSA social worker Karen Wheeler testified that respondent-mother "was given a screen" on 17 January 2020, "but that screen was never returned." When asked to confirm that respondent-mother "did not take the screen" requested on 17 January 2020, Ms. Wheeler replied: "She did not take it. That's correct." Ms. Wheeler further recounted that the terms of respondent-mother's OHFSA, which was admitted into evidence without objection, provided that "[i]f [she] fails to complete a drug screen or attempts to alter a drug screen, the result will be recorded as a positive result." This tes-

timony supports a reasonable inference on the part of the trial court that respondent-mother's unexplained failure to return the drug screen which was given to her on 17 January 2020 amounted to a refusal to submit to the screen. *See In re J.M.J.-J.*, 374 N.C. 553, 560 (2020); see also *In re T.N.H.*, 372 N.C. 403, 411 (2019) (recognizing trial court'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").

¶ 25 Respondent-mother challenges as "partially erroneous" the trial court's Findings of Fact 27 and 52, which portray her as "fail[ing] to follow any of the recommendations from Dr. [Sheaffer]" in his psychological evaluation dated 19 December 2017. In support of her assertion, respondent-mother submits that she completed parenting classes on 21 December 2017 as confirmed by Ms. Wheeler's testimony.

¶ 26 We are not persuaded, however, by respondent-mother's position. Dr. Sheaffer's written evaluation, which was admitted into evidence at the hearing, states that respondent-mother "reported that she is currently participating in parenting classes." Dr. Sheaffer made treatment recommendations to address respondent-mother's substance abuse and mental health issues. Respondent-mother does not deny the trial court's finding that she had failed to comply with these recommendations at the time of the adjudicatory hearing on 7 February 2020.

¶ 27 As for the recommendation that respondent-mother claims to have satisfied in contradiction of the trial court's findings, the record reflects that Dr. Sheaffer "recommend[ed] that increased caregiving responsibilities for [respondent-mother's] children be provided to her based on continued abstinence from substances, completion of parenting classes, and indication of more stable living circumstances." We understand that this is not an unequivocal recommendation for respondent-mother to attend parenting classes, but merely a recognition on Dr. Sheaffer's part that respondent-mother would benefit from "increased caregiving responsibilities" *so long as* she accomplished certain prerequisites which included the completion of parenting classes. Assuming, *arguendo*, that Findings of Fact 27 and 52 erroneously fail to credit respondent-mother with satisfying one of Dr. Sheaffer's recommendations, we conclude that such error, taken in context, is harmless. *See In re S.M.*, 375 N.C. 673, 684 (2020) (disregarding erroneous portion of adjudicatory finding not supported by the evidence). Since Findings of Fact 30 and 53 fully and expressly recognize that respondent-mother completed her parenting classes, we are assured that the trial court thoroughly evaluated the evidence in arriving at its findings concerning respondent-mother's compliance with Dr. Sheaffer's recommendations. Therefore, this exception is overruled.

¶ 28 Next, respondent-mother challenges Findings of Fact 42 and 44 as "erroneous . . . due to . . . vagueness." With regard to Finding of Fact 42, respondent-mother contends that the trial court did not explain how respondent-mother failed to "avail" herself of any specific "opportunities and services to obtain permanence and stability." As to Finding of Fact 44, respondent-mother argues that the trial court failed to identify which of her "actions were willful." We find respondent-mother's claims of vagueness, and her resulting parallel to commissions of error, to be unfounded.

¶ 29 A review of the termination order shows that Findings of Fact 20 through 30 particularize the requirements of respondent-mother's OHFSA and describe in detail her lack of progress in addressing the substance abuse, mental health, housing, and employment components of the agreement. Findings of Fact 31 through 41 provide a similar recitation in addressing specific details regarding respondent-father. Findings of Fact 42 through 44 represent the trial court's summation of both respondents' overall performance in pursuit of their requirements as set forth in findings 20 through 41. The reference to "opportunities and services" in Finding of Fact 42 refers to the mental health and substance abuse services offered to respondent-mother by YCHSA and her treatment providers, as well as the employment opportunity identified in Finding of Fact 28 and the "apartment in Yadkinville with HUD assistance" mentioned in Finding of Fact 29. The extent to which respondent-mother did not avail herself of these opportunities and services is demonstrated by her failure to complete substance abuse or mental health treatment as depicted in Findings of Fact 21 through 23, 25, and 27; by her continued positive drug screens described in Finding of Fact 24; by her limited time span of seven weeks of employment as reflected in Finding of Fact 28; and by her loss of subsidized housing in July 2019 "when she was taken off the lease" as recounted in Finding of Fact 29.

¶ 30 Read in the context of Findings of Fact 24 and 28, the trial court's determination that respondent-mother's "actions were willful" in Finding of Fact 44 refers to both respondent-mother's failure to avail herself of the "opportunities and services to obtain permanence and stability" recognized in Finding of Fact 42 and her failure "to correct the conditions that led to the removal of the[ ] children from [her] care" as stated in Finding of Fact 43.[3] Although respondent-mother does not challenge

3. Respondent-mother also challenges the evidentiary basis of Finding of Fact 43 contending that there is a dearth of information in the record regarding any progress made between the February 2020 adjudicatory hearing and the June 2020 dispositional hearing. As previously discussed, the trial court was under no duty to consider respondent-mother's progress beyond a date "up to the hearing on the motion or petition to terminate

the evidentiary support for Finding of Fact 44 aside from her contention that its vagueness renders the finding erroneous, the evidence of respondent-mother's persistent failure to complete the treatment protocols established by her evaluators or to otherwise address the requirements of her OHFSA over a substantial period of time gives rise to a reasonable determination by the trial court that respondent-mother's actions were willful. *See In re J.S.*, 374 N.C. at 815 (stating that a parent's "prolonged inability to improve her situation, despite some efforts in that direction, will support a finding of willfulness . . . under section 7B-1111(a)(2)" (citation omitted)). Accordingly, we uphold Findings of Fact 42 and 44 as sufficiently specific to support the trial court's adjudication.

¶ 31 Respondent-mother subsequently challenges Finding of Fact 49, asserting that "no competent evidence" supports the trial court's finding that she "made no improvement on her substance abuse issues from the date of the initial adjudication on September 14, 2017, to the present." As previously discussed, we construe "the present" to mean at the time of the adjudicatory hearing on 7 February 2020.

¶ 32 We find no merit to respondent-mother's claim. The evidence and the trial court's uncontested findings show that respondent-mother "failed to successfully complete the substance abuse treatment she was recommended to do by two different clinicians" and that she did not engage in any treatment at all after 7 November 2018. During the course of the case, respondent-mother "tested positive for illegal substances or refused to screen on eight out of twelve screens attempted by YCHSA." Moreover, respondent-mother "test[ed] positive for Methamphetamine and Amphetamine on May 21, 2019, and she refused a screen on January 17, 2020, the last two drug screens attempted on her." Ms. Wheeler relayed to the trial court in her testimony that respondent-mother "has not made any progress" on the substance abuse component of her OHFSA. Although respondent-mother reiterates her unpersuasive argument that her failure to provide the drug screen requested by YCHSA on 17 January 2020 "is *not* the equivalent of a positive drug screen[,]" nonetheless respondent-mother was definitively on notice as a condition of her OHFSA that a refused drug screen would be "recorded as a positive result." The trial court thus could reasonably infer that respondent-mother's unexplained failure to submit to the requested drug

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parental rights," which fell on 7 February 2020. *In re J.S.*, 374 N.C. 811, 815 (2020). Therefore, respondent-mother cannot successfully maintain such a challenge based upon a trial court's alleged failure to consider evidence which it was under no duty to consider. Respondent-mother's contention on this matter is without merit.

screen amounted to an admission that the test's result would be inculpatory. Contrary to respondent-mother's assertion, the fact that YCHSA did not request a drug screen from her in the eight months between May 2019 and January 2020 does not undermine the trial court's finding that respondent-mother had made no progress at the time of the 7 February 2020 hearing.

¶ 33 Finally, respondent-mother challenges Finding of Fact 53, which characterizes respondents' completion of parenting classes and consistent attendance at visitations with Ben and John as "extremely limited progress on their case plans and not reasonable progress[,]" as well as Finding of Fact 54, which states that respondents "did not make adequate progress in a reasonable time under their case plans." Respondent-mother contends that these findings are "unsupported by clear, cogent and convincing evidence, are largely conclusory in nature and are unsupported by proper findings."

¶ 34 We again find respondent-mother's objections to be without foundation. In addition to parenting classes and visitation, respondent-mother's OHFSA required her to address the issues of substance abuse, mental health, housing, and employment. The hearing testimony and the trial court's unchallenged findings show that after completing parenting classes in December 2017, respondent-mother failed to comply with the treatment recommendations of the psychological evaluation completed by Dr. Sheaffer on 19 December 2017, the substance abuse assessment prepared by Ann Adams at Professional Assessment Counseling Center on 30 April 2018, and the Comprehensive Clinical Assessment performed at Daymark on 14 May 2018. Respondent-mother either refused to participate in or tested positive on most of the twelve drug screens requested by YCHSA, including the two most recent screens prior to the termination hearing. At the time of the 7 February 2020 adjudicatory hearing, respondent-mother had not participated in any substance abuse treatment for almost fifteen months, had lacked stable housing since October 2019, and had remained unemployed since 2018. As respondent-mother failed to complete any component of her case plan aside from parenting classes and visitation with the children in the almost twenty-seven months between 17 October 2017 and 7 February 2020, the trial court did not err in deeming the progress of respondent-mother on her case plan to be "extremely limited," "not reasonable," and inadequate for the purposes of responding to YCHSA's allegation that respondent-mother had failed to make reasonable progress in correcting the conditions which resulted in her children's removal from the home.

2. Conclusion of law

¶ 35 Respondent-mother also challenges the trial court's conclusion that grounds existed to terminate her parental rights because she "willfully left the juveniles in foster care or placement outside the home for more than twelve months without showing to the satisfaction of the [c]ourt that reasonable progress under the circumstances was made in correcting those conditions which led to the removal of the juveniles." We hold that the trial court's valid findings of fact amply support this conclusion.

¶ 36 Ms. Wheeler testified at the termination of parental rights hearing that the primary conditions leading to the removal of Ben and John from the home were respondent-mother's substance abuse and lack of stable housing and employment. The trial court's findings of fact show that respondent-mother made only extremely limited progress in remedying these conditions over the span of more than twenty-eight months which transpired since the initial adjudication of neglect. Respondent-mother's "extremely limited progress" over such an extended period supports a conclusion that she willfully failed to make reasonable progress within the meaning of N.C.G.S. § 7B-1111(a)(2). *In re S.M.*, 375 N.C. at 685 (quoting *In re B.O.A.*, 372 N.C. 372, 385 (2019)); *see also In re Z.O.G.-I.*, 375 N.C. 858, 867 (2020). Because we uphold the adjudication under N.C.G.S. § 7B-1111(a)(2), we do not consider respondent-mother's arguments challenging the adjudication under N.C.G.S. § 7B-1111(a)(1). *See In re J.S.*, 374 N.C. at 815. We therefore affirm the trial court's order terminating respondent-mother's parental rights to Ben and John.

B. Respondent-Father's Appeal

1. Findings of fact

¶ 37 **[3]** Respondent-father challenges the trial court's adjudication of the existence of grounds under N.C.G.S. § 7B-1111(a) through his assertion that "[c]ritical [f]indings of [f]act . . . are unsupported by clear, cogent, and convincing evidence or are so vague as to lack any value to support a conclusion of law."[4] As with respondent-mother's appeal, we limit our

4. Respondent-father includes his objections to the trial court's findings of fact in section I of his appellant's brief, which challenges the trial court's adjudication of neglect under N.C.G.S. § 7B-1111(a)(1). Section II of the brief presents respondent-father's argument challenging the adjudication of lack of reasonable progress under N.C.G.S. § 7B-1111(a)(2). Section II neither repeats nor incorporates by reference any of respondent-father's exceptions to the trial court's findings raised in section I. Nevertheless, we review the findings of fact challenged by respondent-father in section I of his brief insofar as the findings support the contested adjudication under N.C.G.S. § 7B-1111(a)(2).

review to the adjudication of respondent-father's willful failure to make reasonable progress under N.C.G.S. § 7B-1111(a)(2).

¶ 38 The trial court made the following findings of fact about respondent-father's circumstances regarding his involvement in this case which are germane to this Court's consideration of the trial court's adjudication:

> 31. Respondent Father was presented an Out of Home Family Services Agreement (hereinafter "Case Plan") with YCHSA on October 27, 2017. The Social Worker went over the Case Plan with Respondent Father but he refused to sign. The components of Respondent Father's case plan was [sic]: obtain a substance abuse assessment and follow recommendations and submit to random drug screens; obtain a Psychological Assessment and follow all recommendations; obtain and maintain stable housing and employment for he [sic] and his children; complete parenting classes; and visitation with his children.
>
> 32. Respondent Father was sent to Ann Adams for a substance abuse assessment in December of 2017. Respondent Father went to the initial meeting, and was asked to come back and participate in a drug screen. Though he promised Adams on multiple occasions he never showed for a screen. As such, Adams was unable to complete the assessment and provide any recommendations.
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> 33. Respondent Father never obtained a substance abuse assessment during the entire time his children were in YCHSA custody.
>
> 34. Respondent Father tested negative on three drug screens in 2017, and tested negative on the two drug screens given him in 2018. Respondent Father refused to screen on May 6, 2019, and then tested positive for Methamphetamine and Amphetamine on May 21, 2019. Respondent Father also refused a drug test offered on January 17, 2020.
>
> 35. Respondent Father failed to take advantage of YCHSA setting up two different appointments

with Dr. Chris [Sheaffer] to perform a psychological evaluation . . . as part of his case plan. Respondent Father failed to attend either appointment. Respondent Father indicated to YCHSA that he wanted to go to the Epilepsy Institute in Winston-Salem, NC to complete his psychological evaluation so YCHSA wrote to the Epilepsy Institute and made a referral for Respondent Father to get a psychological evaluation there. Respondent Father never attended a psychological [evaluation] with the Epilepsy Institute either.

36. Prior to the filing of the Motion for TPR in August, 2019, Respondent Father had failed to attend a psychological evaluation, despite YCHSA setting up numerous appointments for him to do so with two different providers.

37. On November 5, 2019, Respondent Father did go for a psychological evaluation from Carol Pulley . . . . Respondent Father did not tell YCHSA that he was going to Pulley for the evaluation and Pulley did not have the benefit of any YCHSA records or reports to review in doing her evaluation. The [c]ourt specifically finds that Respondent Father was not truthful . . . as he did not report any substance abuse history to Pulley despite having tested positive for Methamphetamine and Amphetamine in May, 2019.

38. Pulley diagnosed Respondent Father with major depressive disorder, somatic symptom disorder, and generalized anxiety disorder. She recommended Cognitive Behavioral Therapy, interpersonal therapy, psychotherapy, and medication management for treatment of his mental health diagnosis. As of June 15, 2020, Respondent Father had not begun any of the therapy or treatments recommended by Pulley.

39. Respondent Father has not had stable housing during the pendency of the juveniles being in YCHSA custody. He . . . did have an apartment

> in Yadkinville with HUD assistance in 2018 until Respondent Father violated his HUD contract and lost the apartment in October of 2019. Besides that time period, Respondent Father has reported he lived with friends in Wilkesboro or Hamptonville, and in various motel rooms with Respondent Mother from early May, 2020 up and through June 15, 2020.
>
> 40. Respondent Father has no stable employment at the time of the hearing and has not for the vast majority of the case. Respondent Father indicated he has partial disability from military service which provides him $500.00 . . . per month. However, he has not had gainful employment since 2018.
>
> 41. Respondent Father did complete parenting classes, and did visit regularly with the juveniles.
>
> . . . .
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> 50. Respondent Father never even completed a substance abuse assessment and has tested positive or refused the last two drug screens given him in 2019 and 2020.
>
> 51. Both Respondent Parents have been homeless, living with friends or in motel rooms for the majority of the time the juveniles have been in YCHSA custody, and are currently living in a room in the Welborn Motel.
>
> 52. . . . Respondent Father failed to take a psychological evaluation until November, 2019, over two years after the children were taken into custody. As of June 15, 2020, he still had not acted on any of the recommendations from his evaluation.

To the extent that respondent-father does not challenge these findings, they are binding. *In re J.S.*, 374 N.C. at 814.

¶ 39 Respondent-father claims that the evidence in the record does not support the trial court's determinations in Findings of Fact 33 and 50 that he never obtained or completed a substance abuse assessment. Respondent-father argues that these findings are contradicted by the

trial court's permanency planning orders entered in the underlying juvenile proceedings, which include findings that he "completed a substance abuse assessment at Daymark Recovery Services on or about June 5, 2018" and that "[h]is substance abuse assessor did not recommend any follow-up treatment." He further notes that the trial court expressly "took judicial notice of all prior juvenile pleadings and [c]ourt orders" entered in the previous neglect proceedings.

¶ 40 Ms. Wheeler testified at the termination of parental rights hearing that respondent-father was referred to Ms. Adams at Professional Assessment Counseling Center for a substance abuse assessment in December 2017, and that he attended the first day of the assessment but failed to return for the second appointment required to complete the assessment. Because respondent-father never attended the second assessment session with Ms. Adams, she was unable to make any treatment recommendations. The trial court admitted into evidence a letter from Ms. Adams dated 30 April 2018, confirming her inability to complete respondent-father's substance abuse assessment due to his multiple cancellations and nonattendance of scheduled appointments. Ms. Wheeler further testified that, to her knowledge, respondent-father never completed a substance abuse assessment or sought any form of treatment for substance abuse.

¶ 41 Respondent-father acknowledged in his testimony at the termination of parental rights hearing that he failed to complete his assessment with Ms. Adams, but also testified that he completed a substance abuse assessment at Daymark on 5 June 2018. Respondent-father's testimony was reflected in the trial court's findings of fact in five permanency planning orders entered between 13 July 2018 and 12 November 2019. Such testimony of respondent-father is also referenced in the written reports which YCHSA submitted to the trial court for four of those permanency planning hearings. At the hearing, Ms. Wheeler was not cross-examined about any discrepancy between YCHSA's prior written reports and her testimony that respondent-father had not completed a substance abuse assessment. Asked generally whether YCHSA had "been provided with any information from [respondent-father] or otherwise that he attended Daymark for substance abuse *treatment*[,]" Ms. Wheeler replied, "I have not." (Emphasis added.)

¶ 42 Generally, where there is conflicting witness testimony on an issue of fact, it is the trial court's "responsibility to pass upon the credibility of the witnesses and the weight to be given their testimony and the reasonable inferences to be drawn therefrom." *In re D.L.W.*, 368 N.C. 835, 843 (2016) (extraneity omitted). Absent some documentation or other

proof of respondent-father's substance abuse assessment at Daymark, the trial court was authorized as the trier of fact to believe Ms. Wheeler's testimony and to disbelieve the testimony of respondent-father. The fact that the trial court took judicial notice of its permanency planning orders in the underlying juvenile file does not preclude the trial court from making a credibility determination in favor of Ms. Wheeler rather than respondent-father in resolving conflicts in their respective testimonial accounts. The findings made in a permanency planning order are not binding upon a trial court at a subsequent termination proceeding. Unlike a permanency planning hearing under N.C.G.S. § 7B-906.1(c), the adjudicatory stage of a termination hearing is governed by the formal rules of evidence.[5] N.C.G.S. § 7B-1109(f). Moreover, findings made for permanency planning purposes are not subject to the heightened "clear, cogent, and convincing evidence" standard of proof that applies to adjudicatory findings under N.C.G.S. § 7B-1109(f). *See In re L.E.W.*, 375 N.C. 124, 127–28 (2020) (concluding that the trial court "erroneously stated in the challenged permanency planning order that . . . 'the following findings of fact have been proven by clear, cogent, and convincing evidence' " because "the trial court's findings of fact need only be supported by sufficient competent evidence" (quoting *In re L.M.T.*, 367 N.C. 165, 180 (2013))).

¶ 43 This Court has authorized trial courts to "take judicial notice of findings of fact made in prior orders, even when those findings are based on a lower evidentiary standard because where a judge sits without a jury, the trial court is presumed to have disregarded any incompetent evidence and relied upon the competent evidence." *In re J.M.J.-J.*, 374 N.C. at 558 (quoting *In re T.N.H.*, 372 N.C. at 410). We have treated such prior findings of fact as sufficient to support an adjudicatory finding of fact under N.C.G.S. § 7B-1109(f). *Id.* (concluding that the trial court's finding that respondent tested positive for hydrocodone and oxycodone was "supported by a permanency planning order . . . which found as a fact that respondent tested positive for hydrocodone and oxycodone[,]" even though the witness attested only to respondent's "positive drug screen"). *But cf. State v. Dula*, 204 N.C. 535, 536 (1933) ("It is generally held that 'a judgment in a civil action is not admissible in a subsequent criminal prosecution' . . . . [I]t would not be just to convict a defendant . . . by reason of a judgment obtained against him in a civil action by a

5. Dispositional reports like those submitted by YCHSA at the permanency planning hearings are inadmissible at the adjudicatory stage of a juvenile abuse, neglect, or dependency proceeding, which is likewise governed by the rules of evidence in civil cases. N.C.G.S. §§ 7B-804, 7B-808(a) (2019).

mere preponderance of evidence."). This Court continues to recognize the deference which is to be accorded to a trial court in reconciling conflicts in the evidence which is provided to it, including the assessment of its prior findings in a permanency planning order and the testimony of a live witness at the termination hearing, in a trial court's determination of witness credibility and resulting findings of fact.[6]

¶ 44 In light of the trial court's authority to resolve conflicts in the evidence, *see In re T.T.E.*, 372 N.C. 413, 420 (2019), we view Ms. Wheeler's testimony that respondent-father failed to complete a substance abuse assessment as sufficient support for Findings of Fact 33 and 50, notwithstanding the existence of contrary evidence in the record.

¶ 45 Respondent-father next challenges portions of Finding of Fact 37 concerning the psychological evaluation he obtained from Carol Pulley on 5 November 2019. Specifically, he claims that the trial court erred in finding that Ms. Pulley "did not have the benefit of any YCHSA records or reports to review in doing her evaluation" and that he "was not truthful" with Ms. Pulley because "he did not report any substance abuse history."

¶ 46 We determine that the evidence in the record supports Finding of Fact 37. Ms. Wheeler testified that YCHSA originally referred respondent-father to TriCare Mental and Behavioral Health Services for a psychological evaluation, but respondent-father failed to attend the appointment. In October 2018, YCHSA made another referral for respondent-father to obtain the psychological evaluation at the Epilepsy Institute of North Carolina. Social worker Valerie Hamilton, who was Ms. Wheeler's predecessor at YCHSA, wrote a referral letter to the provider explaining the case history and the reasons for the requested evaluation. Respondent-father also failed to attend this evaluation.

¶ 47 Respondent-father attended the psychological evaluation with Ms. Pulley on 5 November 2019, nearly two years after the target date in his OHFSA and almost three months after YCHSA moved to termi-

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6. We note that respondent-father's attorney objected to the trial court taking judicial notice of its prior orders, citing "the different levels of evidence and the different standards that are applied to certain orders" and specifically argued that, "[i]n the permanency planning hearings and review hearings, obviously, there's a laxer standard for the Rules of Evidence." YCHSA responded that respondent-father's objection "goes more to the weight to be given [to] the evidence, not to its admissibility." YCHSA's attorney maintained that the trial court was entitled to "take judicial notice of the underlying proceedings, giving to each particular order or document its appropriate weight, taking into consideration the varying standards of proof that may have governed a particular hearing at which a document was generated." The trial court agreed with YCHSA's understanding of the relevant law and overruled respondent-father's attorney's objection.

nate his parental rights. Ms. Wheeler testified that YCHSA neither referred respondent-father to Ms. Pulley nor wrote a referral letter explaining the reasons for the requested evaluation or the case history. Respondent-father likewise testified that he was referred to Ms. Pulley by Daymark after he unsuccessfully attempted to obtain a psychological evaluation at Daymark in April of 2018.[7] Although Ms. Pulley's report lists "Karen Wheeler" as the person who referred respondent-father, Ms. Wheeler testified that she had "spoken to Ms. Pulley about other matters" but did not remember "any conversation referring [respondent-father] for a psychological [evaluation]." The trial court was entitled to credit the respective accounts of Ms. Wheeler and respondent-father instead of a conflicting notation in the document. *See In re T.T.E.*, 372 N.C. at 420.

¶ 48 In disputing the trial court's findings of fact on the matter of his psychological evaluation, respondent-father also cites Ms. Pulley's reference to "Review of Records" as one of the "Assessment Methods" that she used in her evaluation. However, we find nothing in the contents of Ms. Pulley's report to suggest that she was referring to YCHSA records rather than to medical or other records provided by respondent-father. Contrary to respondent-father's claim, Ms. Pulley's report does not state that respondent-father was previously diagnosed with Posttraumatic Stress Disorder (PTSD), a diagnosis that he denies and attributes to inaccurate YCHSA records. Ms. Pulley refers only to a reported "*family history* of depression, anxiety, drug use, and Post-traumatic stress disorder." (Emphasis added.) As respondent-father does not identify any document generated by YCHSA which indicates a family history of PTSD, Ms. Pulley's reference to this background does not operate to establish her access to YCHSA records.

¶ 49 The evidence also supports the trial court's finding that respondent-father was untruthful with Ms. Pulley by failing to disclose his substance abuse history. In the "Substance Abuse History" section of her report, Ms. Pulley states, "None Reported." Although respondent-father posits that Ms. Pulley's entry "implies third-party reporting sources[,]" the trial court could reasonably infer that Ms. Pulley herself asked respondent-father about his substance abuse history and that respondent-father himself represented that he did not have a history of substance abuse. In light of respondent-father's positive drug screen for amphetamine and methamphetamine on 21 May 2019—months before he attended the psychological evaluation by Ms. Pulley—his

7. Respondent-father confirmed that Daymark did not have a psychologist on staff at the time he attempted to obtain his psychological evaluation.

failure to disclose any illicit drug use to Ms. Pulley is fairly characterized as untruthful. Respondent-father's challenge to Finding of Fact 37 is overruled.

¶ 50 Respondent-father next contends that the evidence does not support the trial court's statements in Findings of Fact 38 and 52 that he "had not begun any of the therapy or treatments recommended by [Ms.] Pulley" or that he had otherwise "not acted on any of the recommendations from his [psychological] evaluation."[8] We find no merit to his contention.

¶ 51 The evidence shows that Ms. Pulley diagnosed respondent-father with "major depressive disorder, somatic symptom disorder, and general anxiety disorder." She recommended "individual outpatient therapy [and] medication management," as well as "[i]nvolvement in small group activities such as volunteer work or sports, . . . to provide an opportunity to practice appropriate social skills and to develop self-esteem."

¶ 52 Ms. Wheeler testified that, to her knowledge, respondent-father had not undertaken any of the treatments recommended by Ms. Pulley, that respondent-father was not currently receiving any mental health treatment, and that respondent-father had made no progress on the mental health component of his OHFSA. Ms. Wheeler specifically "asked [respondents] for verification" of any treatment services and "made them aware that, if they are doing something, participating in treatment or doing something that was [i]n their case plan, that they need to make [her] aware of what they're doing."

¶ 53 Respondent-father testified that he "ha[d] not started any kind of therapy or other curriculum of treatment" based on Ms. Pulley's recommendations, but had obtained "[a] prescription to Zoloft by the VA [hospital]." Although respondent-father argues on appeal that he "was able to enroll in medication management and maintains a prescription for Zoloft," there is no evidence in the record that he enrolled in medication management services as recommended by Ms. Pulley.[9] Moreover, the trial court was not required to accept the truthfulness of respondent-father's

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8. Although respondent-father does not raise the issue, we note that Finding of Fact 52 erroneously refers to the date that the dispositional hearing concluded—15 June 2020—rather than the 7 February 2020 date of the adjudicatory hearing. We consider this discrepancy to be a mere scrivener's error.

9. *See Medication Management*, Miller-Keane Encyclopedia and Dictionary of Medicine, Nursing, and Allied Health, Seventh Edition, https://medical-dictionary.thefreedictionary.com/medication+management (last visited Sept. 17, 2021) (defining "medication management" as "a nursing intervention defined as facilitation of safe and effective use of prescription and over-the-counter drugs").

undocumented testimony about the Zoloft prescription, and the record does not reflect that Ms. Pulley recommended this medication.

¶ 54 To the extent that respondent-father cites his own testimony about "navigat[ing] the VA health system" as a basis for challenging Findings of Fact 38 and 52, his assertions do not impugn the accuracy of the trial court's findings. The evidence demonstrates that respondent-father had not complied with any of Ms. Pulley's treatment recommendations at the time of the termination hearing.

¶ 55 Like respondent-mother, respondent-father also challenges several of the trial court's findings of fact as impermissibly vague. These findings, which refer collectively to respondents, state the following:

> 42. Neither the Respondent Mother nor the Respondent Father availed themselves of the opportunities and services to obtain permanence and stability for themselves and their children.
>
> 43. The Respondent Mother and the Respondent Father had the opportunity to correct the conditions that led to the removal of their children from their care, but the parents failed to do so.
>
> 44. The [c]ourt finds that Respondent Parents' actions were willful.

As with respondent-mother's objection, we find no merit in respondent-father's position.

¶ 56 Findings of Fact 42 through 44 represent the trial court's summary assessment of respondent-father's actions since the children were placed in YCHSA custody. Those actions are described in detail by Ms. Wheeler in her hearing testimony and in the trial court's Findings of Fact 31 through 42. The "opportunities and services" referenced in Finding of Fact 42 and the "opportunity" referenced in Finding of Fact 43 include the substance abuse assessment and potential treatment offered through Ms. Adams, which YCHSA scheduled and agreed to financially satisfy but which respondent-father failed to complete; the psychological assessments YCHSA scheduled for respondent-father at TriCare with Dr. Sheaffer, which YCHSA also agreed to financially assume; the sessions at the Epilepsy Institute of North Carolina, which respondent-father failed to attend; the subsidized apartment that respondent-father lost in October 2019 by violating the terms of his HUD contract; and the period of more than twenty-seven months afforded to respondent-father to address the issues of mental health, housing, and employment. The

willfulness described in Finding of Fact 44 refers to respondent-father's overall lack of progress over this extended period in remedying the conditions that led to the children's removal from the home, as described in Findings of Fact 32 through 40. *See In re J.S.*, 374 N.C. at 815 (stating that a parent's "prolonged inability to improve her situation, despite some efforts in that direction, will support a finding of willfulness . . . under section 7B-1111(a)(2)" (quoting *In re J.W.*, 173 N.C. App. 450, 465–66)). Notwithstanding respondent-father's argument on appeal that the trial court erred in failing to specify "exactly which of the [r]espondent-[f]ather's actions were willful" for purposes of an adjudication under N.C.G.S. § 7B-1111(a)(2), we determine that the trial court's Findings of Fact 42 through 44 were sufficiently couched and were supported by the evidence.

2. Conclusion of law

¶ 57 Respondent-father argues that the trial court erred by adjudicating grounds to terminate his parental rights under N.C.G.S. § 7B-1111(a)(2) due to his "lack of perfect compliance" with a case plan that he claims was purely "voluntary." Respondent-father represents that he never signed the OHFSA prepared by YCHSA because he objected to certain statements in the document, specifically that he suffered from PTSD, "has a history of abusing drugs[,]" and knowingly "allow[ed] [respondent-mother] to care for the children while under the influence of illegal substances." Respondent-father notes that the trial court never ordered him to complete the OHFSA or to perform any other action in order to regain custody of the children. While acknowledging the trial court's authority to require a parent to "[t]ake appropriate steps to remedy conditions in the home that led to or contributed to the juvenile's adjudication or to the court's decision to remove custody of the juvenile from the parent," N.C.G.S. § 7B-904(d1)(3) (2019), respondent-father contends that the trial court "abdicated its statutorily defined role to identify the reasons for the [children's] removal and to devise a plan for [respondent-father] to address those reasons."

¶ 58 As a factual matter, we reject respondent-father's assertion that the trial court did not identify the reasons for the removal of Ben and John from the home or inform respondent-father of the actions that he needed to take to resolve the issues. The trial court's initial order adjudicating the children recounted the facts that established Ben and John as neglected juveniles. Beginning with the ninety-day review order entered on 25 January 2018, the trial court notified respondent-father of its expectations of him and the requirements for reunification with the children as follows:

> 11. [Respondent-father] has refused to enter into an OHFSA with the YCHSA but has orally agreed to undergo a drug assessment, a psychological assessment, and parenting classes. . . .
>
> . . . .
>
> 14. The barriers to reunification include: (1) [respondent-mother] is currently working through the requirements of her OHFSA; (2) [respondent-father] has not entered into an OHFSA with the YCHSA but needs to continue working through the items he orally agreed to complete; (3) the parents need to acquire suitable housing; and (4) one or both parents need to provide proof of an established means to support the minor children.

Subsequently, in three permanency planning orders entered prior to YCHSA's motion to terminate respondents' parental rights, the trial court identified the causes of the children's neglect adjudication as "homelessness, substance abuse, and mental health issues in the home."

¶ 59 All four of the permanency planning orders entered before the commencement of termination proceedings listed the following requirements of respondent-father's OHFSA and characterized those "requirements [as] aimed at remedying the issues that necessitated the removal of the minor children from the home":

> a. **Mental Health:** Complete a psychological assessment and complete any of the assessor's recommendations.
>
> b. **Substance Abuse:** Complete a substance abuse assessment and complete any of the assessor's recommendations.
>
> c. **Drug Screening:** Submit to random drug screens at the YCHSA's request.
>
> d. **Parenting Education:** Complete a parenting education program and provide the YCHSA with a certificate of completion.
>
> e. **Housing:** Obtain safe and suitable housing that is appropriate for the minor children.
>
> f. **Employment**: Obtain stable employment.

The orders also summarized respondent-father's progress in satisfying each component of his OHFSA. Those orders then expressly identified the "barriers to reunification" for each respondent in the same manner as the ninety-day review order. To the extent that respondent-father claims that the trial court "abdicated its statutorily defined role[,]" his argument is refuted by the trial court's orders. *Cf. In re Z.O.G.-I.*, 375 N.C. at 866 (rejecting "respondent's argument that he was never provided formal guidance on what he was required to do to demonstrate changed conditions" for purposes of N.C.G.S. § 7B-1111(a)(2)).

¶ 60 Respondent-father's testimony at the termination of parental rights hearing confirms that he was aware of and did not object to the requirements of his OHFSA:

> Q. So it's safe to say that your—the reason that you didn't sign this was not based on what they were asking you to do?
>
> A. No, sir. Not at all.
>
> Q. So you knew what they were asking of you and wanted to take part in it?
>
> A. Yes, sir.

Respondent-father further testified that he "never had any hesitation [about] completing the things asked in that document." *Cf. In re B.O.A.*, 372 N.C. at 386 ("[R]espondent-mother voluntarily agreed upon a case plan with DSS and never contended prior to the termination hearing that its components did not address issues that contributed to causing the conditions that led to [the juvenile's] removal from her home.").

¶ 61 We are not persuaded by respondent-father's suggestion that he is somehow exempt from an adjudication under N.C.G.S. § 7B-1111(a)(2) simply because he refused to sign the OHFSA and the trial court did not affirmatively order him to pursue reunification with his children. The statute requires proof of a parent's failure to make "reasonable progress . . . in correcting those conditions which led to the removal of the juvenile." N.C.G.S. § 7B-1111(a)(2). Such proof was presented in the instant case.

¶ 62 We have held that "parental compliance with a judicially adopted case plan is *relevant* in determining whether grounds for termination exist pursuant to N.C.G.S. § 7B-1111(a)(2)" provided that "the objectives sought to be achieved by the case plan provision in question address issues that contributed to causing the problematic circumstances that led to the juvenile's removal from the parental home." *In re B.O.A.*, 372 N.C.

at 384 (emphasis added). However, compliance or noncompliance with a case plan is not, in and of itself, determinative of a parent's reasonable progress in correcting the conditions that led to a child's removal from the home. *See In re J.S.*, 374 N.C. at 819 (affirming adjudication under N.C.G.S. § 7B-1111(a)(2) when the "respondent had met several conditions of her case plan—completing parenting classes, maintaining regular contact with DSS, attending visitations with the children, passing drug screens, and refraining from illegal activity—but had failed to make meaningful progress in improving the conditions of her home"). The fact that respondent-father refused to sign the OHFSA does not preclude a trial court's assessment of his "progress . . . in correcting those conditions which led to the removal of the [children]." N.C.G.S. § 7B-1111(a)(2).

¶ 63 Finally, the fact that the trial court did not order respondent-father to comply with his OHFSA or otherwise take remedial action does not foreclose a termination of his parental rights pursuant to N.C.G.S. § 7B-1111(a)(2). Although the trial court is authorized to order certain remedial actions by a juvenile's parent following an adjudication of abuse, neglect, or dependency, the statute does not require the trial court to do so. *See* N.C.G.S. § 7B-904(d1) (providing that "the court *may order* the parent . . . to do any of the following" (emphasis added)).

¶ 64 Section 7B-906.2, which governs the permanency planning process, requires the trial court to

> make written findings as to each of the following, which shall demonstrate the degree of success or failure toward reunification:
>
> (1) Whether the parent is making adequate progress within a reasonable period of time under the plan.
>
> (2) Whether the parent is actively participating in or cooperating with the plan, the department, and the guardian ad litem for the juvenile.
>
> (3) Whether the parent remains available to the court, the department, and the guardian ad litem for the juvenile.
>
> (4) Whether the parent is acting in a manner inconsistent with the health or safety of the juvenile.

N.C.G.S. § 7B-906.2(d) (2019). In each of its permanency planning orders, the trial court made the requisite findings assessing respondent-father's progress under N.C.G.S. § 7B-906.2(d)(1)–(4).

¶ 65 We hold that the trial court's findings of fact support its conclusion of law that respondent-father "willfully left the juveniles in foster care or placement outside the home for more than twelve months without showing to the satisfaction of the [c]ourt that reasonable progress under the circumstances was made in correcting those conditions which led to the removal of the juveniles" under N.C.G.S. § 7B-1111(a)(2). At the time of the 7 February 2020 adjudicatory hearing, Ben and John had been in an out-of-home placement for more than twenty-six months. Respondent-father had belatedly obtained a psychological evaluation but had yet to pursue the recommended treatment. Regardless of whether he obtained a substance abuse assessment in June 2018, respondent-father had refused his most recent drug screen and had tested positive for both amphetamine and methamphetamine in the preceding drug screen. Although he had completed parenting classes and consistently attended visitations with the children, respondent-father had not made satisfactory progress toward stable employment or housing suitable for the children. Because respondent-father had not meaningfully improved the conditions leading to the children's removal after more than two years, we affirm the trial court's adjudication as sufficiently supported by the evidence contained in the record. *See In re J.S.*, 374 N.C. at 819–21. Having upheld the trial court's adjudication under N.C.G.S. § 7B-1111(a)(2), we do not need to address respondent-father's arguments pertaining to N.C.G.S. § 7B-1111(a)(1). *See In re A.R.A.*, 373 N.C. 190, 194 (2019) ("[A] finding of only one ground is necessary to support a termination of parental rights . . . .").

III. Conclusion

¶ 66 The trial court's findings of fact are supported by clear, cogent, and convincing evidence, and support its conclusion of law under N.C.G.S. § 7B-1111(a)(2) that respondents willfully failed to make reasonable progress to correct the conditions that led to the removal of the juveniles Ben and John from the home in October 2017. Therefore, the trial court's order terminating the parental rights of respondent-mother and respondent-father is hereby affirmed.

AFFIRMED.

IN RE D.C.

[378 N.C. 556, 2021-NCSC-104]

IN THE MATTER OF D.C.

No. 19A21

Filed 24 September 2021

1. Termination of Parental Rights—grounds for termination—failure to pay a reasonable portion of the cost of care—willfulness—notice of obligation

The trial court's unchallenged findings of fact supported its decision to terminate both parents' rights to their son on the basis that, for a continuous period of six months prior to the filing of the termination petition, they failed to pay a reasonable portion of the cost of care for their child although able to do so (N.C.G.S. § 7B-1111(a)(3)). The Supreme Court declined to revisit its holding in *In re S.E.*, 373 N.C. 360 (2020), which interpreted this statutory provision as not requiring notice to parents regarding their obligation to provide support.

2. Termination of Parental Rights—multiple grounds for termination—adjudicatory stage—statements of trial court—no misapprehension of law

In a termination of parental rights hearing in which four grounds for termination were alleged, the trial court's statement at the end of adjudication that "We're here for — not for [respondents]. We're here for this child." did not reflect a misapprehension of the law by viewing the parents and child as adversaries. The court's full statement indicated its understanding that the parents' constitutionally protected rights as parents were paramount until grounds for termination were proven, at which point the matter would move to disposition.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from order entered on 22 September 2020 by Judge Christopher B. McLendon in District Court, Martin County. This matter was calendared for argument in the Supreme Court on 19 August 2020 but determined on the record and briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

J. Edward Yeager, Jr., for petitioner-appellee Martin County Department of Social Services.

Carrie A. Hanger for appellee Guardian ad Litem.

IN RE D.C.

[378 N.C. 556, 2021-NCSC-104]

Benjamin J. Kull for respondent-appellant father.

Garron T. Michael for respondent-appellant mother.

BERGER, Justice.

¶ 1 Respondents appeal from the trial court's order terminating their parental rights to D.C. (David).[1] We affirm.

Factual and Procedural Background

¶ 2 The Martin County Department of Social Services (DSS) filed a petition alleging that David was a neglected and dependent juvenile. Through Child Protective Services (CPS), DSS had a history with respondents' family dating back to December 2008. DSS received approximately ten CPS reports from 2008 until the filing of the petition. DSS alleged in the petition issues concerning substance abuse, injurious environment, and truancy.

¶ 3 Since April 2017, DSS had been working with respondents' family trying to assist them in obtaining substance abuse treatment and mental health services. DSS further asserted that even though respondent-father had completed his recommended substance abuse assessment, he failed to disclose his substance abuse issues. As a result of respondent-father's failure to disclose, no services were recommended to address substance abuse issues. The day before DSS filed the petition, respondent-father was incarcerated.

¶ 4 In addition, respondent-mother tested positive for cocaine, opioids, and marijuana, and was in and out of jail because of probation violations. She was noted as being "very resistant" to receiving help with her drug addiction.

¶ 5 In October 2017, DSS was informed that a probation officer went to respondents' residence, tested respondent-mother for drugs, and conducted a search of the location. The probation officer found a young female in a bathroom "getting ready to shoot up." A further search of the home disclosed needles under a bathroom sink near David's bedroom as well as a tourniquet and a spoon. The probation officer also found a needle cap and a used condom in David's bedroom. One of respondents' children told law enforcement that the woman who was found using drugs lived in the home and slept in David's bedroom.

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

¶ 6 DSS interviewed respondents while they were both in custody and unable to provide for David's care and supervision. Both respondents were observed with fresh "track marks" on their arms. Respondent-father admitted to being addicted to heroin and needing long term treatment. Respondent-mother acknowledged that she had a problem with drugs. DSS obtained nonsecure custody for David on October 11, 2017.

¶ 7 David was adjudicated to be a neglected and dependent juvenile based on stipulations made by respondents. In a separate dispositional order entered in February 2018, the trial court ordered that legal custody remain with DSS and granted it placement authority. Respondent-mother was allowed a minimum of two hours of supervised visitation every two weeks. The respondents were further ordered to work on a plan of reunification.

¶ 8 A review hearing was held on March 27, 2018. At that time, respondent-mother was incarcerated. Respondent-father was out of jail but had criminal charges pending. The trial court determined that respondent-father appeared to be impaired during one meeting at DSS. Respondent-father completed a psychiatric evaluation and was diagnosed with "Opioid Use Disorder, Severe, in Early Remission." The permanent plan for David was set as reunification. At a subsequent review hearing, the trial court set a secondary permanent plan of guardianship.

¶ 9 The trial court held a permanency planning review hearing in September 2018. The trial court found that respondent-mother had missed the majority of her Substance Abuse Intensive Outpatient Treatment sessions, missed her appointment for her psychological evaluation, had not contacted DSS or visited with David since August 2018, and had not started parenting classes. Additionally, respondent-mother indicated that she did not wish to work on a plan of reunification and approved of David's current custodians being named his guardians.

¶ 10 The trial court found that respondent-father cancelled a substance abuse assessment because he believed his participation in Narcotics Anonymous was sufficient, failed to start parenting classes, had not visited David since July 2018, failed two drug tests, and did not appear interested in working on a plan of reunification. The trial court relieved DSS of further reunification efforts and changed the primary permanent plan to guardianship. The trial court subsequently changed the primary permanent plan to adoption with a secondary permanent plan of guardianship due to ongoing concerns regarding substance abuse. In a permanency planning review order entered on December 9, 2019, the trial court ordered DSS to file a motion to terminate respondents' parental rights.

¶ 11 On March 11, 2020, DSS filed a petition to terminate respondents' parental rights on the grounds of neglect, willful failure to make reasonable progress, failure to pay for the cost of care for the juvenile, and dependency. N.C.G.S. § 7B-1111(a)(1)–(3), (6) (2019). Following a hearing, the trial court determined that grounds existed to terminate respondents' parental rights as alleged in the petition. The trial court further concluded it was in David's best interests that respondents' parental rights be terminated, and terminated respondents' parental rights. Respondents appeal.

Standard of Review

¶ 12 A termination of parental rights proceeding consists of an adjudicatory stage and a dispositional stage. N.C.G.S. §§ 7B-1109, -1110 (2019); *In re Montgomery*, 311 N.C. 101, 110, 316 S.E.2d 246, 252 (1984). At the adjudicatory stage, the petitioner bears the burden of proving by "clear, cogent, and convincing evidence" the existence of one or more grounds for termination under section 7B-1111(a) of our General Statutes. N.C.G.S. § 7B-1109(f) (2019). We review a trial court's adjudication "to determine whether the findings are supported by clear, cogent and convincing evidence and the findings support the conclusions of law." *In re Montgomery*, 311 N.C. at 111, 316 S.E.2d at 253 (citing *In re Moore*, 306 N.C. 394, 404, 293 S.E.2d 127, 133 (1982)). If the petitioner meets its burden during the adjudicatory stage, "the court proceeds to the dispositional stage, at which the court must consider whether it is in the best interests of the juvenile to terminate parental rights." *In re D.L.W.*, 368 N.C. 835, 842, 788 S.E.2d 162, 167 (2016) (citing *In re Young*, 346 N.C. 244, 247, 485 S.E.2d 612, 614–15 (1997); N.C.G.S. § 7B-1110).

¶ 13 "[A]n adjudication of any single ground in N.C.G.S. § 7B-1111(a) is sufficient to support a termination of parental rights." *In re E.H.P.*, 372 N.C. 388, 395, 831 S.E.2d 49, 53 (2019) (citations omitted). We begin our analysis with consideration of whether grounds existed pursuant to N.C.G.S. § 7B-1111(a)(3) to terminate respondents' parental rights.

Analysis

¶ 14 **[1]** A trial court may terminate parental rights pursuant to N.C.G.S. § 7B-1111(a)(3) where:

> The juvenile has been placed in the custody of a county department of social services, a licensed child-placing agency, a child-caring institution, or a foster home, and the parent has for a continuous period of six months immediately preceding the filing

> of the petition or motion willfully failed to pay a reasonable portion of the cost of care for the juvenile although physically and financially able to do so.

N.C.G.S. § 7B-1111(a)(3) (2019). This Court has stated that:

> The cost of care refers to the amount it costs the Department of Social Services to care for the child, namely, foster care. A parent is required to pay that portion of the cost of foster care for the child that is fair, just and equitable based upon the parent's ability or means to pay.

In re J.M., 373 N.C. 352, 357, 838 S.E.2d 173, 176–77 (2020) (cleaned up).

¶ 15 Here, in support of its conclusion that grounds existed pursuant to N.C.G.S. § 7B-1111(a)(3) to terminate respondents' parental rights, the trial court made the following findings of fact:

> [16]a. The juvenile has been in the legal custody of [DSS] for the past thirty-four (34) months. He is placed in a foster home through the foster care system, which entails numerous expenses to provide for his case.
>
> [16]b. Neither respondent-parent has paid any child support or given [DSS] or the foster parents any money that would pay a reasonable portion of the cost of care for the juvenile. The respondent-parents have provided the juvenile with some food and gifts at visitation, and also given the juvenile some small amount of spending money.
>
> [16]c. Each parent is physically able to work, although there was a period during an unsuccessful pregnancy in 2018-19 in which respondent-mother could not work. Each parent has worked at a lawn care business they started at the beginning of 2020.
>
> 16[d]. Each parent is financially able to pay a reasonable portion of the cost of care for the juvenile. Respondent-mother reports that the lawn care business has been even more successful than they envisioned, and they are able to earn enough income to support themselves and their children.

¶ 16 Respondents do not challenge the trial court's findings of fact regarding this statutory ground.[2] *See In re T.N.H.*, 372 N.C. 403, 407, 831 S.E.2d 54, 58 (2019) (stating that "[f]indings of fact not challenged by respondent are deemed supported by competent evidence and are binding on appeal."). Respondents instead claim that the trial court failed to make any findings of fact that they had received notice that they were under any obligation to make payments to DSS or the foster parents for David's care. Respondents contend that without notice of such obligation, they could not have acted willfully. Respondents thus assert that the trial court erred by concluding grounds exist to terminate their parental rights pursuant to N.C.G.S. § 7B-1111(a)(3) because their failure to pay was not willful.

¶ 17 Respondents' argument is nearly identical to that raised by the respondent-mother in *In re S.E.*, 373 N.C. 360, 838 S.E.2d 328 (2020). In *In re S.E.*, the respondent-mother conceded that she did not pay anything towards the cost of care for her children but similarly claimed that her failure to pay was not willful. The respondent argued that she could have paid, but "she did not know she could pay towards the cost of care for her children, did not know how to pay towards the cost, and could not reasonably have been expected to do so." *Id.* at 365, 838 S.E.2d at 332. This Court disagreed, holding that:

> Respondent-mother's argument that she did not know she had to pay a reasonable portion of the cost of care for her children or how to do so is fundamentally without merit. The absence of a court order, notice, or knowledge of a requirement to pay support is not a defense to a parent's obligation to pay reasonable costs, because parents have an inherent duty to support their children. Given her inherent duty to support her children, respondent cannot hide behind a cloak of ignorance to assert her failure to pay a reasonable portion of the cost of care for her children was not willful.

Id. at 366, 838 S.E.2d at 333 (cleaned up).

¶ 18 Respondents contend that we should disavow *In re S.E.* Respondents claim that the interpretation of N.C.G.S. § 7B-1111(a)(3) as set forth in

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2. Respondents make arguments regarding findings of fact 14 and 17, but we do not address them because they are not relevant to grounds for termination under N.C.G.S. § 7B-1111(a)(3). *In re N.G.*, 374 N.C. 891, 900, 845 S.E.2d 16, 23 (2020).

In re S.E., when compared to termination for lack of support pursuant to N.C.G.S. § 7B-1111(a)(4)[3], "results in an unconstitutional dichotomy, under which similarly situated parents are treated differently depending on who the child's custodian is." Respondents argue that "the General Assembly could not have possibly intended to hold only some parents to a strict liability standard, for doing so would result in an unconstitutional outcome in which those parents are deprived of the equal protection of the law."

¶ 19 Adhering to the principle of *stare decisis*, we decline to change our interpretation of N.C.G.S. § 7B-1111(a)(3). This Court has stated:

> It is . . . an established rule to abide by former precedents, *stare decisis*, where the same points come up again in litigation, as well to keep the scale of justice even and steady, and not liable to waver with every new judge's opinion, as also because, the law in that case being solemnly declared and determined what before was uncertain, and perhaps indifferent, is now become a permanent rule, which it is not in the breast of any subsequent judge to alter or swerve from according to his private sentiments; he being sworn to determine, not according to his private judgment, but according to the known laws and customs of the land—not delegated to pronounce a new law, but to maintain and expound the old one—*jus dicere et non jus dare*.

McGill v. Town of Lumberton, 218 N.C. 586, 591, 11 S.E.2d 873, 876 (1940) (cleaned up); *see also Bacon v. Lee*, 353 N.C. 696, 712, 549 S.E.2d 840, 851–52 (2001) ("A primary goal of adjudicatory proceedings is the uniform application of law. In furtherance of this objective, courts generally consider themselves bound by prior precedent, i.e., the doctrine of *stare decisis*." (citing *Payne v. Tennessee*, 501 U.S. 808, 827, 115 L.Ed.2d 720, 736–37 (1991)).

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3. Section 7B-1111(a)(4) provides that a trial court may terminate parental rights where "[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) (2019).

¶ 20 The trial court's unchallenged findings of fact demonstrate that respondents had the ability to pay a reasonable portion of David's cost of care but failed to pay any amount to DSS or the foster parents toward cost of care. Accordingly, we conclude that grounds existed pursuant to N.C.G.S. § 7B-1111(a)(3) to terminate respondents' parental rights.

¶ 21 **[2]** We next consider respondent-father's argument that the trial court conducted the adjudicatory hearing under a fundamental misapprehension of the law. Respondent-father claims that the trial court "conducted the adjudication hearing under the fundamentally misguided belief that parent and child were adversaries—that is, that young David's interests took priority over his parents' constitutionally protected rights." *See Santosky v. Kramer*, 455 U.S. 745, 760, 71 L. Ed. 2d 599, 610 (1982) (stating that "[a]t the factfinding, the State cannot presume that a child and his parents are adversaries. After the State has established parental unfitness at that initial proceeding, the court may assume at the *dispositional* stage that the interests of the child and the natural parents do diverge."). We are not persuaded.

¶ 22 As noted previously herein, a termination of parental rights proceeding consists of two stages, an adjudicatory stage and a dispositional stage. N.C.G.S. §§ 7B-1109, -1110 (2019); *In re Montgomery*, 311 N.C. at 110, 316 S.E.2d at 252. This Court has often stated that in proceedings conducted under the North Carolina Juvenile Code, the best interests of the juvenile are paramount. *See*, *e.g.*, *In re T.H.T.*, 362 N.C. 446, 450, 665 S.E.2d 54, 57 (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. at 109, 316 S.E.2d at 246. However, a trial court only proceeds to "the dispositional stage at which point it must determine whether terminating the parent's rights is in the juvenile's best interests" after it "determines at the adjudicatory stage that one or more of the grounds in N.C.G.S. § 7B-1111(a) exists to terminate parental rights." *In re K.L.M.*, 375 N.C. 118, 121, 846 S.E.2d 488, 490 (2020). Thus, until the trial court has concluded at the adjudicatory stage that a ground exists to terminate parental rights, "the constitutionally[ ]protected paramount right of parents to custody, care, and control of their children must prevail." *Petersen v. Rogers*, 337 N.C. 397, 403–04, 445 S.E.2d 901, 903 (1994).

¶ 23 Respondent-father's argument that the trial court focused on David's interests, rather than respondents' constitutionally protected rights to preserve their family intact, and erroneously placed David and respondents in adversarial roles, is based upon a statement made by the trial court at the conclusion of the adjudicatory phase of the termination

hearing. The trial court stated that "[w]e're here for -- not for [respondents]. We're here for this child."

¶ 24 At the conclusion of the adjudicatory portion of the termination hearing, the trial court's full statement was:

> Well the case is made more difficult than a lot of these because just of the length of time it took for [respondents] to see the light. We're here for -- not for [respondents]. We're here for this child. Had [respondents] taken the steps early on that I think these lawyers have finally got them at least going on, then we wouldn't be here in the situation where [David] had been gone so long. But the court does find that there's evidence to these grounds alleged in the petition.

When read in its entirety and in context, it is apparent that the trial court was not acting under a misapprehension of law. First, the trial court noted in its pre-trial order that "[t]his matter shall proceed to adjudication, and, *if warranted*, to disposition[.]" (Emphasis added) *See In re K.L.M.*, 375 N.C. 118, 121, 846 S.E.2d 488, 490 (2020). The trial court recognized that respondents had a constitutionally protected interest in preserving familial bonds and that the matter would not proceed to disposition unless grounds for termination were proven. The trial court's statements further recognize that respondents acted inconsistently with that interest, parental unfitness had been established, and the trial court would be proceeding to the dispositional phase of the proceeding where determination of David's best interests would be paramount. We therefore conclude that the trial court was not acting under a misapprehension of the law at adjudication.

¶ 25 The trial court's conclusion that a ground for termination existed pursuant to N.C.G.S. § 7B-1111(a)(3) is sufficient in and of itself to support termination of respondents' parental rights. *In re E.H.P.*, 372 N.C. at 395, 831 S.E.2d at 53. As such, we need not address respondents' arguments regarding N.C.G.S. § 7B-1111(a)(1), (2) and (6). Furthermore, respondents do not challenge the trial court's conclusion that termination of their parental rights was in David's best interests. *See* N.C.G.S. § 7B-1110(a) (2019). Accordingly, we affirm the trial court's order terminating respondents' parental rights to David.

AFFIRMED.

IN RE D.J.

[378 N.C. 565, 2021-NCSC-105]

IN THE MATTER OF D.J.

No. 528A20

Filed 24 September 2021

1. Termination of Parental Rights—motion to continue—to secure witness testimony—insufficient offer of proof—no prejudice

In a termination of parental rights matter, respondent-mother's motion to continue the hearing in order to secure a witness—who was expected to relate the services respondent was engaged in at a local health center—was properly denied where the offer of proof by respondent's counsel was vague and did not forecast what the witness's testimony would be, and where there was no dispute that respondent received services at the health center. Respondent waived any constitutional argument by not raising the issue before the trial court, and did not demonstrate she was prejudiced by the court's decision.

2. Native Americans—Indian Child Welfare Act—tribal notice requirements—post-termination of parental rights documentation—noncompliance cured

Where the trial court terminated respondent-mother's parental rights to her son without fully complying with the notice requirements of the Indian Child Welfare Act (ICWA), but the court held post-termination proceedings and made detailed findings of fact—regarding the social services agency's due diligence in confirming the child's non-eligibility status with numerous Indian tribes and seeking assistance from the federal Bureau of Indian Affairs for a non-responsive tribe—before concluding that the minor child was not an Indian child under ICWA, the trial court cured its initial noncompliance.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from an order entered on 18 September 2020 by Judge Beverly Scarlett in District Court, Orange County. This matter was calendared for argument in the Supreme Court on 19 August 2021 but determined on the record and briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

Stephenson & Fleming, LLP, by Deana K. Fleming, for petitioner-appellee Orange County Department of Social Services.

Michelle FormyDuval Lynch for appellee Guardian ad Litem.

IN RE D.J.

[378 N.C. 565, 2021-NCSC-105]

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

BARRINGER, Justice.

¶ 1 Respondent appeals the trial court's order which terminated her parental rights to her minor child, D.J. (Daniel).[1] The trial court found that grounds existed to terminate respondent's parental rights pursuant to N.C.G.S. § 7B-1111(a)(1) and (2) and that termination was in Daniel's best interests. Respondent has not challenged on appeal the trial court's conclusion that the grounds for termination pursuant to N.C.G.S. § 7B-1111(a)(1) and (2) existed or that termination was in Daniel's best interests. Instead, respondent argues that the trial court erred by denying her counsel's motion to continue the termination hearing and that the trial court failed to comply with the requirements of the Indian Child Welfare Act (ICWA). Since we conclude that respondent has failed to show prejudice from the trial court's denial of the motion to continue and, further, since we conclude that the trial court has now sufficiently complied with the ICWA as it pertains to Daniel, we reject respondent's arguments and affirm the trial court's termination-of-parental-rights order.

I. Background

¶ 2 Petitioner Orange County Department of Social Services (DSS or OCDSS) first became involved with respondent and Daniel on 30 January 2019 when it received a Child Protective Services (CPS) report that respondent appeared to be impaired while visiting a children's museum with Daniel. A DSS social worker responded to the scene where respondent acted disorganized and agitated, swayed back and forth while standing, and had difficulty maintaining a linear conversation. When respondent could not identify an alternative caretaker for Daniel, the social worker attempted to locate a temporary safety provider. Respondent became agitated and uncooperative and fled from DSS and law enforcement with Daniel. DSS and law enforcement attempted unsuccessfully to locate respondent and Daniel in the vicinity of the children's museum.

¶ 3 The next day, on 31 January 2019, DSS filed a petition alleging that Daniel was a neglected and dependent juvenile. In addition to recounting the incident at the children's museum, the petition alleged that respondent had a prior CPS report involving Daniel in Randolph County and

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

another in Forsyth County. DSS was also granted nonsecure custody of Daniel. Respondent and Daniel were eventually located at a nearby apartment complex.

¶ 4 On 7 March 2019, DSS filed an amended petition, adding allegations regarding prior CPS reports involving respondent and Daniel in Guilford County and Durham County and respondent's history of substance abuse and mental health issues. After a hearing on the amended petition on 21 March 2019, the trial court entered an order adjudicating Daniel as a neglected and dependent juvenile on 30 April 2019. The trial court's order also incorporated by reference the court report prepared by DSS in which it stated that respondent "has reported American Indian heritage and letters have been mailed to the identified tribes."

¶ 5 DSS filed a motion in the cause to terminate respondent's parental rights on 26 February 2020. In the motion, DSS alleged two grounds for termination: neglect and willful failure to make reasonable progress in correcting the conditions that led to Daniel's removal. *See* N.C.G.S. § 7B-1111(a)(1)–(2) (2019).

¶ 6 The termination motion was called for a hearing on 6 August 2020. Immediately before the termination hearing, the trial court heard a motion to continue that had been filed by respondent's counsel to secure the testimony of a witness who worked at Lincoln Community Health Center. Respondent's counsel recounted his attempts to secure the witness's testimony and indicated that "[his] understanding in talking with the Lincoln Community [Health] Center was that they would not let [the witness] come [testify]." The trial court denied the motion to continue but ruled that the witness could testify by phone or Webex and afforded respondent's counsel the opportunity to contact the witness during an impending thirty-minute recess to determine if she would testify via telephone or Webex. Respondent's counsel then made an offer of proof as follows:

> I'd just like to make an offer of proof on this that [the witness] has had contact and ha[s] been involved with [r]espondent[-m]other since, I think, about May of last year, that [r]espondent[-m]other gets several services at Lincoln Community [Health] Center including I think there's a substance abuse treatment. There's a psychiatrist and maybe another—a therapist involved also.
>
> [The witness] is sort of a—what she calls a bridge counselor, that she's able to connect these services, so

> she's aware of these services. Also she sees [respondent-mother], my understanding is, once or twice a month. I don't know exactly how it was going through COVID. I think it might have been [by] telephone[ ], but [respondent-mother] called in regularly to her and also attended the, you know, Lincoln Community [Health] Center.
>
> So I just think in terms of the information she could offer in court, it would be extremely valuable.

Counsel for DSS in response clarified that there is no dispute that respondent gets some services at Lincoln Community Health Center and that DSS had contact with Lincoln Community Health Center and received some information from them. Counsel for DSS then had a case social worker inform the trial court of her contact with the witness and her attempts to obtain records from the witness which were ultimately unsuccessful. Finally, DSS's counsel raised that Lincoln Community Health Center was in Durham but that respondent indicated she was traveling from her home in Mount Airy. The trial court subsequently took a scheduled recess.

¶ 7 After the recess, respondent's counsel informed the trial court that he was unable to get in contact with the witness despite calling her and leaving her voicemails. The termination hearing then proceeded. Approximately twenty-five minutes later, respondent's counsel received a response from the witness indicating that her employer would not allow her to testify. After DSS concluded its presentation of evidence for the adjudicatory phase of the termination hearing, respondent's counsel renewed the motion to continue. The trial court again denied the motion.

¶ 8 After the termination hearing, the trial court entered an order terminating respondent's parental rights in Daniel. The trial court found that grounds existed to terminate respondent's parental rights pursuant to N.C.G.S. § 7B-1111(a)(1) and (2) and that termination was in Daniel's best interests. The order was amended on 18 September 2020, with the trial court reaching the same conclusions in the amended order. Respondent appealed.

II. Motion to Continue

¶ 9 **[1]** Respondent contends that the trial court erred by denying her motion to continue. Respondent submits that she was prejudiced by her inability to examine the witness who worked at the Lincoln Community Health Center during the termination hearing.

¶ 10 "Ordinarily, a motion to continue is addressed to the discretion of the trial court, and absent a gross abuse of that discretion, the trial court's ruling is not subject to review." *In re A.L.S.*, 374 N.C. 515, 516–17 (2020) (quoting *State v. Walls*, 342 N.C. 1, 24 (1995)). "Abuse of discretion results where the [trial] court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *Id.* at 517 (quoting *State v. Hennis*, 323 N.C. 279, 285 (1988)).

> In reviewing for an abuse of discretion, we are guided by the Juvenile Code, which provides that continuances that extend beyond 90 days after the initial petition shall be granted only in extraordinary circumstances when necessary for the proper administration of justice. Furthermore, continuances are not favored and the party seeking a continuance has the burden of showing sufficient grounds for it. The chief consideration is whether granting or denying a continuance will further substantial justice.

In re J.E., 377 N.C. 285, 2021-NCSC-47, ¶ 15 (cleaned up).

¶ 11 "If, however, the motion [to continue] is based on a right guaranteed by the Federal and State Constitutions, the motion presents a question of law[,] and the order of the [trial] court is reviewable." *In re A.L.S.*, 374 N.C. at 517 (quoting *State v. Baldwin*, 276 N.C. 690, 698 (1970)). However, when "[the respondent] did not assert in the trial court that a continuance was necessary to protect a constitutional right," this Court does not review the trial court's denial of a motion to continue on constitutional grounds. *In re A.L.S.*, 374 N.C. at 517; *see also In re J.E.*, ¶ 14. Instead, the respondent is held to "ha[ve] waived any argument that the denial of the motion to continue violated his [or her] constitutional rights." *In re J.E.*, ¶ 14 (citing *In re S.M.*, 375 N.C. 673, 679 (2020)); *see also In re A.L.S.*, 374 N.C. at 517.

¶ 12 "Moreover, '[r]egardless of whether the motion raises a constitutional issue or not, a denial of a motion to continue is only grounds for a new trial when [the respondent] shows both that the denial was erroneous, and that he [or she] suffered prejudice as a result of the error.' " *In re A.L.S.*, 374 N.C. at 517 (first alteration in original) (quoting *Walls*, 342 N.C. at 24–25); *see also State v. Phillip*, 261 N.C. 263, 266–67 (1964) ("Regardless of whether the defendant bases his appeal upon an error of law or an abuse of discretion, it is elementary that to entitle him to a new trial he must show not only error but prejudicial error.").

¶ 13 In this matter, respondent's counsel did not raise a constitutional argument before the trial court. Thus, while respondent appears to suggest that the trial court's denial of the motion to continue was constitutional error, respondent has waived any argument to this effect. Respondent has also failed to show prejudice. While respondent made an offer of proof concerning the witness's testimony, the offer of proof is vague. *See In re A.L.S.*, 374 N.C. at 518 (upholding the denial of a motion to continue when "respondent-mother's counsel offered only a vague description of the [witness]'s expected testimony"). The offer of proof provided that the witness has had contact and been involved with respondent since May of the prior year, saw respondent once or twice a month, and connected respondent to services at Lincoln Community Health Center. However, it does not say what the witness's testimony would be. There was also no dispute that respondent received some services at Lincoln Health Community Center.

¶ 14 Since continuances are not favored, motions to continue "ought not to be granted unless the reasons therefor are fully established." *State v. Gibson*, 229 N.C. 497, 501 (1948) (citing *Commonwealth v. Millen*, 289 Mass. 441, 463 (1935)). Based on the record before us, respondent's offer of proof fails to demonstrate the significance of the witness's potential testimony and any prejudice arising from the trial court's denial of her motion to continue. *See In re H.A.J.*, 377 N.C. 43, 2021-NCSC-26, ¶ 13; *Phillip*, 261 N.C. at 267 ("[A] mere intangible hope that something helpful to a litigant may possibly turn up affords no sufficient basis for delaying a trial to a later term." (quoting *Gibson*, 229 N.C. at 502)). Therefore, we reject respondent's assignment of error.

III. Indian Child Welfare Act

¶ 15 **[2]** Respondent additionally argues that the trial court failed to comply with its obligations under the ICWA when it had reason to know Daniel had Indian heritage. DSS and the guardian ad litem concede that the record fails to establish that the trial court complied with the ICWA notice requirements prior to the termination hearing, but DSS has supplemented the record on appeal with post-termination-of-parental-rights-hearing orders, exhibits, and related materials that DSS contends are salient to the ICWA issues on appeal.

¶ 16 We have previously addressed the sufficiency of post-termination-of-parental-rights notices and hearings to address compliance with the ICWA in *In re E.J.B.*, 375 N.C. 95 (2020). In that matter, two tribes responded to the notices and indicated that the juveniles "were not 'Indian children' as defined in 25 U.S.C. § 1903(4)," but one tribe—the United Keetoowah Band of Cherokee Indians tribe—did not respond to

the notice. *Id.* at 106. This Court "conclude[d] that the post termination notice sent to the Keetoowah Band of Cherokee Indians tribe did not cure the trial court's failure to comply with the [ICWA] prior to terminating respondent-father's parental rights," *id.*, because the trial court had failed to ensure that DSS used due diligence when contacting the tribes, *id.* (citing 25 C.F.R. § 23.107(b)(1) (2019)). "If a tribe fails to respond, the trial court must seek assistance from the Bureau of Indian Affairs prior to making its own independent determination." *Id.* (citing 25 C.F.R. § 23.105(c) (2019)).

¶ 17 The ICWA provides as follows:

> If you do not have accurate contact information for a Tribe, or the Tribe contacted fails to respond to written inquiries, you should seek assistance in contacting the Indian Tribe from the [Bureau of Indian Affairs] local or regional office or the [Bureau of Indian Affairs]'s Central Office in Washington, DC (see *www.bia.gov*).

25 C.F.R. § 23.105(c) (2020). In *In re E.J.B.*, we thus reversed and remanded to the trial court to issue an order requiring that proper notice be sent to the Keetoowah Band of Cherokee Indians tribe despite the trial court's post-termination-hearing conclusion that the ICWA did not apply. *In re E.J.B.*, 375 N.C. at 106. Further, we instructed the trial court as follows:

> If the Keetoowah Band of Cherokee Indians tribe indicates that the children are not Indian children pursuant to the [ICWA], the trial court shall reaffirm the order terminating respondent-father's parental rights. In the event that the Keetoowah Band of Cherokee tribe indicates that the children are Indian children pursuant to the [ICWA], the trial court shall proceed in accordance with the relevant provisions of the [ICWA].

Id.

¶ 18 In this matter, the trial court also exercised jurisdiction to conduct post-termination-of-parental-rights review and hearings. However, in contrast to *In re E.J.B.*, the trial court ensured compliance with 25 C.F.R. § 23.105(c) and DSS's due diligence before concluding that the ICWA did not apply. The trial court, after hearing the evidence, found and concluded as follows:

14. Respondent[-]mother previously reported to OCDSS potential Native American Heritage, specifically the Cherokee and Iroquois (Haudenosaunee) Tribes.

15. In 2019, OCDSS initially sent ICWA notices to the Easter[n] Band of Cherokee Indians and notification to state-recognized tribes, Haliwa Saponi Indian Tribe and Sappony Indian Tribe. Non-membership letters were received from these tribes.

16. After the case was transferred from the foster care unit to the adoption unit of OCDSS, the agency became aware that notices previously provided to the above-mentioned tribes did not comport with ICWA requirements for notification of the Native American Heritage identified by [r]espondent[-]mother.

17. In January 2021, OCDSS mailed additional Tribal Notification Letters, including Consent to Explore American Indian Heritage, and copies of the Juvenile Petition, by Certified Mail Return Receipt Requested to the nine tribes identified as "Iroquis" . . . .

. . . .

18. In January 2021, OCDSS mailed additional Tribal Notification Letters, including Consent to Explore American Indian Heritage, and copies of the Juvenile Petition, by Certified Mail Return Receipt Requested to the three tribes identified as "Cherokee" . . . .

. . . .

19. In response to the Tribal Notification Letters and accompanying documents set forth above, letters of the juvenile's non-eligibility status have been received from eight of the nine tribes identified as "Iroquis" . . . .

. . . .

20. Despite confirmation of receipt of the Tribal Notification Letters and accompanying documents, the Onondaga Nation (NY) has not responded to the inquiry. On March 11, 2021, the assigned social worker called the Onondaga Nation (NY) to follow up on the notification sent and left a voice mail message.

21. On March 11, 2021, [OCDSS] sent a letter to the Indian Child Welfare Services, Bureau of Indian Affairs Regional Office, Attention Gloria York, 545 Marriot Drive, Suite 700, Nashville, TN, 37214 requesting assistance to determine tribal membership eligibility of the juvenile regarding the identified tribes who have not responded within the fifteen-day time frame.

. . . .

23. On April 7, 2021, the United States Department of the Interior Bureau of Indian Affairs issued a Response to ICWA Child Custody Notification/Request for Indian Ancestry to the assigned OCDSS social worker . . . . A copy of the letter was admitted into evidence and is hereby incorporated by reference.

24. The Bureau of Indian Affairs specified in relevant part as follows:

> a. The BIA acknowledges that you have notified the family's identified Tribe(s) Tuscarora, Tonawanda, Mohawk, Seneca, Oneida, EBCI, Cayugo, Onondaga, and Keetoowah based on your inquiry with the family according to 25 U.S.C. § 1912.
>
> b. You have identified that Onondaga and Keetoowah have not responded. At this point, you have done due diligence and completed your ICWA responsibilities.

25. On May 20, 2021, the assigned social worker received an email from the Cherokee Nation (OK) confirming the juvenile's non-eligibility status. A copy of which was admitted into evidence, and hereby incorporated by reference.

26. On April 26, 2021, the United Keeto[o]wah Band of Cherokee (OK) issued a letter of the juvenile's non-eligibility status. A copy of which was admitted into evidence, and hereby incorporated by reference.

27. In response to the Tribal Notification Letters and accompanying documents set forth above, letters or written correspondence of the juvenile's

> non-eligibility status have been received from the three tribes identified as "Cherokee" . . . .
>
> . . . .
>
> 28. While OCDSS has not received a letter regarding the juvenile's eligibility status with the Onondaga, the Bureau of Indian Affairs determined that OCDSS conducted due diligence and completed responsibilities under the Indian Child Welfare Act.
>
> 29. In accordance with 25 U.S.C. § 1912, OCDSS complied with notification requirements to determine whether the juvenile was a member or eligible for membership in . . . a federally recognized Indian Tribe.
>
> 30. The [c]ourt has sufficient, credible evidence to determine that the juvenile is not an Indian Child as defined by the Indian Child Welfare Act.
>
> . . . .
>
> HAVING MADE THE PRECEDING FINDINGS, THE COURT CONCLUDES AS FOLLOWS:
>
> 1. This [c]ourt has jurisdiction, both personal and subject matter, and all parties have been properly served and are properly before the [c]ourt.
>
> 2. OCDSS has complied with ICWA notification requirements as set forth herein.
>
> 3. The juvenile is not an Indian Child as defined by 25 U.S.C. § 1912.
>
> 4. The Indian Child Welfare Act (ICWA) does not apply to the juvenile and subsequent custody or adoption proceedings.

¶ 19 As reflected in the foregoing findings of fact and conclusions of law by the trial court, the trial court ensured that DSS used due diligence in contacting and working with the tribes. Response letters were received from all tribes but one, and all response letters received indicated that Daniel was not eligible for membership in the respective tribe. For the one tribe that did not provide a response letter, DSS complied with 25 C.F.R. § 23.105(c). DSS contacted the Bureau of Indian Affairs, and the Bureau of Indian Affairs determined that DSS "ha[d] done [its] due diligence and ha[d] completed [its] ICWA responsibilities." The trial

court also concluded that "[t]he juvenile is not an Indian Child as defined by 25 U.S.C. § 1912." Given the foregoing, we hold that the trial court has now sufficiently complied with the requirements of the ICWA as it pertains to Daniel and cured its prior noncompliance.

¶ 20 To the extent respondent argues that the trial court's prior noncompliance with the ICWA deprived the trial court of jurisdiction to enter orders addressing the custody of Daniel, this argument fails. Respondent has not contended, and the record does not support that an Indian tribe has exclusive jurisdiction pursuant to 25 U.S.C. § 1911(a). Exclusive jurisdiction is only vested in an Indian tribe for a "child custody proceeding involving an Indian child who resides or is domiciled within the reservation of such tribe" or "[w]here an Indian child is a ward of a tribal court." 25 U.S.C § 1911(a). Further, after ensuring DSS's due diligence in its compliance with the notice requirements of 25 U.S.C. § 1912(a), albeit post-termination, the trial court concluded that Daniel is *not an Indian child*. Thus, we need not address whether and what remedy exists for noncompliance with 25 U.S.C. § 1912(a) in a child-custody proceeding involving an Indian child as defined by 25 U.S.C. § 1912. In this matter, any error by the trial court on account of its belated compliance with the ICWA is not prejudicial. Therefore, we affirm the termination order.

IV. Conclusion

¶ 21 Based on the foregoing analysis, we reject respondent's arguments on appeal concerning the termination order. Respondent has failed to show prejudice as to the trial court's denial of her motion to continue, and the trial court has now complied with the ICWA. Accordingly, we affirm the trial court's termination order.

AFFIRMED.

IN RE D.T.H.

[378 N.C. 576, 2021-NCSC-106]

IN THE MATTER OF D.T.H.

No. 382A20

Filed 24 September 2021

1. Termination of Parental Rights—findings of fact—sufficiency—mere recitations of testimony—conflicting evidence

When reversing an order terminating a father's parental rights to his son on grounds of neglect, dependency, and abandonment, the Supreme Court disregarded multiple findings of fact in the order that either failed to resolve material conflicts in the evidence or constituted (or potentially constituted) mere recitations of testimony rather than proper factual determinations by the trial court, including findings regarding the father's child support payments, the father's relationship with and efforts to contact his son, and the maternal grandparents' efforts to prevent the father from communicating with the child.

2. Termination of Parental Rights—grounds for termination—neglect—by abandonment—insufficiency of findings—unresolved factual disputes

An order terminating a father's parental rights to his son on grounds of neglect by abandonment (N.C.G.S. § 7B-1111(a)(1)) was reversed and remanded, where the trial court's findings failed to resolve key factual disputes over the amount of contact the father had had with the child and whether such contact was limited because of the father's willful relinquishment of his parental duties or because of the grandparents' efforts to prevent him from communicating with his son.

3. Termination of Parental Rights—grounds for termination—dependency—required findings—alternative care arrangement

The trial court erred in terminating a father's parental rights on grounds of dependency (N.C.G.S. § 7B-1111(a)(6)), where the court failed to enter any written findings addressing whether the father "lacked an alternative child care arrangement" for his son, and where the record did not contain any evidence that the father lacked an alternative child care arrangement.

4. Termination of Parental Rights—grounds for termination—abandonment—insufficiency of findings—unresolved factual disputes

IN RE D.T.H.

[378 N.C. 576, 2021-NCSC-106]

An order terminating a father's parental rights to his son on grounds of abandonment (N.C.G.S. § 7B-1111(a)(7)) was reversed and remanded for entry of further findings, where the trial court failed to make findings addressing the father's conduct during the determinative six-month period before the termination petition was filed, and where the court's findings did not resolve key factual disputes over the amount of contact the father had had with the child and whether such contact was limited because of the father's willful relinquishment of his parental duties or because of the grandparents' efforts to prevent him from communicating with his son.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from an order entered on 5 June 2020 by the Honorable L. Walter Mills in District Court, Carteret County. This matter was calendared for argument in the Supreme Court on 19 August 2021, but was determined on the record and briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

Mark L. Hayes for petitioner-appellees.

Richard Croutharmel for respondent-appellant father.

ERVIN, Justice.

¶ 1 Respondent-father Thomas H. appeals from a trial court order terminating his parental rights in the minor child D.T.H.[1] After careful review of respondent-father's challenges to the trial court's termination order in light of the record and the applicable law, we hold that the legally valid findings of fact contained in the trial court's termination order do not suffice to support a conclusion that respondent-father's parental rights in David were subject to termination. As a result, we reverse the trial court's termination order and remand this case to the District Court, Carteret County, for further proceedings, including the making of new findings of fact and conclusions of law with respect to the issue of whether respondent-father's parental rights in David were subject to termination on the basis of neglect by abandonment, N.C.G.S. § 7B-1111(a)(1), or abandonment, N.C.G.S. § 7B-1111(a)(7).

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

I. Factual Background

¶ 2 David was born in Craven County in March 2007 to respondent-father and the mother Brandi C. Although respondent-father and the mother married in July 2007, they separated during the following August. After the parents separated, the mother and David resided with David's maternal grandparents, who are the petitioners in this case. On 8 September 2008, the mother filed a complaint against respondent-father seeking a divorce from bed and board, custody, and child support. Following the maternal grandparents' decision to intervene in this proceeding for the purpose of seeking to have David placed in their custody, respondent-father filed an answer in which he stated that neither he nor the mother should have custody of David. On 15 April 2010, Judge Cheryl L. Spencer entered a temporary order determining that the mother was unable to care for David on her own, that the maternal grandparents had "insured [David's] well-being and safety," that neither parent should be awarded custody of David at that time, and that it was not in "the best interest of the minor child that [either parent] have visitation, except as agreed upon by [the maternal grandparents], and [the mother] or [respondent-father]." As a result, Judge Spencer concluded that the maternal grandparents "[we]re fit and proper persons for the temporary sole care, custody, and control of the minor child" and placed David in their custody.

¶ 3 On 20 September 2011, the trial court entered an order finding that Judge Spencer's temporary order had remained unmodified since its entry and concluding that it was in David's best interests that the temporary order become permanent. In light of those determinations, the trial court awarded the maternal grandparents "permanent sole care, custody and control, and the residential placement of the minor child" and allowed the parents to visit with him "only at such times, places, and under such conditions, as agreed upon specifically by [the maternal grandparents], and [the mother] or [respondent-father]."

¶ 4 In 2011, the maternal grandmother obtained overseas employment with the Department of Defense and was eventually stationed in Japan. Following the maternal grandfather's retirement from his own employment a few months later, he and David joined the maternal grandmother in Japan in 2013. After David had resided in Japan for three years, the maternal grandparents moved, with David, to Bahrain in 2016 and to Kaiserslautern, Germany, in 2018.

¶ 5 On 20 July 2018, the maternal grandparents filed a petition seeking to have respondent-father's parental rights in David terminated on the basis of neglect, N.C.G.S. § 7B-1111(a)(1); dependency, N.C.G.S.

§ 7B-1111(a)(6); abandonment, N.C.G.S. § 7B-1111(a)(7); and the fact that respondent-father had voluntarily relinquished his parental rights in another juvenile and lacked the ability or willingness to establish a safe home, N.C.G.S. § 7B-1111(a)(9).[2] After a guardian ad litem was appointed in this proceeding, she conducted interviews with each of the parties between November 2018 and July 2019 and submitted a dispositional report that was dated 22 January 2019 and amended on 29 July 2019 in which she recommended that the maternal grandparents' termination petition be denied. On 18 February and 29 July 2019, the trial court conducted a hearing for the purpose of addressing the issues raised by the termination petition at which testimony was received from the maternal grandfather, respondent-father, the mother, the paternal grandmother, the paternal grandfather, and the guardian ad litem. On 5 June 2020, the trial court entered an order determining that respondent-father's parental rights in David were subject to termination on the basis of neglect, N.C.G.S. § 7B-1111(a)(1); dependency, N.C.G.S. § 7B-1111(a)(6); and abandonment, N.C.G.S. § 7B-1111(a)(7), and that it would be in David's best interests for respondent-father's parental rights to be terminated, N.C.G.S. § 7B-1110(a) (2019). Respondent-father noted an appeal to this Court from the trial court's termination order.

II. Substantive Legal Analysis

A. Standard of Review

¶ 6 In seeking relief from the trial court's termination order before this court, respondent-father contends that several of the trial court's findings of fact are legally deficient and that the trial court had erred by concluding that his parental rights in David were subject to termination. According to well-established North Carolina law, a termination of parental rights proceeding involves the use of a two-step process consisting of an adjudicatory hearing and a dispositional hearing. N.C.G.S. §§ 7B-1109, -1110 (2019). At the adjudicatory hearing, at which the petitioner or movant bears the burden of proof, N.C.G.S. § 7B-1110(f), the trial court, sitting without a jury, hears the evidence and makes findings of fact in the course of determining whether any of the grounds for

2. On 9 August 2018, the maternal grandparents filed a petition seeking to have the mother's parental rights in David terminated on the basis of neglect, N.C.G.S. § 7B-1111(a)(1); dependency, N.C.G.S. § 7B-1111(a)(6); and abandonment, N.C.G.S. § 7B-1111(a)(7). After the mother admitted that her parental rights in David were subject to termination on the basis of dependency, N.C.G.S. § 7B-1111(a)(6), the trial court entered an order on 16 January 2020 terminating the mother's parental rights in David. In view of the fact that the mother did not appeal from the trial court's termination order, we will refrain from discussing the proceedings against the mother any further in this opinion.

termination enumerated in N.C.G.S. § 7B-1111(a) exist. In the event that the trial court finds the existence of one or more of the statutory grounds for termination enumerated in N.C.G.S. § 7B-1111(a), it is required to "determine whether terminating the parent's rights is in the juvenile's best interest." *Id.* § 7B-1110(a). This Court reviews a trial court's adjudication order "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 "[u]nchallenged findings of fact made at the adjudicatory stage [being] binding on appeal," *In re D.W.P.*, 373 N.C. 327, 330 (2020) (citing *Koufman v. Koufman*, 330 N.C. 93, 97 (1991)), and with "the trial court's conclusions of law [being] subject to de novo review on appeal." *In re N.D.A.*, 373 N.C. 71, 74 (2019) (citing *In re S.N.*, 194 N.C. App. 142, 146 (2008), *aff'd per curiam*, 363 N.C. 368 (2009)).

B. Findings of Fact

¶ 7 **[1]** In its termination order, the trial court found as fact that:

> 9. The [maternal grandfather] testified that the juvenile has resided with the [maternal grandparents] since April 2010. [Respondent-father] has had no significant contact with the juvenile for the last eight full years. [Respondent-father] has not provided significant support for the juvenile for over eight years. The [maternal grandparents] further testified that the juvenile is a healthy and happy child.
>
> 10. [Respondent-father] has had no relationship with the juvenile, and the juvenile does not have a significant relationship with [respondent-father].
>
> 11. [Respondent-father] testified, as follows:
>
> a. [Respondent-father] does not pay his child support. His child support obligation is paid by his father. He has not worked for the last year and a half.
>
> b. [Respondent-father] has not made any effort to contact the juvenile.
>
> c. [Respondent-father], in his testimony, referred to himself as being on a "path of destruction."

> d. [Respondent-father] has no vehicle, no driver's license, no place of his own, and no job. [Respondent-father] resides with his girlfriend and testified that he currently pays no household bills and has applied for disability due to an injury to his right arm.
>
> . . . .
>
> g. [Respondent-father] never tried to enforce his court-ordered visitation.
>
> h. Based upon the evidence presented and in light of the long pattern of past behavior, [respondent-father] does not have the capability of maintaining a relationship with the juvenile, nor does he have the ability to care for the juvenile.

¶ 8 As an initial matter, respondent-father argues that the trial court erred by stating in Finding of Fact No. 9 that he had had no significant contact with David for eight years on the grounds that "[he had] had plenty of contact with David over the years despite [the maternal grandparents'] attempts to prevent it." In evaluating the validity of this aspect of respondent-father's challenge to Finding of Fact No. 9, we begin by noting that, at an absolute minimum, the first and last sentences contained in Finding of Fact No. 9, which state that the maternal grandfather "testified that the juvenile has resided with the [maternal grandparents] since April 2010" and that the maternal grandparents had "further testified that the juvenile is a healthy and happy child," take the form of recitations of the testimony that was provided at the termination hearing by the maternal grandfather rather than proper findings of fact. *See* N.C. Gen. Stat. § 1A-1, Rule 52 (2019) (providing that, "[i]n all actions tried upon the facts without a jury . . . , the court shall find the facts specially . . . ."); *In re N.D.A.*, 373 N.C. at 75 (stating that "recitations of the testimony of each witness do not constitute findings of fact by the trial judge") (cleaned up); *In re Green*, 67 N.C. App. 501, 505 n.1 (1984) (observing that, where findings of fact began with the phrase the witness " 'testified under oath . . . ,' and continue[d] to merely restate the content of that testimony[,] . . . [s]uch verbatim recitations *did not* constitute *findings of fact* by the trial judge, because they do not reflect a conscious choice between the conflicting versions of the incident in question which emerged from all the evidence presented"). Although the factual accuracy of the assertions contained in the relevant portion of the termination order has not been challenged before this Court, we are unable to determine whether the

other two sentences in Finding of Fact No. 9, which relate to evidence that was in serious dispute during the termination hearing, consist of a recitation of the testimony received at the termination hearing or actual factual determinations by the trial court. As a result, given our inability to determine whether the contents of Finding of Fact No. 9, taken in its entirety, represent a factual determination by the trial court rather than the mere recitation of the maternal grandfather's testimony, we are compelled to disregard Finding of Fact No. 9 in determining whether the trial court's findings of fact adequately support its determination that respondent-father's parental rights in David were subject to termination. *In re N.D.A.*, 373 N.C. at 75 (disregarding a finding of fact in the course of determining whether the trial court properly found that the parent's parental rights were subject to termination on the grounds that the finding in question simply recited the testimony of a particular witness without indicating that the testimony was credible).

¶ 9 In challenging Finding of Fact No. 10, in which the trial court found that respondent-father "has had no relationship with the juvenile" and that "the juvenile does not have a significant relationship with the [r]espondent-[f]ather," respondent-father argues that the record evidence does, in fact, show that he had a relationship with his son. In support of this contention, respondent-father directs our attention to testimony that was delivered by the guardian ad litem at the dispositional phase of the proceeding. In our view, evidence that has been received at the dispositional phase of a termination of parental rights proceeding may not be considered in evaluating the determinations that the trial court made at the adjudicatory phase of that proceeding, given that, while the rules of evidence applicable to civil cases apply during adjudicatory proceedings, *see* N.C.G.S. § 7B-1109(f), evidence is admissible during dispositional proceedings as long as that evidence is "relevant, reliable, and necessary to determine the best interests of the juvenile," N.C.G.S. § 7B-1110(a); *see also In re R.D.*, 376 N.C. 244, 250 (2020). As a result, we will refrain from relying upon the dispositional testimony in evaluating the validity of respondent-father's challenge to Finding of Fact No. 10.[3]

3. Although we note that the trial court took judicial notice of the guardian ad litem's report during the adjudication hearing, it is not clear to us that this decision was consistent with the applicable rules of evidence. *Cf. Dowdy v. S. Ry. Co.*, 237 N.C. 519, 526 (1953) (stating that "[c]ourts take judicial notice of subjects and facts of common and general knowledge"). In view of the fact that the parties have not adequately addressed the extent, if any, to which the trial court properly took judicial notice of this report or the impact of the contents of this report upon the proper resolution of the issue discussed in this portion of our opinion, we will refrain from resolving this aspect of respondent-father's challenge to the trial court's termination order on the basis of an analysis of the information contained in the guardian ad litem's report.

¶ 10 At the adjudication phase of the termination proceeding, the guardian ad litem testified that "[David] spoke very highly of spending time with his father, that he enjoyed spending time with both of his parents, actually, and that he wished he could spend more time with them." In addition, respondent-father testified that, during the eight year period preceding the termination hearing, he had sent David a card and "a couple of games"; that the maternal grandparents had never let him know when they were coming back to the United States; that the interactions that he had had with David during visits arranged by paternal grandparents were "[v]ery short and brief"; that, during a Skype call between the paternal grandmother and David that occurred during 2013, respondent-father had been "in the background"; and that, during an in-person visit that the paternal grandfather had had with David in 2017, respondent-father had stopped by to visit with David. Moreover, respondent-father claimed to have attempted to communicate directly with David following the 2017 visit using a cell phone and that the application that he had used to contact David had been deleted from David's phone.

¶ 11 After carefully examining the materials presented for our consideration on appeal, we are satisfied that the record contains evidence tending to show that respondent-father continued to have contact with David during the years leading up to the termination hearing. On the other hand, the record also contains evidence tending to suggest that the level of contact that respondent-father had with David during the eight years immediately preceding the termination hearing was sporadic and brief. For that reason, even though the evidence concerning the nature and extent of respondent-father's relationship with David is conflicting, we conclude that the record does contain evidence tending to show that respondent-father "has had no relationship with the juvenile, and the juvenile does not have a significant relationship with the [r]espondent-[f]ather." *See Knutton v. Cofield*, 273 N.C. 355, 359 (1968) (stating that the trial court "passes upon the credibility of the witnesses and the weight to be given their testimony and the reasonable inferences to be drawn therefrom" and that, "[i]f different inferences may be drawn from the evidence," the trial court "determines which inferences shall be drawn and which shall be rejected"); *c.f.*, *e.g.*, *In re D.J.D.*, 171 N.C. App. 230, 240 (2005) (upholding the trial court's finding that there was no real relationship between the children and their father given the existence of record evidence tending to show a lack of contact between the children and their father during the five years that the children had been in foster care). As a result, we hold that the trial court did not err by making Finding of Fact No. 10.

¶ 12 Next, respondent-father challenges Finding of Fact Nos. 11(a), 11(b), 11(c), and 11(h).[4] More specifically, respondent-father argues that Finding of Fact No. 11(a), which states that respondent-father testified that he "does not pay his child support," that "[h]is child support obligation is paid by his father," and that "[h]e has not worked for the last year and a half," is irrelevant to the matters at issue before the Court in this proceeding given that "the child support still got paid and it was [r]espondent-[f]ather that made that happen." Respondent-father testified at the termination hearing that he had "three crushed [discs] in [his] neck, and three crushed [discs] in [his] back, and [had] los[t] half of [the] use of [his] right arm" and that he had been working with a physical therapist in the hope that he could recover sufficiently to return to work. In addition, the paternal grandfather testified that respondent-father had been helping the paternal grandmother around the house and that he had been paying respondent-father's child support obligation "somewhat tit for tat[.]" In view of the fact that Finding of Fact No. 11(a) is couched in terms of a recitation of respondent-father's testimony and fails to resolve the issue of whether the paternal grandfather's decision to make respondent-father's child support payments should be treated as sufficient compliance with respondent-father's child support obligation, we conclude that Finding of Fact No. 11(a) should be disregarded in determining whether the trial court's findings of fact support its conclusion of law that respondent-father's parental rights in David were subject to termination. *See In re N.D.A.*, 373 N.C. at 75.

¶ 13 In challenging Finding of Fact No. 11(b), which states that respondent-father had testified that he had "not made any effort to contact the juvenile," respondent-father asserts that the record contains evidence tending to show that he had contacted David over the years leading up to the termination hearing despite the efforts that the maternal grandparents had made to prevent him from being in touch with his son. As we have already noted, the record contains evidence tending to show that, over the eight year period leading up to the termination hear-

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4. As an aside, we note that, in Finding of Fact No. 11, the trial court described each of the eight subparts contained in that finding as a statement made by respondent-father. For that reason, each of the eight subparts of Finding of Fact No. 11 is subject to being disregarded as a recitation of witness testimony in accordance with the legal principles enunciated earlier in this opinion. *See In re N.D.A.*, 373 N.C. at 75. However, given that respondent-father did not challenge those subparts of Finding of Fact No. 11 that are not discussed in the text of this opinion in his brief before this Court, we conclude that respondent-father has waived his right to object to their consideration in our determination of whether the trial court erred by concluding that his parental rights in David were subject to termination.

ing, respondent-father had sent David a card and a couple of games and that respondent-father had not initiated legal proceedings to obtain custody of David or the right to visit with him. Thus, the record, as we have already noted, contains evidence tending to show that respondent-father had had limited contact with David in the interval before the maternal grandparents sought to terminate his parental rights in the child.

¶ 14 On the other hand, the record also reflects that the only contact between respondent-father and David that had occurred while David lived abroad had happened in 2013 and in 2017 during visits that had been arranged so as to permit David to have contact with the paternal grandparents. In addition, the record contains evidence tending to show that the maternal grandfather denied any memory of having provided respondent-father with the maternal grandparents' address, phone number, or e-mail address at the time that they took David abroad. Although the maternal grandfather did give the relevant contact information to the paternal grandparents, the paternal grandmother testified that, when the maternal grandparents lived in Japan and Bahrain, she did not provide their addresses to respondent-father given that the maternal grandfather "was very protective of the information he gave, and [she] didn't want to cross the line by giving it to [respondent-father]." Furthermore, respondent-father testified that he had attempted to contact the maternal grandparents using phone numbers acquired from the mother and Facebook without success and that he had attempted to communicate with the minor child using a cell phone application until that application had been deleted from David's cell phone. As a result, the record also contains evidence tending to show that the maternal grandparents placed obstacles in the path of any attempts that respondent-father might have made to have contact with David.

¶ 15 In view of the fact that Finding of Fact No. 11(b) consisted of nothing more than a recitation of respondent-father's testimony, it is not, in actuality, a finding of fact at all. *See In re N.D.A.*, 373 N.C. at 75; *Knutton*, 273 N.C. at 359. While the record contains conflicting evidence concerning the nature and extent of respondent-father's attempts to contact David and the extent to which the maternal grandparents successfully interposed obstacles to any efforts that respondent-father might have made to contact his son, it is not the role of this Court, rather than the trial court, to resolve such disputed factual issues. *See generally In re B.G.*, 197 N.C. App. 570, 574 (2009) (stating that, "[a]lthough 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"). As a result of the fact that the challenged

trial court finding fails to resolve a material conflict in the evidence, we will disregard Finding of Fact No. 11(b) in evaluating whether the trial court's findings of fact support its conclusion that respondent-father's parental rights in David were subject to termination.

¶ 16 Similarly, respondent-father challenges Finding of Fact No. 11(c), which states that respondent-father testified that he was "on a 'path of destruction' " on the grounds that, when taken in context, the statement referred to in this finding described the conduct in which he had engaged at the time that he surrendered custody of David to the maternal grandparents rather than his current situation. At the termination hearing, respondent-father testified on direct examination that:

> A. After my son was born, yes, I hit a path of self[-]destruction there for a little bit, but I picked myself back up.
>
> . . . .
>
> Q. How long did your path of destruction last?
>
> A. I would say well into two to three years.
>
> Q. Okay. Into at least 2014; is that correct?
>
> A. Yes.

Aside from the fact that, as respondent-father notes, he made the "path of destruction" comment in the course of describing the situation in which he found himself years before the termination hearing, Finding of Fact No. 11(c) is, once more, nothing more than a recitation of witness testimony rather than a genuine finding of fact. *See In re N.D.A.*, 373 N.C. at 75; *Knutton*, 273 N.C. at 359. As a result, we will disregard Finding of Fact No. 11(c) in determining whether the trial court's findings of fact support its determination that respondent-father's parental rights in David were subject to termination.

¶ 17 Finally, even though the trial court introduced Finding of Fact No. 11(h) by stating that "[t]he Respondent-Father testified, as follows," the remainder of that finding states the trial court's determination that, "[b]ased upon the evidence presented and in light of the long pattern of past behavior, [respondent-father] does not have the capability of maintaining a relationship with [David], nor does he have the ability to care for [David]." In our view, the most reasonable reading of Finding of Fact No. 11(h) is that it, unlike Finding of Fact Nos. 11(a), 11(b), and 11(c), is, in actuality, an attempt by the trial court to summarize the evidence upon which its termination decision was based rather than a mere reci-

tation of respondent-father's testimony at the termination hearing. As a result, we will consider Finding of Fact No. 11(h) in determining whether the trial court's findings support its decision that respondent-father's parental rights in David were subject to termination.

C. Grounds for Termination of Parental Rights

¶ 18 In addition to challenging a number of the trial court's findings of fact, respondent-father argues that the trial court erred by determining that his parental rights in David were subject to termination on the basis of neglect, N.C.G.S. § 7B-1111(a)(1); dependency, N.C.G.S. § 7B-1111(a)(6); and abandonment, N.C.G.S. § 7B-1111(a)(7). In support of these determinations, the trial court concluded as a matter of law that:

> 3. Here, as stated in the Petition, the alleged grounds to support termination are [N.C.G.S. §] 7B-1111(a)(1), (6), and (7) or neglect, dependency, and willful abandonment. As case law explains, the definition of a neglected juvenile includes a juvenile who has been abandoned: N.C.G.S. 7B-101(15). Neglect in the form of abandonment does not require findings regarding the six-month period immediately preceding the filing of the petition as does the separate ground of abandonment under N.C.G.S. 7B-1111(a)(7). The [c]ourt may examine the parent's conduct over an extended period of time. *In Re: Humphrey*, 156 [N.C. App 533], (2003).
>
> 4. Grounds exist at N.C.G.S. 7B-1111(a)(1), 7B-1111(a)(6), and 7B-1111(a)(7) in which to terminate the parental rights of [respondent-father] as it applies to the juvenile, in that [respondent-father] has neglected the juvenile, [respondent-father] has abandoned the juvenile, and [respondent-father] is incapable of providing for the proper care and supervision of the juvenile.

1. Neglect

¶ 19 **[2]** According to N.C.G.S. § 7B-1111(a)(1), a trial court is entitled to determine that a parent's parental rights in a child are subject to termination on the basis of neglect if that child's "parent, guardian, custodian, or caretaker does not provide proper care, supervision, or discipline"; or if the child "has been abandoned." N.C.G.S. § 7B-101(15). In determining whether a parent's parental rights in a child are subject to termination

on the basis of neglect, the parent's fitness to care for his or her child must be determined as of the date of the termination hearing, an event that is frequently held after the child has been removed from the parent's custody. *In re Ballard*, 311 N.C. 708, 714 (1984). For that reason, in evaluating whether the neglect ground for termination exists, the "trial court must consider evidence of changed conditions . . . in light of the history of neglect by the parents and the probability of a repetition of neglect." *Id.* (quoting *In re Wardship of Bender*, 170 Ind. App. 274, 285 (1976)). On the other hand, however, "this Court has recognized that the neglect ground can support termination without use of the two-part *Ballard* test if a parent is presently neglecting their child by abandonment." *In re K.C.T.*, 375 N.C. 592, 599–600 (2020) (citing *In re N.D.A.*, 373 N.C. at 81–82); *see also In re W.K.*, 376 N.C. 269, 274 n.5 (2020) (stating that "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).").

¶ 20 In determining whether a parent has neglected his or her child by abandonment for purposes of N.C.G.S. § 7B-1111(a)(1), the relevant time period "is not limited to the six consecutive months immediately preceding the filing of the termination petition," *In re N.D.A.*, 373 N.C. at 81 (citing *In re Humphrey*, 156 N.C. App. 533, 541 (2003)), as is the case in the event that the parent's parental rights are allegedly subject to termination on the grounds of willful abandonment pursuant to N.C.G.S. § 7B-1111(a)(7). "A trial court is entitled to terminate a parent's parental rights in a child for neglect based upon abandonment pursuant to N.C.G.S. § 7B-1111(a)(1) in the event that the trial court finds that the parent's conduct demonstrates a 'wilful neglect and refusal to perform the natural and legal obligations of parental care and support.' " *In re N.D.A.*, 373 N.C. at 81 (quoting *Pratt v. Bishop*, 257 N.C. 486, 501 (1962)). For that reason, "[i]n order to terminate a parent's rights on the ground of neglect by abandonment, the trial court must make findings that the parent has engaged in conduct 'which manifests a willful determination to forego all parental duties and relinquish all parental claims to the child' as of the time of the termination hearing." *Id.* (quoting *In re C.K.C.*, 263 N.C. App. 148, 164 (2018)); *see also Pratt*, 257 N.C. at 501) (describing "willful intent" as an integral part of a court's consideration of abandonment and a question of fact to be determined from the evidence). According to respondent-father, the trial court's findings of fact fail to demonstrate that his parental rights in David were subject to termination on the basis of neglect given the trial court's failure to find a probability of future neglect.

¶ 21 Although respondent-father is correct in pointing out that the trial court failed to find that David was likely to be neglected in the future in the event that he was returned to respondent-father's care, this argument overlooks the fact that the trial court's determination that respondent-father's parental rights were subject to termination on the basis of neglect did not rest upon a legal theory that would have made such a finding necessary. Instead, the trial court's finding of neglect rested upon a theory of neglect by abandonment, which requires no such finding. As a result, this particular aspect of respondent-father's challenge to the trial court's determination that his parental rights were subject to termination on the basis of neglect lacks merit. Our decision to this effect does not, however, end our inquiry into the trial court's determination that respondent-father's parental rights in David were subject to termination on the basis of neglect by abandonment.

¶ 22 In the course of concluding that respondent-father's parental rights in David were subject to termination on the basis of neglect by abandonment, the trial court found as a fact that:

> 10. [Respondent-father] has had no relationship with the juvenile, and the juvenile does not have a significant relationship with [respondent-father].
>
> 11. [Respondent-father] testified, as follows:
>
> . . . .
>
> g. [Respondent-father] never tried to enforce his court-ordered visitation.
>
> h. Based upon the evidence presented and in light of the long pattern of past behavior, [respondent-father] does not have the capability of maintaining a relationship with the juvenile, nor does he have the ability to care for the juvenile.

As a result, the trial court's unchallenged and properly supported findings of fact reflect that respondent-father did not have a signification relationship with David; that respondent-father had not "filed any type of action to get either custody, or to visit [David], or modify visitation"; and that respondent-father "does not have the capability of maintaining a relationship with" David or "the ability to care for" David. We are unable to conclude that these findings, without more, suffice to support a determination that respondent-father's parental rights in David were subject to termination on the basis of neglect by abandonment.

¶ 23 In light of the conflicting evidence received at the termination hearing, the trial court had the obligation to resolve a substantial factual dispute over the extent to which respondent-father had had contact with David and the extent to which the limited relationship that respondent-father had been able to sustain with David stemmed from interference by the maternal grandparents rather than from respondent-father's action or inaction in order to determine whether respondent-father "manifest[ed] a willful determination to forego all parental duties and relinquish all parental claims to the child." *In re Young*, 346 N.C. 244, 252 (1997) (holding that the trial court's findings failed to support a conclusion that the parent willfully abandoned the child in view of its failure to address the "probable hostile relationship" between the respondent and the members of petitioners' family who cared for the child and the parent's ability to contact the minor child) (quoting *In re Adoption of Searle*, 82 N.C. App. 273, 275 (1986)); *see also In re N.D.A.*, 373 N.C. at 82 (stating that "the trial court failed to make any findings of fact regarding whether respondent-father had the ability to contact petitioner and [the minor child,]" with "such findings being necessary in order for the trial court to make a valid determination regarding the extent to which respondent-father's failure to contact [the minor child] and petitioner from 2014 through December 2016 was willful"). The trial court's findings simply do not resolve the conflict in the evidence that is reflected in the record. As a result, we hold that, even though the record contains evidence from which the trial court might have found, based upon its evaluation of the credibility of various witnesses, that respondent-father had willfully abandoned David, the findings of fact that the trial court actually made fail to support its determination that respondent-father neglected David by abandonment.

2. Dependency

¶ 24 **[3]** According to N.C.G.S. § 7B-1111(a)(6), a trial court may terminate a parent's parental rights in his or her child based upon a finding "[t]hat the parent is incapable of providing for the proper care and supervision of the juvenile, such that the juvenile is a dependent juvenile within the meaning of 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), with N.C.G.S. § 7B-101 defining a "[d]ependent juvenile" as "[a] juvenile in need of assistance or placement because . . . the juvenile's parent, guardian, or custodian is unable to provide for the juvenile's care or supervision and lacks an appropriate alternative child care arrangement." N.C.G.S. § 7B-101(9) (2019). As this Court has recently held, "the trial court's findings regarding [an adjudication of

dependency under N.C.G.S. § 7B-1111(a)(6)] '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 (2020) (quoting *In re L.R.S.*, 237 N.C. App. 16, 19 (2014)).

¶ 25 Respondent-father contends that the trial court's determination that his parental rights in David were subject to termination on the basis of dependency lacks sufficient support in the record. More specifically, respondent-father contends that an adjudication of dependency requires a finding that the parent "lacks an alternative child care arrangement," *see* N.C.G.S. § 7B-101(9), with the only finding of fact contained in the trial court's termination order that appears to relate to the dependency ground for termination being Finding of Fact No. 11(h), which states that respondent-father "does not have the capability of maintaining a relationship with [David], nor does he have the ability to care for [David.]"

¶ 26 A careful review of the termination order establishes that the trial court failed to make any findings of fact that address the issue of whether respondent-father lacked an appropriate childcare arrangement. In addition, careful scrutiny of the record satisfies us that the parties did not elicit any evidence that tends to show that respondent-father lacked an appropriate alternative childcare arrangement. *See In re K.C.T.*, 375 N.C. 592, 596 (2020) (reversing a trial court's adjudication of dependency on the grounds that "the burden was on [the] petitioners to show that respondent[ ] lacked a suitable alternative child care arrangement and they presented no evidence to meet their burden."). As a result, we hold that the trial court's findings of fact and the record evidence do not suffice to support the trial court's conclusion of law that respondent-father's parental rights in David were subject to termination on the basis of dependency.

3. Abandonment

¶ 27 **[4]** According to N.C.G.S. § 7B-1111(a)(7), a parent's parental rights in a child are subject to termination in the event that "[t]he parent has willfully abandoned the juvenile for at least six consecutive months immediately preceding the filing of the petition or motion[.]" N.C.G.S. § 7B-1111(a)(7) (2019). As we have already noted, "[a]bandonment implies conduct on the part of the parent which manifests a willful determination to forego all parental duties and relinquish all parental claims to the child." *In re Young*, 346 N.C. at 251 (quoting *In re Adoption of Searle*, 82 N.C. App. at 275); *see also In re C.B.C.*, 373 N.C. 16, 19 (2019) (stating that, "[i]f a parent withholds that parent's presence, love, care, the opportunity to display filial affection, and willfully neglects to lend

support and maintenance, such parent relinquishes all parental claims and abandons the child.") (cleaned up).

¶ 28 According to respondent-father, the trial court's determination that his parental rights in David were subject to termination on the basis of abandonment pursuant to N.C.G.S. § 7B-1111(a)(7) cannot be upheld given the absence of any finding that respondent-father's conduct was willful. In addition, a careful examination of the termination order indicates that the trial court made no findings of fact concerning respondent-father's conduct during the determinative six month period specified in N.C.G.S. § 7B-1111(a)(7). Finally, as we have previously determined, the trial court's proper findings of fact do not resolve the factual disputes that must be addressed in the course of ascertaining whether respondent-father's conduct demonstrated the existence of a "willful determination [on the part of respondent-father] to forego all parental duties and relinquish all parental claims to the child." *In re Young*, 346 N.C. at 251.[5] As a result, we hold that, even though the record contains evidence from which a finding of abandonment might be found, depending upon the manner in which certain disputed issues of fact were resolved, the trial court erred by failing to make sufficient findings of fact to support a determination that respondent-father's parental rights in David were subject to termination on the basis of abandonment pursuant to N.C.G.S. § 7B-1111(a)(7).

III. Conclusion

¶ 29 Thus, for the reasons set forth above, we reverse the trial court's termination order on the grounds that the trial court's findings of fact do not support its conclusion that respondent-father's parental rights in David were subject to termination. However, given the existence of evidence that might, if believed, suffice to support a determination that respondent-father's parental rights in David were subject to termination on the basis of either neglect by abandonment, N.C.G.S. § 7B-1111(a)(1), or abandonment, N.C.G.S. § 7B-1111(a)(7), we remand this case to the District Court, Carteret County, for further proceedings not inconsistent with this opinion, including the entry of a new order determining whether respondent-father's parental rights in David were subject to termination on the basis of these two grounds for termination. On the other hand, given the absence of any evidence tending to show that respondent-father lacked an appropriate alternative childcare arrangement for David, the trial court need not, on remand, consider the issue

5. *See* II.C.1. above.

of whether respondent-father's parental rights in David were subject to termination on the basis of dependency, N.C.G.S. § 7B-1111(a)(6). In the exercise of its discretion, the trial court may receive additional evidence on remand if it elects to do so.

REVERSED AND REMANDED.

IN THE MATTER OF J.D.D.J.C., J.D.R.D.C.

No. 39A21

Filed 24 September 2021

Termination of Parental Rights—no-merit brief—termination on multiple grounds

The termination of a mother's parental rights to her two children on multiple grounds was affirmed where her counsel filed a no-merit brief, the trial court's findings of fact had sufficient record support, those findings both supported termination on at least one ground and adequately addressed the dispositional issues delineated in N.C.G.S. § 7B-1110(a), and the trial court had a rational basis for concluding that termination of the mother's rights was in the children's best interests.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from an order entered on 9 October 2020 by Judge Micah J. Sanderson in District Court, Cleveland County. This matter was calendared in the Supreme Court on 19 August 2021, but was determined on the record and briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

Charles E. Wilson, Jr., for petitioner-appellee Cleveland County Department of Social Services.

Stacy S. Little for appellee Guardian ad Litem.

J. Thomas Diepenbrock for respondent-appellant mother.

PER CURIAM.

IN RE J.D.D.J.C.

[378 N.C. 593, 2021-NCSC-107]

¶ 1 Respondent-mother Sherry C. appeals from an order entered by the trial court terminating her parental rights in her minor children, J.D.D.J.C. and J.D.R.D.C.[1] Counsel for respondent-mother has filed a no-merit brief on respondent-mother's behalf as authorized by N.C. R. App. P. 3.1(e). After careful consideration of the record in light of the applicable law, we affirm the trial court's termination order.

¶ 2 On 13 October 2011, the Cleveland County Department of Social Services filed a petition alleging that three-month-old Joshua, two-year-old Jolene, and their older half-siblings, eleven-year-old Sally and sixteen-year-old Henry, were neglected juveniles[2] and obtained the entry of an order placing Jolene, Sally, and Henry in nonsecure custody.[3] On 13 July 2012, Judge Meredith A. Shuford entered an order finding that Joshua and Jolene were neglected juveniles "in that they live in an environment injurious to their welfare and do not receive proper care or supervision and have not been provided necessary medical care, based upon [respondent-mother's] untreated mental illness and failure to comply with recommended treatment for [Henry]."

¶ 3 In support of this determination, Judge Shuford found that DSS had received reports concerning respondent-mother's untreated mental illness and had offered to provide respondent-mother with assistance as far back as 1999 and that Sally and Henry had been placed in DSS custody in 2001. In addition, Judge Shuford found that, while the family was receiving "Intensive In-Home Family Preservation" services, DSS had received child protective services reports in August and September 2011 that indicated that respondent-mother had physically abused the children, that the children were begging the neighbors for food, and that Sally was having to care for her siblings and further found that Henry had disclosed that he had thought of killing himself or respondent-mother at a Child and Family Team meeting held on 28 September 2011.

¶ 4 Judge Shuford also found that respondent-mother had refused to comply with recommendations that Henry receive a psychological evalu-

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1. J.D.D.J.C. and J.D.R.D.C. will be referred to through the remainder of this opinion as Joshua and Jolene, respectively, which are pseudonyms used for ease of reading and to protect the juveniles' privacy.

2. Sally and Henry are also pseudonyms used for ease of reading and to protect the identity of the juveniles and their siblings.

3. DSS refrained from seeking to obtain nonsecure custody of Joshua at that time given that he was residing with his father. As a result of the fact paternity testing showed that Joshua and Jolene had the same father, Judge Larry J. Wilson subsequently sanctioned Jolene's placement in the father's home with Joshua.

ation and enter a therapeutic foster placement and the recommendation that she should seek mental health treatment for herself. According to Judge Shuford, two days after the 28 September 2011 meeting, DSS had been called to respondent-mother's home, at which law enforcement officers and emergency medical service personnel were attempting to take Henry to the hospital because of his continued suicidal ideation and homicidal threats. Judge Shuford determined that respondent-mother had initially refused to sign a release authorizing Henry's hospitalization before changing her mind. Although Henry was involuntarily committed for mental health treatment, Judge Shuford found that, following Henry's discharge, respondent-mother refused to allow Henry to be placed in a leveled mental health or therapeutic placement, an action that prompted DSS to seek relief through the judicial system.

¶ 5 In addition, Judge Shuford found that respondent-mother had submitted to a psychological evaluation in January 2012 and had been diagnosed as suffering from mood disorder, post-traumatic stress disorder, borderline personality disorder, and paranoid personality disorder; that respondent-mother had consistently failed or refused to comply with recommended and necessary mental health treatment for the past decade; and that the children had experienced negative effects as the result of respondent-mother's mental health condition and her failures to obtain treatment. Finally, Judge Shuford found that respondent-mother had consistently refused to attend Child Family Team meetings with DSS since October 2011.

¶ 6 After having determined that the children were neglected juveniles, Judge Shuford awarded custody of Joshua and Jolene to the father Tracy H., while authorizing respondent-mother to have one hour of supervised visitation with the children each week. Judge Shuford retained jurisdiction over Joshua and Jolene for the purpose of supervising visitation-related issues and ordered respondent-mother to comply with recommended mental health treatment, including participation in individual counseling and medication management, and to sign releases authorizing the release of treatment-related information to DSS. After a review hearing held on 7 November 2012, Judge Anna F. Foster entered an order on 19 November 2012 waiving the necessity for further review hearings relating to Joshua and Jolene.

¶ 7 On 23 October 2013, DSS obtained the entry of orders placing Joshua and Jolene in nonsecure custody and filed a petition alleging that Joshua and Jolene had been abused and neglected while in the custody of their father. On 11 April 2014, Judge Shuford entered an order finding that Joshua and Jolene were abused and neglected juveniles

based upon findings that the children had been exposed to a substantial risk of injury when the father had left them at night without proper supervision in a padlocked room in which various pills and a knife were present; that the father's home was in substandard condition; and that, even though respondent-mother did not have custody of the children, Joshua and Jolene had previously been adjudicated neglected and respondent-mother had failed to sufficiently comply with court-ordered treatment so as to preclude their return to her custody. As a result, Judge Shuford ordered that the children remain in DSS custody and awarded the parents a minimum of one hour of supervised visitation each week. In addition, Judge Shuford ordered the parents to take appropriate measures to facilitate the children's return to parental custody, with respondent-mother having been ordered to comply with all recommendations for mental health and psychiatric treatment and to sign releases authorizing DSS to obtain access to information relating to the progress that she had made in the course of her treatment; to obtain a parental fitness evaluation and comply with any resulting treatment recommendations; and to establish and maintain clean, safe, and stable housing and sufficient income for herself and the children.

¶ 8 In an order entered on 15 October 2014 after a review and permanency planning hearing held on 1 October 2014, Judge Jeannette R. Reeves found that respondent-mother had failed to consistently attend mental health treatment; that, even though she had obtained a parental fitness evaluation and completed parenting classes, she had failed to demonstrate that she had made any progress toward improving her parenting skills and had made statements to the effect that she did not intend to change the manner in which she parented her children. In addition, Judge Reeves found that respondent-mother continued to live in a home that was "essentially uninhabitable" and that she had recently given birth to her seventh child, who had been taken into nonsecure custody by DSS. Based upon these findings, Judge Reeves determined that continued efforts to reunify the children with respondent-mother would be futile and relieved DSS of the necessity for attempting to facilitate such a result. On the other hand, however, Judge Reeves ordered that DSS continue to attempt to reunify the children with the father, who had made significant progress toward addressing the conditions that had led to the children's removal from his home, and established a primary permanent plan for the children of reunification with the father while continuing to sanction weekly visits between respondent-mother and the children.

¶ 9 After a review and permanency planning hearing held on 20 January 2016, Judge Ali Paksoy entered an order returning custody of the chil-

dren to the father. Although respondent-mother requested that she be allowed unsupervised visitation with the children on the grounds that she had made improvements to her home and had complied with the requirements that had previously been imposed upon her, Judge Paksoy determined that respondent-mother had failed to produce any evidence to support her claims, continued to authorize weekly supervised visitation between respondent-mother and the children, and waived the necessity for further review hearings involving Joshua and Jolene.

¶ 10 On 27 June 2018, DSS filed yet another juvenile petition alleging that Joshua and Jolene were abused and neglected juveniles. In this petition, DSS alleged that it had received a request for assistance from the Cleveland County Sheriff's Office on 26 June 2018 predicated upon the fact that the father had been arrested on the basis of Jolene's claims that the father had sexually abused her and the fact that the father's girlfriend had admitted that she had enabled the father's abuse of Jolene and that she had used methamphetamine with the father. In view of the fact that the children had no appropriate alternative caregivers, DSS obtained nonsecure custody of both children.

¶ 11 After a hearing held on 23 January 2019, the trial court entered an order on 6 February 2019 finding that Joshua was a neglected juvenile and that Jolene was an abused and neglected juvenile. In light of those determinations, the trial court authorized the cessation of efforts to reunify the children with the father while ordering DSS to attempt to reunify Joshua and Jolene with respondent-mother, with this requirement resting upon findings that respondent-mother was employed as a long-distance truck driver, that respondent-mother had admitted that she lacked safe and stable housing for herself and the children, and that respondent-mother had continued to deny that she needed to participate in mental health treatment. After authorizing weekly supervised visitation between respondent-mother and the children, the trial court ordered respondent-mother to obtain a psychological and parental fitness evaluation, to comply with any treatment-related recommendations, and to sign releases authorizing the disclosure of information relating to her evaluation and treatment to DSS; to obtain a substance abuse assessment, comply with any treatment-related recommendations, and submit to random drug testing; and to establish and maintain clean, safe, and stable housing and demonstrate the ability to properly care for the children.

¶ 12 After a review and permanency planning hearing held on 13 February 2019, Judge Shuford entered an order on 19 February 2019 in which she found that, while respondent-mother had visited with the children, her

contacts with them had occurred on an inconsistent basis because of the demands of her employment as a truck driver; that respondent-mother had failed to comply with the trial court's prior dispositional order given the fact that she had not maintained safe and stable housing; that she continued to deny the need for the assessments and treatments in which she had been ordered to participate, and that she lacked a reliable plan of care for the children during times when she was scheduled to be out of town driving a truck given that her adult son, with whom she planned to leave the children, had a prior criminal record and child protective services history, was involved in an open child protective services matter, and had mental health problems of his own. After ordering that the children remain in DSS custody, Judge Shuford established a primary permanent plan for the children of reunification with respondent-mother along with a concurrent secondary plan of adoption.

¶ 13 Review and permanency planning hearings relating to Joshua and Jolene were held on 15 May 2019, 6 November 2019, and 6 May 2020. In orders entered by Judge Shuford on 3 June 2019, Judge K. Dean Black on 19 November 2019, and the trial court on 8 June 2020 in the aftermath of these proceedings, these three judges repeatedly found that respondent-mother had failed to visit with the children consistently; that respondent-mother had refused to meet with DSS for the purpose of developing a case or a visitation plan; that respondent-mother had been uncooperative and argumentative with DSS during the course of its attempts to schedule visitation sessions between respondent-mother and the children and to arrange for various services for respondent-mother; that, even though she had completed a comprehensive clinical assessment, respondent-mother had failed to comply with the resulting treatment recommendations on the basis of her continued insistence that she did not need the recommended psychiatric evaluation, medication management services, or mental health treatment; and that respondent-mother had failed to establish or maintain safe and stable housing and had not cooperated with the efforts that DSS had made to schedule a home visit.

¶ 14 In the 3 June 2019 order, Judge Shuford changed the permanent plan for the children to a primary plan of adoption with a concurrent secondary plan of reunification with respondent-mother. In the 19 November 2019 order, however, Judge Black changed Jolene's permanent plan to one of reunification with respondent-mother and a secondary plan of adoption in light of Jolene's need for a therapeutic placement. In the 8 June 2020 order, the trial court changed Jolene's permanent plan back to a primary plan of adoption after a potential permanent placement

with a foster parent who was pursuing therapeutic foster home licensure had been identified.

¶ 15 On 18 February 2020, DSS filed petitions seeking to have respondent-mother's parental rights in Joshua and Jolene terminated on the basis of neglect, N.C.G.S. § 7B-1111(a)(1); willful failure to make reasonable progress toward correcting the conditions that had resulted in the children's removal from the family home, N.C.G.S. § 7B-1111(a)(2); dependency, N.C.G.S. § 7B-1111(a)(6); and the fact that respondent-mother's parental rights in another child had been involuntarily terminated and respondent-mother lacked the ability or willingness to establish a safe home, N.C.G.S. § 7B-1111(a)(9). After electing to hear and decide the case involving respondent-mother separately from a similar termination of parental rights proceeding directed towards the father,[4] the trial court held a hearing for the purpose of considering the merits of the termination petition on 2 and 9 September 2020. On 9 October 2020, the trial court entered an order determining that respondent-mother's parental rights in the children were subject to termination on the basis of all four grounds for termination set forth 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 Joshua and Jolene should be terminated. Respondent-mother noted an appeal to this Court from the trial court's termination order.

¶ 16 As we have already pointed out, respondent-mother's appellate counsel has filed a no-merit brief on her behalf pursuant to N.C. R. App. P. Rule 3.1(e). In this no-merit brief, appellate counsel identified certain issues relating to the adjudication and disposition portions of the termination proceeding that could arguably support an appeal, including whether the trial court had properly determined that respondent-mother's parental rights were subject to termination and whether the trial court had abused its discretion by determining that the termination of

4. At the same time that it sought to have respondent-mother's parental rights in the children terminated, DSS filed a petition seeking to have the father's parental rights in Joshua and Jolene terminated on the basis of neglect, N.C.G.S. § 7B-1111(a)(1); failure to make reasonable progress toward correcting the conditions that had led to the children's removal from the family home, N.C.G.S. § 7B-1111(a)(2); and dependency, N.C.G.S § 7B-1111(a)(6). On 28 September 2020, the trial court entered an order finding that respondent-father's parental rights in the children were subject to termination on the basis of all three of the grounds for termination alleged in the termination petition and that the termination of respondent-father's parental rights in Joshua and Jolene would be in the children's best interests. In view of the fact that the father did not note an appeal to this Court from the trial court's termination order, we will refrain from making any further comment about the father's situation in this opinion.

respondent-mother's parental rights would be in the children's best interests before explaining why he believed that the issues that he had contemplated raising on respondent-mother's behalf either lacked merit or would not justify a decision on the part of this Court to overturn the trial court's termination order.[5] In addition, respondent-mother's appellate counsel advised respondent-mother of her right to file pro se written arguments on her own behalf and provided her with the documents necessary to do so. Respondent-mother has not, however, submitted any written arguments for our consideration.

¶ 17 This Court independently reviews issues identified by appellate counsel in a no-merit brief filed pursuant to N.C. R. App. P. 3.1(e) for the purpose of determining whether they have potential merit. *In re L.E.M.*, 372 N.C. 396, 402 (2019). After careful review of the issues identified in the no-merit brief filed by respondent-mother's appellate counsel in light of the record and the applicable law, we are satisfied that the findings of fact set out in the 9 October 2020 termination order relating to the prior determinations that Joshua and Jolene were neglected juveniles, respondent-mother's failure to participate in court-ordered mental health treatment, respondent-mother's failure to maintain safe and appropriate housing, and the fact that respondent-mother's parental rights in another child had been involuntarily terminated all had sufficient record support. In addition, we are satisfied that the trial court's findings of fact support its determination that respondent-mother's parental rights in Joshua and Jolene were subject to termination on the basis of at least one of the grounds delineated in N.C.G.S. § 7B-1111(a). Finally, we are satisfied that the trial court's findings of fact address the dispositional issues delineated in N.C.G.S. § 7B-1110(a), that these dispositional findings have ample record support, and that these dispositional findings provide a rational basis for the trial court's determination that the termination of respondent-mother's parental rights in Joshua and Jolene would be in the children's best interests. As a result, we affirm the trial court's termination order.

AFFIRMED.

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5. According to respondent-mother's appellate counsel, a meritorious argument can be made with respect to the lawfulness of the trial court's determination that respondent-mother's parental rights in the children were subject to termination on the basis of dependency, N.C.G.S. § 7B-1111(a)(6). On the other hand, however, respondent-mother's appellate counsel acknowledges that a decision in respondent-mother's favor with respect to this issue would not result in the invalidation of the trial court's termination order given that the trial court need only find the existence of a single ground for termination in order to support the termination of that parent's parental rights. *See In re J.S.*, 377 N.C. 73, 2021-NCSC-28, ¶ 24.

IN RE K.B.

[378 N.C. 601, 2021-NCSC-108]

IN THE MATTER OF K.B. & G.B.

No. 48A21

Filed 24 September 2021

1. Termination of Parental Rights—grounds for termination—neglect—likelihood of future neglect—substantial risk of impairment—sufficiency of evidence

An order terminating a mother's parental rights to her children was affirmed where the trial court's findings—supported by clear, cogent, and convincing evidence—showed a likelihood of future neglect if the children were returned to the mother's care, because she failed to make progress in her social services case plan; failed to address her substance abuse, mental health issues, and history of domestic violence; failed to keep a safe and stable home; and disregarded social services' concerns with her having unsupervised contact with the children. Evidence also supported a finding that the children were physically, mentally, or emotionally impaired (or at a substantial risk of such impairment) as a result of the mother's neglect, where both children suffered from adjustment disorder and various behavioral issues.

2. Termination of Parental Rights—best interests of the children—statutory factors—children's bond with parent—likelihood of adoption

The trial court did not abuse its discretion in concluding that termination of a father's parental rights was in the best interests of his two children, where the court properly considered each dispositional factor under N.C.G.S. § 7B-1110(a). The court acknowledged the children's strong bond with their father while finding the children had also bonded with their foster family, their foster parents were willing to adopt both siblings, and the younger sibling's behavioral issues (he suffered from adjustment disorder and post-traumatic stress disorder, which resulted in sleep deprivation, tantrums, hitting, and other problematic behaviors) did not make adoption unlikely because the foster parents were willing to provide him with the necessary therapy and medical treatment to address those issues.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from orders entered on 20 October 2020 by Judge Beverly Scarlett in the District Court of Orange County. This matter was calendared for argument in the Supreme

Court on 19 August 2021 but determined on the record and briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

Stephenson & Fleming, LLP, by Deana K. Fleming, for petitioner-appellee Orange County Department of Social Services.

Steven C. Wilson for appellee Guardian ad Litem.

Jeffrey L. Miller for respondent-appellant mother.

Sydney Batch for respondent-appellant father.

HUDSON, Justice.

¶ 1 Respondents appeal from orders terminating their parental rights in their children, K.B. (Kate)[1] and G.B. (Greg) (collectively the children). Respondent-mother challenges the trial court's conclusion that grounds existed to terminate her parental rights in the children pursuant to N.C.G.S. § 7B-1111(a)(1) and (2) (2019). Respondent-father argues the trial court abused its discretion in concluding that it was in the children's best interests that his parental rights be terminated. For the reasons stated herein, we affirm.

I. Background

¶ 2 Respondents are the parents of Kate, born in September 2012, and Greg, born in December 2014. On 22 February 2013, Orange County Department of Social Services (DSS) filed a petition alleging Kate was a neglected and dependent juvenile. The petition alleged that in September 2012, DSS received a report that respondents had a violent argument wherein law enforcement was called, both parents were intoxicated, and Kate was present. As a result of this incident, respondents signed a safety plan in which they agreed to refrain from drinking when caring for Kate and from arguing in Kate's presence. On 1 November 2012, however, law enforcement responded to another domestic violence call. Then, on 25 December 2012, respondent-father reported to law enforcement that respondent-mother was intoxicated and driving with Kate in the back seat of the car. On 14 February 2013, respondent-mother was stopped by the North Carolina Highway Patrol for driving under the influence. A safety agreement was reached where respondent-mother

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

agreed to not drive Kate except to drop her off at daycare in the mornings. The petition further alleged that respondent-father completed a substance abuse assessment and had been cooperative with DSS but continued to abuse alcohol. He acknowledged his addiction and agreed to seek treatment. Respondent-mother was less cooperative with DSS and denied her addiction. DSS alleged that Kate was at high risk of harm due to respondents' substance abuse.

¶ 3 On 5 March 2013, respondents agreed to entry of a consent order that granted temporary custody of Kate to DSS. On 21 March 2013, the trial court entered a temporary custody order continuing Kate's custody with DSS. On 29 May 2013, Kate was adjudicated a neglected and dependent juvenile, and the trial court concluded that it was in her best interests that she remain in the custody of DSS. Respondent-mother was ordered to complete a screening for Family Drug Treatment Court (FDTC) and, if accepted, to comply with treatment recommendations. In the event she was not accepted into FDTC, the court ordered her to engage in intensive outpatient substance abuse services and to follow all recommendations. Respondent-father was ordered to continue to engage in substance abuse treatment and follow all recommendations and to engage in mental health treatment to address anger issues. Respondents were ordered to complete drug and alcohol screens as requested by DSS, to refrain from using drugs or alcohol, and to have supervised visitation with Kate.

¶ 4 On 7 August 2013, the trial court entered an order suspending Kate's visitation with respondent-mother. The trial court entered a permanency planning order on 17 December 2013 reinstating respondent-mother's supervised visitation with Kate and setting the permanent plan for Kate to be reunification with respondent-father with a concurrent plan of reunification with respondent-mother. The trial court entered a permanency planning order on 19 March 2014, setting reunification with respondent-father as the permanent plan for Kate with a concurrent plan of guardianship with the maternal grandmother and authorizing a trial home placement of Kate with respondent-father. On 30 January 2015, the trial court entered a permanency planning and custody order awarding respondent-father custody of Kate and granting supervised visitation to respondent-mother. The order transferred jurisdiction from juvenile to domestic court pursuant to N.C.G.S. § 7B-911.

¶ 5 On 17 December 2015, DSS filed juvenile petitions alleging that Kate and Greg were neglected and dependent juveniles. The petitions alleged that on 11 December 2015, DSS received a report of domestic violence and substance abuse by respondents. Respondent-mother reported that

respondent-father had been "smoking crack" at least five times a week, drinking alcohol, and acting erratically. She also reported that domestic violence occurred between them. Respondent-father was arrested on 9 December 2015 and released the following day. Respondents failed to complete a drug screen as requested. Respondent-father reported taking Percocet, and respondent-mother reported using alcohol and marijuana a month earlier.

¶ 6 On 22 December 2015, respondents agreed to the entry of a consent order that continued non-secure custody and placement authority with DSS. On 29 February 2016, the trial court entered an order adjudicating Kate and Greg to be neglected juveniles and continuing custody with DSS. Respondents were ordered to, among other things, participate in substance abuse services and follow recommendations, submit to random drug screens, participate in individual therapy, and participate in supervised visitation with the children. On 15 June 2016, the trial court entered a custody order that continued custody of Kate and Greg with DSS and set the primary plan as reunification with a parent, with a secondary plan of guardianship/custody with a relative.

¶ 7 On 3 January 2017, the trial court entered a permanency planning order authorizing a trial home placement of Kate and Greg with respondent-father. The trial court entered a permanency planning and custody order on 9 March 2017 awarding custody of Kate and Greg to respondent-father and granting supervised visitation to respondent-mother. The order transferred jurisdiction from juvenile to domestic court pursuant to N.C.G.S. § 7B-911.

¶ 8 On 11 April 2019, DSS obtained non-secure custody of Kate and Greg and placed them in their maternal grandmother's home, where respondent-mother was also living. DSS also filed juvenile petitions alleging them to be neglected juveniles. The petition alleged that on 7 April 2019, there was an argument between respondent-father and his eldest daughter's[2] boyfriend in which respondent-father attempted to strike the boyfriend with a bat and aimed a gun at him. Kate was inside the home during the incident. On 10 April 2019, DSS received a Child Protective Services (CPS) report that respondent-father had physically abused his eldest daughter. His eldest daughter reported that respondent-father was abusing substances, sleeping all day (resulting in her truancy), and staying away from home for extended periods of time without communication. Respondent-mother completed a drug screen on 9 January 2019 which was "positive for extended opiates, oxycodone."

2. Respondent-father's eldest daughter is not a subject of this appeal.

Respondent-mother had not engaged in any substance abuse treatment since respondent-father was awarded custody of Kate and Greg in 2017. The petition further alleged Kate and Greg were at substantial risk of mental, physical, and emotional impairment in the care and custody of respondent-father, and respondent-mother was not appropriate for placement. On 16 April 2019, respondents agreed to a consent order that continued custody of Kate and Greg with DSS, ordered supervised visitation with respondent-father, and ordered respondent-mother to be supervised at all times around the children.

¶ 9 On 13 August 2019, the trial court entered an order adjudicating Kate and Greg to be neglected juveniles. The trial court continued the children's placement with their maternal grandmother and allowed respondent-mother to continue living in the home with the children, as long as her contact with them was supervised by the maternal grandmother or other DSS-approved supervisor. Respondent-father was granted supervised visitation with the children. Respondent-father was ordered to: comply with random drug screens; complete an assessment with Pathways to Change and follow recommendations; complete updated mental health and substance abuse assessments and follow recommendations; and comply with all recommendations of FDTC. Respondent-mother was ordered to comply with random drug screens and complete a substance abuse and mental health assessment and follow all recommendations.

¶ 10 On 6 August 2019, respondent-mother filed a motion for unsupervised visitation with the children. On 29 August 2019, the trial court ordered respondent-mother to comply with random drug screens, to complete A Fresh Start treatment program and follow recommendations, to engage in current substance abuse treatment consistent with her case plan, and to have negative drug screens. The trial court also ordered that respondent-mother's visitation and contacts with the children should remain supervised, but granted DSS and the treatment team discretion to allow unsupervised visitation and contact upon respondent-mother's compliance with the order.

¶ 11 On 22 October 2019, the trial court entered a custody review order finding that respondent-mother tested positive for oxycodone in January 2019, April 2019, and May 2019 and tested positive for amphetamines, heroin, and alcohol on 28 August 2019. Respondent-mother had failed to consistently engage in individual or group therapy, and her current engagement in treatment at A Fresh Start did not meet her current level of need. The trial court found that respondent-father lost his housing in June 2019. He was diagnosed with cocaine, alcohol, cannabis, and

opioid dependence and had not been compliant with requested drug screens. The trial court continued custody of the children with DSS, continued the children's placement with the maternal grandmother, authorized respondent-mother to live in the placement with the children, and continued respondent-father's supervised visitation with the children.

¶ 12 In January 2020, DSS learned that respondent-mother had taken the children, without the maternal grandmother, to Raleigh unsupervised. As a result, on 9 January 2020, Kate and Greg were moved to a foster home.

¶ 13 Following a permanency planning hearing on 16 January 2020, the trial court entered an order on 3 February 2020 finding that respondent-father was currently homeless and had not consistently engaged in treatment or services. Respondent-father had completed detox in May, June, and August of 2019. After his discharge from detox in June, "he went to an Oxford House but was asked to leave in the first week of July," and after his discharge from detox in August, he went to a halfway house but left after approximately two weeks. The trial court further found that respondent-mother had been unable to sustain consistent engagement in services to address her substance abuse and mental health issues until recently. She had tested positive for alcohol, heroin, and opiates in October, November, and December 2019, and positive for alcohol in January 2020. Respondent-mother had not been in contact with DSS since 22 October 2019 and had failed to maintain stable housing and transportation. The primary permanent plan for Kate and Greg was changed to adoption with a secondary plan of reunification.

¶ 14 On 28 April 2020, DSS filed motions to terminate respondents' parental rights in Kate and Greg. DSS alleged that respondents had neglected the children, *see* N.C.G.S. § 7B-1111(a)(1) (2019), and willfully placed them in foster care or placement outside the home for more than twelve months without showing reasonable progress to correct the conditions which led to their removal, *see* N.C.G.S. § 7B-1111(a)(2) (2019).

¶ 15 Following hearings on 20 August 2020 and 8 September 2020, the trial court entered orders on 20 October 2020 concluding that grounds existed to terminate respondents' parental rights in the children pursuant to N.C.G.S. § 7B-1111(a)(1) and (2). The trial court also concluded that it was in the children's best interests that respondents' parental rights be terminated and terminated respondents' parental rights. Respondents appeal.

II. Analysis

A. Respondent-mother's Appeal

¶ 16 **[1]** Respondent-mother challenges some of the trial court's findings of fact as not being supported by the evidence and contends the trial court's findings of fact were insufficient to support its conclusions that grounds existed to terminate her parental rights under N.C.G.S. § 7B-1111(a)(1)–(2). We first address termination under N.C.G.S. § 7B-1111(a)(1).

¶ 17 "Our Juvenile Code provides for a two-step process for termination of parental rights proceedings consisting of an adjudicatory stage and a dispositional stage." *In re Z.A.M.*, 374 N.C. 88, 94 (2020) (citing N.C.G.S. §§ 7B-1109, -1110 (2019)). "At the adjudicatory stage, the petitioner bears the burden of proving by 'clear, cogent, and convincing evidence' the existence of one or more grounds for termination under section 7B-1111(a) of the General Statutes." *In re A.U.D.*, 373 N.C. 3, 5–6 (2019) (quoting N.C.G.S. § 7B-1109(f) (2019)). We review a trial court's adjudication of grounds to terminate parental rights "to determine whether the findings are supported by clear, cogent and convincing evidence and the findings support the conclusions of law." *In re E.H.P.*, 372 N.C. 388, 392 (2019) (quoting *In re Montgomery*, 311 N.C. 101, 111 (1984)). Unchallenged findings are deemed to be supported by the evidence and are binding on appeal. *In re Z.L.W.*, 372 N.C. 432, 437 (2019). "The trial court's conclusions of law are reviewable de novo on appeal." *In re C.B.C.*, 373 N.C. 16, 19 (2019).

¶ 18 Under N.C.G.S. § 7B-1111(a)(1), a trial court may terminate parental rights if it concludes the parent has neglected the juvenile within the meaning of N.C.G.S. § 7B-101. N.C.G.S. § 7B-1111(a)(1) (2019). A neglected juvenile is defined, in pertinent part, as a juvenile "whose parent, guardian, custodian, or caretaker does not provide proper care, supervision, or discipline; or who has been abandoned; . . . or who lives in an environment injurious to the juvenile's welfare[.]" N.C.G.S. § 7B-101(15) (2019). The conditions at issue must result in "some physical, mental, or emotional impairment of the juvenile or a substantial risk of such impairment . . . ." *In re Stumbo*, 357 N.C. 279, 283 (2003) (citation omitted).

> Termination of parental rights based upon this statutory ground requires a showing of neglect at the time of the termination hearing or, if the child has been separated from the parent for a long period of time, there must be a showing of a likelihood of future neglect by the parent. 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 R.L.D., 375 N.C. 838, 841 (2020) (cleaned up). "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 (2020) (quoting *In re M.J.S.M.*, 257 N.C. App. 633, 637 (2018)).

¶ 19 Here, there were no allegations that respondent-mother was currently neglecting Kate and Greg at the time of the termination hearing. Moreover, it is undisputed that the children were out of respondent-mother's custody for an extended period of time and that they were previously adjudicated to be neglected juveniles on 13 August 2019. Accordingly, the issue before this Court is whether the trial court properly determined that there was a likelihood of future neglect if the children were returned to respondent-mother's care.

¶ 20 In its termination orders, the trial court made numerous findings of fact to support its conclusion that grounds existed to terminate respondent-mother's parental rights pursuant to N.C.G.S. § 7B-1111(a)(1), as described in the background section of this opinion. The trial court found that respondent-mother failed to take the juvenile case, CPS involvement, and her substance use disorder seriously, and that respondent-mother's continued drug use, failure to maintain a safe and stable home, and failure to assure the children received necessary care and supervision subjected the children to the risks of physical and emotional harm and created an injurious environment. The trial court found that there was likelihood of a repetition of neglect if the children were returned to respondent-mother's care because she had not appropriately engaged in or completed recommended substance abuse or mental health treatment, and she had continued to deny that her substance use was an issue related to parenting, failed to understand concerns related to her unsupervised contact with and transporting of the children, failed to make any efforts to address her history of domestic violence and its impact on the children, and failed to maintain or establish a safe home for the children.

¶ 21 On appeal, respondent-mother first argues that "[o]ther than her drug screen test results showing substance use and the two incidents of a lack of supervision, and her inconsistent engagement in therapy," there was no evidence presented of any actual impact or impairment suffered by the children. She asserts that the trial court's findings "shed little light" on how her substance use and inconsistent engagement in mental health treatment impacted the children. We disagree.

¶ 22 As noted above, to establish neglect, the conditions at issue must result in "some physical, mental, or emotional impairment of the juvenile or a substantial risk of such impairment . . . ." *In re Stumbo*, 357 N.C. at 283 (citation omitted). Here, the trial court made express findings that Kate and Greg were impaired or at a substantial risk of impairment as a result of respondent mother's neglect. Regarding both children, the trial court found:

> [81. and 82.] Respondent mother failed to take the juvenile case, CPS involvement, and her substance use disorder seriously. She incredulously fails to understand the noted safety concerns of the [children] unsupervised in her care while she continues to use unprescribed and illegal substances.[3]

¶ 23 Regarding Kate, the trial court found:

> 83. [Kate] was impaired and at a substantial risk of impairment as a result of Respondent mother's neglect. Specifically, this court finds [the] following facts:
>
> a. This court references and fully incorporates Findings of Fact numbers 1 through 82 and subparts set forth above as if set forth fully below as findings of fact.
>
> b. Respondent mother's continued drug abuse, her failure to maintain a safe and stable home, and her failure to assure that [Kate] receives necessary care and supervision subjects [Kate] to the risks of physical and emotional harm and creates an environment injurious to her welfare.
>
> c. [Kate] exhibits parentified behaviors in relation to her younger sibling, [Greg], in that she has taken on the roles and responsibility of caretaker in the home due to improper supervision and care.
>
> d. [Kate] is diagnosed with adjustment disorder and she is engaged in recommended weekly therapy.

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3. This finding of fact is labeled as finding of fact number 82 in the order terminating respondent-mother's parental rights in Kate. It is labeled finding of fact 81 in the order terminating respondent-mother's parental rights in Greg.

> e. Respondent mother has not had authorized unsupervised contact with [Kate] since custody was granted to Respondent father and then to [DSS] due to continued safety concerns related to her substance use.
>
> f. While [Kate] was in the placement with [the maternal grandmother], there are noted concerns regarding Respondent mother having unsupervised contact and the extent to which [Kate] was providing care for [Greg] who exhibits significant disruptive behaviors.

¶ 24 Regarding Greg, the trial court found:

> 82. [Greg] was impaired and at a substantial risk of impairment as a result of Respondent mother's neglect. Specifically, this court finds [the] following facts:
>
> a. This court references and fully incorporates Findings of Fact numbers 1 through 81 and subparts set forth above as if set forth fully below as findings of fact.
>
> b. Respondent mother's continued drug abuse, her failure to maintain a safe and stable home, and her failure to assure that [Greg] receives necessary care and supervision subjects [Greg] to the risks of physical and emotional harm and creates an environment injurious to h[is] welfare.
>
> c. [Greg] has exhibited difficulty in regulating his behaviors since [DSS] was awarded custody, including during placement with [the] maternal grandmother . . . , in his current foster home placement as well as daycare and school.
>
> d. [Greg's] behaviors include not listening to directions, temper tantrums, problematic or lack of nighttime routine, sleep disturbance, and hitting.
>
> e. [Greg] is diagnosed with adjustment disorder and he displays PTSD symptom[s]. He is engaged in recommended weekly individual therapy.

> f. [Greg] had a recent psychiatric evaluation which recommended psychotropic medications to assist with his sleep. Lack of sleep has a corresponding negative impact on his behaviors.
>
> g. On July 24, 2020, Respondent mother participated in a virtual meeting with UNC Psychiatry to discuss the recommendation of using psychotropic medication coupled with therapy to assist in managing [Greg's] behaviors and sleep disturbance. Respondent mother withheld consent for medication.

¶ 25 Respondent-mother contends that the foregoing findings of fact constitute "purported and speculated impairments or risks of impairment" to the children which were unsupported by the evidence and insufficient to support neglect. She also challenges the portions of findings regarding the children's difficulty in regulating behavior, the children's diagnoses of adjustment disorder, and Kate's "parentified" behaviors, arguing that the evidence on these issues were presented at the disposition stage, not at the adjudication stage. A review of the record establishes that these arguments are without merit.

¶ 26 During the adjudicatory phase of the termination hearing, a DSS social worker testified that respondent-mother's multiple positive drug screens are what concerned DSS and caused the need for supervised contact with the children and that DSS was greatly concerned when respondent-mother transported the children unsupervised in January 2020. The DSS social worker also testified that during the time the children were placed in the home of their maternal grandmother and respondent-mother, they had "some behavioral needs." Kate exhibited "internalizing behaviors" such as "not wanting to show or to talk about her emotions, not feeling comfortable when she is feeling something, potentially withdrawing." She was diagnosed with adjustment disorder. The DSS social worker testified that Kate took on a parent role towards Greg and that it was concerning "because parentification of children is typically they're trying to fill a role for their parents [that] are not able or not willing to provide for their siblings."

¶ 27 The DSS social worker further testified that Greg had more "external behaviors" by engaging in outbursts, tantrums, failing to listen, and "choosing to do his own task instead of what has been asked." After the children were placed in their foster home, "some of their behaviors became—like come to the forefront again, particularly for [Greg] in terms

of the not listening." His behaviors "escalated" and included difficulty sleeping and hitting classmates or the foster mother. Greg underwent an assessment at UNC Psychiatry and was diagnosed with adjustment disorder and post-traumatic stress disorder. Medication to address Greg's difficulty sleeping was recommended, but respondent-mother did not consent to treatment. Thus, finding of fact 83c, d, and f of the order terminating respondent-mother's parental rights in Kate and finding of fact 82c, d, e, f, and g of the order terminating respondent-mother's parental rights in Greg are supported by clear, cogent, and convincing evidence.

¶ 28 Respondent-mother also argues that there was no evidence she failed to maintain a safe and stable home, and that from April 2019 until the termination hearings in August and September of 2020, there was no evidence she failed to provide necessary care or supervision subjecting either child to the risks of physical or emotional harm or created an environment injurious to their welfare. We disagree. Unchallenged findings of fact establish that while the children were placed in the maternal grandmother's home where respondent-mother also resided, respondent-mother was ordered to only have supervised contact with the children. DSS learned that on 11 July 2019, Greg stayed home with respondent-mother unsupervised, and on 5 January 2020, respondent-mother drove the children unsupervised and without a valid driver's license. Thereafter, on 9 January 2020, the children were placed in a licensed foster home due to continued safety and supervision concerns in the maternal grandmother's home and lack of evidence of respondent-mother's sustained sobriety. Furthermore, respondent-mother moved out of the maternal grandmother's home after the children were placed in foster care and failed to be forthcoming about this residence. The trial court reasonably inferred from these unchallenged findings that the children were subjected to the risks of physical and emotional harm and that respondent-mother's drug use, failure to maintain a safe and stable home, and failure to assure the children received necessary care and supervision created an environment injurious to their welfare. *See In re D.L.W.*, 368 N.C. 385, 843 (2016) (stating that it is the trial judge's duty to consider all the evidence, pass upon the credibility of the witnesses, and determine the reasonable inferences to be drawn therefrom). Moreover, the trial court also made the reasonable inference that respondent-mother failed to understand or take seriously DSS's safety concerns of the children being unsupervised in her care while she continued to abuse illegal substances. *See id.* Accordingly, the trial court's findings of fact 82 and 83b in the order terminating respondent-mother's parental rights in Kate and findings of

fact 81 and 82b in the order terminating respondent-mother's parental rights in Greg are supported by clear, cogent, and convincing evidence.

¶ 29 Next, respondent-mother challenges the trial court's determination that there existed a likelihood of a repetition of neglect if the children were returned to her care. She contends that the trial court failed to consider and address changed circumstances, pointing to the fact that she provided daily care for the children while they were placed in the maternal grandmother's home, there had been no domestic violence incidents involving respondent-mother since 2015, and she consistently visited the children and brought them toys after they were placed in foster care. We are not convinced.

¶ 30 As an initial matter, it is well established that the "trial court need not make a finding as to every fact which arises from the evidence; rather, the court need only find those facts which are material to the resolution of the dispute." *Witherow v. Witherow*, 99 N.C. App. 61, 63 (1990), *aff'd per curiam*, 328 N.C. 324 (1991). As previously stated, respondent-mother's failure to make progress in completing a case plan is indicative of a likelihood of future neglect. *In re M.A.*, 374 N.C. at 870. The trial court's unchallenged findings of fact reflect that respondent-mother had not adequately made progress in completing her case plan at the time of the termination hearing. After DSS obtained custody of the children in April 2019, she agreed to complete an updated mental health and substance abuse assessment and follow all recommendations, to comply with random drug screens including urine, hair and/or nail screens, and to be screened for potential participation in FDTC. However, by the time of the termination hearing, she had not consistently engaged in mental health treatment, was not engaged in substance abuse treatment, continued to deny she had substance abuse issues, failed to follow substance abuse treatment and mental health recommendations, and tested positive or failed to comply with numerous random drug screens. Based on the foregoing, the trial court properly determined that respondent-mother neglected the children, and there was a likelihood of future neglect if Kate and Greg were returned to respondent-mother's care. Because the existence of a single ground for termination suffices to support the termination of a parent's parental rights in a child, *see In re A.R.A.*, 373 N.C. 190, 194 (2019), we need not address whether the trial court erred in terminating respondent's parental rights pursuant to N.C.G.S. § 7B-1111(a)(2).

B. Respondent-father's Appeal

¶ 31 **[2]** Respondent-father's sole argument on appeal is that the trial court abused its discretion in determining that it was in Kate and Greg's best

interests that his parental rights be terminated. Specifically, he contends that he had a strong bond with his children, and Greg's behaviors made adoption unlikely. Based on the reasons stated herein, we conclude the trial court did not abuse its discretion in determining that terminating respondent's parental rights was in the best interests of the children.

¶ 32 "If [the trial court] determines that one or more grounds listed in section 7B-1111 are present, the court proceeds to the dispositional stage, at which the court must consider whether it is in the best interests of the juvenile to terminate parental rights." *In re D.L.W.*, 368 N.C. at 842 (citing *In re Young*, 346 N.C. 244, 247 (1997); N.C.G.S. § 7B-1110). Unchallenged dispositional findings are binding on appeal. *In re Z.L.W.*, 372 N.C. at 437. A trial court's best interests determination "is reviewed solely for abuse of discretion." *In re A.U.D.*, 373 N.C. at 6 (citing *In re D.L.W.*, 368 N.C. at 842).

¶ 33 In determining whether termination of parental rights is in the best interests of a juvenile:

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

N.C.G.S. § 7B-1110(a) (2019).

¶ 34 In the instant case, the trial court made the following findings about Kate concerning the factors set forth in N.C.G.S. § 7B-1110(a):

105. [Kate's] age is seven (7). Her age is not a barrier to adoption.

106. Termination of Respondent father's parental rights is necessary to implement [Kate's] primary permanent plan of adoption. Adoption offers [Kate] the highest level of security and legal permanence.

107. Termination of parental rights [is] the only barrier to the adoption of [Kate] and this barrier be [sic] overcome in a reasonable period of time by entry of this order.

108. The likelihood of adoption is high. [Kate] is placed in a licensed foster home with [Greg]. The foster parents have expressed a willingness to adopt [Kate] while also recognizing the strong bond [Kate] has with [Greg].

109. While [Kate's] behaviors related to adjustment disorder and adjustment disorder can be managed by the foster parents through individual therapy and parenting strategies, [Greg] exhibits behaviors for which medication has been recommended, but not yet started due to lack of consent.

110. The foster parents are interested in adopting [Kate and Greg] as a sibling group; however, they want to ensure that they can manage [Greg's] needs. They are optimistic in following treatment recommendations, including psychotropic medication, for [Greg] to allow for both [children] to be adopted.

111. In the event the current foster parents do not adopt [Kate], her likelihood of adoption is still high due to her age, resilience, engagement in services, and overall positive disposition. Locating another adoptive family is not a barrier to her adoption.

112. [Kate] and Respondent father exhibit a strong parent-child bond at visits. They greet each other with big smiles and hugs. She engages well with him at visits, although at times, Respondent father has struggled to interact during visits. [Kate] is able to end visits without issue.

> 113. [Kate] has a positive, caring relationship with her foster parents who are a proposed adoptive placement. The foster parents have a six-year old son with whom she has a sibling relationship. The foster home is child-friendly and centered, and [Kate] is encouraged to take advantage of being a child by playing outside or in her room instead of feeling responsibility for supervision of the juvenile. She feels safe and secure in this placement.

¶ 35 In a separate order, the trial court made the following findings about Greg concerning the factors set forth in N.C.G.S. § 7B-1110(a):

> 105. [Greg] is age five (5). His age is not a barrier to adoption.
>
> 106. Termination of Respondent father's parental rights is necessary to implement [Greg's] primary permanent plan of adoption. Adoption offers [Greg] the highest level of security and legal permanence.
>
> 107. Termination of parental rights [is] the only barrier to the adoption of [Greg] and this barrier be [sic] overcome in a reasonable period of time by entry of this order.
>
> 108. The likelihood of adoption is significant. [Greg] is placed in a licensed foster home with [Kate]. The foster parents recognize the strong bond [Greg] has with [Kate], and they would like to adopt them as a sibling group.
>
> 109. [Greg] has displayed concerning behaviors in the foster placement related to his diagnosis of adjustment disorder and corresponding display of PTSD symptoms. The foster parents and current proposed adoptive placement have been working with [Greg's] therapist to learn strategies to modify [Greg's] behaviors, including positive reinforcement and a behavior chart.
>
> 110. While these strategies have been helpful, UNC Psychiatry has recommended [Greg] take medications to help with his sleep disturbance which correlates to his negative behaviors. While Respondent father eventually consented to the recommended

regime on August 10, 2020, Respondent mother did not consent to the medication.

111. The foster parents are interested in adopting [Greg and Kate] as a sibling group; however, they want to ensure that they can manage [Greg's] needs. They are optimistic in following treatment recommendations, including the use [of] psychotropic medication in addition to therapy to address [Greg's] behaviors to be stabilized.

112. [Greg] is in need of permanency and this uncertainty has a negative impact on his therapeutic needs. Termination of parental rights would allow for adoption to be pursued to allow for a secure, stable placement.

113. In the event the current foster parents do not adopt [Greg], his likelihood of adoption is still high due to his age, engagement in therapeutic services, and positive improvement based on routine and proper supervision. Locating another adoptive family is not a barrier to his adoption due to his age and positive demeanor of [Kate] with whom he shares a special bond.

114. [Greg] and Respondent father exhibit a strong parent-child bond at visits. They greet each other with big smiles and hugs. [Greg] engages well with him at visits, although at times, Respondent father has struggled to interact during visits. [Greg] had difficulty separating at some of the initial visits, but he is currently able to end visits without issue and he does not ask about him between the visits.

115. [Greg] has a positive, caring relationship with his foster parents who are a proposed adoptive placement. The foster parents have a six-year old son with whom he has a sibling relationship. This relationship has been strained due to [Greg's] behaviors; however, there is encouragement from his providers that medication will assist in addressing these negative behaviors and improve the relationship with all family members. The foster home is child-friendly and centered, and [Greg] is encouraged to take advantage

> of being a child by playing outside or in [h]is room. The foster parents provide [Greg] a safe and secure placement to allow him the time to adjust to the many transitions in his young life.

¶ 36 First, respondent-father argues the trial court erred in finding that termination of his parental rights was the only barrier to adoption. Yet, the record evidence clearly supports this finding. A DSS social worker testified that adoption had been identified as the children's primary permanent plan, and the "only" barriers to achieving that permanent plan were respondents' parental rights. Thus, finding of fact 107 in both orders terminating respondent-father's parental rights in the children is supported by the evidence.

¶ 37 Second, respondent-father contends that Greg's behaviors made the likelihood of adoption unlikely and that the trial court's finding that the likelihood of Greg's adoption is "significant" contradicts its later finding that in the event his current foster parents do not adopt him, his likelihood of adoption "is still high[.]" We do not find the trial court's use of the term "significant" and "high" in reference to the likelihood of Greg's adoption to be contradictory or inconsistent. A DSS social worker testified that Greg's current foster placement was open to adoption, and although Greg's behavioral issues and need for continued treatment constituted barriers, the foster parents were "willing to keep trying to address the behaviors to make sure they can meet [Greg's] needs." The DSS social worker further testified that the foster parents wanted to follow "the recommendations of [Greg's] treating physicians at UNC Psychiatry and the need for medication[.]" A guardian ad litem court report also indicates that "[w]ith the implementation of the therapeutic plan[,] the likelihood of finding an adoptive home [for Greg] is good." Thus, we do not find respondent-father's arguments compelling.

¶ 38 Third, respondent-father asserts that the trial court failed to acknowledge that the likelihood of implementing Kate's permanent plan of adoption was connected to the marked improvement of Greg's mental health and behavioral status. We disagree with this assessment. In finding of fact 110 of the order terminating respondent-father's parental rights in Kate and 111 of the order terminating respondent-father's parental rights in Greg, the trial court found that while the foster parents were interested in adopting the children "as a sibling group," they wanted to "ensure that they can manage [Greg's] needs." The trial court also found that the foster parents were optimistic in following treatment recommendations to stabilize Greg's behaviors. These findings reflect

the trial court's recognition that Kate's adoptability was related to the treatment of Greg's behaviors and the foster parents' ability to manage his needs. Respondent-father further asserts that the trial court erred in finding that it was highly likely that Kate would be adopted, but this finding is supported by the guardian ad litem's court report, which states that "[t]here are no known barriers which would make it difficult [for Kate] to find an adoptive home."

¶ 39 Fourth, respondent-father argues that the children's bond with the foster parents "paled in comparison" to the bond they shared with respondent-father. He directs the Court's attention to the fact that he regularly talked on the phone and saw his children during visitation, the children were excited to see him and show him affection, the children were sad to see him leave, and he brought them food and toys at visits. He asserts that the trial court paid "little attention" to the lack of bond the children had with the foster parents to justify terminating his parental rights. We do not agree with respondent-father's contentions. The trial court's findings of fact 112 and 113 in the order terminating respondent-father's parental rights in Kate and findings of fact 114 and 115 in its order terminating respondent-father's parental rights in Greg reflect the trial court's consideration of the children's "strong parent-child bond" with respondent-father, as well as the children's "positive, caring relationship with their foster parents[.]" The bond between respondent-father and his children is just one of the factors to be considered under N.C.G.S. § 7B-1110(a), and "the trial court is permitted to give greater weight to other factors." *In re Z.L.W.*, 372 N.C. 432, 437 (2019).

¶ 40 The trial court's findings demonstrate that it considered the dispositional factors set forth in N.C.G.S. § 7B-1110(a) and "performed a reasoned analysis weighing those factors." *In re Z.A.M.*, 374 N.C. at 101. "Because the trial court made sufficient dispositional findings and performed the proper analysis of the dispositional factors," *id.*, we conclude that the trial court did not abuse its discretion in concluding that termination of respondent-father's parental rights was in Kate and Greg's best interests. Accordingly, we affirm the trial court's order terminating respondent-father's parental rights in Kate and Greg.

III. Conclusion

¶ 41 The trial court did not err in concluding that grounds existed to terminate respondent-mother's parental rights in Kate and Greg pursuant to N.C.G.S. § 7B-1111(a)(1). The trial court did not abuse its discretion in concluding that it was in Kate and Greg's best interests that

respondent-father's parental rights be terminated. Accordingly, we affirm the trial court's orders terminating respondents' parental rights in Kate and Greg.

AFFIRMED.

IN THE MATTER OF K.J.E.

No. 500A20

Filed 24 September 2021

Termination of Parental Rights—grounds for termination—willful abandonment—determinative six-month period—lack of findings

The trial court's order terminating a father's parental rights to his son was vacated and the matter remanded for further findings where the court's findings did not adequately address the father's actions during the determinative six-month time period (immediately preceding the filing of the termination petition) for purposes of the ground of willful abandonment (N.C.G.S. § 7B-1111(a)(7)). Although the court heard evidence during adjudication from which it could have made relevant findings, and did make findings addressing this issue in the dispositional portion of the termination order, the dispositional findings were subject to a different standard of review and could not be used to support the adjudication.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from an order entered on 25 September 2020 by Judge Frederick B. Wilkins Jr. in District Court, Alamance County. This matter was calendared for argument in the Supreme Court on 19 August 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 for petitioner-appellee.

No brief for appellee Guardian ad Litem.

Sean P. Vitrano for respondent-appellant father.

BERGER, Justice.

IN RE K.J.E.

[378 N.C. 620, 2021-NCSC-109]

¶ 1 Respondent appeals from an order terminating his parental rights in K.J.E. (Keith).[1] We vacate the termination order and remand the matter to the trial court.

I. Background

¶ 2 Keith's mother (petitioner) initiated this action to terminate respondent's parental rights in District Court, Alamance County on March 8, 2019. The petition asserted that grounds existed to terminate respondent's parental rights based on the failure of respondent to provide substantial financial support or consistent care for Keith pursuant to N.C.G.S. § 7B-1111(a)(5) and willful abandonment pursuant to N.C.G.S. § 7B-1111(a)(7). Respondent filed an answer opposing the termination of his parental rights on April 18, 2019.

¶ 3 Evidence presented in the petition tended to show that respondent was under a monthly child support obligation of $475 and was $9,599.88 in arrears at the time the petition was filed. In addition, respondent failed to make any effort to have contact with Keith since Keith's birth. The only contact between respondent and Keith occurred as a result of petitioner's efforts. Respondent's last contact with Keith occurred in June 2017. Petitioner further alleged that respondent never communicated with Keith, nor had respondent acknowledged the child's birthday by calling or sending a card or gift. Further, respondent never sent a gift to Keith or otherwise communicated with the child at Christmas.

¶ 4 A termination hearing was held on September 16, 2020. Prior to the hearing, the trial court granted respondent's motion to dismiss N.C.G.S. § 7B-1111(a)(5) as a ground for termination because respondent submitted to genetic testing which determined that he was Keith's father, and the child's birth certificate had been amended to recognize respondent as the father. The hearing proceeded solely on petitioner's willful abandonment claim. On September 25, 2020, the trial court entered an order terminating respondent's parental rights based on willful abandonment. Respondent appeals.

II. Analysis

¶ 5 "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

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

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 under N.C.G.S. § 7B-1109 to determine whether the findings are supported by clear, cogent and convincing evidence and the findings support the conclusions of law. The trial court's conclusions of law are reviewable de novo on appeal." *In re C.B.C.*, 373 N.C. 16, 19, 832 S.E.2d 692, 695 (2019) (cleaned up).

¶ 6 Here, the trial court concluded that grounds existed to terminate respondent's parental rights for willful abandonment based on the following findings of fact:

> 5. Petitioner and respondent began a relationship sometime in 2015 and resided together at petitioner's residence . . . until sometime in June, 2016 when petitioner was approximately six (6) weeks pregnant and the parties separated.
>
> 6. The petitioner and respondent reconciled and began living together for approximately two (2) months after the birth of the minor child and resided together at petitioner's residence until sometime in May or June, 2016 when the parties separated.
>
> 7. The Court finds that from the separation in May or June, 2016 through November, 2017, that it was the petitioner who was encouraging respondent to develop a relationship with the minor child, despite respondent's testimony to the contrary.
>
> 8. The Court finds that respondent has no bond with the minor child nor has he made significant effort to establish a relationship or bond by his actions including initiating a visitation proceeding.
>
> 9. That respondent has provided some financial support during the relevant six (6) month period through involuntary wage withholding from November 26, 2018 through the filing of the petition. This was not the court-ordered amount of $465.00/month.
>
> 10. The Court finds by clear, cogent and convincing evidence, that grounds exist for termination of

> parental rights pursuant to G.S. 7B-1111(a)(7) in that the Respondent has willfully abandoned the minor child for at least six (6) consecutive months immediately preceding the filing of this Petition.

¶ 7 Respondent argues the trial court's factual findings are insufficient to establish willful abandonment. More specifically, respondent contends the trial court made inadequate findings regarding his conduct during the determinative period under N.C.G.S. § 7B-1111(a)(7).

¶ 8 A trial court may terminate a parent's parental rights when "[t]he parent has willfully abandoned the juvenile for at least six consecutive months immediately preceding the filing of the petition." 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, 485 S.E.2d 612, 617 (1997) (quoting *In re Adoption of Searle*, 82 N.C. App. 273, 275, 346 S.E.2d 511, 514 (1986)). "[I]f a parent withholds his presence, his love, his care, the opportunity to display filial affection, and wil[l]fully neglects to lend support and maintenance, such parent relinquishes all parental claims and abandons the child." *Pratt v. Bishop*, 257 N.C. 486, 501, 126 S.E.2d 597, 608 (1962). "Whether a biological parent has a willful intent to abandon his child is a question of fact to be determined from the evidence." *In re B.C.B.*, 374 N.C. 32, 35, 839 S.E.2d 748, 752 (2020) (quoting *In re Adoption of Searle*, 82 N.C. App. at 276, 346 S.E.2d at 514). "[A]lthough the trial court may consider a parent's conduct outside the six-month window in evaluating a parent's credibility and intentions, the 'determinative' period for adjudicating willful abandonment is the six consecutive months preceding the filing of the petition." *In re N.D.A.*, 373 N.C. 71, 77, 833 S.E.2d 768, 773 (2019) (quoting *In re D.E.M.*, 257 N.C. App. 618, 619, 810 S.E.2d 375, 378 (2018)). Here, the determinative six-month period was from September 8, 2018 to March 8, 2019.

¶ 9 Upon review, the trial court's sparse findings in the adjudicatory stage are insufficient as they do not address respondent's behavior within the relevant six-month period. Apart from the trial court's ultimate determination in finding of fact ten that "the Respondent has willfully abandoned the minor child for at least six (6) consecutive months immediately preceding the filing of this Petition[,]" only finding of fact nine references the relevant period. Finding of fact nine notes that respondent provided financial support solely through involuntary wage withholding during the "relevant six (6) month period"

but nevertheless fails to address the amount withheld or any other attendant circumstances.

¶ 10 Although the trial court's generalized finding of fact eight arguably addresses the relevant period, the finding does not address any specific conduct by respondent during the relevant period. Instead, the trial court generally states respondent has not "made significant effort to establish a relationship or bond" with Keith. The trial court's order fails to provide sufficient evidentiary findings concerning respondent's acts or omissions for the six months immediately preceding the filing of the petition for this Court to conclude that grounds existed to terminate respondent's parental rights due to willful abandonment. *In re K.C.T.*, 375 N.C. 592, 601, 850 S.E.2d 330, 337 (2020) ("[T]he trial court must make adequate evidentiary findings to support its ultimate finding as to whether willful intent exists.").

¶ 11 We note that evidence was presented during the adjudicatory stage of the termination hearing from which the trial court could have made additional findings of fact that might support a conclusion that grounds existed to terminate respondent's parental rights based on willful abandonment. However, the trial court distinguished its findings of fact in the adjudicatory portion of its order from its findings of fact in the dispositional portion. Indeed, the trial court made such additional findings in the dispositional portion of the termination order. Because the trial court only moves to the dispositional stage if it adjudicates one or more grounds for termination during the adjudicatory stage, *see In re Z.A.M.*, 374 N.C. at 94, 839 S.E.2d at 797, and because there are different evidentiary standards and burdens in the two stages, *see* N.C.G.S. §§ 7B-1109(f), -1110(a), we do not consider the trial court's findings of fact that are clearly labeled as dispositional findings to support the adjudication of grounds to terminate respondent's parental rights.

¶ 12 Thus, because the trial court failed to make proper findings on adjudication, we vacate the trial court's order terminating respondent's parental rights based on willful abandonment under N.C.G.S. § 7B-1111(a)(7) and remand the matter for further factual findings on this ground. *See In re K.N.*, 373 N.C. 274, 284, 837 S.E.2d 861, 869 (2020) (finding that although the record contained additional evidence to support termination, the trial court's adjudicatory findings were insufficient, and remand was necessary).

VACATED AND REMANDED.

IN RE L.H.

[378 N.C. 625, 2021-NCSC-110]

IN THE MATTER OF L.H., I.H.

No. 501A20

Filed 24 September 2021

Termination of Parental Rights—grounds for termination—neglect—likelihood of future neglect—pattern of exposure to child sex abusers

An order terminating a mother's parental rights to her two daughters was affirmed where the trial court's findings—all of which, with one exception, were supported by clear, cogent, and convincing evidence—showed a high likelihood of repeated neglect if the children returned home. Specifically, the court found a pattern in which the mother exposed her daughters to men with histories of child sexual abuse, those men sexually abused the daughters, the daughters were adjudicated neglected and removed from the home, the mother cooperated with social services such that the children were returned to her care, and then the cycle would recommence. Moreover, evidence showed that the mother's cognitive limitations, dependent personality, and tendency to disbelieve her children's abuse allegations rendered her incapable of protecting the children from future abuse.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from an order entered on 26 August 2020 by Judge Burford A. Cherry in District Court, Catawba County. This matter was calendared for argument in the Supreme Court on 19 August 2021 but determined on the record and briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

Marcus P. Almond for petitioner-appellee Catawba County Department of Social Services.

Michelle FormyDuval Lynch for appellee Guardian ad Litem.

Jeffrey William Gillette for respondent-appellant mother.

EARLS, Justice.

¶ 1 Respondent-mother appeals from the trial court's order terminating her parental rights to her minor daughters, L.H. (Lucy) and I.H. (Ingrid).[1] We affirm.

I. Background

¶ 2 The record shows that Catawba County Department of Social Services (DSS) has a long history of involvement with respondent and her children. DSS filed a juvenile petition regarding one-month-old Lucy and three of her older siblings in December 2005 and then filed a second petition and obtained nonsecure custody of the children in January 2006.[2] Following a hearing on the petitions conducted over the course of February, March, and April 2006, the trial court entered an order on 7 June 2006 that adjudicated Lucy and her siblings neglected juveniles and granted DSS custody of the juveniles. The adjudication was based on findings that the children's biological father, from whom respondent was divorced, had twice been convicted of indecent liberties, once for conduct involving two of his sisters and once for conduct involving another juvenile family member; had engaged in inappropriate sexual contact with his oldest daughter; and posed a significant risk of further sexual abuse. The court further found that respondent was aware of the father's convictions but did little to protect the children, did not believe the children were at risk, and refused to agree to prevent the father from further contact with Lucy. Respondent allowed the children to visit the paternal grandmother's home despite a history of inappropriate sexual conduct in the family, left the children in the supervision of an individual who was involved in an active Child Protective Services (CPS) investigation, and lived with the children in an unsafe environment. With the father in prison, respondent made significant progress on her case plan by the time the matter came on for a review hearing on 27 June 2006, and the children had been returned to her care. In the order entered after the review hearing, the trial court returned custody of the children to respondent.

¶ 3 Nine years later, on 3 November 2015, DSS filed a juvenile petition alleging that nine-year-old Lucy, seven-year-old Ingrid, and their fifteen-year-old sister Sarah were neglected juveniles and obtained nonsecure custody of the children. Following a hearing in February 2016, the trial court entered an order on 1 March 2016 that adjudicated the

1. Pseudonyms are used to protect the identity of the juveniles, as well as their minor sibling mentioned in this opinion, and for ease of reading.

2. Lucy was born in November 2005. Ingrid was born in December 2007.

children neglected juveniles based on the following findings: that respondent and the children were residing with an individual, Charles Fleming, who had previously been charged with felony indecent liberties with a child and convicted of assault on a child and had been separately convicted of misdemeanor contributing to the delinquency of a juvenile; that respondent refused to sign an agreement specifying there would be no unsupervised contact between Mr. Fleming and the children and continued to live with Mr. Fleming and leave the children in his care unsupervised; that respondent admitted to a social worker that Sarah had been sleeping in the same bed with Mr. Fleming; and that, despite the parties' denials, evidence indicated a sexual relationship existed between Sarah and Mr. Fleming. The trial court granted custody of the children to DSS. Respondent cooperated with services offered by DSS, and the matter came on for regular review and permanency-planning hearings until the trial court returned Lucy and Ingrid to respondent's custody by order entered 22 May 2018.

¶ 4 On 18 March 2019, DSS filed the most recent juvenile petition alleging thirteen-year-old Lucy and eleven-year-old Ingrid were abused and neglected juveniles and obtained nonsecure custody of the children. The petition alleged that respondent's boyfriend, Johnny Gortney, who was also a caretaker for the children, had inappropriately touched Ingrid "both over and under her clothes on her 'boobs' and genital area, using his hands and fingers[,]" on more than one occasion between August and December 2018; and he had inappropriately touched Lucy "over her clothes on her 'boobs' with his hand" on more than one occasion in November 2018. Following a hearing on 22 April 2019, the trial court entered an order on 23 May 2019 that adjudicated Lucy and Ingrid abused and neglected juveniles based on findings that were consistent with the allegations in the petition. The trial court ordered that DSS retain custody of the children and that respondent comply with a case plan with requirements to complete an updated psychological evaluation, a parenting assessment, a non-offending parenting program, individual counseling, and therapy with the children. The court allowed respondent weekly supervised visitation with the children but ordered Mr. Gortney not to have contact with the children.

¶ 5 In an order entered on 29 August 2019 following a 29 July 2019 permanency-planning hearing, the trial court set the primary permanent plan for the children as reunification and the secondary plan as adoption. The court's findings indicated respondent was availing herself of services, but the court expressed concern that respondent had not proven capable of protecting the children from sexual abuse by members of

their household despite CPS's long history of involvement with the family and the extensive services provided. The court specifically identified respondent's failure to demonstrate that she could keep her children safe from risk as a barrier to reunification.

¶ 6 Following the next permanency-planning hearing on 21 October 2019, the trial court entered an order on 22 November 2019 that changed the primary permanent plan for the children to adoption with a concurrent secondary plan of reunification and guardianship. The change in the permanent plan was based, in part, on the results of respondent's psychological evaluation reassessment, which indicated "the combination of [respondent's] mental health and cognitive limitations result[ed] in her inability to effectively and safely parent and protect her children" and that "it [was] not likely that any service provided to [respondent] could significantly alter her inability to parent and protect her children." The court further found the results were validated by its own history with and observation of respondent. Specifically, the court found a clear pattern had emerged, whereby the children were exposed to men with histories of committing sexual offenses and were sexually abused; then the children were removed from the home, respondent participated in services and demonstrated some improvement, and the children were returned to respondent's care for the cycle of abuse to be repeated. The court also found that respondent disbelieved the sexual abuse even occurred and believed the abusers over her children.

¶ 7 On 27 November 2019, DSS filed a motion in the cause to terminate respondent's parental rights in Lucy and Ingrid on the grounds of neglect, willfully leaving the children in a placement outside the home for more than twelve months without a showing of reasonable progress, and dependency. *See* N.C.G.S. § 7B-1111(a)(1)–(2), (6) (2019). Respondent filed a reply denying that grounds existed to terminate her parental rights. A termination hearing began on 2 June 2020 and continued on 1, 14, and 15 July 2020.[3] The trial court entered an order on 26 August 2020 that adjudicated the existence of all three grounds for termination alleged in the motion, concluded termination of respondent's parental rights was in Lucy's and Ingrid's best interests, and terminated respondent's parental rights in both children. Respondent appeals.

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3. The matter was also before the trial court on 9 July 2020 for a hearing on a motion to quash a subpoena requiring the children to testify during the dispositional stage of the termination hearing. Only the motion was considered on 9 July 2020.

II. Analysis

¶ 8 Respondent challenges the trial court's adjudication of the existence of grounds to terminate her parental rights pursuant to N.C.G.S. § 7B-1111(a)(1), (2), and (6).

¶ 9 "Our Juvenile Code provides for a two-step process for termination of parental rights proceedings consisting of an adjudicatory stage and a dispositional stage." *In re Z.A.M.*, 374 N.C. 88, 94 (2020) (citing N.C.G.S. §§ 7B-1109, -1110 (2019)). "At the adjudicatory stage, the petitioner bears the burden of proving by 'clear, cogent, and convincing evidence' the existence of one or more grounds for termination under section 7B-1111(a) of the General Statutes." *In re A.U.D.*, 373 N.C. 3, 5–6 (2019) (quoting N.C.G.S. § 7B-1109(f) (2017)). This Court reviews a trial court's adjudication of grounds for termination "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)). "A trial court's finding of fact that is supported by clear, cogent, and convincing evidence is deemed conclusive even if the record contains evidence that would support a contrary finding." *In re B.O.A.*, 372 N.C. 372, 379 (2019). "Findings of fact not challenged by respondent are deemed supported by competent evidence and are binding on appeal." *In re T.N.H.*, 372 N.C. 403, 407 (2019) (citing *Koufman v. Koufman*, 330 N.C. 93, 97 (1991)). "Moreover, we review only those findings necessary to support the trial court's determination that grounds existed to terminate respondent's parental rights." *Id.* "The trial court's conclusions of law are reviewed de novo." *In re M.C.*, 374 N.C. 882, 886 (2020).

¶ 10 A trial court may terminate parental rights if it concludes the parent has neglected the juvenile within the meaning of N.C.G.S. § 7B-101. N.C.G.S. § 7B-1111(a)(1). A neglected juvenile is statutorily defined, in pertinent part, as one "whose parent, guardian, custodian, or caretaker does not provide proper care, supervision, or discipline; . . . or who lives in an environment injurious to the juvenile's welfare." N.C.G.S. § 7B-101(15) (2019). As we have recently explained:

> Termination of parental rights based upon this statutory ground requires a showing of neglect at the time of the termination hearing or, if the child has been separated from the parent for a long period of time, there must be a showing of a likelihood of future neglect by the parent. 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 R.L.D., 375 N.C. 838, 841 (2020) (cleaned up).

¶ 11 In the instant case, the trial court issued findings detailing DSS's long history of involvement with the family and Lucy's and Ingrid's prior adjudications as neglected juveniles. The court also issued findings regarding the services offered to respondent throughout DSS's involvement and respondent's cooperation with those services. The court ultimately determined there was a substantial likelihood that the children would again be neglected if returned to respondent's care based on findings that, despite her cooperation with services, respondent failed to take any responsibility for her role in the abuse and neglect of the children, continued to disbelieve the children were abused and neglected, and failed to demonstrate the ability to protect her children.

¶ 12 Respondent does not contest that Lucy and Ingrid were previously adjudicated neglected juveniles. Instead, while acknowledging that "the [trial] court made many findings of fact that could, conceivably, bear on the likelihood of future neglect," she nevertheless contends the trial court's findings failed to establish there was current neglect or a likelihood of future neglect.

¶ 13 To understand the robust factual basis for the trial court's ruling on this ground, it is useful to review the findings relevant to its adjudication of neglect, which are as follows:

> 5. On or about April 17, 2006, the minor child [Lucy] and her three older siblings were adjudicated neglected, based in part on the refusal of [respondent] to protect the children from contact with their biological father who was convicted in 1986 for taking indecent liberties with two of his sisters, was convicted in 2006 of taking indecent liberties with his sixteen-year-old female relative and who had also engaged in inappropriate sexual contact with the couple's oldest daughter. . . .
>
> 6. On February 1, 2016, the minor children [Lucy] and [Ingrid], as well as their older sister [Sarah] were adjudicated neglected. This time the adjudication was based in part on [respondent] leaving her children in the care of Charles Fleming and allowing her then

sixteen-year-old daughter [Sarah] to sleep in the same bed with Mr. Fleming, who was an adult. After [DSS] warned [respondent] of their concerns related to Mr. Fleming's prior charge [of] Indecent Liberties with a Minor which resulted in a conviction of Assault on a Child under 12, [respondent] refused to sign a safety plan prohibiting Mr. Fleming's unsupervised contact with her children, and she continued to leave the children in his care.

7. On April 22, 2019, [Lucy] and [Ingrid] were adjudicated abused and neglected and once again placed in the custody of [DSS], after their mother's boyfriend Johnny Gortney touched [Ingrid] on more than one occasion on her "boobs" and genital area and touched [Lucy] on her "boobs." . . .

. . . .

9. Over the course of the family's involvement with [DSS], [respondent] has been offered a variety of services to improve her parenting skills and assist her in developing an ability to protect her children from abuse and neglect. While the children were in foster care during 2006, these services included but were not limited to completion of the Nonoffending Parents' Group (education and therapy group for parents of children who have been abused), individual therapy, and GED classes. After the children were removed in 2015, these services included psychological evaluation, Darkness to Light (education program related to the prevention of child sexual abuse), individual therapy, one-on-one parenting instruction, and in-home family therapy. Since the children's most recent removal, these services have included but are not limited to updated psychological evaluation, individual therapy, one-on-one review of Nonoffending Parents Group materials.

10. Each time that the children have been in foster care, [respondent] has been cooperative with services offered by [DSS].

11. Dr. Jennifer Cappelletty, clinical psychologist, has evaluated [respondent] on three occasions, May 16, 2016, November 10, 2017 and September 29, 2019.

12. During the first evaluation on May 16, 2016, [respondent] reported to the psychologist that she did not believe that her late husband had committed the sexual offenses that resulted in his felony convictions and incarceration, reporting that he only confessed so that she wouldn't lose all of her children. When questioned about whether she believed that her husband had abused her daughter, as adjudicated by the [c]ourt, she stated she did not know because she did not see it. Such statements are consistent with [respondent's] statements during her testimony during these proceedings.

13. [Respondent] has a full[-]scale IQ of approximately 63, placing her in the extremely low range for intellectual abilities. As a result, [respondent] has an extremely limited general fund of knowledge, poor abstract reasoning skills, and an elementary vocabulary. She tends to think in very concrete terms, such that once she is taught something, she may be able to repeat the skill or phrases[ ] but has difficulty . . . apply[ing] her learning to new circumstances and decisions. She has been diagnosed with Intellectual Disability, Mild.

14. Psychological testing with [respondent] was limited by her cognitive difficulties; however, Dr. Cappelletty noted dependent personality characteristics, such that [respondent] has a pervasive need to be taken care of, she is dependent on others when making decisions, and she tends to go from one relationship to another. Dr. Cappelletty testified and the [c]ourt finds that [respondent's] cognitive limitations coupled with her dependent personality tends to hinder her judgment when making decisions about her relationships and how those relationships may impact her children.

15. When [respondent] is confronted with facts that contradict her beliefs, such as her beliefs about her

husband's, Mr. Fleming's or Mr. Gortney's threat to her children, she tends to become defensive and to reject evidence of such a threat. Her typical stance on any of these issues tends to be that she does not believe any abuse occurred (or she doesn't know) because she did not see it. She accepts only minimal responsibility for the repeated removals of her children from her care. Such reactions, observed by Dr. Cappelletty during all three of her evaluations, are consistent with the behaviors and statements observed by this [c]ourt during these proceedings.

16. Intellectual limitation, such as that exhibited by [respondent] is highly unlikely to change, and this limitation is further complicated by [respondent's] dependent personality structure, which is also unlikely to change without long-term treatment. [Respondent] would have difficulty benefitting from such treatment due to her cognitive limitations.

17. Over the course of the [c]ourt's involvement with the family, [respondent] has learned to articulate some basic concrete tasks of parenting, such as the need to provide increased supervision for her children, the need to supervise their access to phones and social media, and the need to behave as a parent rather than a friend to her children. However, based on her intellectual limitations, [respondent] remains unable to apply those concepts to new scenarios that might arise during parenting. [Respondent] lacks the ability to extrapolate things she may have learned to situations that had not yet presented themselves in caring for her children. In short, while [respondent] had gained some new concepts, her ability to exercise judgment had not improved.

18. During her third evaluation by Dr. Cappelletty in September 2019, and during her testimony in this [c]ourt, [respondent] was reluctant to acknowledge that her children were abused by Mr. Gortney. She repeatedly stated that she simply did not know what happened because she had not seen it. She was unwilling to believe what her children stated about

the abuse and she did not demonstrate a desire to understand what her children had gone through.

19. During her evaluations and during these proceedings, [respondent] has not acknowledged any personal responsibility for her children's placement in foster care. She continues to blame her family for calling in CPS reports, to blame [DSS] for Mr. Gortney being in her home, and even to blame her own children.

20. Upon learning of [Lucy's] and [Ingrid's] statements that Mr. Gortney had acted in sexually inappropriate ways toward them, [respondent] did contact [DSS]. After the children's most recent removal, [respondent] did report when one of the children had an unauthorized phone. Thus, [respondent] has perhaps learned how to react to the sexual abuse of her children; however, there is no evidence that she has learned sufficient skills to proactively protect her children from harm.

21. [Respondent] has demonstrated a long-term pattern of difficulty believing that her children have been abused. She has expressed disbelief that her oldest daughter was abused by her father. She has repeatedly stated her disbelief that her now deceased husband abused anyone, despite his own admission of guilt and his convictions for abusing multiple individuals. When [Lucy] and [Ingrid] were interviewed following the abuse by Mr. Gortney, [respondent] refused to hear the results of those interviews. She has demonstrated a long-term pattern of denial and of failure to believe her own children over the men that abuse them.

22. Given their history of abuse, [Lucy] and [Ingrid] are likely to display sexualized behaviors and to require an even greater level of parental competence, vigilance, and skill. [Respondent] is likely unable to provide the level of care and supervision her children need.

23. . . . During the time that [Lucy] and [Ingrid] resided with [respondent] and [Mr.] Gortney, [their older

> sister Sarah] visited the home. [Sarah] had concerns about Mr. Gortney because he smacked her on the butt and because [Lucy] and [Ingrid] told her that he had touched them. [Sarah] reported her concerns to [respondent] who told her that she didn't believe her.
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> 24. In or about March 2020, [Sarah] met [respondent] for dinner at Denny's in Lincolnton, and [Mr.] Gortney was present with [respondent]. [Respondent's] continued association with Mr. Gortney, including having him at a dinner where her daughter [Sarah], who has previously expressed concerns about him, is indicative of her failure to place the needs of her children above her own or to demonstrate an ability and willingness to protect [t]he children.
>
> 25. Despite her cooperation with services over a period of years, [respondent] has failed to take responsibility for her role in the abuse and neglect of her children. She has failed to demonstrate the ability to believe her children and to protect them from maltreatment.
>
> . . . .
>
> 27. There is a significant likelihood that the minor children would again be abused or neglected if returned to the care of their mother.

¶ 14 The only finding respondent specifically challenges as not supported by any evidence is finding of fact seventeen. Respondent contends the portions of finding of fact seventeen providing that she lacks the ability to extrapolate and apply recently acquired skills to circumstances that arise in parenting the children is not supported by the evidence and is contradicted by finding of fact twenty. We agree. The trial court found in finding of fact twenty that "[u]pon learning of [Lucy's] and [Ingrid's] statements that Mr. Gortney had acted in sexually inappropriate ways toward them, [respondent] did contact [DSS,]" and "[a]fter the children's most recent removal, [respondent] did report when one of the children had an unauthorized phone." Thus, finding of fact twenty showed that respondent applied learned parenting concepts on at least two occasions. Accordingly, we disregard the challenged portions of finding of fact seventeen to the extent the finding implies respondent was unable to apply anything she learned through her participation in services.

See In re J.M., 373 N.C. 352, 358 (2020) (disregarding factual findings not supported by the record).

¶ 15 Although respondent does not otherwise challenge the trial court's findings as unsupported by evidence, respondent does argue the trial court's findings concerning the impact of her cognitive limitations and dependent personality on her understanding of the causes and prevention of sexual abuse and her ability to keep Lucy and Ingrid safe are based on speculation and run counter to other evidence of her positive changes adduced at the termination hearing. She specifically identifies findings of fact fourteen, sixteen, seventeen, twenty, and twenty-two as speculative and counter to other evidence. Respondent's argument essentially asks this Court to reweigh the evidence and place greater weight on her own testimony and the testimony of her therapist regarding her progress in addressing her parenting issues.

¶ 16 It is the trial court's duty, however, to consider the evidence and pass upon the credibility of the witnesses, *see In re T.N.H.*, 372 N.C. at 411 (citing *In re D.L.W.*, 368 N.C. 835, 843 (2016)), and this Court will not reweigh the evidence. Here, the trial court's findings concerning the impediment that respondent's cognitive limitations and dependent personality posed to her in making significant parenting changes in order to protect Lucy and Ingrid from further harm are supported by the testimony of Dr. Cappelletty, who evaluated respondent three times between 2016 and 2019 with the specific purpose of assessing her capacity to parent and protect her children. Dr. Cappelletty testified as an expert in clinical psychology about her conclusions from each assessment, including the impact of respondent's cognitive limitations and dependent personality, and the combination of the two, on her ability to learn and implement positive parenting behaviors. Dr. Cappelletty continued to express concern about respondent's ability to protect the children as of the termination hearing, testifying that while she believed respondent was better equipped to respond to abuse of the children after the fact, there was no indication that respondent was prepared to proactively prevent the children from being abused in the first place. She concluded there had been no significant change since she became involved in respondent's case, and the pattern of neglect was likely to continue. The challenged findings reflect Dr. Cappelletty's testimony; are supported by clear, cogent, and convincing evidence; and are binding on appeal. *See In re B.O.A.*, 372 N.C. at 379.

¶ 17 Additionally, we note that while any determination of a likelihood of future neglect is inevitably predictive in nature, the trial court's findings were not based on pure speculation. Not only are the findings supported

by Dr. Cappelletty's testimony, but the findings were also validated by the pattern of past neglect of the children due, in part, to respondent's repeated failure to comprehend and protect the children from the risks of harm to which she exposed them, despite her cooperation with services intended to address her parenting deficiencies.

¶ 18 Respondent also asserts challenges to the trial court's findings concerning her doubts or disbelief that her children have been abused in findings of fact twelve, fifteen, eighteen, twenty-one, and twenty-three; her continued association with Mr. Gortney as recent as March 2020, which the court found "indicative of her failure to place the needs of her children above her own or to demonstrate an ability and willingness to protect [t]he children" in finding of fact twenty-four; and her refusal to acknowledge her role in and accept responsibility for the adjudications of neglect in findings of fact nineteen and twenty-five. Again, respondent does not argue the findings are not supported by evidence. She instead attempts to rationalize her beliefs and behaviors. She asserts that she had reasons to doubt the allegations of sexual abuse; that she disputed the portion of Sarah's testimony from the termination hearing that respondent brought Mr. Gortney to dinner in early 2020 and denied that it ever happened, yet respondent claimed even if she did have dinner with Mr. Gortney that it did not violate the court order that he not have contact with Lucy or Ingrid; that DSS and the court were to blame for her relationship with Mr. Gortney and the most recent adjudication of neglect; and that her denial of responsibility was fair and reasonable because the questions presented to her at the termination hearing were confusing, and the record does not indicate the sexual abuse of her children was the result of anything she did or did not do.

¶ 19 Respondent's assertions here tend to confirm the trial court's findings that she continues to doubt that Lucy and Ingrid were abused and fails to accept any responsibility. However, for purposes of our review of the challenged findings, it is sufficient that the findings are supported by Dr. Cappelletty's testimony, Sarah's testimony, and respondent's own testimony at the termination hearing, as well as the record evidence. The findings are therefore binding on appeal. *See In re B.O.A.*, 372 N.C. at 379.

¶ 20 Upon review of the relevant findings, we believe the findings show a pattern of neglect that is likely to be repeated if Lucy and Ingrid are returned to respondent's care. Specifically, the undisputed findings detail three prior adjudications of neglect that resulted from respondent's exposure of the children to men with histories of child sexual abuse and her failure to protect the children in their own home, with the second and third adjudications occurring after respondent began cooperating

with services to address parenting concerns. The findings and evidence also show that respondent's cognitive limitations and dependent personality continue to be a concern related to her ability to appropriately supervise the children and protect them from future abuse. Furthermore, respondent continues to express doubt that the children were abused and fails to acknowledge her own role in their neglect. The combination of these findings supports the trial court's determination that there is a substantial likelihood of future neglect if Lucy and Ingrid are returned to respondent's care. In turn, the past adjudications of neglect coupled with the determination that there was a likelihood of future neglect support the trial court's adjudication of the existence of grounds for termination pursuant to N.C.G.S. § 7B-1111(a)(1).

¶ 21 Because "an adjudication of any single ground in N.C.G.S. § 7B-1111(a) is sufficient to support a termination of parental rights[,]" *In re E.H.P.*, 372 N.C. 388, 395 (2019), we need not address respondent's arguments as to grounds for termination pursuant to N.C.G.S. § 7B-1111(a)(2) and (6). Furthermore, because respondent has not challenged the trial court's determination that termination of her parental rights was in Lucy's and Ingrid's best interests, we affirm the termination order.

AFFIRMED.

IN THE MATTER OF M.R.F.

No. 83A21

Filed 24 September 2021

Termination of Parental Rights—standard of proof—clear, cogent, and convincing evidence—not stated in open court or in written findings—insufficient evidence to support grounds

The order terminating a father's parental rights to his child was reversed where the trial court did not state the standard of proof (clear, cogent, and convincing) either in open court or in its written findings, as required by N.C.G.S. § 7B-1109, and where insufficient evidence was presented to support the alleged grounds of failure to make reasonable progress (there was no evidence that the child had been in a court-ordered placement for at least twelve months prior to the termination petition being filed), failure to pay support (there was no evidence that the child's mother had been awarded custody

or that the father was required by decree or custody agreement to pay support), or failure to legitimate (there was no evidence that the child was born out of wedlock). Where petitioner (the child's maternal grandmother) did not allege neglect or abandonment or seek a ruling on those grounds, her arguments pertaining to them were not properly considered on appeal.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from an order entered on 3 November 2020 by Judge Mack Brittain in District Court, Transylvania County. This matter was calendared for argument in the Supreme Court on 19 August 2021 but determined on the record and briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

Donald H. Barton for petitioner-appellee.

No brief for appellee Guardian ad Litem.

Anné C. Wright for respondent-appellant father.

MORGAN, Justice.

¶ 1 Respondent-father appeals from the trial court's order terminating his parental rights to "Margot,"[1] a minor child born in May 2014. The order also terminated the parental rights of Margot's mother, but she is not a party to this appeal. We reverse the trial court's order as to respondent-father.

I. Factual and Procedural Background

¶ 2 Petitioner is Margot's maternal grandmother. On 30 October 2019, petitioner filed a petition to terminate the parental rights of both of Margot's parents. As the statutory grounds for termination, petitioner alleged the following: respondents willfully left Margot in a placement outside the home for more than twelve months without making reasonable progress to correct the conditions leading to Margot's removal, *see* N.C.G.S. § 7B-1111(a)(2) (2019); respondents "willfully failed without justification to pay for the care, support and education of the minor child in violation of N.C.G.S. [§] 7B-1111(a)(4)"; and respondent-father "has not undertaken any of those actions required of him" to legitimate the child under N.C.G.S. § 7B-1111(a)(5). Respondent-father was served

1. We use a pseudonym to protect the juvenile's identity and for ease of reading.

with the petition and with an alias and pluries summons on 31 January 2020. On 19 February 2020, respondent-father filed a verified answer denying many of the allegations in the petition.

¶ 3 The trial court held a hearing on the petition on 14 October 2020. Petitioner testified and introduced a copy of Margot's birth certificate. Respondent-father did not call any witnesses at the hearing but presented federal court records reflecting his incarceration in federal prison.

¶ 4 In its "Order Terminating Parental Rights" entered on 3 November 2020, the trial court concluded that grounds existed to terminate respondent-father's parental rights pursuant to N.C.G.S. § 7B-1111(a)(2), (4), and (5).[2] The trial court further concluded that it was in Margot's best interests that respondent-father's parental rights be terminated. *See* N.C.G.S. § 7B-1110(a) (2019). Respondent-father filed timely notice of appeal from the termination of parental rights order.

II. Arguments on Appeal

¶ 5 On appeal, respondent-father contends that the trial court erred by failing to state the standard of proof that it applied in finding the facts to support the trial court's adjudication of grounds for terminating respondent-father's parental rights under N.C.G.S. § 7B-1111(a)(2), (4)–(5). *See* N.C.G.S. § 7B-1109(f) (2019) ("[A]ll findings of fact shall be based on clear, cogent, and convincing evidence."). He further claims that petitioner's evidence and the trial court's findings of fact are insufficient to establish any of the three adjudicated grounds for termination. We agree with respondent-father's assertions on all points and reverse the termination of parental rights order.

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2. The trial court announced at the hearing that it was "not going to find the third ground as to [respondent-father] regarding legitimization, since [respondent-father] is listed on the birth certificate." In its order, however, the trial court concluded that grounds existed to terminate the parental rights of respondent-father pursuant to N.C.G.S. § 7B-1111(a)(5). Generally, where a trial court's ruling rendered in open court is inconsistent with its written order, the written order controls. *See generally In re A.U.D.*, 373 N.C. 3, 9–10 (2019) ("[A] trial court's oral findings are subject to change before the final written order is entered.").

In their briefs, the parties agree that the trial court found that petitioner had failed to prove grounds for terminating respondent-father's parental rights under N.C.G.S. § 7B-1111(a)(5). However, respondent-father also challenges the adjudication under N.C.G.S. § 7B-1111(a)(5) included in the written order as unsupported by the trial court's findings of fact or petitioner's evidence. In viewing the written order as controlling, we review respondent-father's argument contesting the trial court's adjudication under N.C.G.S. § 7B-1111(a)(5).

¶ 6 A proceeding for the termination of parental rights consists of

> two stages, beginning with an adjudicatory determination. 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. If a trial court finds one or more grounds to terminate parental rights under N.C.G.S. § 7B-1111(a), it then proceeds to the dispositional stage at which it determines whether terminating the parent's rights is in the juvenile's best interest.

In re K.C.T., 375 N.C. 592, 595 (2020) (extraneity omitted).

¶ 7 Respondent-father confines his appeal to the trial court's ruling on adjudication. "We review a [trial] court's adjudication 'to determine whether the findings are supported by clear, cogent and convincing evidence and the findings support the conclusions of law.' " *In re N.P.*, 374 N.C. 61, 62–63 (2020) (quoting *In re Montgomery*, 311 N.C. 101, 111 (1984)). "[T]he issue of whether a trial court's adjudicatory findings of fact support its conclusion of law that grounds existed to terminate parental rights pursuant to N.C.G.S. § 7B-1111(a)" is reviewed de novo by the appellate court. *In re T.M.L.*, 377 N.C. 369, 2021-NCSC-55, ¶ 15. "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the [trial court]." *Id.* (alteration in original) (quoting *In re C.V.D.C.*, 374 N.C. 525, 530 (2020)).

A. Standard of Proof

¶ 8 As respondent-father notes, "[t]he trial court's order fails to identify" the standard of proof under which the trial court made adjudicatory findings of fact. He contends that the trial court's order "must be vacated" as a result of this omission.

¶ 9 Section 7B-1109 establishes the requirements of an adjudicatory hearing in a termination of parental rights proceeding and provides 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." N.C.G.S. § 7B-1109(f). Although subsection 7B-1109(f) "merely specifies a particular standard of proof in termination-of-parental-rights proceedings," *In re B.L.H.*, 376 N.C. 118, 123 (2020), this Court has held that the statute "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," *id.* at 126; *see also* N.C.G.S. § 7B-1109(e) (requiring trial court to "take evidence, *find the facts*, and . . . adjudicate the existence or nonexistence of any of the circumstances set forth in G.S. 7B-1111 which authorize the termination of parental rights of the respondent" (emphasis added)).

¶ 10 Contrary to respondent-father's argument on appeal, "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." *In re B.L.H.*, 376 N.C. at 126 ("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."). In the present case, however, the trial court failed to announce the standard of proof for its adjudicatory findings either in open court *or* in its written order. Therefore, the trial court failed to comply with the statutory mandate.

¶ 11 Petitioner concedes that the trial court failed to articulate the applicable standard of proof but insists that "there was overwhelming evidence leading to the entitlement of [petitioner] to an order terminating parental rights and that the evidence obviously met the clear and convincing standard." Petitioner argues that a remand of this case to the trial court merely to have the tribunal announce the "clear, cogent, and convincing" evidentiary standard of N.C.G.S. § 7B-1109(f) will have no effect on the ultimate outcome of the case. As elucidated at length hereafter, we are not persuaded by petitioner's argument.

¶ 12 When the record reflects that "there was competent evidence before the trial court to support a finding that any of the [adjudicated] statutory grounds existed for termination of parental rights[,]" the appropriate remedy for the trial court's noncompliance with N.C.G.S. § 7B-1109(f) is to vacate the trial court's order and to remand the case for the entry of new findings of fact and conclusions of law based on the clear, cogent, and convincing evidence standard. *In re Church*, 136 N.C. App. 654, 658 (2000) ("[T]he case must be remanded for the trial court to determine whether the evidence satisfies the required standard of proof . . . ."). A review of the record in the instant case, however, shows that petitioner failed to adduce sufficient evidence to sustain any of the alleged grounds for terminating respondent-father's parental rights. In light of not only the failure of the trial court to announce the standard of proof which it was applying to its findings of fact but also due to petitioner's failure to present sufficient evidence to support any of the alleged grounds

for the termination of the parental rights of respondent-father, we are compelled to simply, *without remand*, reverse the trial court's order. *See Arnold v. Ray Charles Enters., Inc.*, 264 N.C. 92, 99 (1965) ("To remand this case for further findings, however, when defendants, the parties upon whom rests the burden of proof here, have failed to offer any evidence bearing upon the point, would be futile."); *Cnty. of Durham v. Hodges*, 257 N.C. App. 288, 298 (2018) ("Since there is no evidence to support the required findings of fact, we need not remand for additional findings of fact. Instead, we reverse . . . .").

B. Adjudication under N.C.G.S. § 7B-1111(a)(2)

¶ 13 Respondent-father argues that the trial court erred in adjudicating grounds for terminating his parental rights pursuant to N.C.G.S. § 7B-1111(a)(2). He asserts that the trial court's adjudication lacks "indispensable supporting findings of fact." Respondent-father further contends that crucial findings of fact entered by the trial court are unsupported by the evidence.

¶ 14 An adjudication under N.C.G.S. § 7B-1111(a)(2)

> requires the trial court to perform a two-step analysis where it must determine by clear, cogent, and convincing evidence whether (1) a child has been willfully left by the parent in foster care or placement outside the home for over twelve months, and (2) the parent has not made reasonable progress under the circumstances to correct the conditions which led to the removal of the child. Under the first step, the twelve-month period begins when a child is left in foster care or placement outside the home pursuant to a court order, and ends when the motion or petition for termination of parental rights is filed. Where the twelve-month threshold does not expire before the motion or petition is filed, a termination on the basis of N.C.G.S. § 7B-1111(a)(2) cannot be sustained.

In re K.H., 375 N.C. 610, 613 (2020) (extraneity omitted).

¶ 15 Respondent-father asserts that petitioner's evidence and the trial court's findings of fact fail to establish that Margot had been left in a placement outside the home pursuant to a court order for at least twelve months at the time petitioner filed her petition on 30 October 2019. We agree. The only evidence presented at the hearing on this issue was petitioner's testimony that Margot was six years old at the time of the

hearing, that Margot had lived with petitioner "since she was [thirteen] days old[,]" and that Margot was the subject of "DSS proceedings" which resulted in petitioner being granted guardianship of the child after "a hearing." As respondent-father observes, the trial court received "no evidence . . . as to whether Margot was living with the petitioner pursuant to a court order prior to the entry of the guardianship order and no evidence . . . as to when the guardianship order was entered." The record is silent on the question of when Margot's "placement outside the home *pursuant to a court order*" commenced. *See In re K.H.*, 375 N.C. at 613 (emphasis added).

¶ 16 Respondent-father specifically challenges, for lack of evidence in the record, the following finding of fact entered by the trial court: "That since the child's birth Petitioner has had custody of the minor child by custody placement through Transylvania County D.S.S." We agree with respondent-father that there is no evidence to support this finding with regard to the date of Margot's "custody placement through Transylvania County D.S.S." Moreover, this finding makes no reference to a court order or to a date on which such a court order was entered.

¶ 17 We hold that the evidence and the trial court's findings of fact fail to establish an essential fact required for an adjudication under N.C.G.S. § 7B-1111(a)(2); namely, that Margot had been in a court-ordered placement outside the home for at least twelve months at the time the petition to terminate respondent-father's parental rights was filed. Therefore, the trial court's adjudication of this ground "cannot be sustained." *In re K.H.*, 375 N.C. at 613 (quoting *In re J.G.B.*, 177 N.C. App. 375, 383 (2006)).

¶ 18 Respondent-father also submits additional bases for disputing the trial court's adjudication under N.C.G.S. § 7B-1111(a)(2). Citing his confinement in federal prison, respondent-father claims that the evidence does not support the trial court's findings that he "willfully" left Margot in petitioner's care for more than twelve months and that he "at all relevant times . . . had the ability to be involved in [Margot's] care and upbringing" but "willfully failed to do so." Respondent-father also submits that the trial court heard no evidence and made no findings regarding the "conditions which led to the removal of [Margot]" from respondent-father's care or the reasonableness of his "progress under the circumstances" in correcting those conditions. *See* N.C.G.S. § 7B-1111(a)(2).

¶ 19 We do not need to address these issues. *Cf. In re T.N.H.*, 372 N.C. 403, 407 (2019) ("[W]e review only those findings necessary to support the trial court's determination that grounds existed to terminate respon-

dent's parental rights."). For purposes of our review, we have determined that petitioner failed to show that Margot resided in a placement outside the home pursuant to a court order for at least twelve months at the time the petition in this case was filed. *See In re K.H.*, 375 N.C. at 616 (reversing order adjudicating grounds for termination under N.C.G.S. § 7B-1111(a)(2)); *accord In re A.C.F.*, 176 N.C. App. 520, 529 (2006).

C. Adjudication under N.C.G.S. § 7B-1111(a)(4)

¶ 20 Respondent-father next claims that the trial court erred by terminating his parental rights pursuant to N.C.G.S. § 7B-1111(a)(4), which allows for termination 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). As petitioner is Margot's grandmother and hence not Margot's parent, respondent-father argues that this statutory provision is "inapplicable to the instant case." He further posits that "[t]here was no evidence presented or findings of fact made regarding the existence of an order requiring [him] to pay child support." Finally, respondent-father contends that the evidence does not support the trial court's findings that respondent-father had the ability to pay child support "at all relevant times" and that he willfully failed to do so. In response, petitioner merely offers a conclusory statement, with no elaboration, that respondent-father's "parental rights could be terminated under N.C.G.S. § 7B-1111([a])(4) as there was substantial competent evidence to support such a finding." Petitioner's stance on this issue is without merit.

¶ 21 Petitioner testified at the termination of parental rights hearing that she is Margot's maternal grandmother and not Margot's parent. Petitioner represented that she had been granted guardianship of Margot and that the mother has no meaningful relationship with the child. There is no evidence in the record that the mother was "awarded custody of the juvenile by judicial decree or has custody by agreement of the parents" or that respondent-father was "required by the decree or custody agreement" to pay for Margot's "care, support, and education," as required for an adjudication under N.C.G.S. § 7B-1111(a)(4). Consistent with this

dearth of any custodial determination is the lack of any findings by the trial court on such matters. "Accordingly, we hold the trial court erred in concluding this ground existed to terminate respondent[-father]'s parental rights." *In re D.T.L.*, 219 N.C. App. 219, 221 (2012).

D. Adjudication under N.C.G.S. § 7B-1111(a)(5)

¶ 22 Respondent-father also contends that petitioner's evidence and the trial court's findings of fact do not support the trial court's adjudication under N.C.G.S. § 7B-1111(a)(5). This provision authorizes the termination of parental rights when

> [t]he father of a juvenile born out of wedlock has not, prior to the filing of a petition or motion to terminate parental rights, done any of the following:
>
> > a. Filed an affidavit of paternity in a central registry maintained by the Department of Health and Human Services. The petitioner or movant shall inquire of the Department of Health and Human Services as to whether such an affidavit has been so filed and the Department's certified reply shall be submitted to and considered by the court.
> >
> > b. Legitimated the juvenile pursuant to provisions of G.S. 49-10, G.S. 49-12.1, or filed a petition for this specific purpose.
> >
> > c. Legitimated the juvenile by marriage to the mother of the juvenile.
> >
> > d. Provided substantial financial support or consistent care with respect to the juvenile and mother.
> >
> > e. Established paternity through G.S. 49-14, 110-132, 130A-101, 130A-118, or other judicial proceeding.

N.C.G.S. § 7B-1111(a)(5). To support a determination that the ground for termination of parental rights as provided in N.C.G.S. § 7B-1111(a)(5) exists, the trial court must make findings of fact indicating that the petitioner has met her burden of proving that the juvenile was born out-of-wedlock and that the putative father has failed to take any of the actions enumerated in the subsections of N.C.G.S. § 7B-1111(a)(5). *See*, *e.g.*, *In re L.S.*, 262 N.C. App. 565, 568 (2018).

¶ 23 Neither the record nor the trial court's findings of fact demonstrate any basis for terminating respondent-father's parental rights pursuant to N.C.G.S. § 7B-1111(a)(5). There is no evidence or finding that Margot was born out of wedlock. *See* N.C.G.S. § 7B-1111(a)(5); *In re L.S.*, 262 N.C. App. at 568. Respondent-father is identified as Margot's father on her birth certificate, and the child bears his surname. Furthermore, petitioner

> adduced no evidence to support a finding . . . that, at the time its petition was filed on [30 October 2019], Respondent-Father had not filed an affidavit of paternity in a central registry maintained by the Department of Health and Human Services; legitimated or filed a petition to legitimate the children pursuant to N.C.[G.S.] §§ 49-10, -12.1; legitimated the children by marriage to the mother; or established paternity through a judicial proceeding.

Id. at 568–69. "We hold, therefore, that petitioner failed to meet its burden of proof and the trial court committed prejudicial error in concluding grounds existed for terminating respondent[-father]'s parental rights." *In re I.S.*, 170 N.C. App. at 88.

E. Additional Grounds for Termination

¶ 24 In her brief to this Court, petitioner asserts that "[t]he action and/or inactions of the parents appear to constitute neglect of the child." *See* N.C.G.S. § 7B-1111(a)(1) (authorizing termination of parental rights when "[t]he parent has abused or neglected the juvenile"). "It would also appear," petitioner contends, "that grounds exist under N.C.G.S. § 7B-1111([a])(7) as to abandonment of the child." However, the trial court's order makes no reference to respondent-father's neglect or abandonment of Margot or to the statutory provisions found in N.C.G.S. § 7B-1111(a)(1) and (7). Since the trial court did not address either of these grounds in its order and since petitioner did not allege these grounds at the trial court level, this Court is not empowered to evaluate the existence of the grounds of neglect or willful abandonment here in the first instance.

¶ 25 To the extent that petitioner proffers N.C.G.S. § 7B-1111(a)(1) or (7) as alternative bases for upholding the trial court's termination of respondent-father's parental rights, her argument is not properly before this Court. In her petition filed on 30 October 2019, petitioner did not raise neglect or willful abandonment as grounds for terminating respondent-father's rights. *See generally In re B.L.H.*, 190 N.C. App. 142,

147 ("[W]here a respondent lacks notice of a possible ground for termination, it is error for the trial court to conclude such a ground exists."), *aff'd per curiam*, 362 N.C. 674 (2008). Nor did petitioner ask the trial court to adjudicate either of these statutory grounds for termination at the hearing on 14 October 2020 or obtain a ruling from the court as to either ground. *See* N.C. R. App. P. 10(a)(1), (c).

III. Conclusion

¶ 26 The trial court failed to state, in oral or written form, the standard of proof which it utilized in rendering its adjudicatory findings of fact. However, the evidence in the record of this case is insufficient to support findings which are necessary to establish any of the statutory grounds for termination which were alleged by petitioner and found by the trial court. Accordingly, there is not a sufficient foundation upon which the trial court could expressly announce the proper application of the standard of proof upon remand to it by this Court. Therefore, the trial court's order as to the termination of respondent-father's parental rights is reversed.

REVERSED.

IN THE MATTER OF M.R.J.

No. 37A21

Filed 24 September 2021

1. Termination of Parental Rights—jurisdiction—standing to initiate termination proceedings—"county director" of social services—Uniform Child Custody Jurisdiction and Enforcement Act

Wake County Human Services (WCHS) had standing under N.C.G.S. § 7B-1103(a)(3) to petition to terminate a mother's parental rights because her child—who lived in South Carolina when WCHS filed the petition in Wake County—was placed in WCHS's custody by a "trial court of competent jurisdiction" where the Wake County District Court met the jurisdictional prerequisites under the Uniform Child Custody Jurisdiction and Enforcement Act and where the petition had been properly verified. Furthermore, neither the definition of "director" found in N.C.G.S. § 7B-101(10) nor the county-specific

allocation of social services under N.C.G.S. § 153A-257(a) imposes a geographical limit on which "county director" may initiate termination proceedings under N.C.G.S § 7B-401.1(a). Therefore, the District Court had subject matter jurisdiction over the termination matter. To the extent the mother's appellate arguments addressed venue rather than jurisdiction, those arguments were unpreserved and lacked merit.

2. Termination of Parental Rights—best interests of the child—need for permanency—no misapprehension of the law—dispositional factors

The trial court did not abuse its discretion in concluding that terminating a mother's parental rights was in her two-year-old child's best interests, where the mother had previously executed a relinquishment of her rights conditioned upon her sister and brother-in-law adopting the child. Because the relinquishment statutes permitted the mother to revoke her relinquishment or challenge its validity, the court reasonably considered possible hindrances to the adoption process, and therefore did not act under a misapprehension of the law in finding termination necessary to ensure the child received a permanent plan of care. Furthermore, the court properly considered the child's young age and high likelihood of adoption (dispositional factors under N.C.G.S. § 7B-1110(a)) given that two families were already willing to adopt him.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from an order entered on 30 September 2020 by Judge Monica Bousman in District Court, Wake County. This matter was calendared for argument in the Supreme Court on 19 August 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 Boyce Wells for petitioner-appellee Wake County Human Services.

Michelle FormyDuval Lynch for appellee Guardian ad Litem.

Christopher M. Watford for respondent-appellant mother.

MORGAN, Justice.

¶ 1 Respondent-mother appeals from the trial court's order terminating her parental rights to "Mike,"[1] a minor child born in April 2018. Because we conclude that the trial court had jurisdiction over the subject matter and did not abuse its discretion in determining Mike's best interests, we affirm.

I. Factual and Procedural Background

¶ 2 In April 2018, Vance County Child Protective Services (VCCPS) received a report that Mike and his twin brother had tested positive for methadone and marijuana at birth. While VCCPS was assessing the family on 10 June 2018, the agency received a second report on the family that Mike's twin brother had died in respondent-mother's home. Respondent-mother stated that she had placed both children on a bed and later found the deceased child unresponsive.

¶ 3 On 10 June 2018, VCCPS placed Mike with Theresa R., an approved safety resource who lived in Wake County. The family was found to be in need of services, and the case was transferred from VCCPS to Wake County Human Services (WCHS) in August 2018.

¶ 4 A WCHS social worker scheduled a home visit with respondent-mother and Theresa R. for the afternoon of 15 October 2018. When the social worker arrived at the residence, Theresa R. reported that respondent-mother had removed Mike from the home on the previous day of 14 October 2018, claiming that respondent-mother was taking Mike to live with his maternal grandmother in South Carolina. Respondent-mother confirmed to the social worker on 15 October 2018 that she "sent" Mike to South Carolina to live with his maternal grandmother.

¶ 5 On 31 October 2018, the WCHS social worker visited respondent-mother at the Wake County Detention Center where respondent-mother was being held for violating her probation. Respondent-mother agreed to contact the social worker after her release from jail but failed to do so.

¶ 6 WCHS was unaware of respondent-mother's whereabouts after her release from incarceration until 2 January 2019, when the social worker learned that respondent-mother was hospitalized at UNC Hospital with an infection. WCHS contacted respondent-mother and established a safety plan for Mike, pursuant to which he would continue to reside with the maternal grandmother in South Carolina. On the following day

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1. We use pseudonyms to protect the identities of some of the individuals discussed in this opinion and for ease of reading. We note that the trial court's order also terminated the parental rights of Mike's father, whose identity is unknown.

of 3 January 2019, respondent-mother gave the name of a friend of hers in Vance County to the social worker and asked for the friend to be considered as a placement for Mike. VCCPS conducted a home study of respondent-mother's recommended friend on behalf of WCHS but did not approve the friend as a placement.

¶ 7 On 16 January 2019, a safety assessment was performed on the maternal grandmother's home by Fairfield County, South Carolina, CPS. The grandmother's residence was approved for Mike's placement. Respondent-mother identified for WCHS another friend, Donna W., as a potential placement option for respondent-mother's children. On 30 January 2019, WCHS approved Donna W.'s home as a placement for Mike's older half-brother.

¶ 8 Respondent-mother was released from UNC Hospital on 1 February 2019, but she failed to respond to repeated telephone calls from WCHS social workers. On 8 February 2019, the maternal grandmother brought Mike to Wake County to visit respondent-mother, after obtaining the approval of WCHS for Mike to stay overnight in Donna W.'s home. WCHS informed Donna W. and the maternal grandmother that Mike was to return to South Carolina on 10 February 2019.

¶ 9 The maternal grandmother reported that respondent-mother was incoherent and falling asleep during a supervised visit with Mike on 10 February 2019. On the next day of 11 February 2019, respondent-mother contacted law enforcement in Wake County and reported that Mike was with the maternal grandmother and that the maternal grandmother had been drinking alcohol. Multiple police units and a helicopter responded to the call. Officers detained the maternal grandmother and contacted WCHS, which confirmed that Mike was legally placed with the maternal grandmother and that she had not been drinking. Respondent-mother then sent numerous text messages to the WCHS social worker on 11 February 2019, threatening to remove Mike from his placement with the maternal grandmother and reminding the social worker that respondent-mother still had legal custody of the child.

¶ 10 On 13 February 2019, WCHS filed a juvenile petition alleging that Mike was neglected. The petition stated that respondent-mother "is reportedly still actively using heroin and is without stable housing" and that she "has not been compliant with any recommended services" or treatment to address her substance abuse and mental health issues. WCHS further alleged that respondent-mother "continues to sabotage" Mike's placement with the maternal grandmother, "has not been willing to allow [Mike] to remain in a stable placement[,]" and "has a history of

becoming upset with kinship providers/temporary safety providers and immediately removing the children from the home."

¶ 11 Based on the petition's verified allegations, the trial court granted nonsecure custody of Mike to WCHS on 13 February 2019. On 14 February 2019, Mike joined his older half-brother in a fictive kinship placement with Donna W. in Wake County.

¶ 12 The trial court conducted a hearing on the petition on 9 May 2019. Based on a written stipulation of facts signed by the parties, the trial court adjudicated Mike to be a neglected juvenile in that he "do[es] not receive proper care and supervision from [his] parents and live[s] in an environment injurious to [his] welfare." *See* N.C.G.S. § 7B-101(15) (2019). The trial court kept Mike in WCHS custody and awarded weekly supervised visitation with the child to respondent-mother. Mike remained in his placement with Donna W.

¶ 13 In addition to the aforementioned facts, the trial court found as follows:

> 30. The mother submitted to a substance abuse assessment and [was] diagnosed with Opiate Use Disorder Severe and given specific recommendations. She is using amounts of Heroin that are life threatening and needs to go into drug detoxification immediately . . . .
>
> 31. The mother is not in[ ]compliance with the terms and conditions of her probation and has stated that she is not visiting [Mike] because she is afraid of being arrested . . . .
>
> 32. The mother reports diagnoses of Bi-Polar Disorder and Personality Disorder . . . .

The trial court ordered respondent-mother to comply with her Out-of-Home Family Services Agreement (OHFSA) by immediately entering drug detoxification; participating in intensive outpatient drug treatment; refraining from the use of impairing substances; submitting to random drug screens; obtaining a psychiatric evaluation; obtaining a psychological evaluation and following any recommendations; refraining from criminal activity and complying with the conditions of her probation; participating in parenting classes and demonstrating learned parenting skills; obtaining and maintaining stable and appropriate housing and income; maintaining regular contact with the WCHS social worker; and regularly attending visitations.

¶ 14 The trial court held a permanency planning hearing on 5 August 2019 and entered an order on 19 September 2019 establishing a primary permanent plan of reunification with a secondary plan of adoption. The trial court found that respondent-mother had not maintained regular contact with the social worker or documented respondent-mother's completion of any court-ordered services. Respondent-mother had been incarcerated in the Vance County Jail through mid-July 2019, had additional pending charges in Wake and Franklin Counties, and had not visited with Mike since March 2019. The trial court concluded that respondent-mother "continues to act in a manner inconsistent with her [c]onstitutionally protected status as a parent . . . ."

¶ 15 At the next permanency planning hearing, in an order entered on 9 March 2020, the trial court changed Mike's primary permanent plan to adoption with a secondary plan of reunification. With regard to the requirements of her OHFSA, the trial court found that respondent-mother had failed to respond to the social worker's telephone calls, text messages, emails, or letters; was jailed in Vance County in January 2020 for violating her probation and resisting a public officer; had failed to comply with the recommendations of her substance abuse assessment; had failed to submit to any requested drug screens; had failed to attend a scheduled psychological evaluation or to reschedule the appointment; was discharged by her parenting coach for lack of communication and general noncompliance; and had failed to attend any visitations with Mike. The trial court determined that further efforts to reunify Mike with respondent-mother "clearly would be unsuccessful or inconsistent with [his] health or safety and need for a safe, permanent home within a reasonable time." *See* N.C.G.S. § 7B-906.2(b) (2019).

¶ 16 On 12 March 2020, WCHS filed a motion to terminate respondent-mother's parental rights to Mike. The trial court held a hearing on the motion on 10 July and 3 August 2020 and entered its "Order Terminating Parental Rights" on 30 September 2020. As grounds for termination, the trial court established that respondent-mother previously neglected Mike and was likely to subject him to further neglect if he was returned to her care, *see* N.C.G.S. § 7B-1111(a)(1) (2019), and that respondent-mother willfully left Mike in an out-of-home placement for more than twelve months without making reasonable progress to correct the conditions leading to his removal, *see* N.C.G.S. § 7B-1111(a)(2). The trial court concluded that it was in Mike's best interests for the parental rights of respondent-mother to be terminated. *See* N.C.G.S. § 7B-1110(a) (2019).

¶ 17 Respondent-mother filed timely notice of appeal from the order terminating her parental rights.

II. Respondent-Mother's Arguments on Appeal

A. Subject Matter Jurisdiction

¶ 18 **[1]** Respondent-mother first claims that the trial court was without jurisdiction to enter the order terminating respondent-mother's parental rights because WCHS lacked standing to initiate the termination proceeding under N.C.G.S. § 7B-1103(a) (2019).

¶ 19 "Whether or not a trial court possesses subject-matter jurisdiction is a question of law that is reviewed de novo. Challenges to a trial court's subject-matter jurisdiction may be raised at any stage of proceedings, including for the first time before this Court." *In re A.L.L.*, 376 N.C. 99, 101 (2020) (extraneity omitted). However, "[t]his Court presumes the trial court has properly exercised jurisdiction unless the party challenging jurisdiction meets its burden of showing otherwise." *In re L.T.*, 374 N.C. 567, 569 (2020).

¶ 20 The statute that confers subject matter jurisdiction over termination of parental rights proceedings provides as follows:

> 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. . . . 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.

N.C.G.S. § 7B-1101 (2019). The Juvenile Code defines "[c]ourt" as "[t]he district court division of the General Court of Justice." N.C.G.S. § 7B-101(6) (2019).

¶ 21 Respondent-mother does not claim that the District Court, Wake County failed to meet the general jurisdictional requirements of N.C.G.S. § 7B-1101; she instead contends that WCHS lacked standing under N.C.G.S. § 7B-1103(a) to initiate the termination proceeding in this case. Respondent-mother's argument is well summarized by the Court of Appeals opinion in *In re E.X.J.*:

> Under N.C.[G.S.] § 7B-1103(a)(3) (20[19]), a petition or motion to terminate the parental rights of a parent

> may be filed by a "county department of social services . . . to whom custody of the juvenile has been given by a court of competent jurisdiction." If DSS does not lawfully have custody of the children, then it lacks standing to file a petition or motion to terminate parental rights, and the trial court, as a result, lacks subject matter jurisdiction.

In re E.X.J., 191 N.C. App. 34, 39 (2008) (ellipsis in original), *aff'd per curiam*, 363 N.C. 9 (2009).

¶ 22 Respondent-mother contends that WCHS was not "a proper party" authorized to file the petition which alleged that Mike was neglected in February 2019. She opines that Mike was a resident of South Carolina when the petition was filed and when the District Court, Wake County purported to grant nonsecure custody of the child to WCHS on 13 February 2019. Respondent-mother also contends that the petition filed by WCHS "fail[ed] to establish that [her] legal residence was in Wake County." As a result, "because the [WCHS] director had no authority over a child whose legal residence was in South Carolina, the petition was void for lack of subject matter jurisdiction[,]" and "the initial order granting nonsecure [custody] was invalid[.]" Respondent-mother consequently reasons that the District Court, Wake County was not "a court of competent jurisdiction" when it awarded WCHS custody of Mike, and WCHS "lacked standing to move for the termination of [respondent-mother's] parental rights" under N.C.G.S. § 7B-1103(a)(3).

¶ 23 "North Carolina district courts have 'exclusive, original [subject matter] jurisdiction over any case involving a juvenile who is alleged to be abused, neglected, or dependent.' " *In re E.X.J.*, 191 N.C. App. at 47 (alteration in original) (quoting N.C.G.S. § 7B-200 (2005)). "A trial court's subject matter jurisdiction over all stages of a juvenile case is established when the action is initiated with the filing of a properly verified petition." *In re T.R.P.*, 360 N.C. 588, 593 (2006). Under N.C.G.S. § 7B-401.1(a), "[o]nly a county director of social services or the director's authorized representative may file a petition alleging that a juvenile is abused, neglected, or dependent." N.C.G.S. § 7B-401.1(a) (2019).

¶ 24 In interpreting N.C.G.S. § 7B-401.1(a), respondent-mother notes that N.C.G.S. § 7B-101(10) defines "Director" as "the director of the department of social services in the county in which the juvenile resides or is found, or the director's representative . . . ." She then points to N.C.G.S. § 153A-257(a) (2019), which allocates the responsibility for providing social services among the state's local social services agencies

based on the recipient's county of residence. "Read in *paria materi* [sic]," respondent-mother argues that "both of these statutes are meant to identify the director, if any, who is responsible for providing a service, such as filing a juvenile petition, and both unquestionably tie that identification to location."

¶ 25 Based on her reading of the statutes, respondent-mother asserts that

> [t]he director of Wake County, and by extension, any authorized representative, was without statutory authority to file the juvenile petition in this matter. It is undisputed that [Mike] resided in South Carolina with his grandmother for 131 days including the day of the filing of the Petition. It is undisputed that [respondent-mother's] actual location was unknown and that Wake County made no representation as to where they believed her to reside. No document indicates that the child "was found in" Wake County prior to anytime before the filing of the petition. Thus, under both G.S. § 7B-101 and G.S. § 153A-247, Wake County has no authority over Mike at the time of filing.

¶ 26 Respondent-mother's positions are inconsistent with the factual record before this Court. Moreover, her legal arguments appear to address the issue of venue and thus do not implicate the trial court's subject matter jurisdiction to place Mike in WCHS custody.

¶ 27 We have previously considered and rejected the claim that the definition of "Director" found in N.C.G.S. § 7B-101(10) imposes a geographical limit on which "county director" may invoke the trial court's subject matter jurisdiction by filing a juvenile petition under N.C.G.S. § 7B-401.1(a). Regarding this circumstance, this Court has stated:

> Because the language of section 7B-401.1(a) identifies "a county director of social services" as the proper petitioner in a juvenile adjudication action rather than "the director" (importing the definition from N.C.G.S. § 7B-101(10)) or similar language singling out particular directors, we hold that the legislature did not intend to limit the class of parties who may invoke the court's subject matter jurisdiction in juvenile adjudication actions to only directors of county

> departments of social services in the county where the juvenile at issue resides or is found.

In re A.P., 371 N.C. 14, 20 (2018). Nor does N.C.G.S. § 153A-257(a) purport to limit the trial court's subject matter jurisdiction in juvenile abuse, neglect, and dependency cases.[2]

¶ 28 The question of which county director of social services is sanctioned to file a juvenile petition is answered by the venue statute N.C.G.S. § 7B-400, which provides:

> A proceeding in which a juvenile is alleged to be abused, neglected, or dependent may be commenced in the judicial district in which the juvenile resides or is present at the time the petition is filed. . . . Notwithstanding G.S. 153A-257, the absence of a juvenile from the juvenile's home pursuant to a protection plan during an assessment or the provision of case management services by a department of social services shall not change the original venue if it subsequently becomes necessary to file a juvenile petition.

N.C.G.S. § 7B-400(a) (2019).

¶ 29 "Improper venue is *not jurisdictional*, and it is subject to waiver." *Stokes v. Stokes*, 371 N.C. 770, 773 (2018) (emphasis added). Unlike the issue of subject matter jurisdiction, which may be raised at any time, an objection to improper venue is waived if not "taken in apt time" in the trial court. *McMinn v. Hamilton*, 77 N.C. 300, 301 (1877); *see also* N.C.G.S. § 1A-1, Rule 12(h)(1) ("A defense of . . . improper venue . . . is waived (i) if omitted from a motion [made under Rule 12], or (ii) if it is neither made by motion under this rule nor included in a responsive pleading or an amendment thereof permitted by Rule 15(a) to be made as a matter of course."). Because respondent-mother made no claim of improper venue at any time in the trial court while this matter was pending in the lower forum, the issue of venue is waived and therefore is not properly before this Court. *See* N.C. R. App. P. 10(a)(1).

¶ 30 Moreover, contrary to respondent-mother's characterization, the record demonstrates that Wake County is a proper venue for the juvenile

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2. Respondent-mother attempts to replace the requirement of the *trial court*'s subject matter jurisdiction with a novel concept of a *petitioner*'s subject matter jurisdiction, arguing that "because the [WCHS] director had no authority over a child whose legal residence was in South Carolina, *the petition was void for lack of subject matter jurisdiction*." (Emphasis added).

proceeding initiated on 13 February 2019. The verified petition filed by WCHS expressly alleged that Mike "resides in the district at the address shown below, was found in the district as alleged herein, or venue exists pursuant to G.S. 7B-400(a) or (b)." Although the petition did not list respondent-mother's street address, it identified her as "a citizen and resident of Wake County, North Carolina[.]"[3] The petition further averred—and respondent-mother subsequently stipulated—that Mike was living in South Carolina with his maternal grandmother pursuant to a safety plan that WCHS established with respondent-mother on 2 January 2019. *See* N.C.G.S. § 7B-400(a) ("[T]he absence of a juvenile from the juvenile's home pursuant to a protection plan during an assessment or the provision of case management services by a department of social services shall not change the original venue if it subsequently becomes necessary to file a juvenile petition."). Finally, the petition's allegations—and the parties' signed stipulations entered on 8 May 2019—indicated that Mike was visiting Wake County with his grandmother and was therefore "present" in the county at the time that WCHS filed the petition on 13 February 2019.[4] N.C.G.S. § 7B-400(a) (allowing proceeding to "be commenced in the judicial district in which the juvenile resides or is present at the time the petition is filed").

¶ 31 Respondent-mother also frames her challenge to the trial court's jurisdiction in terms of the statutory requirement that a juvenile petition be verified pursuant to N.C.G.S. § 7B-403(a) by the "county director of social services or the director's authorized representative[.]" N.C.G.S. § 7B-401.1(a); *see also* N.C.G.S. § 7B-403(a) ("[T]he petition shall be

3. Respondent-mother later stipulated that she was "a citizen and resident of Henderson, North Carolina[.]" Although Henderson is located in Vance County rather than Wake County, North Carolina, this potential discrepancy had no effect on the trial court's subject matter jurisdiction. *See generally In re A.P.*, 371 N.C. at 20 ("hold[ing] that the legislature did not intend to limit the class of parties who may invoke the court's subject matter jurisdiction in juvenile adjudication actions to only directors of county departments of social services in the county where the juvenile at issue resides or is found."). Moreover, since it is unclear from the record here, there is the prospect that respondent-mother was a Wake County resident when WCHS filed its petition in February 2019 yet was a Vance County resident when she signed the stipulation in March or May of 2019.

4. The petition and the parties' stipulations describe the maternal grandmother's attainment of WCHS's approval to visit Wake County with Mike on 8 February 2019 and "to stay overnight at the home of Mrs. Donna W[.] during [the] visit." Although Mike and his grandmother "were to return to South Carolina . . . on Sunday, February 10, 2019[,]" they remained in Wake County at least through 11 February 2019, when respondent-mother called the police and reported that Mike was with his maternal grandmother who had been drinking. "Wake County police . . . responded and detained [the maternal grandmother] until they got in contact with [WCHS] After [H]ours who assisted with ensuring that [Mike was] legally placed in the care of [the grandmother] and [she] had not been drinking[.]"

drawn by the director, *verified* before an official authorized to administer oaths, and filed by the clerk . . . ." (emphasis added)). In doing so, respondent-mother quotes our opinion in *In re T.R.P.* for the principle that "[a] trial court's subject matter jurisdiction over all stages of a juvenile case is established when the action is initiated with the filing of a *properly verified* petition." *In re T.R.P.*, 360 N.C. at 593 (emphasis added). She goes on to contend that, in the present case, "[t]he initial juvenile petition seeking custody of Mike was *improperly verified* and thus did not grant the court subject matter jurisdiction to issue the initial non-secure custody order on 13 February 2019." (Emphasis added).

¶ 32 In *In re T.R.P.*, this Court held that the Wilkes County Department of Social Services' "failure to verify [its] juvenile petition is a fatal defect" depriving the trial court of subject matter jurisdiction. 360 N.C. at 598. We noted that, "[a]lthough the juvenile petition setting forth these allegations [of neglect] was notarized, it was neither signed nor verified by the Director of WCDSS or any authorized representative thereof." *Id.* at 589. Other cases cited by respondent-mother likewise involved a petitioner's failure to verify its petition in accordance with N.C.G.S. § 7B-403(a). *See In re S.E.P.*, 184 N.C. App. 481, 487 (2007) ("Neither the 26 September 2002 adjudication petition nor the 8 April 2004 amended petition conferred subject matter jurisdiction upon the trial court" because (1) "the alleged signature which appears on the [original] petition was not in fact the director's signature[,]" and (2) "[t]he verification section of the amended petition shows no signature in the 'Signature of Petitioner' space."); *In re A.J.H-R.*, 184 N.C. App. 177, 180 (2007) (concluding that the trial court "lacked subject matter jurisdiction to adjudicate this matter" where the juvenile neglect petitions were "neither signed nor verified" by the agency's director or his authorized representative).

¶ 33 In the instant case, the petition filed by WCHS was properly verified before a notary by social worker Martheia Capel, acting as the authorized representative of WCHS Director Regina Petteway, thereby satisfying the verification requirement in N.C.G.S. § 7B-403(a). Given this obvious distinction, respondent-mother's reliance on *In re T.R.P.* and similar cases is misplaced and unavailing. *See In re T.R.P.*, 360 N.C. at 589 ("Although the juvenile petition . . . was notarized, it was neither signed nor verified by the Director of WCDSS or any authorized representative thereof.").

¶ 34 Having addressed respondent-mother's arguments challenging the trial court's subject matter jurisdiction, we next consider whether the trial court properly exercised its recognized jurisdiction in light of the fact that Mike was living in South Carolina with his maternal

grandmother at the time that the petition was filed. We conclude that the trial court had such jurisdiction.

¶ 35 In North Carolina, the issue of whether the courts of a particular *state* have jurisdiction over a proceeding which affects child custody is governed by the Uniform Child-Custody Jurisdiction and Enforcement Act (UCCJEA), specifically the provisions of Article 2, Part 2 as codified in N.C.G.S. §§ 50A-201 through -210 (2019). *See*, *e.g.*, N.C.G.S. § 7B-1101 ("[B]efore 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 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." *In re L.T.*, 374 N.C. at 569. Although respondent-mother makes no mention of these statutes, nonetheless the scope of the trial court's subject matter jurisdiction here, and the extent to which it is impacted—if at all—by the availability of the courts of South Carolina, is properly determined by consulting the applicable provisions of this enactment.

¶ 36 Under the UCCJEA,

> [g]enerally, 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). If a court of another state has home state jurisdiction, North Carolina courts do not have jurisdiction unless one of several statutory exceptions applies.

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

¶ 37 Respondent-mother observes that "[i]t is undisputed that [Mike] resided in South Carolina with his grandmother for 131 days including the day of the filing of the Petition" on 13 February 2019. Because 131 days is less than the six consecutive months required by N.C.G.S. § 50A-102(7) for home state recognition, South Carolina is not Mike's home state for jurisdictional purposes under the UCCJEA. Furthermore, as the guardian ad litem correctly notes, Mike was born in late April of 2018 and therefore had not been alive for a full six months at the time that he left North Carolina to live with his maternal grandmother in South Carolina

on 15 October 2018. We agree with the contention that Mike had no home state under the UCCJEA, because (1) Mike had not lived in any state for at least six consecutive months prior to the petition being filed, and (2) although Mike was less than six months of age, he had not lived from birth in any one state with a parent or person acting as a parent. N.C.G.S. § 50A-102(7).

¶ 38 Also, the UCCJEA provides, due to North Carolina's adoption of it, that "a court of this State has jurisdiction to make an initial child custody determination" in the following circumstances:

> a. The child and the child's parents, or the child and at least one parent or a person acting as a parent, have a significant connection with this State other than mere physical presence; and
>
> b. Substantial evidence is available in this State concerning the child's care, protection, training, and personal relationships[.]

N.C.G.S. § 50A-201(a)(2) (2019). "The trial court is not required to make specific findings of fact demonstrating its jurisdiction under the UCCJEA, but the record must reflect that the jurisdictional prerequisites in the Act were satisfied when the court exercised jurisdiction." *In re L.T.*, 374 N.C. at 569.

¶ 39 The record in the case sub judice illustrates that both Mike and respondent-mother had a significant connection with North Carolina beyond their mere presence in the state at the time WCHS filed its petition on 13 February 2019. *See* N.C.G.S. § 50A-201(a)(2)(a). Respondent-mother had been a North Carolina resident at least since Mike's birth and had a CPS history in both Vance and Wake Counties. M.T., one of respondent-mother's older children, and two of respondent-mother's safety resources, Theresa R. and Donna W., were also North Carolina residents. Respondent-mother was also on probation in North Carolina and had additional criminal charges pending. Mike was born in North Carolina and lived in the state before he was taken to South Carolina to live with his maternal grandmother on 15 October 2018. Mike's mother and an older sibling continued to reside in North Carolina at the time that the petition was filed.

¶ 40 The record further reflects that substantial evidence was available in North Carolina regarding Mike's care and family history at the time that the petition was filed. *See* N.C.G.S. § 50A-201(a)(2)(b). Respondent-mother, Theresa R., and Donna W. were all located in North

Carolina, and so were (1) the hospital where Mike was born and where Mike tested positive for methadone and marijuana, (2) two child protective services agencies that investigated, and consistently provided services to, the family since Mike's birth, and (3) the police department that responded to respondent-mother's false report of Mike's abduction by his maternal grandmother on 11 February 2019. Therefore, the District Court, Wake County properly exercised "significant connection" jurisdiction under the UCCJEA.

¶ 41 We conclude that the trial court possessed subject matter jurisdiction over the juvenile petition filed by WCHS on 13 February 2019. The trial court thereupon entered its orders placing Mike in WCHS custody in the trial court's capacity as "a court of competent jurisdiction." N.C.G.S. § 7B-1103(a)(3). Accordingly, WCHS had standing under N.C.G.S. § 7B-1103(a)(3) to file its motion to terminate respondent-mother's parental rights on 12 March 2020 and the trial court had jurisdiction to issue the termination of parental rights order.

B. Best Interests Determination

¶ 42 **[2]** Respondent-mother contends that the trial court abused its discretion at the dispositional stage of the proceeding by determining that it was in Mike's best interests to terminate her parental rights. Respondent-mother argues that the trial court did not need to terminate her parental rights because respondent-mother had already executed a conditional relinquishment or "specific relinquishment" of her rights authorizing Mike to be adopted by her sister and brother-in-law (the Petersons).[5] Respondent-mother asserts that the trial court mistakenly believed that terminating her parental rights was necessary to provide Mike with legal protections beyond those which were conferred by her relinquishment.

¶ 43 Under N.C.G.S. § 7B-1110(a), if the trial court adjudicates the existence of one or more statutory grounds for terminating a respondent-parent's rights,

> it proceeds to the dispositional stage where it must "determine whether terminating the parent's rights is in the juvenile's best interest" based on the following factors:

5. Although respondent-mother posits that the termination order effectively "terminated parental rights of a parent that did not exist[,]" she asserts that her appeal is not moot because the order may result in adverse collateral consequences to her "including[,] but not limited to, a potential termination of parental rights to future children under [N.C.]G.S. § 7B-1111(a)(9) [(2019)]."

> (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.

In re J.J.B., 374 N.C. 787, 791 (2020) (quoting N.C.G.S. § 7B-1110(a)).

¶ 44 The trial court's determination of a juvenile's best interests under N.C.G.S. § 7B-1110(a) is reviewed only for abuse of discretion. *In re B.E.*, 375 N.C. 730, 745 (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 745 (quoting *In re J.J.B.,* 374 N.C. at 791). An abuse of discretion may occur if the trial court bases its best interests determination on a misunderstanding of the relevant law. *Id.*

¶ 45 Although she did not produce such a document in court, respondent-mother adduced testimony at the dispositional hearing that she executed a relinquishment of her parental rights to Mike on 10 July 2020, conditioned upon his adoption by the Petersons. *See* N.C.G.S. § 48-3-704 (2019). The trial court made the following findings of fact related to the dispositional criteria in N.C.G.S. § 7B-1110(a):

> 32. The primary permanent plan for the child is adoption and termination of the parents' parental rights will aid in the accomplishment of the primary permanent [plan].
>
> 33. The child is 2 years of age. He is young and healthy and has no developmental issues that are likely to be a barrier to adoption.
>
> 34. . . . The child has been out of the care of the mother since he was approximately 38 days old. He has had limited and inconsistent contact with the mother since that time. He does not have a substantial parent-child relationship with the mother.

> 35. The child was placed in the home of [Donna W. and her husband] as requested by the mother when he came into foster care. He has remained in that home since that time. His needs are being met in the home and they are willing to adopt the child. He has developed a strong, appropriate parent-child bond with them. He is happy and healthy. He looks to them for comfort, and accepts discipline from them.
>
> 36. The mother has a sister and brother in law ("the [Petersons]") in South Carolina [who] submitted to an ICPC home study for possible placement of the child. They would also be willing to adopt the child. The ICPC home study was positive. The [Petersons] and the child have had a few visits since February, 2020. The child does not have a parental bond with the [Petersons] at the present time but he has the ability to . . . bond with caregivers and could bond with them if they are chosen to adopt him.
>
> 37. The child's young age and availability of at least two families that are committed to adopting him indicates [there] is a high probability that this child will be adopted. He is in need of a permanent plan of care at the earliest possible age which can be obtained only by the severing of the relationship between the child and his parents by termination of the parental rights of the parents.

As respondent-mother does not contest these findings, they are binding on appeal. *In re A.M.O.*, 375 N.C. 717, 720 (2020).

¶ 46 In support of her claim that the trial court acted under a misapprehension of law, respondent-mother points to the trial court's statement in open court which expressed concern that Mike might be left without a permanent placement for an extended period of time if the trial court did not elect to terminate respondent-mother's parental rights and the Petersons were subsequently unable to adopt the child:

> [Counsel for respondent-mother] makes a very valid point that if I did not find [terminating respondent-mother's parental rights] was in [Mike's] best interest that the mother's already signed relinquishments and that the [Petersons] could -- could just then adopt

> him. We all know that things happen that none of us plan. Something may happen in the future that even if the [Petersons] were chosen to be the adoptive parents, it could be that something would happen to them. And I am not wishing anybody any bad luck. Believe me. But -- but things happen.
>
> Af -- after presiding in this courtroom for seventeen and a half years, I am very well aware of things that happened that interrupt the adoption process. And that is not in [Mike's] best interest. And then we would be right back where we would -- where -- where we are right now a year from now, two years from now, or something like that, and [Mike] still would not have permanence if the [Petersons] were unable to adopt him and if I found that it wasn't in his best interest.

¶ 47 Respondent-mother asserts that "it is very possible that Mike can find permanence through adoption with the [Petersons]," and that, even if the Petersons were ultimately granted guardianship of Mike in lieu of adoption, "that too is a permanency outcome which does not mandate the termination of [her] parental rights." She notes that the trial court made no findings explaining "what conditions might be encountered that would interrupt the [Petersons'] adoption process, or somehow stall permanence for Mike." Moreover, notwithstanding the trial court's articulated concerns, respondent-mother argues that the trial court erred in believing that it was necessary to terminate respondent-mother's parental rights in order to provide permanency for Mike. She suggests that the trial court could have "held open a decision as to [her parental rights] to see if Mike actually found permanence with the [Petersons]."

¶ 48 Respondent-mother's argument is unpersuasive. Assuming that respondent-mother did, in fact, execute a valid specific relinquishment of her parental rights to Mike expressly to facilitate Mike's adoption by the Petersons, the adoption statutes permit her to revoke her relinquishment if, for whatever reason, the Petersons did not adopt Mike.[6] *See*

6. Respondent-mother's observation that the Petersons could be granted guardianship of Mike without terminating her parental rights is true, with or without her execution of the specific relinquishment. While guardianship provides some measure of permanence for the ward, *see* N.C.G.S. § 7B-600(b) (2019), it does not ensure the same degree of finality as adoption. *Compare* N.C.G.S. §§ 7B-600(b)–(b1), -1000 (2019) (authorizing review and termination of guardianship) with N.C.G.S. § 48-1-106 (2019) (describing legal effect of adoption and rights of adoptee).

N.C.G.S. §§ 48-3-704, -707(b) (2019). Irrespective of the Petersons' willingness or ability to adopt the child, respondent-mother was also free to challenge the relinquishment at any time prior to entry of the adoption decree on the ground that the relinquishment was "obtained by fraud or duress." N.C.G.S. § 48-3-707(a)(1) (2019). In either case, Mike would be needlessly denied permanence for some period of time. *See* N.C.G.S. § 48-3-707(c). The trial court's recognition of potential hindrances, whether general or specific, to the realization of Mike's primary permanent plan of adoption does not reflect either a misapprehension of the law or an abuse of discretion in the trial court's contemplation here of the juvenile's best interests.

¶ 49 By terminating respondent-mother's parental rights, the trial court facilitated Mike's adoption by the Petersons, by Donna W. and her husband—who had already developed "a strong, appropriate parent-child bond" with the child—and by any other adoptive parents identified and approved by WCHS. Respondent-mother does not offer an explanation as to why it is in Mike's best interests to limit his options for adoption to a single family such as the Petersons, to the exclusion of his current caretakers or other potential adoptive families.

¶ 50 The trial court's written findings reflect its due consideration of the factors in N.C.G.S. § 7B-1110(a) and provide a reasoned basis for the trial court's conclusion that the termination of respondent-mother's parental rights would further Mike's best interests by providing the juvenile with "a permanent plan of care at the earliest possible age." *See In re B.E.*, 375 N.C. at 750. We therefore hold that the trial court did not abuse its discretion in terminating the parental rights of respondent-mother and, consequently, we affirm the trial court's order terminating respondent-mother's parental rights.

III. Conclusion

¶ 51 WCHS had standing to file a motion to terminate the parental rights of respondent-mother pursuant to N.C.G.S. 7B-1103(a)(3) because the juvenile Mike was placed in the custody of WCHS in February 2019 by a trial court of competent jurisdiction. Therefore, the trial court had subject matter jurisdiction to enter the order which terminated respondent-mother's parental rights.

¶ 52 The trial court did not base its determination of Mike's best interests upon a misapprehension of the law pertaining to the legal effect of respondent-mother's specific relinquishment of her parental rights, nor did the trial court abuse its discretion in evaluating its considerations and reaching its conclusions regarding the juvenile's best interests. The

trial court properly considered the dispositional factors in N.C.G.S. § 7B-1110(a) in concluding that the termination of the parental rights of respondent-mother was in the juvenile's best interests. Accordingly, the trial court's order is affirmed.

AFFIRMED.

IN THE MATTER OF M.Y.P.

No. 364A20

Filed 24 September 2021

1. Termination of Parental Rights—grounds for termination—neglect—repetition of neglect—findings

The trial court properly determined that grounds existed to terminate respondent-father's parental rights to his child based on neglect despite a few unsupported findings, given other supported findings establishing that the child was previously neglected and that there was a likelihood of the repetition of neglect if the child were returned to respondent's care. The two-year-old was removed from the home after being left alone in an unfurnished apartment for at least several hours; respondent had a history of untreated and continuing substance abuse; respondent's lack of progress on his case plan left issues regarding domestic violence, lack of stable housing, and mental illness unresolved; and his visits with the child were sporadic.

2. Appeal and Error—termination of parental rights hearing—testimony excluded—no offer of proof made

In a termination of parental rights matter in which respondent-father's two-year-old son was placed with the child's maternal grandfather, respondent failed to make an offer of proof, as required by Evidence Rule 103(a)(2), to preserve for appeal his argument that the trial court erred by excluding respondent's testimony about the grandfather's allegedly inappropriate behaviors. Even if respondent had made an offer of proof, the trial court had wide discretion to consider which evidence, including hearsay, was relevant during disposition. Moreover, the same trial judge presided over the case since the beginning and previously heard concerns about the grandfather and determined they were without merit.

IN RE M.Y.P.

[378 N.C. 667, 2021-NCSC-113]

3. Termination of Parental Rights—dispositional stage—best interests of the child—evidentiary standard not stated

In a termination of parental rights matter in which the adjudicatory and dispositional stages were combined but the trial court did not delineate the different standards of proof for each stage, the entirety of the proceedings clearly showed that the trial court understood and applied the proper evidentiary standard before assessing whether termination of respondent-father's parental rights was in the best interests of the child, where the court considered each dispositional factor in N.C.G.S. § 7B-1110. Even if the court improperly used the clear, cogent, and convincing standard at disposition, use of that heightened standard for petitioner-agency to overcome caused no prejudice to respondent.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from an order entered on 19 March 2020 by Judge Elizabeth T. Trosch in District Court, Mecklenburg County. This matter was calendared for argument in the Supreme Court on 19 August 2021 but determined on the record and briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

Marc S. Gentile, Senior Associate County Attorney, for petitioner-appellee Mecklenburg County Department of Social Services, Youth and Family Services Division.

Amanda S. Hawkins for appellee Guardian ad Litem.

Benjamin J. Kull for respondent-appellant father.

NEWBY, Chief Justice.

¶ 1 Respondent, the father of M.Y.P. (Max), appeals from the trial court's order terminating his parental rights.[1] After careful review, we affirm.

¶ 2 Max was born on 27 May 2016. His parents have a lengthy history with family court, with each parent seeking legal custody at different times.

¶ 3 On 2 October 2018, the Mecklenburg County Department of Social Services, Youth and Family Services Division (YFS) received a

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

referral regarding Max. A neighbor had observed Max, who was then two years old, alone and crying on the balcony of his apartment. The Charlotte-Mecklenburg Police Department went to the residence, and after knocking several times, entered the unlocked apartment, and found Max alone inside the home. The apartment had no furniture in it other than a pack-n-play. The police and YFS attempted to contact respondent but were unsuccessful.

¶ 4 Accordingly, on 3 October 2018, YFS filed a petition, which it later amended, alleging that Max was neglected and dependent and obtained nonsecure custody. Respondent did not reappear until he arrived at a hospital on 5 October 2018 seeking treatment. Max was placed with the maternal grandfather and his girlfriend following a nonsecure custody hearing held on 10 October 2018.

¶ 5 After a hearing on 4 February 2019, on 8 March 2019, the trial court entered an order adjudicating Max neglected and dependent pursuant to respondent's stipulations to allegations in the amended petition. At disposition, the trial court found that there had been no alleviation of the conditions which led to Max's removal from respondent's home, which included domestic violence, lack of stable housing, and mental health issues. The trial court specifically noted the history of domestic violence between respondent and Max's mother, as well as between them and other partners, which the trial court labeled as "volatile and violent." Additionally, respondent had failed to provide the court with accurate information regarding his housing or work history. The trial court also found that respondent "seems to have an irrational view of the facts in this matter" and "[h]is view of the facts is not credible and may qualify as delusional." The trial court further found that respondent had one visit with Max, was difficult to contact, and had not made any effort to establish or confirm visitation since 24 October 2018. Conversely, the court noted that Max had been placed with his siblings with the maternal grandfather, the placement had been positive, and Max was thriving. The trial court ordered the primary permanent plan for Max as reunification with a secondary plan of adoption. Additionally, the trial court ordered that Max remain in his placement with the maternal grandfather and granted respondent supervised visitation.

¶ 6 On 7 June 2019, the trial court entered a review order in which it found that respondent had: (1) outstanding orders for his arrest; (2) not visited with Max on a consistent basis; and (3) not demonstrated his ability to provide for Max's basic needs. Additionally, the court noted that YFS no longer had valid contact information for respondent and last had contact with him on 21 March 2019. The trial court further found that

respondent had "taken no meaningful steps within the last two months to ameliorate the removal conditions" and authorized YFS to file a petition to terminate parental rights. The trial court also changed the primary permanent plan for Max to adoption and the secondary permanent plan to reunification.

¶ 7 The trial court held a permanency planning review hearing on 10 July 2019. In an order entered on 6 August 2019, the trial court found that respondent still had not engaged in any services nor alleviated the removal conditions. The trial court noted that respondent had only visited Max twice since 4 February 2019.

¶ 8 On 11 July 2019, YFS filed a motion in the cause to terminate respondent's parental rights pursuant to N.C.G.S. § 7B-1111(a)(1) (neglect) and (3) (failure to pay for the cost of care). On 19 March 2020, the trial court entered an order determining that grounds existed to terminate respondent's parental rights pursuant to neglect. N.C.G.S. § 7B-1111(a)(1) (2019). The trial court further concluded it was in Max's best interests that respondent's parental rights be terminated. Accordingly, the trial court terminated respondent's parental rights.[2] Respondent appeals.

I. Adjudication

¶ 9 **[1]** Respondent first argues that the trial court erred by terminating his parental rights based on neglect. Specifically, respondent contests several findings of fact, asserts that those findings do not support the trial court's conclusions of law, and argues that terminating his rights here would undermine the legislature's intent in promulgating the neglect ground for termination cases.

¶ 10 A termination of parental rights proceeding consists of an adjudicatory stage and a dispositional stage. N.C.G.S. §§ 7B-1109, -1110 (2019); *In re Montgomery*, 311 N.C. 101, 110, 316 S.E.2d 246, 252 (1984). At the adjudicatory stage, the petitioner bears the burden of proving by "clear, cogent, and convincing evidence" the existence of one or more grounds for termination under section 7B-1111(a) of our General Statutes. N.C.G.S. § 7B-1109(f) (2019). We review a trial court's adjudication "to determine whether the findings are supported by clear, cogent and convincing evidence and the findings support the conclusions of law." *In re Montgomery*, 311 N.C. at 111, 316 S.E.2d at 253 (citing *In re Moore*, 306 N.C. 394, 404, 293 S.E.2d 127, 133 (1982)). "Findings of fact not challenged by respondent are deemed supported by competent evidence

2. The trial court's order also terminated the parental rights of Max's mother, but she did not appeal.

and are binding on appeal." *In re T.N.H.*, 372 N.C. 403, 407, 831 S.E.2d 54, 58 (2019).

¶ 11 Here the trial court concluded that a ground existed to terminate respondent's parental rights based on N.C.G.S. § 7B-1111(a)(1) (neglect). A trial court may terminate parental rights pursuant to N.C.G.S. § 7B-1111(a)(1) 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 . . . 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). We have recently explained that

> "Termination of parental rights based upon this statutory ground requires a showing of neglect at the time of the termination hearing or, if the child has been separated from the parent for a long period of time, there must be a showing of . . . a likelihood of future neglect by the parent." "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 R.L.D., 375 N.C. 838, 841, 851 S.E.2d 17, 20 (2020) (first quoting *In re D.L.W.*, 368 N.C. 835, 843, 788 S.E.2d 162, 167 (2013), then quoting *In re Z.V.A.*, 373 N.C. 207, 212, 835 S.E.2d 425, 430 (2019)).

¶ 12 In support of its conclusion as to N.C.G.S. § 7B-1111(a)(1), the trial court made the following findings of fact:

> 22. On October 2, 2018 at approximately 10:20 pm, YFS received a referral alleging that the juvenile had been left alone at his residence and had been in and out of the apartment residence crying for the Respondent Father.
>
> 23. Law enforcement had been called to the Respondent Father's residence approximately 40 minutes before YFS was called. When officers arrived, they knocked on the door several times, but no one answered. Because the child was so young, the doorknob was checked and it was unlocked so officers entered. The child was found alone and without any supervision. The only furniture in the

residence was a pack-n-play. There was a letter addressed to the Respondent Father, but a different address was listed. Officers knocked on neighbors' doors but no one knew the Respondent Father. The telephone numbers that law enforcement found for the Respondent Father were disconnected or were no longer in service so the juvenile was transported to a regional substation.

24. The juvenile was left alone without adult supervision since at least 8:00 pm on October 2, 2018. The Respondent Father was unavailable to provide any care or supervision until Friday, October 5, 2018. During the nonsecure custody hearing for this juvenile, the Respondent Father [sic] testimony was inconsistent and mostly incoherent. In sum, he claimed that [Max's mother] kidnapped him in the evening hours of October 2, 2018 and then held him hostage and assaulted him repeatedly until October 5, 2018 when he sought treatment at a local hospital. [Max's mother] has been charged criminally as a result of this allegation, but she has not been seen or heard from since October 5, 2018 and her charges remain pending.

25. As for the lack of furniture in the apartment where the juvenile was found, the Respondent Father and the juvenile had been living there for weeks. He claims that furniture was being delivered. He and [his wife] were married at this time, but he had not lived with her for at least three years though he still depended on her for support.

26. Prior to the filing of the juvenile petition, [respondent and Max] lived together in at least six different residences.

. . . .

28. [Max] was adjudicated neglected and dependent on February 4, 2019. [Respondent] was present during the adjudication. The dispositional hearing occurred immediately after the juvenile was adjudicated.

29. During disposition, the [c]ourt found that issues of mental illness, domestic violence, inadequate and

unstable housing and substance abuse were all conditions that led to the aforesaid neglect adjudication. The Respondent Father was awarded a minimum of biweekly supervised visitation.

30. Between the dispositional hearing and the First Review Hearing (on April 29, 2019), Respondent Father visited with the juvenile only twice and during a two-month stretch within this review period he contacted YFS only once. By this First Review Hearing, which he did not attend, he had not taken any steps to demonstrate that he was making any progress on alleviating any of the removal conditions. During this April hearing, this [c]ourt adopted the Respondent Father's case plan which called for him to be screened by the FIRST program which screens for needs in the areas of mental health, substance abuse, and domestic violence and to then comply with all recommendations, sign appropriate releases for any services, and to demonstrate that he can meet the basic needs of himself and the juvenile.

31. The [c]ourt conducted a Permanency Planning Hearing (PPH) on July 10, 2019 which the Respondent Father attended. Between the aforesaid April hearing and the PPH, Respondent Father did not have any visitation with the juvenile.

32. With respect to the Respondent Father's involvement with FIRST since the filing of the juvenile petition, he was initially referred there in January 2019. He completed paperwork at that time and submitted a urine sample that was positive for alcohol and marijuana. On or about July 21, 2019, he provided another marijuana-positive urine sample. The Respondent Father eventually submitted to the assessment on July 31, 2019. Needs were identified in the areas of substance abuse and domestic violence. Respondent Father was referred for a substance abuse assessment with Anuvia and for a domestic violence assessment with Community Support Services. On October 17, 2019, he provided a urine sample that was positive for cocaine and marijuana. A follow up appointment was requested after the October sample

was received, but Respondent Father never returned. Anuvia's assessment recommended that he complete a 40-hour outpatient program, but he never started the program.

33. Respondent Father claimed to the forensic evaluator . . . that he had only occasionally consumed alcohol since he moved back from California. For this same time frame, he claimed that he had not used any illegal drugs. He lived in California between August 2017 and February 2018. The drug screen results discussed above demonstrate his testimony in this regard was not accurate.

34. Overall, the Respondent Father has provided inconsistent information to the [c]ourt, the forensic evaluator, and YFS. Assessments of his emotional and behavioral functioning completed as part of the Personality Assessment Inventory were uninterpretable due to his scores on the validity scales. The pattern of responses suggested a significant level of defensiveness. His responses also reflected a considerable distortion and minimization of difficulties. It was this personality profile and behavioral approach to issues that has led to the Respondent Father's failure to acknowledge any problems that impact on his ability to provide adequate care and supervision to the juvenile or take any action to address his noted problems.

35. As of the date of this TPR proceeding, Respondent Father had not initiated any services to address issues related to substance abuse or domestic violence so he has made no progress in alleviating either condition. He maintained that he resides in the apartment where the juvenile was found unattended on October 2, 2019. He has never made that residence available for inspection to determine whether it is structurally safe or otherwise appropriate for the juvenile.

36. The Respondent Father testified with clarity and certainty about events and circumstances of the custody dispute with [Max's mother] (e.g. the procedural history of the family court proceedings), his prior

> living arrangements, and his work history. However, he offered the effects of a traumatic brain injury to excuse or explain his absence from his son's life since he entered YFS nonsecure custody, his failure to consistently visit with the child during that same time, or otherwise to engage in services to alleviate the injurious conditions that led to YFS obtaining nonsecure custody.
>
> . . . .
>
> 38. . . . . [Respondent] has had only sporadic contact with [Max] since [Max] entered YFS nonsecure custody. He has not engaged in or remedied any removal conditions and his residence has not been confirmed. He is unable to provide proper care and supervision within a reasonable period of time.
>
> 39. Due to [respondent's] failure . . . to engage in any services or to establish that [he] can provide proper care and supervision [of Max], YFS cannot recommend that [Max] be returned [to his care]. Consequently, multiple barriers to reunification are still present, [Max] remains in YFS nonsecure custody, and there is a high probability of the repetition of neglect.

¶ 13 We first consider respondent's challenges to findings of fact 25, 29, and 31. Respondent contends that in finding of fact 25, the following portions of the finding were unsupported by the evidence: that he had been living "for weeks" in the apartment where Max was found; that he "claimed that furniture was being delivered" for the apartment; and that he depended on his then wife for support. We agree. Accordingly, we disregard these portions of finding of fact 25. *See In re S.M.*, 375 N.C. 673, 684, 850 S.E.2d 292, 302 (2020) (disregarding findings of fact that are unsupported by clear, cogent, and convincing evidence).

¶ 14 Respondent next contends that finding of fact 29 incorrectly states that during disposition, the trial court found that substance abuse was one of the conditions which led to the adjudication of neglect. While the dispositional order states that respondent "seems to have a substance abuse history," respondent is correct that the trial court only explicitly listed "domestic violence," "stable housing," and "mental health" to be "the problems which led to adjudication and must be resolved to achieve reunification." Therefore, we disregard this portion

of finding of fact 29 to the extent it was considered as a problem that led to adjudication. We note, however, that respondent does not challenge finding of fact 32, which states that respondent's assessment in July of 2019 identified needs "in the area[ ] of substance abuse." As such, the fact that respondent had a history of substance abuse is a proper consideration when determining whether the trial court properly terminated respondent's rights.

¶ 15 Respondent next argues that finding of fact 31 incorrectly states that he did not visit with Max between 29 April and 10 July 2019. We agree. A social worker testified that respondent visited Max on 7 June 2019. Therefore, we disregard this portion of the trial court's finding of fact since respondent had a visit with the child during this four-month period.

¶ 16 Regardless of our conclusion that the above findings of fact are unsupported, such error is harmless as the remaining findings in the trial court's order still support its conclusion that respondent's rights were subject to termination based on neglect. The trial court found that Max was adjudicated neglected on 4 February 2019. Notably, respondent stipulated to the findings of fact supporting the adjudication of neglect and did not appeal from the trial court's order. This Court has repeatedly stated that "[w]hen determining whether a child is neglected, the circumstances and conditions surrounding the child are what matters, not the fault or culpability of the parent." *In re Z.K.*, 375 N.C. 370, 373, 847 S.E.2d 746, 748–49 (2020); *see also In re S.D.*, 374 N.C. 67, 75, 839 S.E.2d 315, 322 (2020) ("[T]here is no requirement that the parent whose rights are subject to termination on the grounds of neglect be responsible for the prior adjudication of neglect."); *In re J.M.J.-J.*, 374 N.C. 553, 564, 843 S.E.2d 94, 104 (2020) (rejecting the respondent's argument "that the trial court's conclusion of neglect was erroneous because he was not responsible for the conditions that resulted in [his daughter's] placement in DSS custody"). Consequently, based upon its finding that there had been a prior adjudication of neglect, we conclude the trial court's findings were sufficient to support its conclusion that Max was previously neglected.[3]

3. Respondent also challenges findings of fact 9–14, 17, and 19 as being unsupported by the evidence. These findings of fact concern events between October 2016 and October 2017. They detail respondent's relationship with Max's mother, claims of substance abuse by respondent and improper care and supervision of Max, various custody orders entered concerning Max, and a motion for contempt filed by respondent against Max's mother and her purging of contempt. We decline, however, to review these findings of fact. These findings of fact all concern events and allegations that were unrelated to and preceded

¶ 17 Respondent next argues that the trial court's determination that there was a likelihood of future neglect was erroneously based on his failure to comply with his case plan. Respondent asserts that allowing termination under N.C.G.S. § 7B-1111(a)(1) based on a parent's non-compliance with his case plan would rob the parent of the important safeguards provided by N.C.G.S. § 7B-1111(a)(2), which would have afforded him a full twelve months to show improvement. Again, respondent's argument is unpersuasive.

¶ 18 This Court has stated that "[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)); *see also In re W.K.*, 376 N.C. 269, 278–79, 852 S.E.2d 83, 91 (2020) (noting that "[b]ased 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").

¶ 19 Here the trial court's unchallenged findings of fact demonstrate that mental illness, domestic violence, and unstable housing were conditions the trial court identified which led to Max's removal from respondent's custody and the adjudication of neglect. To address these issues, the trial court adopted respondent's case plan, which required him to be screened for needs in these areas and to comply with all recommendations. Respondent submitted to the screening, which identified a need in the area of domestic violence. The trial court found, however, that respondent failed to initiate any services to address domestic violence and made no progress in ameliorating this issue. In addition to those findings regarding respondent's failure to address domestic violence concerns, the trial court found that, consistent with respondent's prior issues with unstable housing, YFS was unable to confirm respondent's residence.

¶ 20 Furthermore, though awarded visitation, respondent failed to consistently visit with Max. Additionally, the trial court's determination that there was a likelihood of future neglect did not rest solely on respondent's failure to complete his case plan. For example, substance abuse was also identified as an area of need for services, and the trial court

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the claims which led to the filing of the juvenile petition and the adjudication of Max as a neglected juvenile. Consequently, because they are not necessary to the trial court's determination that respondent previously neglected Max, we need not review them. *See In re T.N.H.*, 372 N.C. at 407, 831 S.E.2d at 58–59 ("[W]e review only those findings necessary to support the trial court's determination that grounds existed to terminate respondent's parental rights." (citing *In re Moore*, 306 N.C. at 404, 293 S.E.2d at 133)).

could properly conclude that failure to address this issue could lead to a repetition of neglect. *See In re D.L.A.D.*, 375 N.C. 565, 572, 849 S.E.2d 811, 817 (2020) (stating that "a substance abuse problem that likely went untreated could inhibit a parent's capability or willingness to consistently provide adequate care to a child" and thus would support a determination that neglect would likely repeat in the future). The trial court found that during the relevant periods of time during this proceeding, respondent twice tested positive for marijuana, tested positive once for cocaine, and failed to begin a recommended forty-hour outpatient substance abuse program. Thus, based on respondent's failures to address all of these issues, the trial court properly determined that there was a high probability of repetition of neglect should Max be returned to his father's care and custody.

¶ 21 Notably, though respondent disputes the trial court's assessment of his culpability, i.e., whether he was responsible for the neglect, it was within the trial court's authority to pass on respondent's credibility. Having interacted with respondent throughout the proceeding, the trial court was in the best position to determine respondent's credibility regarding his culpability as it relates to neglect. *See In re C.A.H.*, 375 N.C. 750, 759, 850 S.E.2d 921, 927 (2020) (noting that the trial court, given its unique position, is the proper entity to make credibility determinations and thus appellate courts should not reweigh such determinations). Therefore, the trial court's remaining findings of fact support its conclusion of law that a ground existed to terminate respondent's parental rights pursuant to N.C.G.S. § 7B-1111(a)(1). Accordingly, we affirm the trial court's determination that a ground existed to terminate respondent's parental rights based on neglect.

II. Disposition

¶ 22 We next consider respondent's arguments regarding disposition. If the trial court finds at least one ground to terminate parental rights under N.C.G.S. § 7B-1111(a), it proceeds to the dispositional stage where it must "determine whether terminating the parent's rights is in the juvenile's best interest" based on the following factors:

> (1) The age of the juvenile.
>
> (2) The likelihood of adoption of the juvenile.
>
> (3) Whether the termination of parental rights will aid in the accomplishment of the permanent plan for the juvenile.
>
> (4) The bond between the juvenile and the parent.

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

(6) Any relevant consideration.

N.C.G.S. § 7B-1110(a) (2019).

¶ 23 **[2]** Respondent contends the trial court committed reversible error when it prevented him from testifying about his concerns regarding Max being placed with the maternal grandfather. At the termination hearing, respondent began testifying that before Max was born, the following events occurred:

> [Max's mother] called me ranting and raving, saying that [the maternal grandfather] was yelling and being belligerent. But when I was on the phone with him -- or with her, I guess he whipped out his penis and peed on the door. She told me to get over there. I left my apartment at --

DSS's attorney objected to respondent's testimony and the trial court sustained the objection, noting that the allegation about the maternal grandfather's suitability as a placement for Max had already been litigated and resolved.

¶ 24 Respondent asserts that the trial court's exclusion of his testimony was based on the doctrine of collateral estoppel. Respondent contends that the trial court misapplied the doctrine because there was no prior order in the case regarding the incident about which he sought to testify. Respondent argues that the exclusion of the testimony was prejudicial because it directly undermined its determination of Max's best interests. We are not persuaded.

¶ 25 Importantly, to preserve an argument concerning the exclusion of evidence, a party is required to make an offer of proof in accordance with N.C.G.S. § 8C-1, Rule 103(a)(2). *State v. Atkins*, 349 N.C. 62, 79, 505 S.E.2d 97, 108 (1998). This Court has stated:

> [W]e would hold that, whether an objection be to the admissibility of testimony or to the competency of a witness to give that, or any, testimony, the significance of the excluded evidence must be made to appear in the record if the matter is to be heard on review. Unless the significance of the evidence is obvious from the record, counsel offering the evidence must

> make a specific offer of what he expects to prove by the answer of the witness.

Currence v. Hardin, 296 N.C. 95, 99–100, 249 S.E.2d 387, 390 (1978). Here respondent failed to make an offer of proof regarding the excluded testimony and the substance of the excluded testimony regarding the maternal grandfather is not obvious from the record.

¶ 26 Furthermore, even assuming that this argument was preserved for appeal, we would decline to find that the trial court abused its discretion by curtailing respondent's testimony. N.C.G.S. § 7B-1110(a) provides that at the dispositional hearing, the trial 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) (emphases added). Additionally, this Court has stated 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[.]

In re R.D., 376 N.C. 244, 250–51, 852 S.E.2d 117, 124 (2020) (emphasis added).

¶ 27 Notably, here the same trial judge who presided over the termination hearing had presided over Max's case since the filing of the initial petition in October 2018. Furthermore, though respondent's testimony was curtailed, some of his concerns regarding the maternal grandfather were described in his testimony. Importantly, the trial court had previously heard the concerns regarding the maternal grandfather's fitness and determined they were without merit. Given the wide discretion afforded the trial court in making evidentiary rulings during the dispositional hearing, even assuming that the issue had been preserved for appellate review, we would conclude the trial court did not abuse its discretion by excluding further testimony from respondent on this issue. *See id.* at 253, 852 S.E.2d at 126 (stating that N.C.G.S. § 7B-1110 "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").

¶ 28 **[3]** Respondent next argues that the trial court applied the wrong evidentiary standard when deciding whether it was in Max's best interests to terminate his parental rights. Specifically, respondent claims that the trial court applied the clear, cogent, and convincing evidentiary standard that is required for adjudicatory findings. Respondent argues that the failure to apply the correct standard was necessarily prejudicial.

¶ 29 At the adjudication stage, the burden "shall be upon the petitioner or movant and all findings of fact shall be based on clear, cogent, and convincing evidence[,]" N.C.G.S. § 7B-1109(f) (2019), whereas "no burden of proof should be imposed upon either party at the dispositional stage," *In re R.D.*, 376 N.C. at 256, 852 S.E.2d at 127. A trial court is not required to bifurcate the adjudicatory and dispositional hearing, and the evidence from both stages may be intertwined. *See In re S.M.M.*, 374 N.C. 911, 915, 845 S.E.2d 8, 12 (2020) ("Although the dispositional evidence was intertwined with adjudicatory evidence, a trial court is not required to bifurcate the hearing into two distinct stages."). The trial court must still apply the correct standard of proof at each stage of the proceedings. *See In re R.B.B.*, 187 N.C. App. 639, 643–44, 654 S.E.2d 514, 518 (2007) (stating that a trial court may combine the adjudicatory and dispositional stages into one hearing so long as it applies the correct evidentiary standard to each stage), *disc. rev. denied*, 362 N.C. 235, 659 S.E.2d 738 (2008). Nevertheless, this Court has recognized that even an incorrect recitation of the standard of proof may not constitute reversible error where it is not prejudicial. *See In re L.E.W.*, 375 N.C. 124, 128, 846 S.E.2d 460, 465 (2020) (concluding that the trial court's incorrect statement that it applied a clear, cogent, and convincing evidentiary standard to review a permanency planning order worked in the respondent's favor as it required DSS to present stronger proof than actually required, thus rendering any error harmless); *see also In re A.J.A.-D.*, 269 N.C. App. 677, 837 S.E.2d 483 (2020) (noting that the trial court's improper designation of the "clear, cogent, and convincing" standard of proof to its dispositional findings was harmless error since it worked to benefit the respondent by requiring DSS to meet a higher burden than would normally apply).

¶ 30 Here with respondent's consent, the trial court consolidated the adjudicatory and dispositional hearings. In its written order, the trial court noted that it made its findings of fact by "clear, cogent, and convincing evidence." The trial court did not, however, state in open court or in its order that it recognized that there was no burden of proof applicable to the best interests determination at the dispositional stage.

¶ 31 Despite the trial court's failure to state the different evidentiary standards applied to each portion of the proceeding, the trial court noted

that it determined that terminating respondent's rights was in the child's best interests. It did so after assessing each factor listed in N.C.G.S. § 7B-1110, finding that:

> 38. While [respondent] did appear to have a bond when he visited with [Max], it was not a particularly strong bond. . . . [4]
>
> . . . .
>
> 40. That the goal of the case is adoption.
>
> 41. [Max] resides with his maternal grandfather . . . . In that home, [Max's] two older siblings also reside along with [the maternal grandfather's] paramour . . . . That home is a loving, caring, stable, and potentially adoptive home. The likelihood of adoption is very high. Terminating [respondent's] parental rights will aid in the accomplishment of the permanent plan of adoption. [Max] cannot be adopted unless [respondent] consent[s] to an adoption or [his] parental rights are terminated. During observations of [Max] in [the maternal grandfather and his paramour's] residence, he appears happy and very attached to everyone who resides there. Terminating [respondent's] parental rights is in the child's best interest.

¶ 32 Therefore, it is clear that the trial court understood what it must consider when determining the best interests of the child. Moreover, even if the trial court applied the wrong evidentiary standard, respondent has not shown he was prejudiced by the trial court's failure to articulate the lower standard employed for the dispositional phase. Applying a "clear,

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4. Respondent also challenges as being unsupported by clear, cogent, and convincing evidence the portion of finding 38 which stated that "[w]hile [respondent] did appear to have a bond when he visited with [Max], it was not a particularly strong bond." Notably, this finding of fact concerns the trial court's determination of the child's best interests under N.C.G.S. § 7B-1110(a) and was not necessary to the trial court's conclusion that a ground existed to terminate respondent's parental rights.

We review this argument as a challenge to one of the trial court's dispositional findings. Respondent notes that there was testimony in the record that respondent interacted appropriately with Max and that their visits were positive. Notably, this evidence that respondent cites does not concern the strength of the bond between respondent and Max. Importantly, the record contains evidence that the bond between respondent and Max could not be described as a parent/child bond due to, *inter alia*, the infrequency of respondent's visits and his general lack of effort. Thus, there is competent evidence in the record that supports the trial court's finding here.

cogent, and convincing" standard to the dispositional phase here meant that the trial court would have required YFS to overcome a heightened standard to show that terminating respondent's rights was in the child's best interests. *See In re L.E.W.*, 375 N.C. at 128, 846 S.E.2d at 465. Thus, respondent's argument is overruled.

¶ 33 As such, we affirm the trial court's order terminating respondent's parental rights.

AFFIRMED.

IN THE MATTER OF T.M.B.

No. 5A21

Filed 24 September 2021

Termination of Parental Rights—grounds for termination—parental rights terminated as to another child—lack of safe home—no protection from abusive individuals

The trial court properly terminated a mother's parental rights to her son on the basis that her parental rights had been terminated involuntarily to two of her other children and she lacked the ability to establish a safe home (N.C.G.S. § 7B-1111(a)(9)), after making findings, which were based on clear, cogent, and convincing evidence, that she had a pattern of exposing her children to abusive individuals and lacked insight into her son's sexual abuse and the effect it had on him, that she had not made sufficient progress with her own mental health treatment, and that she was unable to provide safe and stable housing for her son. The court's findings in turn supported its conclusion that grounds existed to terminate and that termination of the mother's parental rights was in the best interest of her son.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from orders entered on 17 September 2020 by Judge Monica Bousman in District Court, Wake County. This matter was calendared for argument in the Supreme Court on 19 August 2021 but determined on the record and briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

IN RE T.M.B.

[378 N.C. 683, 2021-NCSC-114]

Mary Boyce Wells for petitioner-appellee Wake County Human Services.

Parker Poe Adams & Bernstein LLP, by Carlos E. Manzano, for appellee Guardian ad Litem.

Mercedes O. Chut for respondent-appellant mother.

BARRINGER, Justice.

¶ 1 Respondent appeals from the trial court's 17 September 2020 order terminating her parental rights in her minor child T.M.B. (Thomas).[1] After careful review, we affirm the trial court's order terminating respondent's parental rights.

I. Factual and Procedural Background

¶ 2 In December 2006, respondent prematurely gave birth to Thomas who weighed only two pounds and four ounces. Respondent's drug screen came back positive for cocaine, and respondent admitted to using cocaine during her pregnancy. In April 2009, CPS received a report that respondent was homeless, Thomas had a black eye, and respondent and her boyfriend, C.H., were abusing drugs. In September 2012, Thomas reported that C.H. was violent and aggressive in the home. On 7 October 2015, Wake County Human Services (WCHS) filed a juvenile petition alleging that Thomas was a neglected juvenile. The petition outlined respondent's extensive history with Child Protective Services (CPS) that began on 7 March 2000 and included sixteen reports of neglect regarding respondent's other children.

¶ 3 Following a hearing on 3 November 2015, the trial court entered an order on 18 November 2015 adjudicating Thomas to be a neglected juvenile. In a separate disposition order entered on 8 January 2016, the trial court found that respondent signed an Out of Home Family Services Agreement (OHFSA) on 29 September 2015. The trial court ordered respondent to comply with the OHFSA and to have supervised visitation with Thomas as agreed upon by Thomas's father, who was given sole legal custody of Thomas.

¶ 4 On 6 September 2018, WCHS filed a petition alleging Thomas to be a neglected juvenile and obtained nonsecure custody of Thomas. WCHS

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

alleged that on 3 July 2018, a report was received that Thomas was hospitalized for mental health treatment at Holly Hill Hospital after running away from home for fear of the corporal punishment his father and stepmother inflicted upon him. The petition also alleged that a Child and Family Evaluation (CFE) was completed, and the CFE provider found that Thomas was exhibiting symptoms in the clinical range for anxiety, depression, posttraumatic stress, dissociation, dissociation-overt, dissociation-fantasy, sexual concerns, and sexual preoccupation.

¶ 5 After the adjudication hearing on the petition for neglect on 1 November 2018, the trial court entered a consent order adjudicating Thomas to be a neglected juvenile. The trial court again ordered respondent to comply with the OHFSA and ordered WCHS to retain custody of Thomas.

¶ 6 Following a permanency-planning hearing on 28 January 2019, the trial court entered an order on 21 February 2019 finding that respondent had completed a substance abuse assessment in July 2018 for a case regarding one of her other children. Respondent's parental rights to two of her children were terminated in 2018. At the time, respondent was the biological mother of five children under the age of eighteen, none of whom were in her care. She had been incarcerated and charged with felony child abuse in March 2018, convicted of misdemeanor child abuse, and released in December 2018. The primary permanent plan for Thomas was set as reunification with a parent, with a secondary permanent plan of adoption.

¶ 7 Following another permanency-planning hearing on 22 July 2019, the trial court entered an order on 3 September 2019 finding that a WCHS social worker visited respondent's home on 15 May 2019, and the home was unsuitable for a child. Respondent shared the home with her mother and respondent's girlfriend. It was cluttered with no room for a child to sleep. The trial court ordered that the primary permanent plan remain reunification with a parent, with a secondary permanent plan of adoption.

¶ 8 On 28 January 2020, the trial court entered a permanency-planning order finding that respondent had made minimal progress in engaging in her case plan. Specifically, the trial court found that WCHS had not been able to contact respondent from July to October 2019, respondent had engaged in unpermitted contact with Thomas through Facebook in October 2019, respondent had picked Thomas up from school and taken him to her home on 29 October 2019, and respondent had arranged for Thomas to be picked up from school on 5 November 2019 by C.H., though the attempt was thwarted by a WCHS social worker who intervened. In

addition, the trial court found that respondent was still living with her mother and respondent's girlfriend. Finally, the trial court found that respondent had attended her updated substance abuse assessment on 26 November 2019 and complied with two random drug screens, both of which were negative. However, the trial court noted that WCHS had not received proof of respondent's attendance at Alcoholics Anonymous/ Narcotics Anonymous meetings. After making these findings, the trial court changed the primary permanent plan to adoption, with a secondary permanent plan of reunification with a parent.

¶ 9 Around July 2020, Thomas was placed in a therapeutic foster home with prospective adoptive parents. Thomas bonded with his foster parents who fully incorporated him into their lives. Thomas stated that he would like to be adopted by his foster parents.

¶ 10 WCHS filed a motion to terminate respondent's parental rights to Thomas[2] pursuant to N.C.G.S. § 7B-1111(a)(1), (2), and (9) on 4 February 2020. Following a 20 August 2020 hearing on WCHS's motion to terminate respondent's parental rights, the trial court entered an order on 17 September 2020 concluding that grounds existed to terminate respondent's parental rights to Thomas pursuant to N.C.G.S. § 7B-1111(a)(1), (2), and (9). The trial court also concluded that it was in Thomas's best interests that respondent's parental rights be terminated and terminated respondent's parental rights. Respondent appealed.

II. Analysis

¶ 11 North Carolina law sets out a two-step process for the termination of parental rights: an adjudicatory stage and a dispositional stage. N.C.G.S. §§ 7B-1109 to -1110 (2019). At the adjudicatory stage, the petitioner bears the burden of proving by clear, cogent, and convincing evidence the existence of one or more grounds for termination under N.C.G.S. § 7B-1111(a). N.C.G.S. § 7B-1109(e)–(f). Then, if the trial court finds that one or more grounds for terminating the respondent's parental rights exist, the matter proceeds to the dispositional stage where the trial court examines whether termination of the respondent's parental rights is in the juvenile's best interests. N.C.G.S. § 7B-1110(a).

A. Standard of Review

¶ 12 Respondent challenges numerous findings of fact from the adjudication stage, as well as the trial court's conclusions of law concerning each of the three grounds under N.C.G.S. § 7B-1111(a) which it found war-

2. WCHS also filed to terminate the parental rights of Thomas's father, but the petition was heard separately, and he is not a party to this appeal.

ranted termination. On appeal, this Court limits its review of the findings of fact to "only those findings necessary to support the trial court's determination that grounds existed to terminate respondent's parental rights." *In re T.N.H.*, 372 N.C. 403, 407 (2019). We review these findings "to determine whether [they] are supported by clear, cogent and convincing evidence." *In re Montgomery*, 311 N.C. 101, 111 (1984). "A trial court's finding of fact that is supported by clear, cogent, and convincing evidence is deemed conclusive even if the record contains evidence that would support a contrary finding." *In re B.O.A.*, 372 N.C. 372, 379 (2019). Further, "[f]indings of fact not challenged by respondent are deemed supported by competent evidence and are binding on appeal." *In re T.N.H.*, 372 N.C. at 407. "The trial court's conclusions of law are reviewable de novo on appeal." *In re C.B.C.*, 373 N.C. 16, 19 (2019).

B. Termination Pursuant to N.C.G.S. § 7B-1111(a)(9)

¶ 13 Respondent challenges the trial court's adjudication that termination was warranted pursuant to N.C.G.S. § 7B-1111(a)(9). Under N.C.G.S. § 7B-1111(a)(9), grounds exist to terminate a parent's parental rights when "[t]he parental rights of the parent with respect to another child of the parent have been terminated involuntarily by a court of competent jurisdiction and the parent lacks the ability or willingness to establish a safe home." N.C.G.S. § 7B-1111(a)(9) (2019). A "safe home" is defined by statute as one "in which the juvenile is not at substantial risk of physical or emotional abuse or neglect." N.C.G.S. § 7B-101(19).

C. Challenges to Specific Findings of Fact

¶ 14 On appeal, respondent challenges numerous factual findings made by the trial court. However, we address only those challenges that are necessary to support the trial court's adjudication that grounds existed to terminate respondent's parental rights pursuant to N.C.G.S. § 7B-1111(a)(9). While respondent challenges other findings of fact, those findings are clearly unnecessary to support the grounds for termination given the findings examined below, so we do not address them.

¶ 15 Respondent challenges findings of fact 17 and 18 stating that she had a history of not complying with orders regarding contact with Thomas's brother Troy,[3] including "[a]lmost immediate[]" disregard of a 2017 supervised contact order. Respondent appears to question these findings' relevance, noting that they do not involve Thomas, and further contend-

3. This Court previously used this pseudonym in its opinion reviewing and affirming the termination of respondent's parental rights to Troy. *In re T.N.H.*, 372 N.C. 403, 404, 412–13 (2019).

ing that they were exaggerated. While respondent is correct that the findings do not involve Thomas, they are still relevant since they involve the previous termination of respondent's parental rights with respect to a child. Moreover, findings 17 and 18 were not exaggerated. As reflected in the testimony and exhibits admitted at the termination hearing, the trial court rendered an order prohibiting respondent from unsupervised contact with Troy in August 2017 and then rendered another order waiving further review in November of 2017. Only a month later, in December of 2017, respondent violated that order, engaging in unsupervised contact with Troy. This was in addition to numerous other violations of visitation orders. Accordingly, we conclude that findings of fact 17 and 18 were supported by clear, cogent, and convincing evidence.

¶ 16 Next, respondent challenges the trial court's findings that she lacked insight into Thomas's trauma. Respondent appears to interpret these findings as stating that she denied Thomas's abuse. But that is not what the trial court found. In its findings, the trial court noted that respondent had acknowledged to some degree that Thomas had been sexually abused but focused on her lack of insight into this abuse. As detailed below, respondent's own words and actions demonstrated that she did not understand the extent of Thomas's trauma or how to help him heal from it.

¶ 17 Prior to the termination hearing, respondent had asserted multiple times that she did not believe Thomas had ever been sexually abused, even when presented with evidence to the contrary. At the termination hearing itself, respondent stated she believed Thomas was sexually abused, but she did not appear to understand the extent of his trauma, downplaying it since he had not been "penetrated."

¶ 18 Additional evidence supported the trial court's finding that respondent had not gained insight into Thomas's trauma. Respondent contends that her testimony concerning her own abuse was sufficient to show that she understood Thomas's trauma. This testimony consisted of respondent disclosing her own experiences and asserting that, "[Y]ou can't tell me nothing that I already don't know." However, other testimony showed that this past experience had not provided respondent insight into how to prevent her children from being sexually abused or how to care for the trauma they incurred. Further, respondent limits her challenge on appeal to Thomas's sexual abuse. However, the trial court found that Thomas's trauma stemmed from both sexual abuse and the severe physical abuse he endured at the hands of his birth father and C.H. Respondent does not challenge that she lacked insight into Thomas's trauma resulting from physical abuse. Nor does respondent

contend that she has insight into the anxiety, depression, posttraumatic stress disorder, dissociation, dissociation-overt, dissociation-fantasy, sexual concerns, and sexual preoccupation Thomas endured as a result of both sexual and physical abuse.

¶ 19 Further, respondent's actions demonstrate a lack of insight into Thomas's abuse. In July of 2019, the trial court suspended respondent's visitations out of concern for Thomas's mental health. Nevertheless, respondent disregarded those concerns, putting her own needs above the safety and welfare of her son. Respondent engaged with Thomas on social media, visited with him, and attempted to arrange more visits, despite the threat they posed to Thomas's mental health. These actions contradict respondent's assertion that she understands the trauma Thomas experienced. Rather, the evidence of respondent's actions and her own testimony support the trial court's finding that respondent lacked insight into Thomas's trauma.

¶ 20 Next, respondent contends that the evidence does not support finding of fact 33 that she could not control Thomas while he was in her care, prevent him from spending time with a past abuser and other unsafe individuals, or stop him from engaging in risky behaviors. In support of this challenge, respondent proffers her testimony that she could prevent Thomas from visiting C.H. but not from calling him. However, other evidence presented at the termination hearing contradicts this assertion. In the two-and-a-half years preceding the termination hearing, respondent twice obtained custody of one of her children and each time exposed that child to an abuser. First, in January 2018, respondent brought Troy to a motel and then left him unsupervised, directly leading to his sexual abuse. Second, in October 2019, respondent picked up Thomas and immediately brought him to meet C.H., a past abuser. The next month, respondent again would have placed Thomas in a dangerous situation, as respondent had arranged for C.H. to pick Thomas up from school until the plot was uncovered by a social worker. In addition, respondent conceded that she could not control Thomas's access to technology, and Thomas had demonstrated a proficiency for using communication technology. Based on the evidence before the trial court, we find that it could discredit respondent's assertion and find that if Thomas was returned to her care, she either could not or would not keep him away from dangerous individuals, control him, and prevent him from engaging in risky behavior. Accordingly, we are bound by the trial court's finding of fact 33.

¶ 21 Next, respondent challenges the portions of findings of fact 35–40 relating to her obtainment of mental health services. Specifically, respondent challenges the findings that her untreated mental health

condition made it emotionally unsafe for her to interact with Thomas, that respondent did not engage in mental health treatment to resolve this issue, that respondent was not taking medication for her diagnoses, and that COVID-19 did not cause respondent's lack of progress.

¶ 22 Each of these findings, however, are supported by sufficient evidence. Respondent's psychological evaluation concluded that she needed to progress in her personal stability before interacting with Thomas again, and her social worker testified that she never reached a place where she could safely participate in Thomas's mental health treatment. Additionally, the documentary and testamentary evidence reflected that respondent was neither taking medication for her mental health diagnoses, despite finding that it had helped her in the past, nor participating in any mental health counseling. Additionally, though respondent admitted that she needed mental health treatment to stabilize her mood, she had not participated in any appointments with Turning Point despite being directed to them for treatment. Respondent blames Turning Point and COVID-19 for her nonparticipation in mental health treatment, but the evidence demonstrates that respondent had a history of missing mental health appointments, even when they were scheduled for her in advance and she received numerous reminders.

¶ 23 Finally, respondent challenges the trial court's finding that she was unable to provide safe and stable housing for Thomas. Respondent's challenge mostly centers on the fact that she was looking for housing at the time of termination. However, respondent had only recently started looking for housing at the time of the termination hearing. Prior to that, respondent had been living with her mother in a home a social worker had reviewed and found not suitable for a child. The last time respondent brought Thomas to visit this home, in October of 2019, he was exposed to a past abuser. Further, at the time of the termination hearing, respondent was residing in a motel. Given the foregoing, the trial court's finding that respondent had not obtained safe and stable housing for Thomas was supported by clear, cogent, and convincing evidence.

D. Challenge to the trial court's legal conclusion

¶ 24 Respondent further argues that the facts addressed above do not support the trial court's legal conclusion that grounds existed to terminate her parental rights pursuant to N.C.G.S. § 7B-1111(a)(9). We disagree. As an initial matter, we note that the first requirement of N.C.G.S. § 7B-1111(a)(9)—that the parental rights of the parent with respect to another child have been previously terminated—is met in this case and unchallenged. Respondent previously had her custody to Thomas's

brother Troy terminated, which this Court affirmed. *See In re T.N.H.*, 372 N.C. at 412–13. Accordingly, respondent focuses her arguments on the second requirement of N.C.G.S. § 7B-1111(a)(9)—that respondent lacks the ability or willingness to establish a safe home. Respondent contends that she is able and willing to provide a safe home since she is no longer incarcerated, understands the sexual trauma Thomas endured, would not put Thomas at risk of abuse, no longer is in a relationship with one of Thomas's abusers, and sufficiently changed her circumstances.

¶ 25 However, respondent's contentions are contradicted by the trial court's previously described findings of fact to which this Court is bound. These findings show that at the time of the termination hearing respondent was unable to protect Thomas from abuse or prevent him from engaging in risky behaviors. Indeed, respondent was still actively exposing Thomas to abusers. Additionally, respondent had not gained insight into Thomas's sexual- or physical-abuse-related trauma or how to properly care for it. Further, respondent had not procured a safe or stable home for Thomas to live in. Finally, respondent had failed to progress in her mental health treatment to a point where she could safely interact with Thomas without endangering his emotional safety. These findings, which were supported by clear, cogent, and convincing evidence, are sufficient to support the trial court's conclusion that respondent lacked the ability and willingness to provide Thomas a safe home.

III. Conclusion

¶ 26 Since only one of the grounds outlined in N.C.G.S. § 7B-1111(a) is necessary to support a termination of parental rights, we decline to address respondent's arguments challenging the trial court's finding that grounds existed to terminate her parental rights under N.C.G.S. § 7B-1111(a)(1) and (2). Respondent does not challenge the trial court's determination, in the dispositional stage, that it was in Thomas's best interests to terminate her parental rights. Accordingly, we affirm the trial court's order.

AFFIRMED.

STATE v. HILTON

[378 N.C. 692, 2021-NCSC-115]

STATE OF NORTH CAROLINA
v.
DONALD EUGENE HILTON

No. 292A20

Filed 24 September 2021

1. Satellite-Based Monitoring—lifetime—reasonableness balancing test—aggravated offenders

The imposition of lifetime satellite-based monitoring (SBM) on defendant after the end of his post-release supervision was not an unconstitutional search in violation of the Fourth Amendment because defendant had been convicted of first-degree statutory rape and first-degree statutory sexual offense, making him an aggravated offender as defined by N.C.G.S. § 14-208.6(1a). Lifetime SBM as applied to aggravated offenders is reasonable in light of the State's paramount interest in protecting the public (particularly children), the SBM program's efficacy as a deterrent for recidivism, and the minimal nature of the intrusion required by SBM monitoring given the diminished expectation of privacy by aggravated offenders.

2. Constitutional Law—North Carolina—general warrants—orders imposing satellite-based monitoring

Orders entered pursuant to the statutory satellite-based monitoring (SBM) program do not constitute general warrants, which are prohibited by Art. I, sec. 20 of the North Carolina constitution, and therefore do not violate the state constitution on that basis.

Justice EARLS dissenting.

Justices HUDSON 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, 271 N.C. App. 505, 845 S.E.2d 81 (2020), affirming in part, reversing in part, and remanding an order entered on 10 May 2018 by Judge Daniel A. Kuehnert in Superior Court, Catawba County. On 23 September 2020, the Supreme Court allowed defendant's petition for discretionary review as to additional issues and the State's petition for discretionary review. Heard in the Supreme Court on 17 May 2021.

STATE v. HILTON

[378 N.C. 692, 2021-NCSC-115]

Joshua H. Stein, Attorney General, by Joseph Finarelli, Special Deputy Attorney General, for the State-appellee.

Glenn Gerding, Appellate Defender, by Nicholas C. Woomer-Deters, Assistant Appellate Defender, and James R. Grant, Assistant Appellate Defender, for defendant-appellant.

NEWBY, Chief Justice.

¶ 1 The Supreme Court of the United States held that North Carolina's satellite-based monitoring (SBM) program effects a Fourth Amendment search. As such, the imposition of SBM on a limited category of sex offenders is constitutional so long as it is reasonable. "The reasonableness of a search depends on the totality of the circumstances, including the nature and purpose of the search and the extent to which the search intrudes upon reasonable privacy expectations." *Grady v. North Carolina* (*Grady I*), 575 U.S. 306, 310, 135 S. Ct. 1368, 1371 (2015) (per curiam). The Fourth Amendment reasonableness test requires balancing significant competing interests: the State's interest in protecting children and others from sexual abuse and a convicted sex offender's right to privacy from government monitoring.

¶ 2 Upon remand from the Supreme Court's *Grady I* order, this Court held the SBM program to be unconstitutional as applied to the narrow category of individuals "who are subject to mandatory lifetime SBM based solely on their status as a statutorily defined 'recidivist' who have completed their prison sentences and are no longer supervised by the State through probation, parole, or post-release supervision." *State v. Grady* (*Grady III*), 372 N.C. 509, 522, 831 S.E.2d 542, 553 (2019) (footnote omitted). Our *Grady III* decision, however, left unanswered the question of whether the SBM program is constitutional as applied to sex offenders who are in categories other than that of recidivists who are no longer under State supervision.

¶ 3 Defendant here is not a member of the category contemplated in *Grady III*. Rather, he falls into the aggravated offender category, which consists of defendants who are subject to SBM due to their conviction of at least one statutorily defined "aggravated offense." A limited number of very serious sexual offenses such as rape are categorized as aggravated. Defendant's crime being one of the most serious sex offenses impacts our weighing of the reasonableness factors, including society's interest in protecting its most vulnerable members and the expectation of privacy that society recognizes as legitimate. As such, the task here is

to determine whether the SBM program[1] is constitutional as applied to aggravated offenders.

¶ 4 For guidance, the Supreme Court has provided two examples for conducting the Fourth Amendment reasonableness test in the context of categorical searches. *Grady I*, 575 U.S. at 310, 135 S. Ct. at 1371 (citing *Samson v. California*, 547 U.S. 843, 857, 126 S. Ct. 2193, 2202 (2006) (suspicionless search of parolee was reasonable); *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 664–65, 115 S. Ct. 2386, 2396 (1995) (random drug testing of student athletes was reasonable)). Having conducted the reasonableness analysis in light of *Samson*, *Vernonia*, and our prior decision in *Grady III*, we conclude that searches effected by the imposition of lifetime SBM upon aggravated offenders are reasonable. We also conclude that the SBM program does not violate Article I, Section 20 of the North Carolina Constitution. The trial court's order imposing lifetime SBM based upon defendant's status as an aggravated offender thus complies with the Fourth Amendment and Article I, Section 20. Accordingly, we (1) modify and affirm the portion of the decision of the Court of Appeals which upheld the imposition of SBM during post-release supervision and (2) reverse the portion of the decision which held the imposition of post-supervision SBM to be an unreasonable search. Therefore, the trial court's SBM order is reinstated.

I. Facts and Procedural History

¶ 5 During an interview with a criminal investigator on 8 June 2005, defendant admitted to having sexual intercourse with one minor child and sexual contact with another while a third minor child watched. On 5 July 2005, defendant was charged with first-degree statutory rape and first-degree statutory sexual offense. On 26 April 2007, he pled guilty to the charges and received a sentence of 144 to 182 months. Defendant was released from prison on 9 July 2017 and placed on post-release supervision for a period of five years. Defendant's post-release supervision terms prohibited him from leaving Catawba County without first obtaining approval from his probation officer. Defendant, however, traveled to Caldwell County on several occasions without his probation officer's consent. While in Caldwell County, defendant sexually assaulted his mi-

1. The General Assembly recently amended the SBM program. *See* Act of Sep. 2, 2021, S.L. 2021-138, § 18, https://www.ncleg.gov/Sessions/2021/Bills/Senate/PDF/S300v8.pdf. The relevant amendments, however, do not become effective until 1 December 2021. *See id.* § 18.(p). Therefore, the version of the SBM program in effect on the date of the trial court's SBM order governs the present case.

nor niece. As a result, defendant was charged in Caldwell County with taking indecent liberties with a child.[2]

¶ 6 The trial court in Catawba County conducted a hearing on 19 April 2018 and 10 May 2018 to determine whether defendant should be enrolled in SBM based upon his 2007 convictions. Finding that defendant "[fell] into at least one of the categories requiring [SBM] under [N.C.] G.S. [§] 14-208.40, in that . . . the offense of which . . . defendant was convicted was an aggravated offense," the trial court ordered defendant to enroll in lifetime SBM. In support of its order, the trial court made the following additional findings:

> l. That the defendant admitted to sexually assaulting more than one minor child prior to being convicted of first degree rape and first degree sexual offense.
>
> 2. That the defendant [completed his prison sentence] for the crimes of first degree rape and first degree sexual offense[.]
>
> 3. That probable cause has been found to currently charge the defendant with the crime of taking indecent liberties with a minor.
>
> 4. That the defendant was charged with this crime just a couple months after being released from custody from serving his sentence for the crimes of first degree rape and first degree sexual offense.
>
> 5. That the alleged victim in the pending charge is related to one of the victim's [sic] associated with the defendant's previous convictions of first degree rape and first degree sexual assault.
>
> 6. That the defendant has been monitored by probation and parole since his release from prison on July 9, 2017.
>
> 7. That one of the conditions of defendant's post release supervision is not to leave Catawba County without the permission of his probation/parole officer.
>
> 8. That the defendant has violated this condition of post release supervision and has traveled to

2. Subsequent to the SBM order in this case, defendant was convicted of this indecent liberties charge.

> Caldwell County without the knowledge of probation and parole.
>
> 9. That defendant's current charge of taking indecent liberties with a minor is out of Caldwell County were [sic] the alleged victim lives.
>
> 10. That the [SBM] program in Catawba County utilizes an ankle monitoring device to detect the location of one subject to [SBM] through Global Positioning System.
>
> 11. That the ankle monitoring device is light weight, small in size, can be adjusted for comfort and is of little intrusion to the person wearing the device.
>
> 12. That the monitoring of this device is done by authorized personnel from probation and parole that are assigned to monitor a particular person subject to [SBM].
>
> 13. That there are safe guards [sic] in place to protect a person subject to [SBM] in the case of an emergency or malfunction of the equipment.
>
> 14. That there are no known circumstances regarding this defendant that would cause a unique concern about his ability to wear the ankle monitoring device whether it be physical health, mental health, the defendant's occupation, the defendant's leisure or otherwise.
>
> 15. That there does not currently exist any other way for probation and parole to utilize [SBM] other than the current practice of using an ankle bracelet.
>
> 16. That there does not exist currently any other form of monitoring available to probation and[ ]parole other than physical monitoring similar to what is understood as supervised probation and [SBM] as described above.

Based upon these findings, the trial court concluded that, under the totality of the circumstances, the SBM program is constitutionally reasonable as applied to defendant. Defendant appealed.

¶ 7 Before the Court of Appeals, defendant argued: (1) the trial court exceeded its constitutional authority because the SBM order effected an

unreasonable search; (2) the SBM statute is facially unconstitutional due to the State's failure to demonstrate that the program serves a legitimate government interest; and (3) orders authorizing SBM pursuant to the program constitute "general warrants" in violation of Article I, Section 20 of the North Carolina Constitution. That court issued a divided decision where it affirmed in part, reversed in part, and remanded to the trial court. *State v. Hilton*, 271 N.C. App. 505, 514, 845 S.E.2d 81, 88 (2020). The Court of Appeals noted that under *Grady I* the constitutionality of an SBM order depends on whether it is reasonable "based on the 'totality of the circumstances.' " *Id.* at 509, 845 S.E.2d at 85 (quoting *Grady I*, 575 U.S. at 310, 135 S. Ct. at 1371). It also recognized that a reviewing court should "consider, among other things, 'the nature and purpose of the search' and 'the extent to which the search intrudes upon reasonable expectations of privacy.' " *Id.* (quoting *Grady I*, 575 U.S. at 310, 135 S. Ct. at 1371).

¶ 8 The Court of Appeals then considered this Court's holding in *Grady III* and opined:

> Though the holding was limited to a subset of unsupervised, convicted sex offenders, the *Grady* [*III*] holding appears to impose a high standard on the State to meet in order to show reasonableness when imposing SBM on *any* convicted sex offender who is not under any form of State supervision, mainly because of the high burden of showing the efficacy of SBM in helping solve future crimes.
>
> In its analysis, though, our Supreme Court recognized that the calculus of reasonableness is different when a defendant *is* subject to State supervision. For instance, in the Conclusion section, the Court emphasized that its holding does not enjoin all of the SBM program's applications, in part, "because this provision *is still enforceable* against a [sex offender] during the period of his or her State supervision[.]"

Id. (second and third alterations in original) (citations omitted) (quoting *Grady III*, 372 N.C. at 546, 831 S.E.2d at 570). As such, the Court of Appeals held that based on *Grady III*, "the trial court's imposition of SBM on [d]efendant *for any period beyond* his period of post-release supervision is unreasonable." *Id.* at 510, 845 S.E.2d at 85.

¶ 9 The Court of Appeals, however, then noted that "the expectation of privacy for a defendant who is still under a form of State supervision is

extremely low." *Id.* at 510, 845 S.E.2d at 86 (citing *Grady III*, 372 N.C. at 533, 831 S.E.2d at 561). According to that court, "[w]hile the intrusion [upon defendant's reasonable expectation of privacy] is great, . . . it is not as great as in *Grady* [*III*]" because "the imposition [here] is only for the remainder of the period that [d]efendant is subject to supervision." *Id.* at 511, 845 S.E.2d at 86. It also recognized that "there is a justification for SBM during [d]efendant's post-release supervision period" in that it "help[s] law enforcement determine whether [d]efendant is violating the condition of his post-release supervision that he remain in Catawba County." *Id.* The Court of Appeals thus held that "the imposition of SBM *during* [d]efendant's post-release supervision period is reasonable." *Id.* at 510, 845 S.E.2d at 85.

¶ 10 Regarding defendant's facial challenge to the SBM statute, the Court of Appeals noted that "[t]he General Assembly's enactments are presumed to be constitutional." *Id.* at 513, 845 S.E.2d at 88. In recognizing that the State's interest in the SBM statute is "without question legitimate," *id.* (quoting *Grady III*, 372 N.C. at 543, 831 S.E.2d at 568), the Court of Appeals held that the SBM statute "is facially valid, at least to the extent that it can be applied to defendants under State supervision," *id.* Finally, the Court of Appeals addressed defendant's general warrant argument and concluded that "the imposition of SBM on individuals who are otherwise under State post-release supervision does not violate our Constitution." *Id.* at 514, 845 S.E.2d at 88. As such, the Court of Appeals affirmed the SBM order "to the extent that it imposes SBM on [d]efendant for the remainder of his post-release supervision," reversed the SBM order "to the extent that [it] imposes SBM *beyond* [d]efendant's period of post-release supervision," and remanded for further proceedings. *Id.*

¶ 11 The dissent agreed with the Court of Appeals' decision to reverse the SBM order to the extent that it imposed SBM beyond defendant's post-release supervision period. *Id.* (Brook, J., concurring in the result in part and dissenting in part). The dissent, however, would have reversed the entire SBM order because "the State introduced no evidence of the SBM program's efficacy." *Id.* at 527, 845 S.E.2d at 96. According to the dissent,

> the trial court made no findings of fact regarding the efficacy of the program in preventing or solving sex crimes. Nor did the State present any witnesses to testify that SBM is an effective law enforcement tool. As in *Grady III*, the State here presented no data or empirical studies to show that SBM is effective at

> preventing recidivism or deterring sex crimes. Nor did it request that the trial court take judicial notice of any studies or reports regarding the efficacy of SBM in reducing recidivism. The State also put forth no evidence regarding general recidivism rates of sex offenders to support the reasonableness of the intrusion.

Id. at 527, 845 S.E.2d at 95–96. The dissent noted that the State's "evidence of the likelihood of SBM to prevent [d]efendant's own recidivism . . . does not provide the requisite evidence '*regarding the actual efficacy of* [*the State's*] *SBM program in preventing recidivism.*' " *Id.* at 527–28, 845 S.E.2d at 96 (third alteration in original) (quoting *State v. Anthony*, 267 N.C. App. 45, 48, 831 S.E.2d 905, 907 (2019)). The dissent further opined that the State's "interest in preventing defendants from absconding" is insufficient to justify imposing SBM. *Id.* at 529, 845 S.E.2d at 97. As such, the dissent would have held "that the absence of evidence supporting SBM's efficacy in this instance means that the State cannot justify this significant lifetime intrusion on [d]efendant's privacy interests." *Id.* at 519, 845 S.E.2d at 91.

¶ 12 Defendant appealed to this Court based upon the dissenting opinion at the Court of Appeals. Additionally, this Court allowed (1) defendant's petition for discretionary review to address whether orders authorizing SBM are unconstitutional "general warrants" prohibited by Article I, Section 20 of the North Carolina Constitution and (2) the State's petition for discretionary review to address whether the trial court properly determined that defendant was subject to lifetime SBM. We disagree with defendant's contention that the SBM order effects an unreasonable search. Rather, we hold that a search effected by the imposition of lifetime SBM upon a defendant due to his status as an aggravated offender is reasonable under the Fourth Amendment. We also hold that the SBM program does not violate Article I, Section 20 because SBM orders do not constitute "general warrants."

II. Reasonableness Under the Fourth Amendment

¶ 13 **[1]** We first address whether North Carolina's SBM statute violates the Fourth Amendment by authorizing the imposition of lifetime SBM upon aggravated offenders. Enactments of the General Assembly are presumed to be constitutional. *Grady III*, 372 N.C. at 521–22, 831 S.E.2d at 553; *see San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 60, 93 S. Ct. 1278, 1311 (1973) (recognizing "the basic presumption of the constitutional validity of a duly enacted state or federal law" as "one of the first principles

of constitutional adjudication"). As such, "we will not declare a law invalid unless we determine that it is unconstitutional beyond reasonable doubt." *Grady III*, 372 N.C. at 522, 831 S.E.2d at 553 (alteration omitted) (quoting *Cooper v. Berger*, 370 N.C. 392, 413, 809 S.E.2d 98, 111 (2018)).

¶ 14 The Supreme Court has held that the imposition of SBM pursuant to North Carolina's SBM program effects a Fourth Amendment search. *Grady I*, 575 U.S. at 310, 135 S. Ct. at 1371. The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures" by the government. U.S. Const. amend. IV.

> The Fourth Amendment prohibits only *unreasonable* searches. The reasonableness of a search depends on the totality of the circumstances, including the nature and purpose of the search and the extent to which the search intrudes upon reasonable privacy expectations. *See, e.g.*, *Samson v. California*, 547 U.S. 843, 126 S. Ct. 2193, 165 L. Ed. 2d 250 (2006) (suspicionless search of parolee was reasonable); *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646, 115 S. Ct. 2386, 132 L. Ed. 2d 564 (1995) (random drug testing of student athletes was reasonable).

Grady I, 575 U.S. at 310, 135 S. Ct. at 1371. "[W]e 'examin[e] the totality of the circumstances' to determine whether a search is reasonable within the meaning of the Fourth Amendment." *Samson*, 547 U.S. at 848, 126 S. Ct. at 2197 (second alteration in original) (quoting *United States v. Knights*, 534 U.S. 112, 118, 122 S. Ct. 587, 591 (2001)). This examination must consider the government's purpose in conducting the search and the nature of the search balanced with the degree of intrusion upon the recognized privacy interest. *See Grady I*, 575 U.S. at 310, 135 S. Ct. at 1371; *Grady III*, 372 N.C. at 538, 831 S.E.2d at 564 ("The balancing analysis that we are called upon to conduct here requires us to weigh the extent of the intrusion upon legitimate Fourth Amendment interests against the extent to which the SBM program sufficiently 'promot[es] . . . legitimate governmental interests' to justify the search, thus rendering it reasonable under the Fourth Amendment." (alterations in original) (quoting *Vernonia*, 515 U.S. at 653, 115 S. Ct. at 2390)). In assessing reasonable expectations of privacy, "[t]he Fourth Amendment does not protect all subjective expectations of privacy, but only those that society recognizes as 'legitimate.' What expectations are legitimate varies, of course, with context." *Vernonia*, 515 U.S. at 654, 115 S. Ct. at 2391 (citing

and quoting *New Jersey v. T.L.O.*, 469 U.S. 325, 337–38, 105 S. Ct. 733, 740–41 (1985)).

¶ 15 By citing *Samson* and *Vernonia* in *Grady I*, the Supreme Court provided an instructive framework for conducting the reasonableness balancing test to determine whether imposing SBM on a limited category of convicted sex offenders is valid. *See Samson*, 547 U.S. at 848, 126 S. Ct. at 2197; *Vernonia*, 515 U.S. at 652–53, 115 S. Ct. at 2390. In *Samson* the Supreme Court evaluated the reasonableness of a statute that required parolees to agree to any warrantless search, without cause, at any time. *Samson*, 547 U.S. at 846, 852–53 n.3, 126 S. Ct. at 2196, 2199–200 n.3. The Court began "by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests." *Id.* at 848, 126 S. Ct. at 2197 (quoting *Knights*, 534 U.S. at 118–19, 122 S. Ct. at 591). The Court first concluded that parolees "have severely diminished expectations of privacy by virtue of their status alone." *Id.* at 852, 126 S. Ct. at 2199. Viewing that diminished privacy expectation in the totality of the circumstances, the Supreme Court concluded the warrantless search did not intrude upon "an expectation of privacy that society would recognize as legitimate," despite the unlimited breadth of the right to search and regardless of the crime. *Id.* Therefore, balancing no intrusion upon any reasonable expectation of privacy against the State's substantial interests in deterring recidivism, the Court found the statute constitutional under the Fourth Amendment. *Id.* at 853, 857, 126 S. Ct. at 2200, 2202.

¶ 16 In *Vernonia* the Supreme Court applied the same balancing test for another categorical warrantless search "when special needs, beyond the normal need for law enforcement, ma[d]e the warrant . . . requirement impracticable." *Vernonia*, 515 U.S. at 653, 115 S. Ct. at 2391 (quoting *Griffin v. Wisconsin*, 483 U.S. 868, 873, 107 S. Ct. 3164, 3168 (1987)). A school policy required that high school athletes consent to random drug screenings in order to participate in school athletics. *Id.* at 650, 115 S. Ct. at 2389. The Court noted that the school had a special relationship with the students and that "[p]ublic school locker rooms [where the drug screenings take place] . . . are not notable for the [bodily] privacy they afford." *Id.* at 655–57, 115 S. Ct. at 2391–93. As such, the Court determined that student athletes based on their status have diminished expectations of privacy. *Id.* at 657, 115 S. Ct. at 2392–93. Next, the Court examined the intrusion upon privacy by the drug screening process and determined it had a "negligible" effect on a student athlete's privacy interests. *Id.* at 658, 115 S. Ct. at 2393. The Court then noted that "a drug problem largely

fueled by the 'role model' effect of athletes' drug use, and of particular danger to athletes, is effectively addressed by making sure that athletes do not use drugs." *Id.* at 663, 115 S. Ct. at 2395–96. Therefore, the State's important interest in deterring drug use among all teenagers, particularly for the narrow, at-risk category of student athletes, justified the search under a Fourth Amendment reasonableness analysis. *Id.* at 661–62, 665, 115 S. Ct. at 2395, 2397.

¶ 17 In *Grady III* the trial court imposed SBM on the defendant solely due to his status as a recidivist even though he had completed his prison sentence and was no longer subject to post-release supervision at the time of the SBM order. *Grady III*, 372 N.C. at 516, 522, 831 S.E.2d at 550, 553. In applying the Supreme Court's *Grady I* order on remand, this Court conducted the Fourth Amendment reasonableness analysis with respect to the category in which the defendant fell—i.e., recidivists no longer subject to post-release supervision. *Id.* at 522, 831 S.E.2d at 553. This Court held the SBM program to be unconstitutional as applied to the narrow category of individuals "who are subject to mandatory lifetime SBM based solely on their status as a statutorily defined 'recidivist' who have completed their prison sentences and are no longer supervised by the State through probation, parole, or post-release supervision." *Id.* (footnote omitted).

¶ 18 Our *Grady III* holding specifically left unanswered the question of whether the SBM program is constitutional as applied to defendants who fall outside of the narrow category of recidivists who are no longer under State supervision. *See id.* ("We decline to address the application of SBM beyond [the specified] class of individuals."). As such, we must now use the framework provided by the Supreme Court to determine the reasonableness of the General Assembly's decision to impose SBM on the category of convicted sex offenders whose convictions arose from defined aggravated offenses.

¶ 19 The first step of our reasonableness inquiry under the totality of the circumstances requires analyzing the legitimacy of the State's interest. Though the General Assembly has the authority to impose harsher prison sentences or lengthier parole times for convicted sex offenders, it chose to use an alternative civil remedy. Specifically, it enacted the SBM program as a civil, regulatory scheme to further its paramount interest in protecting the public—especially children—by monitoring certain sex offenders after their release. The General Assembly has "recognize[d] 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 govern-

mental interest." N.C.G.S. § 14-208.5 (2019).[3] "The General Assembly also recognize[d] . . . that the protection of [sexually abused] children is of great governmental interest." *Id.* These findings are supported by Supreme Court precedent, congressional action, the public policy of the various states, and "the moral instincts of a decent people." *Packingham v. North Carolina*, 137 S. Ct. 1730, 1736 (2017); *see* 34 U.S.C. § 20981 (authorizing grants to states that implement twenty-four-hour, continuous GPS monitoring programs for sex offenders); *Conn. Dep't of Pub. Safety v. Doe*, 538 U.S. 1, 4, 123 S. Ct. 1160, 1163 (2003); *Smith v. Doe*, 538 U.S. 84, 89–90, 123 S. Ct. 1140, 1145 (2003).[4]

¶ 20 This Court's precedent also supports the General Assembly's findings regarding the dangers posed by the recidivist tendencies of sex offenders. Specifically, in *Bryant*, we stated that "[c]onvicted sex offenders ' "are a serious threat in this Nation. [T]he victims of sex assault are most often juveniles," and "[w]hen convicted sex offenders reenter society, they are much more likely than any other type of offender to be rearrested for a new rape or sexual assault." ' " *State v. Bryant*, 359 N.C. 554, 555, 614 S.E.2d 479, 480 (2005) (second and third alterations in original) (quoting *Conn. Dep't of Pub. Safety*, 538 U.S. at 4, 123 S. Ct. at 1163 (quoting *McKune v. Lile*, 536 U.S. 24, 32–33, 122 S. Ct. 2017, 2024 (2002))). We later noted in *Standley* that "released sex offenders are four times more likely to be rearrested for subsequent sex crimes than other released offenders." *Standley v. Town of Woodfin*, 362 N.C. 328, 333, 661 S.E.2d 728, 731 (2008) (citing Patrick A. Langan, et al., U.S. Dep't of Just., *Recidivism of Sex Offenders Released from Prison in 1994*, at 1 (2003)).

¶ 21 Given the dangers posed by convicted sex offenders, we have recognized that "[p]rotecting children and other[s] . . . from sexual attacks is certainly a legitimate government interest." *Id.* Most recently, we opined

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3. In *Grady III*, we recognized that "N.C.G.S. § 14-208.5 is relevant to . . . the 'nature and immediacy of' the State's concern in protecting the public from sex offenders." *Grady III*, 372 N.C. at 542, 831 S.E.2d at 567 (quoting *Vernonia*, 515 U.S. at 660, 115 S. Ct. at 2394).

4. When presented with conflicting evidence supporting the legislature's public policy determinations, courts should defer to the legislature's findings of fact, especially where, like here, that determination is corroborated. *See Standley v. Town of Woodfin*, 362 N.C. 328, 333, 661 S.E.2d 728, 731 (2008) (deferring to the General Assembly's finding "that sex offenders often pose a high risk of engaging in sex offenses even after being released from incarceration," N.C.G.S. § 14-208.5, and concluding that a town's concern in protecting children and others from convicted sex offenders was thus "founded on fact"); *Redevelopment Comm'n of Greensboro v. Sec. Nat'l Bank of Greensboro*, 252 N.C. 595, 611, 114 S.E.2d 688, 700 (1960) (stating that legislative findings "are entitled to weight in construing [a] statute and in determining whether the statute promotes a public purpose or use under the Constitution").

in *Grady III* that the State's "interests [in protecting the public through SBM] are without question legitimate." *Grady III*, 372 N.C. at 543, 831 S.E.2d at 568. There, however, our analysis applied only to the recidivist category. *Id.* at 522, 831 S.E.2d at 553. Notably, we made the following observation regarding the recidivist category:

> [l]ifetime monitoring for recidivists is mandated by our statute for anyone who is convicted of two sex offenses that carry a registration requirement. A wide range of different offenses are swept into this category. For example, a court is required to impose lifetime SBM on an offender who twice attempts to solicit a teen under the age of sixteen in an online chat room to meet with him, regardless of whether the person solicited was actually a teen or an undercover officer, or whether any meeting ever happened.

Id. at 544, 831 S.E.2d at 568. Unlike the recidivist category, the aggravated offender category applies only to a small subset of individuals who have committed the most heinous sex crimes. An individual can only receive aggravated offender status if he

> (i) engag[es] in a sexual act involving vaginal, anal, or oral penetration with a victim of any age through the use of force or the threat of serious violence; or (ii) engag[es] in a sexual act involving vaginal, anal, or oral penetration with a victim who is less than [twelve] years old.

N.C.G.S. § 14-208.6(1a) (2019). When compared to the *Grady III* example of a recidivist with two convictions of attempted solicitation of a child by a computer, *see id.* § 14-202.3(a) (2019), it is clear that those who have committed statutorily defined aggravated offenses pose a much greater threat to society. As such, the State's interest in protecting the public from aggravated offenders is paramount.

¶ 22 Further, the General Assembly has clearly stated the purpose of North Carolina's "Sex Offender and Public Protection Registration Programs" is to proactively protect children and others from dangerous sex offenders:

> [T]he 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. . . .
>
> 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.

Id. § 14-208.5.

¶ 23 In furtherance of this purpose, the SBM program "uses a continuous [SBM] system" for narrowly defined categories of sex offenders who present a significant enough threat of reoffending to "require[ ] the highest possible level of supervision and monitoring." *Id.* § 14-208.40(a) (2019). Under the statute, after our decision in *Grady III*,[5] the three categories of offenders who require continuous lifetime SBM to protect public safety are (1) sexually violent predators, (2) aggravated offenders, and (3) adults convicted of statutory rape or a sex offense with a victim under the age of thirteen (adult-child offenders). *Id.* § 14-208.40A(c) (2019). A "sexually violent predator" is a person who "has been convicted of a sexually violent offense," such as rape or incest, and "who suffers from a mental abnormality or personality disorder," as determined by a board of experts, "that makes the person likely to engage in sexually violent offenses directed at strangers or at a person with whom a relationship has been established or promoted for the primary purpose of victimization." *Id.* §§ 14-208.6(5)–(6), -208.20 (2019). The second category comprises those who commit "aggravated offenses" defined as "engaging in a sexual act involving vaginal, anal, or oral penetration" either (1) through use or threat of force or (2) "with a victim who is less

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5. *Grady III* held lifetime SBM is unconstitutional as applied to defendants "who are subject to mandatory lifetime SBM based solely on their status as a statutorily defined 'recidivist' who have completed their prison sentences and are no longer supervised by the State through probation, parole, or post-release supervision." *Grady III*, 372 N.C. at 522, 831 S.E.2d at 553 (footnote omitted). We explicitly "decline[d] to address the application of SBM beyond this class of individuals" in *Grady III*. *Id.* As such, our analysis in that case has no bearing on cases where lifetime SBM is imposed on sexually violent offenders, aggravated offenders, or adult-child offenders.

than [twelve] years old." *Id.* § 14-208.6(1a). Here the trial court properly found that defendant falls within this aggravated offender category. The third category includes convictions of any sex act by a person over eighteen years old against any victim under thirteen years old. *Id.* §§ 14-27.23, -27.28 (2019). If a trial court finds that an offender falls into one of these categories, the statute requires the court to "order the offender to enroll in a[n] [SBM] program for life." *Id.* § 14-208.40A(c).

¶ 24 Though the program is commonly referred to as "lifetime" monitoring, one year after a defendant completes his sentence, probation, or parole, the defendant may petition the Post-Release Supervision and Parole Commission for termination of enrollment. *Id.* §§ 14-208.41(a), -208.43 (2019). Further, the SBM program is a "civil, regulatory scheme." *State v. Bowditch*, 364 N.C. 335, 352, 700 S.E.2d 1, 13 (2010). As such, a defendant subject to SBM may petition "the court . . . [to] relieve [him] from a final . . . [SBM] order . . . for . . . [a]ny . . . reason justifying relief from the operation of the [order]." N.C.G.S. § 1A-1, Rule 60(b)(6) (2019).[6]

¶ 25 Imposing lifetime SBM upon aggravated offenders serves the General Assembly's stated purpose by assisting law enforcement agencies in solving crimes. For instance,

> [p]assive GPS data may place a sex offender at the scene of a crime, allowing an agency to identify potential suspects or witnesses. A sex offender's alibi may be supported or discredited using GPS data. This information could assist law enforcement agencies with verifying sex offender registration information, such as residential or employment address, and locating noncompliant sex offenders and absconders. . . .
>
> Active GPS systems can assist law enforcement agencies in enforcing exclusion and inclusion zones. If an agency receives notification that an offender has entered an exclusionary zone, a quick response may prevent an offense. If the agency finds the sex offender near a school or playground, the officer on the scene can report this information to the offender's probation or parole officer.

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6. The General Assembly's recent amendments to the SBM statute become effective on 1 December 2021. *See* Act of Sep. 2, 2021, S.L. 2021-138, § 18.(p). These changes may provide defendant with an additional avenue of relief. *Id.* § 18.(i).

Int'l Ass'n of Chiefs of Police, *Tracking Sex Offenders with Electronic Monitoring Technology: Implications and Practical Uses for Law Enforcement* 4 (2008).

¶ 26 Further, in a case pending before this Court, *State v. Strudwick*, No. 334PA19-2, the State's witness, a probation officer, testified concerning situations in which lifetime SBM would assist law enforcement in preventing and solving future crimes. The trial court in *Strudwick* found that "when a sexual assault is reported, location information from the monitor could be used to implicate the participant as a suspect if he was in the area of the sexual assault, or to eliminate him as a suspect if he was not in the area of a sexual assault." We take judicial notice of this finding from *Strudwick*. *See State ex rel. Swain v. Creasman*, 260 N.C. 163, 164, 132 S.E.2d 304, 305 (1963) (taking judicial notice of the Court's own records). As such, we conclude that the SBM program assists law enforcement agencies in solving crimes.

¶ 27 SBM also serves the State's interest in protecting the public from aggravated offenders by deterring recidivism. *See Belleau v. Wall*, 811 F.3d 929, 943 (7th Cir. 2016) ("[I]t is undisputed that the [SBM] law promotes deterrence."); *accord Doe v. Bredesen*, 507 F.3d 998, 1007 (6th Cir. 2007). SBM "deter[s] future offenses by making the [subject] aware that he is being monitored and is likely therefore to be apprehended should a sex crime be reported at a time, and a location, at which he is present." *Belleau*, 811 F.3d at 935; *see also Vernonia*, 515 U.S. at 663, 115 S. Ct. at 2395–96 (remarking that the "efficacy" of the search was "self-evident" where the goal was to deter drug use by athletes and the school promulgated the drug-testing policy so that athletes would know they would be tested); *Skinner v. Ry. Lab. Execs.' Ass'n*, 489 U.S. 602, 632, 109 S. Ct. 1402, 1421 (1989) (recognizing that drug tests "are highly effective means of . . . deterring the use of drugs"). Just as the drug-testing policy in *Vernonia* serves as an effective deterrent with respect to student athletes categorically, the SBM program in the present case serves as an effective deterrent with respect to aggravated offenders categorically.

¶ 28 SBM's efficacy as a deterrent is supported by empirical data. The National Institute of Justice sponsored a "research project examin[ing] the impact that GPS monitoring has on the recidivism rates of sex offenders in California." Philip Bulman, *Sex Offenders Monitored by GPS Found to Commit Fewer Crimes*, 271 NIJ J. 22, 22 (Feb. 2013). The study "found that those placed on GPS monitoring had significantly lower recidivism rates than those who received traditional supervision." *Id.* In fact, offenders not placed on GPS monitoring "returned to custody at a rate 38 percent higher than [those placed on GPS monitoring]." *Id.*

at 23. Similarly, a more recent study "examine[d] whether GPS is effective in terms of reducing violations for supervision conditions as well as new criminal behavior and returns to custody among" high risk sex offenders. Susan Turner, Alyssa W. Chamberlain, Jesse Jannetta & James Hess, *Does GPS Improve Recidivism among High Risk Sex Offenders? Outcomes for California's GPS Pilot for High Risk Sex Offender Parolees*, Victims & Offenders: Int'l J. Evidence-based Rsch., Pol'y, and Prac., Jan. 2015, at 7. The study found that offenders not placed on GPS monitoring "were significantly more likely to be violated for new criminal behavior compared to GPS offenders (35.2% versus 19.1%[)]." *Id.* at 15. These studies demonstrate that SBM is efficacious in reducing recidivism. Since we have recognized the efficacy of SBM in assisting with the apprehension of offenders and in deterring recidivism, there is no need for the State to prove SBM's efficacy on an individualized basis.

¶ 29 Having found that the SBM program serves a legitimate government interest, we next consider the scope of the privacy interests involved. An aggravated offender's expectation of privacy is severely diminished while he is subject to post-release supervision. *See Samson*, 547 U.S. at 844, 126 S. Ct. at 2195 ("An inmate electing to complete his sentence out of physical custody remains in the Department of Corrections' legal custody for the remainder of his term and must comply with the terms and conditions of his parole. The extent and reach of those conditions demonstrate that parolees have severely diminished privacy expectations by virtue of their status alone."); *Grady III*, 372 N.C. at 546, 831 S.E.2d at 570 (stating that the SBM statute is "still enforceable against a recidivist during the period of his or her State supervision"). At the SBM hearing, defendant's counsel admitted that "[d]uring the time that [defendant] is out on parole . . . he has a lower expectation of privacy. He has [a] diminished expectation of privacy." Defendant's counsel thus conceded that SBM "would be appropriate" during defendant's period of parole. Therefore, SBM is clearly constitutionally reasonable during a defendant's post-release supervision period.

¶ 30 Though an aggravated offender regains some of his privacy interests upon the completion of his post-release supervision term, these interests remain impaired for the remainder of his life due to his status as a convicted aggravated sex offender. "[I]t is beyond dispute that convicted felons do not enjoy the same measure of constitutional protections, including the expectation of privacy under the Fourth Amendment, as do citizens who have not been convicted of a felony." *Bowditch*, 364 N.C. at 349–50, 700 S.E.2d at 11 (citations omitted); *see also Vernonia*, 515 U.S. at 654, 115 S. Ct. at 2391 ("[T]he legitimacy of certain privacy

expectations vis-à-vis the State may depend upon the individual's legal relationship with the State."); *Grady III*, 372 N.C. at 534, 831 S.E.2d at 561 (recognizing that "a person's status as a convicted sex offender may affect the extent to which the State can infringe upon fundamental rights"). Convicted felons face a plethora of lifetime rights restrictions including a reduction in liberty interests and Fourth Amendment privacy expectations "that society recognizes as 'legitimate.' " *Vernonia*, 515 U.S. at 654, 115 S. Ct. at 2391 (quoting *T.L.O.*, 469 U.S. at 338, 105 S. Ct. at 741). For example, their liberty interests are restricted regarding firearms possession. *Cf. District of Columbia v. Heller*, 554 U.S. 570, 626, 128 S. Ct. 2783, 2816–17 (2008) (affirming that the "longstanding prohibitions on the possession of firearms by felons" survive Second Amendment scrutiny). Additionally, individuals convicted of sex offenses may be permanently barred from certain occupations, a harsh sanction that limits them from choosing where they work and what type of livelihood they may pursue. *E.g.*, N.C.G.S. § 84-28(b)(1), (c) (2019) (attorney); *id.* § 90-14(a)(7), (c) (2019) (medical doctor); *id.* § 93-12(9)(a) (2019) (certified public accountant); *id.* § 93A-6(b)(2) (2019) (real estate broker).

¶ 31 Sex offender registration requirements also manifest a diminished expectation of privacy. *Cf. Smith*, 538 U.S. at 89–90, 123 S. Ct. at 1145–46. For instance, a registrant is required to provide the following information to the public: "name, sex, address, physical description, picture, conviction date, offense for which registration was required, the sentence imposed as a result of the conviction, and registration status." N.C.G.S. § 14-208.10(a) (2019). Since aggravated offenders are required to remain on the sex offender registry for life, *see* N.C.G.S. § 14-208.23 (2019), certain liberty, movement, and privacy restrictions apply even after the completion of any post-release supervision term. Specifically, aggravated offenders are perpetually inhibited by limitations on their movements and residency restrictions. *See* N.C.G.S. § 14-208.18(a)(1), (4) (2019) (prohibiting registered sex offenders from being present at "any place intended primarily for the use, care, or supervision of minors, including, but not limited to, schools, children's museums, child care centers, nurseries, and playgrounds," as well as the State Fair); *Standley*, 362 N.C. at 333, 661 S.E.2d at 732 (upholding prohibition on convicted sex offenders entering public parks); N.C.G.S. § 14-208.16(a) (2019) (prohibiting registered sex offenders from "knowingly resid[ing] within 1,000 feet of the property on which any public or nonpublic school or child care center is located").[7] Society therefore recognizes that

7. The General Assembly recently amended N.C.G.S. § 14-208.16(a) to broaden its scope. *See* Act of Aug. 23, 2021, S.L. 2021-115, § 3, https://www.ncleg.gov/Sessions/2021/

aggravated offenders have restricted liberty interests and diminished privacy expectations for the entirety of their lives.

¶ 32 We lastly consider the level of intrusion effected by the imposition of lifetime SBM. Unlike punitive measures, SBM "does not impose a significant affirmative disability or restraint." *Belleau*, 811 F.3d at 943. As the trial court found, "the ankle monitoring device is light weight, small in size, can be adjusted for comfort and is of little intrusion to the person wearing the device." Specifically, the device is "approximately 2-inches wide" and "is the size of an 8-ounce coke can." Charging the device takes approximately two hours per day. Further, the device does not hamper medical treatment because it can easily be removed by any medical provider in the event of an emergency. "The restraint imposed by these requirements is minimal and incidental to [SBM's] actual purpose—tracking [the offender's] whereabouts." *Id.* "[A]s GPS devices become smaller and batteries last longer, any affirmative restraint imposed by [SBM] will, over time, become less and less burdensome." *Id.* These physical limitations are more inconvenient than intrusive and do not materially invade an aggravated offender's diminished privacy expectations.

¶ 33 Regarding the effect on other privacy interests, SBM falls on a spectrum of available "regulatory schemes that address the recidivist tendencies of convicted sex offenders." *Bowditch*, 364 N.C. at 341, 700 S.E.2d at 6. At one end of the continuum, criminal sanctions—i.e., imprisonment, probation, and parole—and civil commitment involve a highly invasive affirmative restraint and deprivation of rights. *See Kansas v. Hendricks*, 521 U.S. 346, 363, 117 S. Ct. 2072, 2083 (1997); *Belleau*, 811 F.3d at 932. Next, housing, career, and travel limitations significantly restrict the exercise of fundamental freedoms. Finally, on the other end of the spectrum, registration statutes impose the fewest restrictions on a defendant's liberty and privacy, yet they still require the offender to provide certain personal information to law enforcement and the public. *See* N.C.G.S. § 14-208.10.

¶ 34 The privacy intrusion effected by SBM falls on the less intrusive side of the regulatory spectrum. *See Belleau*, 811 F.3d at 943 (noting that SBM "imposes as little burden as possible on the offender"). Similar to sex

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Bills/House/PDF/H84v4.pdf (prohibiting registered sex offenders from knowingly residing "within 1,000 feet of any property line of a property on which any public or nonpublic school or child care center is located" or "[w]ithin any structure, any portion of which is within 1,000 feet of any property line of a property on which any public or nonpublic school or child care center is located").

offender registration, SBM provides information to the State that is not ordinarily required for the general public, protects the public through deterrence, and allows for termination. Specifically, under the statute, a defendant may petition to be removed from SBM after one year. N.C.G.S. § 14-208.43 (permitting termination if a defendant shows he has not been convicted of any additional qualifying convictions, has substantially complied with the SBM program, and "is not likely to pose a threat to the safety of others"). Since the SBM program is civil in nature, the North Carolina Rules of Civil Procedure govern. As such, a defendant may also seek removal of SBM through Rule 60(b). *Id.* § 1A-1, Rule 60(b)(6) ("On motion and upon such terms as are just, the court may relieve a party . . . from a final judgment, order, or proceeding for . . . [a]ny . . . reason justifying relief from the operation of the judgment."). These avenues for termination reduce the degree of intrusion caused by lifetime SBM.[8]

¶ 35 SBM also stands in stark contrast to the potential confinement measures that convicted sex offenders face. Unlike criminal imprisonment or civil commitment, "[t]he SBM program does not detain an offender in any significant way." *Bowditch*, 364 N.C. at 349, 700 S.E.2d at 11. Additionally, "[t]he monitoring taking place in the SBM program is far more passive and is distinguishable from the type of State supervision imposed on probationers." *Id.* at 346, 700 S.E.2d at 9. While these alternative measures limit a sex offender's liberty interests, SBM does not. For instance, SBM does not prevent a defendant from going anywhere he is otherwise allowed to go. *See Belleau*, 811 F.3d at 936 ("It's untrue that 'the GPS device burdens liberty . . . by its continuous surveillance of the offender's activities'; it just identifies locations; it doesn't reveal what the wearer of the device is doing at any of the locations." (alteration in original) (quoting *Commonwealth v. Cory*, 454 Mass. 559, 570, 911 N.E.2d 187, 196 (2009))). Where a defendant is unsupervised, no one regularly monitors the defendant's location, significantly lessening the degree of intrusion. *See id.* at 941 (Flaum, J., concurring). "Occupational debarment is [also] far more harsh than an SBM program . . . ." *Bowditch*, 364 N.C. at 349, 700 S.E.2d at 10; *see also Bredesen*, 507 F.3d at 1005 (citing *Smith*, 538 U.S. at 100, 123 S. Ct. at 1151) (noting SBM is less harsh than occupational debarment). Therefore, SBM is significantly less intrusive than the harsher alternatives that convicted sex offenders face.[9]

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8. *See* footnote 6 of this opinion.

9. We in no way opine that SBM is a form of punishment. Rather, in looking at the full spectrum of potential State action, we highlight criminal imprisonment, civil commitment, probation, and occupational debarment to show that SBM is a less intrusive means of protecting the public from convicted sex offenders.

Given the totality of the circumstances, SBM's collection of information regarding physical location and movements effects only an incremental intrusion into an aggravated offender's diminished expectation of privacy.

¶ 36 In sum, the State's interest in protecting the public—especially children—from aggravated offenders is paramount. The SBM program furthers this interest by deterring recidivism and assisting law enforcement agencies in solving crimes. Further, an aggravated offender has a diminished expectation of privacy both during and after any period of post-release supervision as shown by the numerous lifetime restrictions that society imposes upon him. Lastly, the imposition of lifetime SBM causes only a limited intrusion into that diminished privacy expectation. Therefore, in light of the totality of the circumstances, the paramount government interest outweighs the additional intrusion upon an aggravated offender's diminished privacy interests. As such, we hold that a search effected by the imposition of lifetime SBM on the category of aggravated offenders is reasonable under the Fourth Amendment. Therefore, the SBM statute as applied to aggravated offenders is not unconstitutional.

¶ 37 Here defendant was convicted of first-degree statutory rape and first-degree statutory sexual offense. These convictions qualify defendant as an aggravated offender under N.C.G.S. § 14-208.6(1a). The trial court thus appropriately ordered lifetime SBM pursuant to N.C.G.S. § 14-208.40A(c). "The touchstone of the Fourth Amendment is reasonableness, not individualized suspicion." *Samson*, 547 U.S. at 855 n.4, 126 S. Ct. at 2201 n.4. Further, this Court's practice is to examine searches effected by the SBM statute categorically. *See Grady III*, 372 N.C. at 522, 831 S.E.2d at 553. Therefore, in light of our determination in the present case that searches effected by the imposition of lifetime SBM are reasonable as applied to the aggravated offender category, the trial court's imposition of SBM in this case does not violate the Fourth Amendment.

III. "General Warrant" Under Article I, Section 20

¶ 38 **[2]** We next address whether the SBM program complies with Article I, Section 20 of the North Carolina Constitution.[10] "The analytical framework for reviewing a facial constitutional challenge is well-established." *Town of Boone v. State*, 369 N.C. 126, 130, 794 S.E.2d 710, 714 (2016).

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10. Defendant asks this Court to "declare the SBM procedures codified in [the statute] facially unconstitutional because they authorize the issuance of orders which are indistinguishable from, and tantamount to, . . . 'general warrants.' "

"Our 'State Constitution is in no matter a grant of power,' and as such, '[a]ll 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.' " *Id.* (alteration in original) (citations omitted) (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, 79 S. Ct. 985 (1959)). "We seldom uphold facial challenges because it is the role of the legislature, rather than this Court, to balance disparate interests and find a workable compromise among them." *Id.* (quoting *Beaufort Cnty. Bd. of Educ. v. Beaufort Cnty. Bd. of Comm'rs*, 363 N.C. 500, 502, 681 S.E.2d 278, 280 (2009)). Thus, we will only declare an act of the General Assembly to be unconstitutional when "it [is] plainly and clearly the case" and "its unconstitutionality [is] demonstrated beyond reasonable doubt." *Id.* (first alteration in original) (first quoting *State ex rel. Martin v. Preston*, 325 N.C. 438, 449, 385 S.E.2d 473, 478 (1989), then citing *Baker v. Martin*, 330 N.C. 331, 334–35, 410 S.E.2d 887, 889 (1991)).

¶ 39 Article I, Section 20 provides that "[g]eneral warrants, whereby any officer or other person may be commanded to search suspected places without evidence of the act committed, or to seize any person or persons not named, whose offense is not particularly described and supported by evidence, are dangerous to liberty and shall not be granted."[11] N.C. Const. art. I, § 20. "Both the state and the U.S. constitutions prohibit general warrants, but only the state constitution defines them as such: warrants that are not supported by evidence and that do not name names." John V. Orth & Paul Martin Newby, *The North Carolina State Constitution* 73 (2d ed. 2013). "Drawn originally from a section of the Virginia Declaration of Rights, the ban on general warrants reflects colonial experience with abuses of the procedures of criminal investigation by the authorities." *Id.* (citing Va. Const. of 1776, Declaration of Rights § 10). "Vivid in the memory of the newly independent Americans were those general warrants known as writs of assistance[12] under which . . . . customs officials [had] blanket authority to search where they pleased

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11. The language of Article I, Section 20 is nearly identical to that in North Carolina's original Constitution. *See* N.C. Const. of 1776, Declaration of Rights § XI ("That General Warrants whereby any Officer or Messenger may be commanded to search suspected Places, without Evidence of the Fact committed, or to seize any Person or Persons not named, whose offence is not particularly described and supported by Evidence, are dangerous to Liberty, and ought not to be granted.").

12. These writs of assistance "received their name from the fact that they commanded all officers and subjects of the Crown to assist in their execution." Nelson B. Lasson, *The History and Development of the Fourth Amendment to the United States Constitution* 53–54 (1937).

for goods imported in violation of the British tax laws." *Stanford v. Texas*, 379 U.S. 476, 481, 85 S. Ct. 506, 510 (1965). "[T]he consistent and overarching themes in colonial judicial resistance to the writs was opposition to their *unparticularized nature* and to the *unconstrained discretion* they therefore afforded a searcher." Fabio Arcila Jr., *In the Trenches: Searches and the Misunderstood Common-Law History of Suspicion and Probable Cause*, 10 U. Pa. J. Const. L. 1, 13 (2007) (emphases added).

> Courts and commentators condemned general warrants precisely because they lacked each of the protections afforded by specific warrants: a complainant's swearing out of specific allegations, the complainant's accountability for fruitless searches, a judge's assessment of the grounds for the warrant, and—perhaps most importantly—clear directions to the officer as to whom to arrest or where to search.

Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 Mich. L. Rev. 547, 655–57 (1999).

¶ 40 Unlike the writs of assistance seen during the founding era, orders imposing lifetime SBM adhere to a meticulous statutory procedure. Under the SBM program, a defendant is entitled to a hearing where the State must present evidence establishing how the defendant qualifies for SBM enrollment. N.C.G.S. § 14-208.40A(a). The defendant may then present evidence to refute the State's presentation. *Id.* After hearing evidence from both parties, the trial court must make findings of fact for every category of eligibility under which the defendant qualifies. *Id.* § 14-208.40A(b). The trial court must then order SBM depending on the defendant's statutory category, each of which requires that the defendant be a convicted sex offender. *Id.* § 14-208.40A(c). These procedural protections are significantly more robust than the protections afforded by specific warrants.

¶ 41 Further, the scope of the search effected by an SBM order is not "indiscriminate." Rather, the General Assembly has defined the limited scope of any such search:

> The [SBM] program shall use a system that provides all of the following:
>
> (1) Time-correlated and continuous tracking of the geographic location of the subject using a global positioning system based on satellite and other location tracking technology.

> (2) Reporting of subject's violations of prescriptive and proscriptive schedule or location requirements. Frequency of reporting may range from once a day (passive) to near real-time (active).

N.C.G.S. § 14-208.40(c). Thus, the State may only access a defendant's physical location as recorded by the satellite monitoring device. Unlike general warrants and writs of assistance, the SBM program does not authorize State officials to indiscriminately search unidentified individuals for unspecified items and for an indefinite period of time without stated cause or constraint. Orders imposing SBM pursuant to the program thus do not constitute general warrants. Defendant has failed to demonstrate that the SBM program is unconstitutional beyond reasonable doubt. As such, we hold that the SBM order complies with Article I, Section 20.

IV. Conclusion

¶ 42 A search arising from the SBM program for a limited category of aggravated offenders, given the totality of the circumstances, is reasonable under the Fourth Amendment. The purpose of the SBM program to protect the public from sex crimes is of paramount importance, and an aggravated offender's reasonable expectation of privacy is significantly diminished. The incremental nature of a search providing location information and the method of data collection via an ankle bracelet are more inconvenient than intrusive. Moreover, the SBM program provides a particularized procedure for imposing SBM and thus does not violate Article I, Section 20. Accordingly, we modify and affirm the portion of the Court of Appeals' decision which upheld the imposition of SBM during post-release supervision and reverse the portion of the decision which held the imposition of post-supervision SBM to be an unreasonable search. Therefore, we reinstate the trial court's SBM order.

MODIFIED AND AFFIRMED IN PART, REVERSED IN PART.

Justice EARLS dissenting.

¶ 43 The majority addresses a version of the satellite-based monitoring (SBM) statutes which, as of 2 September 2021, have been amended in ways that likely obviate at least some of the constitutional issues which form the basis of Mr. Hilton's appeal. *See* Act of Sept. 2, 2021, S.L. 2021-138, § 18, https://www.ncleg.gov/Sessions/2021/Bills/Senate/PDF/S300v8.pdf. Although the majority acknowledges that the new law

applies to Mr. Hilton, the majority fails to account for the fact that operation of its newly enacted provisions will afford Mr. Hilton the opportunity to have the order requiring him to enroll in SBM for life converted into an order requiring him to enroll in SBM for ten years. A decision which fails to examine the consequences of S.L. 2021-138 ignores the actual manner in which SBM will be applied to Mr. Hilton and thus has no relevance to future decisions interpreting the statutes governing the SBM program.

¶ 44 The proper course for a Court to follow when the General Assembly amends a statute while litigation involving the constitutionality of that statute is pending is, at a minimum, to permit further briefing on the impact of the amendments. Further briefing is necessary because when a statute is amended

> it is presumed that the legislature intended either (a) to change the substance of the original act, or (b) to clarify the meaning of it. 82 C.J.S. Statutes § 384, p. 897 (1953). The presumption is that the legislature "intended to change the original act by creating a new right or withdrawing any existing one." 1 Sutherland, Statutory Construction § 1930 (Horack, 3d ed. 1943).

Childers v. Parker's, Inc., 274 N.C. 256, 260 (1968). As the majority acknowledges, the new statutes provide Mr. Hilton with a new remedy. Thus, the opinion rendered by the Court today is only relevant for the few weeks remaining until the new law takes effect. Absent any exigent or urgent circumstances attendant to the parties in this case, the Court acts rashly, and without any apparent rationale or justification, in issuing an unnecessary opinion about a law the General Assembly has seen fit to change.

¶ 45 Even on its own terms, the majority's soon-to-be-irrelevant conclusion that imposing lifetime SBM on Mr. Hilton is constitutional, based solely upon his status as having been convicted of an aggravated offense as defined under N.C.G.S. § 14-208.6(1a), without an assessment of his individual circumstances, and absent any evidence in the record indicating that lifetime SBM serves the State's asserted interest, is patently incorrect. The majority reaches this conclusion only by flouting or mischaracterizing precedents from this Court and the United States Supreme Court and by disregarding the Fourth Amendment. Therefore, I dissent.

I. Although Mr. Hilton is currently subject to an order requiring him to enroll in lifetime SBM, he will not be required to enroll in SBM for more than ten years.

¶ 46 In *Grady III*, this Court held unconstitutional the imposition of lifetime SBM as applied to "individuals who are subject to mandatory lifetime SBM based solely upon their status as a statutorily defined 'recidivist' who have completed their prison sentences and are no longer supervised by the State through probation, parole, or post-release supervision." *State v. Grady* (*Grady III*), 372 N.C. 509, 522 (2019) (footnote omitted). Although we "decline[d] to address the application of SBM beyond this class of individuals," *id.*, our examination of the Fourth Amendment and the contours of the SBM program plainly had implications for any individual subject to lifetime SBM pursuant to N.C.G.S. § 14-208.40. Every panel of the Court of Appeals confronted with a challenge to a lifetime SBM order—including challenges raised by individuals who fell outside the category of offenders addressed in *Grady III*—turned to *Grady III* for guidance. *See, e.g.*, *State v. Gordon*, 270 N.C. App. 468, 469 (2020), *review allowed*, *writ allowed*, 853 S.E.2d 148 (N.C. 2021); *State v. Jackson*, No. COA18-1122, 2020 WL 2847885, at *15–18 (N.C. Ct. App. June 2, 2020) (unpublished), *review denied*, 375 N.C. 494 (2020); *State v. Hutchens*, 272 N.C. App. 156, 160–61 (2020).[1] The same Fourth Amendment and the same statutes obviously apply to any individual subject to SBM, whether he or she is an aggravated offender or a recidivist.

¶ 47 The General Assembly also recognized that *Grady III* cast doubt on the constitutionality of N.C.G.S. § 14-208.40 as applied to all categories of offenders automatically made subject to lifetime SBM, not just recidivists. S.L. 2021-138, an omnibus criminal justice reform bill, is titled in relevant part "AN ACT TO . . . ADDRESS CONSTITUTIONAL ISSUES WITH SATELLITE-BASED MONITORING RAISED IN STATE VERSUS GRADY AND CREATE A PROCESS TO REVIEW WHETHER OFFENDERS SUBJECT TO THAT CASE WHICH WERE REMOVED FROM SATELLITE-BASED MONITORING ARE OTHERWISE ELIGIBLE."[2] The final version of S.L. 2021-138 which contains the provisions

1. A longer list of Court of Appeals decisions interpreting and applying *Grady III* to resolve the merits of an individual's challenge to an SBM order can be found in Appendix I.

2. As we have noted, "even when the language of a statute is plain, 'the title of an act should be considered in ascertaining the intent of the legislature.' *Smith Chapel Baptist Church v. City of Durham*, 350 N.C. 805, 812, 517 S.E.2d 874, 879 (1999) (citing *State ex rel. Cobey v. Simpson*, 333 N.C. 81, 90, 423 S.E.2d 759, 764 (1992))." *Ray v. N.C. DOT*, 366 N.C. 1, 8 (2012).

amending the SBM program was ratified by the Legislature on 25 August 2021—after oral argument was heard in this case—and signed by the Governor on 2 September 2021. The Act becomes effective on 1 December 2021.

¶ 48 S.L. 2021-138 made changes to the SBM program which will be applicable to all individuals ordered to enroll in SBM on the basis of their status as among one of the categories of offenders singled out by N.C.G.S. § 14-208.40(a), including aggravated offenders similarly situated to Mr. Hilton, after the law becomes effective. Many of these changes directly respond to constitutional concerns identified by this Court in *Grady III*. Together, they render much of the majority's reasoning unnecessary dicta.

¶ 49 First, the Act adds a new section, N.C.G.S. § 14-208.39, which for the first time provides some evidentiary basis for the State's assertion that SBM effectively deters individuals convicted of sex offenses from committing further sex crimes. *Id.* at § 18.(a). Second, the Act amends N.C.G.S. § 14-208.40(a)(1) to impose SBM only upon certain categories of offenders, including aggravated offenders and recidivists[3], who "based on the Division of Adult Correction and Juvenile Justice's risk assessment program require[ ] the highest possible level of supervision and monitoring." *Id.* at § 18.(c). Third, the Act amends N.C.G.S. § 14-208.40A to establish that an offender eligible for SBM pursuant to N.C.G.S. § 14-208.40(a)(1) shall be ordered to enroll in SBM for a period of ten years, rather than for life. *Id.* at § 18.(d).

¶ 50 Each of these changes significantly alters the legal terrain upon which the constitutionality of SBM as applied to individuals subject to SBM due to their status as aggravated offenders will be assessed going forward. Because the majority opinion addresses a version of the SBM program yet to incorporate these changes, our decision today has no relevance to the disposition of future legal challenges brought by any individual after S.L. 2021-138 takes effect on 1 December 2021.

¶ 51 However, because the majority's opinion also ignores changes the General Assembly made to the SBM program which directly and unmistakably apply to individuals ordered to enroll in lifetime SBM prior to the enactment of S.L. 2021-138, the majority opinion has little relevance as applied to Mr. Hilton, either.

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3. S.L. 2021-138 uses the term "reoffender" instead of "recidivist." For ease of reading, I continue to use the term "recidivist" throughout.

¶ 52 S.L. 2021-138 adds a new section to Article 27A which provides that an offender like Mr. Hilton who is "enrolled in a satellite-based monitoring [program] for life may file a petition for termination or modification of the monitoring requirement with the superior court in the county where the conviction occurred five years after the date of initial enrollment." Act of Sept. 2, S.L. 2021-138, § 18.(i) (to be codified at N.C.G.S. § 14-208.46(a)). Only two outcomes can result when an individual files such a petition. For individuals who have been enrolled in SBM for less than ten years, "the court shall order the petitioner to remain enrolled in the satellite-based monitoring program for a total of 10 years." *Id.* (to be codified at N.C.G.S. § 14-208.46(d)). For individuals who have been enrolled in SBM for more than ten years, "the court shall order the petitioner's requirement to enroll in the satellite-based monitoring program be terminated." *Id.* (to be codified at N.C.G.S. § 14-208.46(e)). Thus, upon motion of any individual subject to an order requiring lifetime enrollment in SBM, the order requiring lifetime enrollment in SBM will be converted into an order requiring enrollment in SBM for a period of time not to exceed ten years.

¶ 53 Shortening the period of time an individual is required to enroll in SBM from life to ten years significantly diminishes the burden SBM places on an individual's constitutional privacy interests. It reduces the likelihood that an individual will be required to enroll in SBM for an extended period of time beyond his or her period of incarceration and post-release supervision. It also reduces the risk that technological advancements—or changes in an individual's circumstances—will render the considerations justifying the initial imposition of SBM obsolete. The period of time Mr. Hilton would be subject to SBM was undoubtedly relevant to the Court of Appeals' disposition of his appeal, which correctly distinguished between the period of time during which Mr. Hilton was under post-release supervision and the remainder of his life after completing the terms of his sentence. *State v. Hilton*, 271 N.C. App. 505, 512–13 (2020) ("After [his] period of supervision, the imposition of SBM is no longer reasonable, as [Mr. Hilton's] expectation of privacy is too high and the State's legitimate purpose in monitoring [his] location . . . is extinguished."). At a minimum, this Court should consider the changes implemented by S.L. 2021-138 before resolving Mr. Hilton's constitutional claims.

¶ 54 Consistent with the text, purpose, and structure of S.L. 2021-138, Mr. Hilton will be entitled to avail himself of the new procedural mechanism created by subsection 18.(i) of the Act. Subsection 18.(p) provides that "[s]ubsection (i) of this section becomes effective December 1, 2021,

and applies to any individual required to enroll in satellite-based monitoring for life on or after that date." As the statutes governing the SBM program make readily apparent, individuals like Mr. Hilton who were initially ordered to enroll in lifetime SBM prior to 1 December 2021 will be "required to enroll" in SBM on 1 December 2021, 2 December 2021, and on every day afterwards unless and until the initial order is modified or terminated.

> [W]hen an offender is required to enroll in satellite-based monitoring . . . the offender shall continue to be enrolled in the satellite-based monitoring program for the period required [ ] *unless the requirement that the person enroll in a satellite-based monitoring program is terminated*. . . . The offender shall cooperate with the Division of Adult Correction and Juvenile Justice and the requirements of the satellite-based monitoring program *until the offender's requirement to enroll is terminated*[.]"

N.C.G.S. § 14-208.42 (2019) (emphases added). Further, if individuals like Mr. Hilton are not entitled to utilize the procedural mechanism created by subsection 18.(i) of the Act, then nobody is. Subsection 18.(i) provides that "[a]n offender who is enrolled in a satellite-based monitoring for life may file a petition for termination or modification of the monitoring requirement . . . ." *Id.* at § 18.(i). However, after 1 December 2021, every court entering an SBM order must comply with the statutory changes enacted by subsection 18.(d), which amends N.C.G.S. § 14-208.40A to require a court to "order the offender to enroll in a [SBM] program for a period of 10 years." *Id.* at § 18.(d). To respect the legislature's policy choice to afford offenders required to enroll in lifetime SBM a process through which those orders will be modified or terminated, individuals like Mr. Hilton who were previously ordered to enroll in lifetime SBM must be able to utilize the procedural mechanism subsection 18.(i) creates.[4]

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4. The final report summarizing S.B. 300 (now S.L. 2021-138) released by the General Assembly's Legislative Analysis Division stated that the provisions amending the SBM program "to address constitutional issues" would "[r]educe lifetime SBM to ten years" and "[a]llow for a judicial review to terminate or modify SBM for offenders." Legislative Analysis Division, 2021–22 N.C. Gen. Assemb., Bill Summary (Aug. 18, 2021), https://dashboard.ncleg.gov/api/Services/BillSummary/2021/S300-SMSA-67(e6)-v-2. Although not determinative, this "contemporaneous committee report[ ]" sheds further light on the "purpose of this specific part" of the broader Act, *Est. of Savino v. Charlotte-Mecklenburg Hosp. Auth.*, 375 N.C. 288, 296 (2020), which is to ensure that no individual in North Carolina is required to enroll in SBM for life given the significant constitutional issues such a requirement creates.

¶ 55 The practical effect of S.L. 2021-138 is that no individual in North Carolina, no matter when they were initially ordered to participate in SBM, will be required to enroll in the program for life if they avail themselves of the process established by statute. Thus, the majority's sweeping holding that "a search effected by the imposition of lifetime SBM upon a defendant due to his status as an aggravated offender is reasonable under the Fourth Amendment" does not address the circumstances of this case, or of any case that is likely to arise under North Carolina law. We lack authority and reason to construe a statute the legislature has chosen to amend. *Cf. State v. McCluney*, 280 N.C. 404, 407 (1972) (holding that "repeal of [the challenged statute] renders moot the question of its constitutionality"). Given the changes enacted by S.L. 2021-138, the majority opinion does no more than express the speculative view of four Justices that it would not offend the Fourth Amendment to require an individual to enroll in SBM for life based solely upon his or her status as an aggravated offender. Under our precedents, that is not a function this Court is empowered to perform.

II. The Fourth Amendment does not permit the State to impose lifetime SBM solely on the basis of an individual's status as an aggravated offender.

¶ 56 For the reasons stated above, I do not believe it is necessary for the majority to opine on the constitutionality of subjecting Mr. Hilton to lifetime SBM when S.L. 2021-138 will afford him the opportunity to seek and obtain an order reducing his required period of enrollment from life to ten years. However, because the majority chooses to reach this question, I also write to explain why its choice to reverse the decision of the Court of Appeals and leave the trial court's SBM order undisturbed cannot be reconciled with the Fourth Amendment or with the precedent we established in *Grady III*.

A. SBM is a "civil, regulatory scheme," not a lesser "punishment."

¶ 57 First, the majority justifies the imposition of lifetime SBM on Mr. Hilton as a lesser punishment than imprisonment. The implication is that because the alternative to an order imposing SBM is criminal imprisonment or civil commitment, the intrusion on Mr. Hilton's privacy rights is minimal. Yet the order imposing SBM on Mr. Hilton is not restricted to Mr. Hilton's period of incarceration and post-release supervision—the order imposes SBM *for life*, including any time remaining after he has completed all of the terms of his sentence.[5] The majority's sweeping

5. To reiterate, Mr. Hilton will not be required to enroll in SBM for life because of the changes to the SBM program contained in S.L. 2021-138. Additionally, as stated above,

logic simply does not hold true under circumstances contemplated in the order itself.

¶ 58 More fundamentally, this Court held in *State v. Bowditch*, 364 N.C. 335 (2010), that North Carolina's SBM program is a "civil, regulatory scheme" with a "nonpunitive" legislative intent. *Id.* at 342–44. Ignoring this holding, the majority adopts a "heads I win, tails you lose" approach. On the one hand, SBM (arguably) can be applied consistently with the constitutional prohibition against ex post facto laws because it is non-punitive. On the other hand, SBM (arguably) can be applied consistently with the Fourth Amendment's protection against unreasonable searches and seizures because it is a lesser form of punishment. The State should not be afforded the opportunity to have its cake and eat it too. Having decided *Bowditch*, this Court should adhere to its conclusions about the SBM program's purpose and effect. The SBM program cannot be justified as a substitute for a more intrusive form of criminal punishment because SBM is not a form of criminal punishment.

B. The majority's sweeping opinion is untethered to the facts.

¶ 59 Second, the majority goes far beyond the issue presented by the facts in this case. The majority declares that any offender who has committed an aggravated offense may constitutionally be ordered to enroll in SBM for life, whether currently under state supervision or not. Yet Mr. Hilton's present status as someone under the supervision of the Division of Adult Corrections has immense constitutional ramifications. Because he has not completed his sentence, Mr. Hilton arguably has a lesser privacy interest under the Fourth Amendment than someone who has completed his sentence and re-entered society. *See Grady III*, 372 N.C. at 533 ("[T]here is no precedent for the proposition that persons . . . who have served their sentences and whose legal rights have been restored to them (with the exception of the right to possess firearms . . . nevertheless have a diminished expectation of privacy in their persons and in their physical locations at any and all times of the day or night for the rest of their lives."). Mr. Hilton could also be required to participate in electronic monitoring as a condition of his post-release supervision independent of the sex-offender statute at issue here. *See* N.C.G.S. § 15A-1368.4(e)(13) (2019). He is not similarly situated to every

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reducing the period of time an offender will be required to enroll in SBM from life to ten years has significant implications for our examination of SBM's constitutionality as applied to Mr. Hilton or to any other similarly situated individual. However, for the purposes of illustrating the errors in the majority's constitutional analysis, I adopt the majority's premise that Mr. Hilton will be required to enroll in SBM for the remainder of his life.

aggravated offender subject to a lifetime SBM order. The majority errs in proceeding as if he is.

¶ 60 The majority repeatedly characterizes this Court's opinion in *Grady III* as limited or narrow. This characterization is correct, to a point: the holding of *Grady III* was carefully tailored to the facts before the Court at that time, although it was not so limited or narrow as to have no applicability in any case involving an individual who is not a recidivist. *See Grady III*, 372 N.C. at 545. Regardless, it is the majority's (mis)characterization of *Grady III* as being so limited and so narrow that it has no applicability beyond the specific facts of that case which allows the majority to pretend a precedent we established in 2019 simply does not exist.

¶ 61 Yet, for some reason, the majority now feels completely unburdened by our longstanding norms of judicial modesty and by constitutional constraints on judicial power. Rather than issue an opinion limited to the category of offenders implicated by the facts of this case—aggravated offenders who are currently under State supervision and control—the majority feels entitled to opine on categories of individuals who differ from Mr. Hilton in constitutionally salient ways. Rather than wait for a case that presents the issue of whether SBM is constitutional as applied to an offender who is no longer subject to State supervision and control,[6] the majority eagerly jumps at the chance to try to immunize a soon-to-be-outdated version of the SBM program from constitutional challenge in every conceivable circumstance. Our role as judges has traditionally meant avoiding broad, facial holdings when a narrow, case-specific one will suffice. *See Kirkman v. Wilson*, 328 N.C. 309, 312 (1991) ("The function of appellate courts . . . is not to give opinions on merely abstract or theoretical matters." (alteration in original)). There is no justification for abandoning this rule in this case.

C. The majority improperly excuses the State from its burden of demonstrating the efficacy of the SBM program.

¶ 62 Third, the majority's Fourth Amendment analysis rests on factual conclusions it draws out of thin air. A warrantless search is only con-

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6. The majority rests heavily on the fact that because SBM is a civil judgment (except when it is not), a defendant who is subject to SBM but no longer subject to State supervision or control may move "the court . . . [to] relieve [him] from a final . . . [SBM] order . . . for . . . [a]ny . . . reason justifying relief from the operation of the judgment." N.C.G.S. § 1A-1, Rule 60(b)(6) (2019). Of course, it flips the Fourth Amendment on its head to affirm an order allowing the State to effectuate what may very well be an unconstitutional search on the promise that an individual could someday get back into court.

stitutional if it is reasonable. *See*, *e.g.*, *Riley v. California*, 573 U.S. 373, 381–82 (2014). Reasonableness requires an examination of "the nature and purpose of the search and the extent to which the search intrudes upon reasonable privacy expectations." *Grady v. North Carolina*, 575 U.S. 306, 310 (2015) (per curiam). The Fourth Amendment places the burden on the State to prove that the search is reasonable, not on the individual being searched to prove that it is not. *Grady III*, 372 N.C. at 543 ("[T]he State bears the burden of proving the reasonableness of a warrantless search."). If a search does not effectively advance the interest the State invokes to justify it, then it is hard to fathom how the search could be reasonable, no matter how weighty the State's interest. Thus, adhering to United States Supreme Court precedent, we held in *Grady III* that we must "consider the nature and immediacy of the governmental concern at issue here, *and the efficacy of this means for meeting it*." 372 N.C. at 538 (emphasis added) (quoting *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 660 (1995)).

¶ 63 It is undisputed that in this case, the State did not present any evidence to support its assertion that imposing lifetime SBM deters sex offenders from committing future sex crimes. In the face of that stark evidentiary void, the majority is willing to lend a helping hand. According to the majority, "[t]he SBM program furthers [the State's asserted] interest by deterring recidivism and assisting law enforcement agencies in solving crimes." To be clear, there is not actually any evidence in the record demonstrating the efficacy of SBM, either categorically or specifically in this case. The empirical studies the majority relies upon were not introduced by the State at Mr. Hilton's initial SBM hearing. They were not even cited by the State on appeal. Mr. Hilton did not have an opportunity to dispute the efficacy of SBM by introducing his own studies or critiquing the ones the majority finds persuasive. *See*, *e.g.*, *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 202 n.20 (2008) ("Supposition . . . is not an adequate substitute for admissible evidence subject to cross-examination in constitutional adjudication.").[7] It is

7. This Court specifically rejected the argument that the deterrence effect of SBM was self-evident in *Grady III* in part because the social science research available at the time that case was decided indicated that "applications of electronic monitoring as a tool for reducing crime are not supported by existing data." *State v. Grady* (*Grady III*), 372 N.C. 509, 543 n. 20 (2019) (quoting Deeanna M. Button et al., *Using Electronic Monitoring to Supervise Sex Offenders: Legislative Patterns and Implications for Community Corrections Officers*, 20 Crim. Just. Pol'y Rev. 414, 418 (2009)). Further, the studies the majority relies upon in support of its conclusion that "SBM's efficacy as a deterrent is supported by empirical data" both involved a California-specific program requiring intensive supervision of parolees. One of the studies found that the likelihood of a parolee violating the conditions of his or her parole or reoffending correlated significantly with a parole

difficult to imagine a more glaring example of an "impermissible exercise of appellate factfinding," *In re Harris Teeter, LLC*, 2021-NCSC-80, ¶ 34, than the majority making two studies the parties did not cite in any proceeding below the linchpin of its analysis.

¶ 64 In further support of its conclusion regarding the efficacy of SBM, the majority claims that "[j]ust as the drug-testing policy in *Vernonia* serves as an effective deterrent with respect to student athletes categorically, the SBM program in the present case serves as an effective deterrent with respect to aggravated offenders categorically." This analogy does not hold up. The efficacy of a program for drug testing students is "self-evident" because the only thing the program needs to do is identify the presence or absence of drugs in a student's system. *See Vernonia*, 515 U.S. at 663. Provided that the tests are accurate, there is simply no disputing that a program which regularly subjects students to drug testing—and promises they will be punished if they test positive—serves the government's interest in deterring student drug use.[8]

¶ 65 By contrast, the link between lifetime SBM and recidivism is far more complex. Even in this case, the most the State's witness could offer was to answer in the affirmative when asked "*hypothetically* if the first time [Mr. Hilton] went to Caldwell County he had no contact with [the victim], then you *possibly*, if in fact an assault did occur, you *might* have been able to avoid that with satellite-based monitoring?" Lifetime enrollment in SBM "[h]ypothetically," "possibly," "might" have helped deter a crime allegedly committed by an aggravated offender still subject to post-release supervision. This is hardly the kind of ringing endorsement one would expect of a proposition the majority suggests is self-evident.

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officer's caseload, leading the researchers to recommend "smaller caseloads of no more than 20 people per officer." Philip Bulman, *Sex Offenders Monitored by GPS Found to Commit Fewer Crimes*, 271 NIJ J. 22 (Feb. 2013). This conflicting empirical data further undermine the majority's assertion that the efficacy of lifetime SBM is "self-evident" and illustrate the need for these evidentiary issues to be addressed in the first instance by the trial court.

8. Further, in *Vernonia*, the United States Supreme Court went out of its way to "caution against the assumption that suspicionless drug testing will readily pass constitutional muster in other contexts. The most significant element in this case is the first we discussed: that the Policy was undertaken in furtherance of the government's responsibilities, under a public school system, as guardian and tutor of children entrusted to its care." *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 665 (1995). The majority's willingness to cherry-pick and expand *Vernonia*'s limited, context-specific holding—which involved very different circumstances and very different interests—stands in stark contrast to its disavowal of *Grady III* based upon its convenient view of that decision's limits.

¶ 66 It may seem pedantic to hold the State to its burden of proving that the SBM program effectively deters sex offenders from committing future sex crimes, and maybe it would be, if the only interest implicated here was the State's interest in promoting public safety. After all, it certainly seems possible that strapping a plastic box to a person's leg in order to collect location data in perpetuity will deter that person from committing future crimes. The problem with this view is that the State's interest is not and cannot be the only interest that matters when evaluating the scope of protection afforded to North Carolinians under our state and federal constitutions.

¶ 67 When we allow the State to define for itself when a presumptively unreasonable search is reasonable, we place all North Carolinians' constitutional rights at risk. After all, the Fourth Amendment safeguards "[t]he right of the people to be secure in their persons . . . against unreasonable searches and seizures" *by the government*. U.S. Const. amend. IV. Preventing law enforcement officers and other government officials from acting unlawfully is "[t]he point of the Fourth Amendment." *Johnson v. United States*, 333 U.S. 10, 13 (1948). The State could have presented evidence to support its assertion that SBM promotes its legitimate governmental interest in preventing sex offenders from reoffending. It did not. That should end our inquiry. Yet rather than hold the State to this very much surmountable burden, the majority excuses the State's inability or unwillingness to present any evidence demonstrating that SBM helps deter recidivism and instead invents a new test: a warrantless, suspicionless search is reasonable when the State says it is. The danger for abuse should be self-evident.

D. The majority's flagrant disregard for precedent.

¶ 68 Finally, the majority has adopted numerous arguments advanced in the dissenting opinion in *Grady III* which the majority in that case rejected. Key factual and legal conclusions established in *Grady III* have been turned upside down. Without acknowledgment, the majority proceeds as if the dissent in *Grady III* controls in analyzing the constitutionality of a lifetime SBM order under the Fourth Amendment.[9] The majority's refusal to adhere to precedent is inconsistent with this Court's longstanding respect for the doctrine of stare decisis, creates unnecessary and inexplicable fissures in our Fourth Amendment jurisprudence, and threatens this Court's legitimacy.

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9. To be sure, the majority does not expressly or impliedly overrule *Grady III*. Thus, its holding that it is unconstitutional under the Fourth Amendment to require certain offenders to enroll in lifetime SBM remains binding precedent, at least with respect to the category of offenders addressed in that case.

¶ 69 On numerous occasions, the majority opinion in this case discards legal principles articulated by the majority in *Grady III* which plainly apply in examining any offender's challenge to an order imposing lifetime SBM, including Mr. Hilton's. For example, in *Grady III*, we explained that "[i]n addressing the search's 'intrusion on the individual's *Fourth Amendment* interests,' '[t]he first factor to be considered is the nature of the privacy interest upon which the search here at issue intrudes,' or, in other words, 'the scope of the legitimate expectation of privacy at issue.' " *Grady III*, 372 N.C. at 527 (second alteration in original) (emphasis added) (quoting *Vernonia*, 515 U.S. at 652–54, 658). Now, the majority decides instead that "[t]he first step of our reasonableness inquiry under the totality of the circumstances requires analyzing the legitimacy of the State's interest."

¶ 70 In assessing the State's interest in *Grady III*, this Court held that "the extent of a problem justifying the need for a warrantless search cannot simply be assumed; instead, the existence of the problem and the efficacy of the solution need to be demonstrated by the government." *Id.* at 540–41. We explicitly rejected the argument that "we must defer to . . . legislative findings concerning the significance of the problem the SBM program is intended to address and the risk of sex offenders re-offending as codified at N.C.G.S. § 14-208.5 (stating the 'Purpose' of Article 27A) despite the absence of any record evidence supporting the State's position." *Id.* at 541–42. We found an inconsistency between the record evidence in that case and the relevant legislative findings and further noted that the referenced "findings" related to the sex offender registry, not the SBM program. *Id.* Today, the majority relies on the exact same legislative statement of purpose to support the factual conclusion that sex offenders pose a high risk of reoffending.

¶ 71 A central question in the constitutional analysis and one that should be of concern to all is whether the SBM program actually accomplishes the purposes it is intended to achieve. On this fundamental issue of efficacy, in *Grady III* this Court again explicitly rejected the position now adopted by the majority that the program's deterrent effect is self-evident. *See Id.* at 543–44 ("[T]he State has not presented any evidence demonstrating that the SBM program is effective at deterring crime. . . . We cannot simply assume that the program serves its goals and purposes . . . .").

¶ 72 Another example of the majority's abandonment of *Grady III* when conducting the balancing required under the Fourth Amendment's reasonableness inquiry is its characterization of the intrusiveness of the search SBM effectuates. In *Grady III*, this Court explicitly rejected

the State's argument that "[t]he physical intrusion here is minimal," *id.* at 536 (alteration in original), concluding instead that the physical intrusiveness of SBM is both distinct in nature from the requirements of the sex offender registry and substantial, *id.* at 537. We stated that "[w]e cannot agree with the Court of Appeals that these physical restrictions, [like charging the ankle monitoring device,] which require defendant to be tethered to a wall for what amounts to one month out of every year, are 'more inconvenient that intrusive.' " *Id.* at 535–36 (footnote omitted) (quoting *State v. Grady*, 259 N.C. App. 664, 672 (2018)). Today, the Court holds, directly contra *Grady III*, that "[t]hese physical limitations are more inconvenient than intrusive and do not materially invade an aggravated offender's diminished privacy expectations." SBM technology has not changed. The requirement that the person wearing an ankle monitoring device must be tethered to the wall for two hours a day to charge the battery has not changed. The fact that an audible sound is emitted when voice commands are made has not changed. And there is no difference in the level of intrusiveness of SBM for an individual who is a recidivist as compared to an aggravated offender.

¶ 73 On the question of whether a court order to enroll in lifetime SBM is easily terminated, the *Grady III* Court examined the significance of the fact that North Carolina law provides for review by the Post-Release Supervision and Parole Commission and found several practical and constitutional problems with this purported remedy. *Id.* at 534–35, 534 n.16. We noted that from 2010 through 2015 the Commission received only sixteen requests for termination by individuals subject to lifetime SBM and denied all of them. *Id.* at 535. The majority now makes the completely unsupported factual assumptions that "the aggravated offender category applies only to a small subset of individuals" and that while the statute refers to "lifetime" monitoring, termination is practically available after one year.

¶ 74 Similarly, with regard to Mr. Hilton's state constitutional claim, the majority relies upon reasoning rejected by the United States Supreme Court and by this Court in the *Grady* cases. The majority concludes that an order imposing mandatory lifetime SBM is not a general warrant, and is thus constitutional, because SBM only provides information about a person's location. Yet this requires embracing a characterization of the SBM program as not actually effectuating a constitutional search—a characterization the United States Supreme Court unanimously overruled in a per curiam opinion. The majority's fact-free, tautological reasoning has the effect of nullifying any meaningful judicial review of claims arising under Article I, Section 20 of the North Carolina Constitution altogether.

¶ 75 I could go on. But proceeding issue by issue to examine all the ways in which this Court is now disavowing *Grady III*, without acknowledging what it is doing or even trying to justify its norm-breaking opinion, risks missing the forest for the trees. Nothing about SBM or the Fourth Amendment has changed between our decision in *Grady III* and the decision today. The only thing that has changed is the composition of the Court.

¶ 76 In refusing to adhere to *Grady III*, the majority ignores the dozens of Court of Appeals decisions interpreting and applying *Grady III*'s logic in cases involving non-recidivists. *See*, *e.g.*, *State v. Perez*, 854 S.E.2d 15, 21 (N.C. Ct. App. 2020) ("Since our Supreme Court's holding in *Grady III*, this Court has applied the reasonableness analysis under the totality of the circumstances to non-recidivists in SBM appeals in accordance with *Grady I*."); *Gordon*, 270 N.C. App. at 475–77 (applying the reasonableness analysis employed in *Grady III* to a defendant convicted of an aggravated offense and subject to lifetime SBM as a result); *State v. Griffin*, 270 N.C. App. 98, 106 (2020) ("*Grady III* offers guidance as to what factors to consider in determining whether SBM is reasonable under the totality of the circumstances."), *review allowed*, *writ allowed*, 854 S.E.2d 586 (N.C. 2021); *Jackson*, 2020 WL 2847885, at *16 ("Defendant is an aggravated offender subject to mandatory lifetime SBM following his release from incarceration, placing his circumstances outside of the limited facial holding of *Grady III*. Accordingly, as we did in *Griffin* . . . , we employ *Grady III* as a roadmap . . . ."). This Court is not bound by Court of Appeals decisions, but the majority's failure to explain why *Grady III* is inapposite in a case applying Fourth Amendment principles to examine the constitutionality of a lifetime SBM order—contrary to the reasoning of every Court of Appeals panel which has considered the very same question—is inexcusable.[10]

¶ 77 Ostensibly, our Court adheres to the doctrine of stare decisis. *See*, *e.g.*, *In re T.A.M.*, 2021-NCSC-77, ¶ 61 (Ervin, J. dissenting) ("[T]hose who disagree with an earlier decision are expected to continue to adhere to it unless and until it is overruled."). "This Court has always attached great importance to the doctrine of *stare decisis*, both out of

10. The majority states that *Grady III* "has no bearing on cases where lifetime SBM is imposed on sexually violent offenders, aggravated offenders, or adult-child offenders" because the decision was limited to a narrow class of recidivists. But the majority does little to explain the distinction between recidivists and aggravated offenders which justifies discarding the reasoning we articulated in *Grady III*. Again, the Fourth Amendment and the SBM statutes which govern the lawfulness of subjecting an individual to lifetime SBM are the same for recidivists and aggravated offenders.

respect for the opinions of our predecessors and because it promotes stability in the law and uniformity in its application." *Wiles v. Welparnel Constr. Co.*, 295 N.C. 81, 85 (1978). Indeed, respect for our own precedents is necessary for us to remain faithful to the rule of law.

> This rigorous standard for constitutional challenges ensures uniformity and predictability in the application of our constitution. *State v. Emery*, 224 N.C. 581, 584, 31 S.E.2d 858, 861 (1944) ("[Constitutions] should receive a consistent and uniform construction . . . even though circumstances may have so changed as to render a different construction desirable." (citing, *inter alia*, *State ex rel. Att'y-Gen. v. Knight*, 169 N.C. 333, 85 S.E. 418 (1915))); *see also Bacon v. Lee*, 353 N.C. 696, 712, 549 S.E.2d 840, 851–52 ("A primary goal of adjudicatory proceedings is the uniform application of law. In furtherance of this objective, courts generally consider themselves bound by prior precedent, *i.e.*, the doctrine of stare decisis." (citations omitted)), *cert. denied*, 533 U.S. 975, 122 S. Ct. 22, 150 L. Ed. 2d 804 (2001). Adhering to this fixed standard ensures that we remain true to the rule of law, the consistent interpretation and application of the law. *State v. Bell*, 184 N.C. 701, 720, 115 S.E. 190, 199 (1922) (Stacy, J., dissenting) ("[T]here must be some uniformity in judicial decisions . . . or else the law itself, the very chart by which we are sailing, will become as unstable and uncertain as the shifting sands of the sea . . . .").

State ex rel. McCrory v. Berger, 368 N.C. 633, 651 (2016) (Newby, J., concurring in part, dissenting in part) (alterations in original). "Our system of constitutional adjudication depends upon a vast reservoir of respect for law and courts." Archibald Cox, *The Warren Court: Constitutional Decision as an Instrument of Reform* 25 (Harvard Univ. Press 1968). Public acceptance of the legitimate authority of judicial decisions rests "at least partly upon the understanding that what the judge decides is not simply his personal notion of what is desirable but the application of rules that apply to all men equally, yesterday, today, and tomorrow." *Id.* at 26. This Court's actions today threaten to drain that "reservoir of respect for law and courts."

¶ 78 Of course, "*stare decisis* is 'not an inexorable command.' " *Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, 138 S. Ct. 2448,

2478 (2018) (quoting *Pearson v. Callahan*, 555 U.S. 223, 233 (2009)). On rare occasion, a Court will find it necessary to depart from the conclusions and reasoning it endorsed in its own prior decisions. Although this Court has not articulated factors to consider when examining the continued vitality of our precedents—perhaps because this Court has for so long respected the doctrine of stare decisis—the United States Supreme Court considers "the quality of [ ] reasoning [of the precedent being challenged], the workability of the rule it established, its consistency with other related decisions, developments since the decision was handed down, and reliance on the decision." *Id.* at 2478–79.

¶ 79 In light of these factors, what is particularly troubling about the majority's unwillingness to adhere to *Grady III* is that it comes in precisely the circumstances where respect for our precedent should be at its apex. Here, based upon a plausible reading of *Grady III*, the General Assembly expended significant time and energy to address the SBM program's constitutional deficiencies. The constitutionality of a law was challenged. This Court ruled. The General Assembly responded. This is precisely how our system of constitutional adjudication and judicial review should proceed. *Cf. Hilton v. S.C. Pub. Rys. Comm'n*, 502 U.S. 197, 202 (1991) ("*Stare decisis* has added force when the legislature, in the public sphere . . . ha[s] acted in reliance on a previous decision, for in this instance overruling the decision would dislodge settled rights and expectations or require an extensive legislative response."). The majority should not ignore a precedent it does not like, in a circumstance where doing so is both unwarranted and, given the passage of S.L. 2021-138, completely unnecessary, absent a compelling reason or any identifiable reason at all.

¶ 80 A Court which discards its own precedents without explaining why it is doing so—which refuses to even admit what it is doing—is a Court which forfeits its claim to the special legitimacy the judiciary purports to derive from its capacity to reason and persuade. That is precisely what this Court does today. In "disregarding or distorting precedent as necessary to reach their desired result," the majority flaunts its power and tells the public " '*C'est légal, parce que je le veux*' ('It is legal because it is my will.')." *State v. Robinson*, 375 N.C. 173, 193 (2020) (Newby, J., dissenting). The majority also signals to future litigants that the relevance of our decisions depends not upon any objective set of rules articulated by the Court, but rather upon the whims of its members. Whether or not one agrees with the outcome of *Grady III* or with the outcome of this case, the majority's flagrant disregard for precedent and its unwillingness to own up to its actions should be alarming to anyone in North Carolina who cares about constitutional rights and the rule of law.

III. Conclusion

¶ 81 It is important to not shy away from the facts of this particular case. Mr. Hilton was convicted of sexually abusing two minors. When he was released from prison after serving a 12-year sentence, he violated a condition of his post-release supervision by traveling to Caldwell County without his probation officer's permission. He was subsequently accused of sexually assaulting another minor during at least one of these unauthorized trips. Although the State's testimony was extremely speculative, it is certainly possible that if the assault was not on his first trip and if the probation officer supervising Mr. Hilton had intervened after the first trip to stop Mr. Hilton from leaving Catawba County, then the second assault may have been avoided. Given the magnitude of the harm inflicted by individuals who commit aggravated sex offenses—and the frightening prospect of prior offenders reoffending upon their release from prison—it is tempting to allow the State to do pretty much whatever it wants in the name of deterring crime.

¶ 82 Yet without disputing the magnitude of the interest the State asserts to justify its imposition of SBM in this case, I cannot join the majority in its unqualified embrace of an application of SBM that is both unconstitutional and irreconcilable with recent precedents of this Court and the United States Supreme Court, in a case that has been significantly altered by the General Assembly's substantial revision of the SBM program. I cannot join the majority in its decision to "shr[i]nk from declaring the truth" that the constitutions of North Carolina and the United States do not permit the State to intrude upon the privacy of its citizens merely because the legislature declares the intrusion wise. *Stanmire v. Taylor*, 48 N.C. 207, 211 (1855). Although of limited relevance, the majority opinion represents a grievous violation of our "solemn obligation" to enforce constitutional rights against State overreach. *Id.*

¶ 83 The practical result of the majority's holding has been nullified because, as explained above, the law the majority purports to interpret will no longer exist after 1 December 2021. Nevertheless, the majority's reasoning is troubling. According to the majority, the State would be permitted to physically affix an electronic tracker to Mr. Hilton's ankle and collect pinpoint location data from now until the day he dies, based solely upon his status as an aggravated offender, even after he has completed all terms of his criminal sentence. The majority may think this an effective way to prevent recidivism. It may very well be. But allowing the State to conduct an invasive, never-ending search of an individual's person, without requiring the State to present *any* evidence that doing so in any way serves the interest the State advances to justify the search,

makes a mockery of the constitutional rights which protect all North Carolinians. I disagree with the majority's abandonment of the state and federal constitutions, its refusal to respect the Court and its precedents, and its abdication of our judicial role. If this Court believes it necessary to reach the merits of Mr. Hilton's claim absent further briefing on the ramifications of S.L. 2021-138, I would affirm the decision of the Court of Appeals reversing in part the order imposing lifetime SBM on Mr. Hilton. Therefore, I dissent.

Justice HUDSON and Justice ERVIN join in this dissenting opinion.

Appendix:

Case	Category	Court of Appeals Disposition as to SBM
State v. Clemons, No. COA18-469, 2019 WL 6134546 (N.C. Ct. App. Nov. 19, 2019) (unpublished).	Non-Recidivist Lifetime	SBM Order Held Unconstitutional
State v. Dravis, 269 N.C. App. 617 (2020).	Lifetime (unknown category)	SBM Order Held Unconstitutional
State v. Griffin, 270 N.C. App. 98 (2020), *review allowed*, *writ allowed*, 854 S.E.2d 586 (N.C. 2021).	30 years	SBM Order Held Unconstitutional
State v. Gordon, 270 N.C. App. 468 (2020), *review allowed*, *writ allowed*, 853 S.E.2d 148 (N.C. 2021).	Non-Recidivist Lifetime	SBM Order Held Unconstitutional
State v. Graham, 270 N.C. App. 478, *writ allowed*, 845 S.E.2d 788 (N.C. 2020), *review allowed in part*, *denied in part*, 375 N.C. 272 (2020).	Non-Recidivist Lifetime	Vacated and Remanded
State v. Willis, No. COA18-507, 2020 WL 2126759 (N.C. Ct. App. May 5, 2020) (unpublished).	Recidivist Lifetime	SBM Order Held Unconstitutional

State v. Ricks, 271 N.C. App. 348, *writ allowed*, 375 N.C. 281 (2020).	Non-Recidivist Lifetime	SBM Order Vacated
State v. Jackson, No. COA18-1122, 2020 WL 2847885 (N.C. Ct. App. June 2, 2020) (unpublished), *review denied*, 375 N.C. 494 (2020).	Non-Recidivist Lifetime	SBM Order Held Unconstitutional
State v. Hutchens, 272 N.C. App. 156 (2020).	Non-Recidivist Lifetime	SBM Order Held Unconstitutional
State v. Tucker, 272 N.C. App. 223, *writ denied*, 843 S.E.2d 647 (N.C. 2020), *review denied*, 376 N.C. 546 (2020).	Non-Recidivist Lifetime	SBM Order Held Unconstitutional
State v. Springle, No. COA17-652-2, 2020 WL 4187312 (N.C. Ct. App. July 21, 2020) (unpublished).	Recidivist Lifetime	SBM Order Held Unconstitutional
State v. Lindquist, 273 N.C. App. 163 (2020).	Recidivist Lifetime	SBM Order Vacated and Remanded
State v. Thompson, 273 N.C. App. 686 (2020).	Non-Recidivist Lifetime	SBM Order Held Unconstitutional
State v. Strudwick, 273 N.C. App. 676 (2020), *writ allowed*, 849 S.E.2d 296 (N.C. 2020).	Non-Recidivist Lifetime	SBM Order Held Unconstitutional
State v. Ennis, No. COA19-896, 2020 WL 5902804 (N.C. Ct. App. Oct. 6, 2020) (unpublished), *review denied*, 851 S.E.2d 49 (N.C. 2020).	Non-Recidivist Lifetime	SBM Order Vacated

State v. Battle, No. COA19-677, 2020 WL 6140629 (N.C. Ct. App. Oct. 20, 2020) (unpublished).	Non-Recidivist Lifetime	SBM Order Vacated
State v. Cooper, No. COA18-637-2, 2020 WL 6140636 (N.C. Ct. App. Oct. 20, 2020) (unpublished).	Non-Recidivist Lifetime	SBM Order Held Unconstitutional
State v. Anthony, No. COA18-1118-2, 2020 WL 6742712 (N.C. Ct. App. Nov. 17, 2020) (unpublished).	Non-Recidivist Lifetime	SBM Order Held Unconstitutional
State v. Essary, No. COA19-917, 2020 WL 7038839 (N.C. Ct. App. Dec. 1, 2020) (unpublished), *review denied*, 376 N.C. 902 (2021).	Non-Recidivist Lifetime	SBM Order Vacated
State v. Harris, 854 S.E.2d 51 (N.C. Ct. App. 2020), *writ allowed*, 376 N.C. 679 (2021).	Non-Recidivist Lifetime	SBM Order Held Unconstitutional
State v. Perez, 854 S.E.2d 15 (N.C. Ct. App. 2020).	Non-Recidivist Lifetime	SBM Order Held Unconstitutional
State v. Robinson, 854 S.E.2d 407 (N.C. Ct. App. 2020).	Non-Recidivist Lifetime	SBM Order Held Unconstitutional
State v. Westbrook, No. COA18-32-2, 2020 WL 7973944 (N.C. Ct. App. Dec. 31, 2020) (unpublished).	Recidivist Lifetime	SBM Order Held Unconstitutional
State v. White, No. COA18-39-2, 2020 WL 7974418 (N.C. Ct. App. Dec. 31, 2020) (unpublished).	10 years	SBM Order Held Unconstitutional

State v. Clark, No. COA19-318, 2020 WL 7974412 (N.C. Ct. App. Dec. 31, 2020) (unpublished).	Non-Recidivist Lifetime	SBM Order Held Unconstitutional
State v. Chaudoin, No. COA20-340, 2021 WL 1978943 (N.C. Ct. App. May 18, 2021) (unpublished).	Recidivist Lifetime	SBM Order Vacated and Remanded
State v. Spinks, 2021-NCCOA-218.	Recidivist Lifetime	SBM Order Reversed in Part and Remanded
State v. Billings, 2021-NCCOA-306.	Recidivist Lifetime	SBM Order Vacated
State v. Barnes, 2021-NCCOA-304.	Non-Recidivist Lifetime	SBM Order Vacated and Remanded

STATE v. RICKS

[378 N.C. 737, 2021-NCSC-116]

STATE OF NORTH CAROLINA
v.
JOHNATHAN RICKS

No. 233A20

Filed 24 September 2021

Appeal and Error—review of unpreserved constitutional argument—lifetime satellite-based monitoring—no appeal filed—Rule 2—certiorari erroneously granted

After a trial court entered orders imposing lifetime satellite-based monitoring (SBM) upon defendant, and defendant neither objected at the SBM hearing nor filed a written notice of appeal of the SBM orders, the Court of Appeals' decision vacating the orders was reversed because it was error to allow defendant's petition for a writ of certiorari and to invoke Appellate Rule 2 to review defendant's unpreserved challenge to the orders. Defendant failed to demonstrate that a refusal to invoke Rule 2 would result in manifest injustice, and his petition did not show any merit where the trial court appropriately ordered lifetime SBM because of his status as an aggravated offender.

Justice HUDSON dissenting.

Justices ERVIN and EARLS 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, 271 N.C. App. 348, 843 S.E.2d 652 (2020), finding no error in part and vacating in part a judgment entered on 17 January 2019 by Judge Claire V. Hill in Superior Court, Harnett County. Heard in the Supreme Court on 26 April 2021.

Joshua H. Stein, Attorney General, by Teresa M. Postell, Assistant Attorney General, for the State-appellant.

Kimberly P. Hoppin for defendant-appellee.

NEWBY, Chief Justice.

¶ 1 In this case we decide whether the Court of Appeals erred by allowing defendant's petition for writ of certiorari and invoking Rule 2

to review defendant's unpreserved challenge to the trial court's orders imposing lifetime satellite-based monitoring (SBM). The North Carolina Rules of Appellate Procedure require that a party seeking appellate review of an SBM order make an objection before the trial court and file a written notice of appeal. A writ of certiorari and invocation of Rule 2 cannot be used to circumvent the Rules of Appellate Procedure. Rather, an appellate court may only consider certiorari when the petition shows merit, meaning that the trial court probably committed error at the hearing. Further, an appellate court may only invoke Rule 2 when injustice appears manifest to the court or when the case presents significant issues of importance in the public interest. Here the Rules of Appellate Procedure bar defendant's appeal. Defendant failed to demonstrate any manifest injustice sufficient to warrant invoking Rule 2, and his petition to the Court of Appeals showed no merit. Therefore, the Court of Appeals abused its discretion when it allowed defendant's petition for writ of certiorari and invoked Rule 2 to review the SBM orders. Accordingly, we reverse the Court of Appeals' decision vacating the trial court's orders imposing SBM.

¶ 2 On 17 January 2019, a jury convicted defendant of three counts of statutory rape of a child by an adult, two counts of statutory sex offense with a child, and three counts of taking indecent liberties with a child. Directly after sentencing in the criminal case, the trial court conducted a civil hearing to address SBM and found that defendant's convictions were reportable under N.C.G.S. § 14-208.6(4) (2019).[1] The trial court determined that all of defendant's offenses were sexually violent and involved the physical, mental, or sexual abuse of a minor. The trial court also found that the statutory rape and statutory sex offense convictions were aggravated offenses. The trial court issued separate SBM orders for defendant's various convictions. Based upon defendant's indecent liberties convictions, the trial court ordered defendant to comply with the sex offender registry for thirty years upon his release from prison and, following a risk assessment, to return to the trial court for a later determination

1. "When an offender is convicted of a reportable conviction as defined by [N.C.]G.S. [§] 14-208.6(4), ... the court shall determine whether the offender's conviction places the offender in one of the categories described in [N.C.]G.S. [§] 14-208.40(a), and if so, shall make a finding of fact of that determination, specifying whether (i) the offender has been classified as a sexually violent predator pursuant to [N.C.]G.S. [§] 14-208.20, (ii) the offender is a recidivist, (iii) the conviction offense was an aggravated offense, (iv) the conviction offense was a violation of [N.C.]G.S. [§] 14-27.23 or [N.C.]G.S. [§] 14-27.28, or (v) the offense involved the physical, mental, or sexual abuse of a minor." N.C.G.S. § 14-208.40A(a)–(b) (2019).

on SBM.[2] Additionally, based upon defendant's other convictions, which were aggravated offenses, the trial court ordered lifetime sex offender registration and SBM pursuant to N.C.G.S. § 14-208.40A(c) (2019).[3]

¶ 3 Though defendant gave oral notice of appeal from his criminal convictions, he made no objection to the imposition of SBM and never filed a written notice of appeal of the SBM orders. After filing the record in the Court of Appeals for his criminal appeal, defendant filed a petition for writ of certiorari seeking review of the SBM orders. The Court of Appeals unanimously held that defendant received a trial free from prejudicial error. *State v. Ricks*, 271 N.C. App. 348, 364, 843 S.E.2d 652, 665 (2020). It reached a divided decision, however, on the SBM issue. *Id.* Despite defendant's fatal procedural errors, the Court of Appeals relied upon this Court's decision in *State v. Bursell*, 372 N.C. 196, 827 S.E.2d 302 (2019), and reached the merits of defendant's SBM challenge. *Ricks*, 271 N.C. App. at 361, 843 S.E.2d at 664. It did so by allowing defendant's petition for writ of certiorari and invoking Rule 2 of the North Carolina Rules of Appellate Procedure. *Id.* at 358, 843 S.E.2d at 662. The Court of Appeals then held that the trial court failed to conduct a reasonableness hearing pursuant to this Court's decision in *State v. Grady*, 372 N.C. 509, 831 S.E.2d 542 (2019), and vacated the SBM orders without prejudice. *Ricks*, 271 N.C. App. at 364, 843 S.E.2d at 665.

¶ 4 The dissent, however, would not have allowed defendant's petition for writ of certiorari because "[d]efendant ha[d] not demonstrated any prejudice to merit issuance of the writ." *Id.* at 368, 843 S.E.2d at 668 (Tyson, J., concurring in the result in part and dissenting in part) (citing *State v. Grundler*, 251 N.C. 177, 189, 111 S.E.2d 1, 9 (1959)). Further, the dissent would have refused to invoke Rule 2 because defendant failed to show he is any "different from other defendants who failed to preserve their constitutional arguments in the trial court, and because he ha[d] not argued any specific facts that demonstrate manifest injustice." *Ricks*, 271 N.C. App. at 366, 843 S.E.2d at 666 (quoting *State v. Bishop*, 255 N.C. App. 767, 770, 805 S.E.2d 367, 370 (2017)). According to the dissent, the trial court's imposition of SBM did not demonstrate manifest injustice because (1) "[d]efendant's status does not fall within the category of

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2. "If the court finds that the offender committed an offense that involved the physical, mental, or sexual abuse of a minor, . . . the court shall order that the Division of Adult Correction do a risk assessment . . . . and report the results to the court." N.C.G.S. § 14-208.40A(d).

3. "If the court finds that the offender . . . has committed an aggravated offense, . . . the court shall order the offender to enroll in [lifetime SBM]." N.C.G.S. § 14-208.40A(c).

defendants at issue in *Grady* . . . , that is, recidivists who have completed their sentence and are no longer under any State supervision"; (2) defendant's convictions "were reportable convictions pursuant to N.C.[G.S.] § 14-208.6"; (3) "[d]efendant's convictions of statutory rape of a child by an adult and statutory sex offense are sexually violent and aggravated offenses involving the sexual abuse of a minor"; and (4) N.C.G.S. § 14-208.40A(c), which has "withstood and survived constitutional scrutiny," requires "defendants convicted of sexually violent offenses or aggravated offenses to be subject to [SBM]." *Ricks*, 271 N.C. App. at 367, 843 S.E.2d at 667. As such, the dissent noted that "[d]efendant's failure to appeal from or to preserve his purported challenge to his SBM order[s] on constitutional grounds mandates dismissal." *Id.* at 369, 843 S.E.2d at 668. The State appealed to this Court based upon the dissenting opinion at the Court of Appeals.

¶ 5 We review the Court of Appeals' decision to allow a petition for writ of certiorari and invoke Rule 2 for an abuse of discretion. *Bursell*, 372 N.C. at 201, 827 S.E.2d at 306; *see Grundler*, 251 N.C. at 189, 111 S.E.2d at 9 (holding that certiorari is a discretionary writ). A party seeking appellate review of a trial court order in a civil proceeding must make a timely objection and file a notice of appeal. "In order to preserve an issue for appellate review, a party must have presented to the trial court a timely . . . objection . . . ." N.C. R. App. P. 10(a)(1). "It is well settled that an error, even one of constitutional magnitude, that [the] defendant does not bring to the trial court's attention is waived and will not be considered on appeal." *Bursell*, 372 N.C. at 199, 827 S.E.2d at 305 (quoting *State v. Bell*, 359 N.C. 1, 28, 603 S.E.2d 93, 112 (2004)). Rule 2 allows an appellate court to suspend the Rules of Appellate Procedure and reach the merits of an unpreserved issue "in a case pending before [the court]." N.C. R. App. P. 2. An appellate court, however, may only invoke Rule 2 "in exceptional circumstances" when "injustice . . . appears manifest to the [c]ourt" or when the case presents "significant issues of importance in the public interest." *State v. Hart*, 361 N.C. 309, 315–16, 644 S.E.2d 201, 205 (2007) (quoting *Steingress v. Steingress*, 350 N.C. 64, 66, 511 S.E.2d 298, 299–300 (1999)). Notably, "precedent cannot create an automatic right to review via Rule 2." *State v. Campbell*, 369 N.C. 599, 603, 799 S.E.2d 600, 603 (2017). "[W]hether an appellant has demonstrated that his matter is the rare case meriting suspension of our appellate rules," rather, "is always a discretionary determination to be made on a case-by-case basis." *Id.*

¶ 6 Further, a party appealing an order "rendered in a civil action" must "fil[e] notice of appeal with the clerk of superior court and serv[e] copies

thereof upon all other parties" in a timely manner. N.C. R. App. P. 3(a). The Court of Appeals thus does not have jurisdiction to review a trial court's SBM order unless the party seeking review complies with Rule 3(a) by filing a written notice of appeal. *See State v. Bowditch*, 364 N.C. 335, 352, 700 S.E.2d 1, 13 (2010) (stating that the SBM program is a "civil, regulatory scheme"); *Crowell Constructors, Inc. v. State ex rel. Cobey*, 328 N.C. 563, 563–64, 402 S.E.2d 407, 408 (1991) (holding that when "the record does not contain a notice of appeal in compliance with Rule 3, the Court of Appeals ha[s] no jurisdiction of the appeal"). Though the Court of Appeals may issue a writ of certiorari to review a trial court's order "when the right to prosecute an appeal has been lost by failure to take timely action," N.C. R. App. P. 21(a)(1), the petition must show "merit or that error was probably committed below," *Grundler*, 251 N.C. at 189, 111 S.E.2d at 9 (citing *In re Snelgrove*, 208 N.C. 670, 672, 182 S.E. 335, 336 (1935)). "A writ of certiorari is not intended as a substitute for a notice of appeal" because such a practice would "render meaningless the rules governing the time and manner of noticing appeals." *Bishop*, 255 N.C. App. at 769, 805 S.E.2d at 369.

¶ 7 The Court of Appeals majority relied upon our decision in *Bursell*, but that case is distinguishable. There the defendant filed a timely notice of appeal challenging the trial court's imposition of lifetime SBM on Fourth Amendment grounds. *Bursell*, 372 N.C. at 198, 827 S.E.2d at 304. The defendant, however, had failed to properly object to the SBM order and thus did not preserve his ability to raise that issue on appeal. *Id.* at 200, 827 S.E.2d at 305. The Court of Appeals invoked Rule 2 to review the defendant's unpreserved argument. *Id.* This Court recognized that the Court of Appeals examined the specific circumstances of that individual case:

> The Court of Appeals first noted that a constitutional right, such as the Fourth Amendment right implicated here, is a substantial right. The Court of Appeals deemed the invocation of Rule 2 appropriate "when considering defendant's young age, the particular factual bases underlying his pleas, and the nature of those offenses, combined with the State's and the trial court's failures to follow well-established precedent in applying for and imposing SBM, and the *State's concession of reversible Grady error.*"

Id. at 201, 827 S.E.2d at 306 (emphasis added) (quoting *State v. Bursell*, 258 N.C. App. 527, 533, 813 S.E.2d 463, 467 (2018)). This Court then held that "the Court of Appeals did not abuse its discretion by invoking

Rule 2" because "the State concede[d] that the trial court committed error relating to a substantial right." *Bursell*, 372 N.C. at 201, 827 S.E.2d at 306.

¶ 8 A case whose procedural posture is more aligned with the present case is *Bishop*. There the defendant failed to preserve for appeal his constitutional challenge to the imposition of SBM and failed to timely appeal the trial court's SBM order. *Bishop*, 255 N.C. App. at 768, 805 S.E.2d at 369. The defendant then asked the Court of Appeals "to take *two* extraordinary steps to reach the merits, first by issuing a writ of certiorari to hear th[e] appeal, and then by invoking Rule 2 . . . to address [the] unpreserved constitutional argument." *Id.* at 768–69, 805 S.E.2d at 369. The Court of Appeals held the defendant failed to show that his argument was "meritorious or that the trial court probably committed error." *Id.* at 769, 805 S.E.2d at 369. The Court of Appeals declined to invoke Rule 2 because the defendant was "no different from other defendants who failed to preserve their constitutional arguments" and failed to argue "any specific facts" to demonstrate that invoking Rule 2 would prevent "manifest injustice." *Id.* at 770, 805 S.E.2d at 370. The Court of Appeals then noted that the defendant could not prevail on his SBM challenge "without the use of Rule 2." *Id.* Thus, that court "decline[d] to issue a writ of certiorari to review th[e] unpreserved argument on direct appeal." *Id.*

¶ 9 The question here is whether the Court of Appeals abused its discretion when it allowed defendant's petition for writ of certiorari and invoked Rule 2 to reach the merits of defendant's unpreserved challenge to the SBM orders. Notably, this Court's decision in *Bursell* rested heavily upon the State's concession that the trial court committed error. The State in the present case, however, has made no such concession. Further, unlike the defendant in *Bursell*, defendant here failed to give written notice of appeal pursuant to Rule 3(a). As such, the present case is distinguishable from *Bursell*.

¶ 10 Rather, like the defendant in *Bishop*, defendant here committed two fatal procedural errors and failed to show that a refusal to invoke Rule 2 would result in manifest injustice. The trial court appropriately followed N.C.G.S. § 14-208.40A(c) by ordering lifetime SBM due to defendant's status as an aggravated offender. Absent an objection, the trial court was under no constitutional requirement to inquire into the reasonableness of imposing SBM. Defendant is no different from other defendants who failed to preserve their constitutional arguments. The Court of Appeals should have declined to invoke Rule 2.

¶ 11 Without the use of Rule 2, defendant's challenge to the SBM orders is meritless as it is barred by Rule 10(a)(1). Defendant's petition thus failed to show merit or that error was probably committed below. An invocation of Rule 2 and writ of certiorari cannot substitute for a timely objection and notice of appeal. By allowing defendant's petition for writ of certiorari and invoking Rule 2 to review defendant's challenge to the SBM orders, the Court of Appeals abused its discretion. Accordingly, we reverse the Court of Appeals' decision to vacate the trial court's orders imposing SBM.

REVERSED.

Justice HUDSON dissenting.

¶ 12 There is no dispute that the Court of Appeals could only reach the merits of this case to determine whether the SBM order was constitutional as applied to defendant if it allowed defendant's petition for a writ of certiorari and invoked Rule 2, given defendant's failure to properly object and file a written notice of appeal of the SBM order. The only question is whether the Court of Appeals' choice both to allow defendant's petition for a writ of certiorari and to invoke Rule 2 was an abuse of its discretion. Because I would hold that the Court of Appeals did not abuse its discretion, I respectfully dissent.

¶ 13 In order for the Court of Appeals to exercise its discretion to allow a writ of certiorari, "[a] petition for [a] writ [of certiorari] must show merit or that error was probably committed below." *State v. Grundler*, 251 N.C. 177, 189 (1959). Likewise, Rule 2 may be "applied in the discretion of the Court . . . to consider, in exceptional circumstances, significant issues of importance in the public interest, or to prevent injustice which appears manifest to the Court." *Steingress v. Steingress*, 350 N.C. 64, 66 (1999) (citing *Blumenthal v. Lynch*, 315 N.C. 571, 578 (1986)). "[A] decision to invoke Rule 2 and suspend the appellate rules 'is always a discretionary determination.' " *State v. Bursell* (*Bursell II*), 372 N.C. 196, 201 (2019) (quoting *State v. Campbell*, 369 N.C. 599, 603 (2017)). "A court should consider whether invoking Rule 2 is appropriate in light of the specific circumstances of individual cases and parties, such as whether substantial rights of an appellant are affected." *Id.* at 200 (cleaned up) (quoting *Campbell*, 369 N.C. at 603).

¶ 14 Here, the Court of Appeals noted that defendant's Fourth Amendment right implicated by the SBM order was a substantial right. *State v. Ricks*, 271 N.C. App. 348, 360 (2020) (citing *Bursell II*, 372 N.C. at 201). The

court also looked at the specific circumstances of the case and parties involved, noting that "[d]efendant here was convicted of three counts of statutory rape of a child, two counts of committing a statutory sex offense with a child, and three counts of taking indecent liberties with a child when he, at 21 years old, had sex with two 12-year-old girls," that defendant had committed an aggravated offense, and that the State and trial court "had the benefit of even more guidance regarding the State's burden" to show the reasonableness of imposing a lifetime SBM order "than in *Bursell*" itself. *Id.* In addition, the Court of Appeals noted that "the trial court . . . summarily concluded that SBM should be imposed, without making any findings regarding the reasonableness of the search and without any evidence from the State." *Id.* Having considered these facts, the Court of Appeals determined in its discretion that it would invoke Rule 2 to reach the merits of this case to prevent the injustice that would be manifest if defendant were to be subjected to an unconstitutional lifetime SBM order. *See id.* at 361.

¶ 15 In its analysis, the Court of Appeals tied its considerations to this Court's analysis in *Bursell II* which affirmed the Court of Appeals' invocation of Rule 2 in *State v. Bursell* (*Bursell I*), 258 N.C. App. 527 (2018), *aff'd in part, rev'd in part*, 372 N.C. 196 (2019). *Id.* at 359. The majority here concludes that *Bursell II* is distinguishable from the facts of this case and determines that *State v. Bishop*, 255 N.C. App. 767 (2017), is "more aligned with the present case." But the Court of Appeals was very clear that, although the *Bursell II* analysis was "instructive," the factors examined in *Bursell II* by our Court were "not determinative in the exercise of [its] discretion."[1] *Id.* It noted that the invocation of Rule 2 is a "discretionary and fact-specific" determination that "[can]not [be] applied mechanically." *Id.* (citing *State v. Campbell*, 369 N.C. 599, 603 (2017)). Just as similarities to *Bursell II* do not "create an automatic right to review via Rule 2," *Campbell*, 369 N.C. at 603, likewise differences between the cases do not automatically defeat the court's ability to invoke Rule 2.[2] The invocation of Rule 2 "is always a discretionary

1. Indeed, the Court of Appeals acknowledged the same dissimilarity that my colleagues in the majority now emphasize to distinguish *Bursell II* from this case—that "[t]he State here has not, as it did in *Bursell I*, conceded that the trial court's failure to conduct a hearing to determine the reasonableness of the search before imposing SBM constitutes error." *State v. Ricks*, 271 N.C. App. 348, 361 (2020).

2. For this reason, I find the majority's comparison to *State v. Bishop*, 255 N.C. App. 767, 770 (2017), no more persuasive than the Court of Appeals' comparison to *Bursell II*. While other case law can certainly be helpful in guiding a court's analysis and ensuring consistency in the exercise of discretion, the invocation of Rule 2 is a case-by-case determination which requires an appellate court to review the specific facts and circumstances

determination" to be made on a case-by-case basis. *Ricks*, 271 N.C. App. at 359 (quoting *Bursell II*, 372 N.C. at 201). I would conclude that the Court of Appeals here properly looked at the "specific circumstances of individual cases and parties" involved, *Bursell II*, 372 N.C. at 200, when it chose to exercise its discretion and invoke Rule 2.

¶ 16 My colleagues in the majority ultimately conclude that defendant "failed to show that a refusal to invoke Rule 2 would result in manifest injustice." In reaching its conclusion that defendant has failed to show that the imposition of lifetime SBM would result in manifest injustice, the majority points to the holding from the Court of Appeals decision in *Bishop* that the majority states means "[a]bsent an objection, the trial court was under no constitutional requirement to inquire into the reasonableness of imposing [lifetime] SBM." With all due respect, I note that the issue here is not whether the inquiry was required, but whether the Court of Appeals abused its discretion in deciding to address the issue at the time this case was heard in 2020. At best, the law in this area was developing very quickly, leading to a lack of clear guidance for practitioners.

¶ 17 At the time the Court of Appeals used its discretion to invoke Rule 2 in this case, our appellate law arguably required that a trial court conduct a *Grady* hearing to determine the constitutionality of ordering any defendant to enroll in the SBM program and the law required that the State bear the burden of proving the reasonableness under the Fourth Amendment of the SBM search. *See*, *e.g.*, *Grady v. North Carolina* (*Grady I)*, 575 U.S. 306, 310–11 (2015) (vacating the judgment of this Court and remanding because "[t]he North Carolina courts did not examine whether the State's monitoring program is reasonable" without creating subcategories of SBM that might not require a Fourth Amendment search analysis); *State v. Grady* (*Grady II*), 259 N.C. App. 664, 676 (2018) ("We reiterate the continued need for individualized determinations of reasonableness at *Grady* hearings. . . . [T]he State failed to present any evidence of its need to monitor defendant, or the procedures actually used to conduct such monitoring in unsupervised cases. Therefore, the State failed to prove, by a preponderance of the evidence, that lifetime SBM of defendant is a reasonable search under the Fourth Amendment."), *aff'd as modified*, *State v. Grady* (*Grady III*), 372 N.C. 509 (2019); *State v. Griffin*, 270 N.C. App. 98, 108–09 (2020) ("Our case law is clear that the State has advanced legitimate interests in favor of

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presented in the case at bar. Comparison to the facts of other cases in the discretionary Rule 2 context is not dispositive.

SBM. . . . But, in addition to showing valid objectives, the State bears the burden of proving the reasonableness of a warrantless search which, in the context of SBM, includes the burden of coming forward with some evidence that its SBM program assists in apprehending sex offenders, deters or prevents new sex offenses, or otherwise protects the public. The State's failure to produce any evidence in this regard weighs heavily against a conclusion of reasonableness." (cleaned up) (quoting *Grady III*, 372 N.C. at 543–44)), *review allowed*, *writ allowed*, 854 S.E.2d 586 (N.C. Mar. 10, 2021); *State v. Gordon* (*Gordon I*), 261 N.C. App. 247, 257 (2018) ("[T]he State has failed to meet its burden of showing that the implementation of [SBM] of this Defendant will be reasonable . . . ."); *State v. Greene*, 255 N.C. App. 780, 782 (2017) ("North Carolina courts must first examine whether the State's monitoring program is reasonable—when properly viewed as a search—before subjecting a defendant to its enrollment. This reasonableness inquiry requires the court to analyze the totality of the circumstances, including the nature and purpose of the search and the extent to which the search intrudes upon reasonable privacy expectations." (cleaned up) (quoting *Grady I*, 575 U.S. at 310)).

¶ 18 At the Court of Appeals, the State argued that our Court's decision in *Grady III* did not apply to this case because defendant did not fall within the category of defendants at issue in *Grady III*, namely: recidivists who have completed their sentence and are no longer under State supervision. The Court of Appeals explained in its opinion that it had already rejected this argument in *Griffin* where it concluded that although the *Grady III* analysis "[did] not compel the result we must reach in this case, its reasonableness analysis does provide us with a roadmap to get there." *Ricks*, 271 N.C. App. at 361 (quoting *Griffin*, 270 N.C. App. at 106). Thus, at the time the Court of Appeals exercised its discretion to invoke Rule 2, the law arguably required that the State present evidence of reasonableness and that the trial court make findings of reasonableness to order lifetime SBM for defendants classified as aggravated offenders.[3]

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3. Besides *Griffin*, on which the Court of Appeals here expressly relied, in three other cases decided since *Grady III* and prior to this one, the Court of Appeals applied *Grady III* to hold an SBM order was an unconstitutional search and in one case vacated and remanded the order to the trial court for a hearing on the reasonableness of the search under the Fourth Amendment. *See State v. Hilton*, 378 N.C. 692, 733-36, 2021-NCSC-115 (Appendix) (Earls, J., dissenting) (collecting cases). Although not binding on this Court, this precedent demonstrates both the reasonableness of the Court of Appeals' exercise of its discretion and the likelihood of error or manifest injustice to the defendant here absent further review under Rule 2.

¶ 19 In *State v. Hilton*, published on the same day as this opinion, the same majority of the Court comprised here seeks to clarify the applicability of *Grady III* to aggravated offenders by categorically holding—incorrectly, I believe—that "searches effected by the imposition of lifetime SBM upon aggravated offenders are reasonable." *State v. Hilton*, 378 N.C. 692, 694, 2021-NCSC-115, ¶ 4. The *Hilton* dissent, which I join fully, emphasizes why this holding improperly disregards this Court's recent precedent in *Grady III* (which held that "the extent of a problem justifying the need for a warrantless search cannot simply be assumed, instead, the existence of the problem and the efficacy of the solution need to be demonstrated by the government," 372 N.C. at 540) and strays beyond the specific facts of the case to create a broader rule than those facts required. *See Hilton*, 378 N.C. at 726-31, 2021-NCSC-115, ¶¶ 68–80 (Earls, J., dissenting). Because *Hilton* was not precedent when the Court of Appeals decided this case, though, it could not impact the reasoning of that court below in invoking Rule 2, and therefore cannot influence our sole consideration here: whether, based on the precedent available at that time, the Court of Appeals abused its discretion in doing so.

¶ 20 Given the state of the law at the time, I cannot conclude that the Court of Appeals abused its discretion when it invoked Rule 2 to reach the merits of this case where there was no hearing regarding the constitutionality of lifetime SBM and the trial court imposed lifetime SBM—a never-ending warrantless search—without any argument from the parties or evidence from the State.

¶ 21 I would hold that the Court of Appeals did not abuse its discretion when it concluded that defendant had a meritorious claim and allowed defendant's petition for a writ of certiorari. Likewise, I would hold that the Court of Appeals did not abuse its discretion when it concluded that invoking Rule 2 would prevent manifest injustice. Accordingly, I respectfully dissent.

Justices ERVIN and EARLS join in this dissenting opinion.

APPENDIXES

GENERAL RULES OF PRACTICE

RULES FOR COURT-ORDERED ARBITRATION

RULES FOR MEDIATED SETTLEMENT CONFERENCES AND OTHER SETTLEMENT PROCEDURES IN SUPERIOR COURT CIVIL ACTIONS

RULES OF MEDIATION FOR MATTERS BEFORE THE CLERK OF SUPERIOR COURT

RULES OF MEDIATION FOR MATTERS IN DISTRICT CRIMINAL COURT

RULES OF THE DISPUTE RESOLUTION COMMISSION

RULES FOR SETTLEMENT PROCEDURES IN DISTRICT COURT FAMILY FINANCIAL CASES

STANDARDS OF PROFESSIONAL CONDUCT FOR MEDIATORS

ORDER AMENDING THE GENERAL RULES OF PRACTICE FOR THE SUPERIOR AND DISTRICT COURTS

Pursuant to section 7A-34 of the General Statutes of North Carolina, the Court hereby amends Rule 6 of the General Rules of Practice for the Superior and District Courts.

* * *

Rule 6. Motions in Civil Actions

~~All motions, written or oral, shall state the rule number or numbers under which the movant is proceeding. (See Rule 7 of Rules of Civil Procedure.)~~

~~Motions may be heard and determined either at the pre-trial conference or on motion calendar as directed by the presiding judge.~~

~~Every motion shall be signed by at least one attorney of record in his individual name. He shall state his office address and telephone number immediately following his signature. The signature of an attorney constitutes a certificate by him that he has read the motion; that to the best of his knowledge, information and belief, there are good grounds to support it; and that the motion is not interposed for delay. (See Rule 7(b)(2); also Rule 11).~~

~~The court in civil matters, on its motion or upon motion by a party, may in its discretion order that argument of any motion be accomplished by means of a telephone conference without requiring counsel to appear in court in person. Upon motion of any party, the court may order such argument to be recorded in such manner as the court shall direct. The court may direct which party shall pay the costs of the telephone calls. Conduct of counsel during such arguments may be subject to punishment as for direct criminal contempt of court.~~

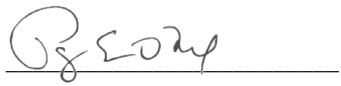
An attorney scheduling a hearing on a motion must make a good-faith effort to request a date for the hearing on which each interested party is available. This requirement does not apply if a motion is properly made ex parte. An attorney's failure to comply with this requirement is an adequate ground on which the court may grant a continuance.

* * *

This amendment to the General Rules of Practice for the Superior and District Courts becomes effective on 1 September 2021.

This amendment shall be published in the North Carolina Reports and posted on the rules web page of the Supreme Court of North Carolina.

Ordered by the Court in Conference, this the 25th day of August 2021.



For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 27th day of August 2021.

AMY L. FUNDERBURK
Clerk of the Supreme Court

ORDER AMENDING THE RULES FOR COURT-ORDERED ARBITRATION

Pursuant to section 7A-37.1 of the General Statutes of North Carolina, the Court hereby amends Rule 6 of the Rules for Court-Ordered Arbitration.

* * *

Rule 6. Arbitration Hearings

(a) *Hearing Scheduled by the Court.* Arbitration hearings shall be scheduled by the court and ~~held in a courtroom, if available, or in any other public room suitable for conducting judicial proceedings and~~ shall be open to the public. Arbitration hearings may be conducted by audio and video transmission only if the court and the arbitrator follow the requirements applicable to judicial officials in N.C.G.S. § 7A-49.6 ("Proceedings conducted by audio and video transmission").

(1) *Scheduling.* The court shall schedule hearings with notice to the parties to begin within 60 days after:

(i) the docketing of an appeal from a magistrate's judgment,

(ii) the filing of the last responsive pleading, or

(iii) the expiration of the time allowed for the filing of such pleading.

(b) *Date of Hearing Advanced by Agreement.* A hearing may be held earlier than the date set by the court, by agreement of the parties with court approval.

(c) *Hearings Rescheduled; Continuance; Cancellation.* A hearing may be scheduled, rescheduled, or continued to a date after the time allowed by this rule only by the court before whom the case is pending, and may be upon a written motion filed at least 24 hours prior to the scheduled arbitration hearing, and a showing of a strong and compelling reason to do so. In the event a consent judgment or dismissal is not filed with the clerk and notice provided to the court more than 24 hours prior to the scheduled arbitration hearing, all parties shall be liable for the arbitrator fee in accordance with Arb. Rule 5. Any settlement reached prior to the scheduled arbitration hearing must be reported by the parties to the court official administering the arbitration. The parties must file dismissals or consent judgments prior to the scheduled hearing to close the case without a hearing. If the dismissals or consent judgments are not filed before the scheduled hearing, the parties should appear at the hearing to have their agreement entered as the award of the arbitrator.

(d) *Prehearing Exchange of Information*. At least 10 days before the date set for the hearing, the parties shall exchange:

(1) Lists of witnesses they expect to testify;

(2) Copies of documents or exhibits they expect to offer in evidence; and

(3) A brief statement of the issues and their contentions.

Parties may agree in writing to rely on stipulations and/or statements, sworn or unsworn, rather than a formal presentation of witnesses and documents, for all or part of the hearing. Failure to comply with Arb. Rule 6(n) may be cause for sanctions under Arb. Rule 6(o). ~~Each party shall bring to the hearing and provide to the arbitrator a copy of these materials.~~The parties shall provide a copy of these materials to the arbitrator before the hearing begins, and each party shall ensure that it has a copy of the materials for use during the hearing. These materials shall not be filed with the court or included in the case file.

(e) *Exchanged Documents Considered Authenticated*. Any document exchanged may be received in the hearing as evidence without further authentication; however, the party against whom it is offered may subpoena and examine as an adverse witness anyone who is the author, custodian, or a witness through whom the document might otherwise have been introduced. Documents not so exchanged may not be received if to do so would, in the arbitrator's opinion, constitute unfair, prejudicial surprise.

(f) *Copies of Exhibits Admissible*. Copies of exchanged documents or exhibits are admissible in arbitration hearings.

(g) *Witnesses*. Witnesses may be compelled to testify under oath or affirmation and produce evidence by the same authority and to the same extent as if the hearing were a trial. The arbitrator is empowered and authorized to administer oaths and affirmations in arbitration hearings.

(h) *Subpoenas*. N.C. R. Civ. P. 45 shall apply to subpoenas for attendance of witnesses and production of documentary evidence at an arbitration hearing under these rules.

(i) *Authority of Arbitrator to Govern Hearings*. Arbitrators shall have the authority of a trial judge to govern the conduct of hearings, except the arbitrator may not issue contempt orders, issue sanctions or dismiss the action. The arbitrator shall refer all contempt matters and dispositive matters to the court.

(j) *Law of Evidence Used as Guide*. The law of evidence does not apply, except as to privilege, in an arbitration hearing but shall be

considered as a guide toward full and fair development of the facts. The arbitrator shall consider all evidence presented and give it the weight and effect the arbitrator determines appropriate.

(k) *No Ex Parte Communications With Arbitrator*. No ex parte communications between parties or their counsel and arbitrators are permitted.

(l) *Failure to Appear; Defaults; Rehearing*. If a party who has been notified of ~~the date, time and place of~~ the hearing fails to appear, or fails to appear with counsel for cases in which counsel is mandated by law, without good cause therefor, the hearing shall proceed and an award may be made by the arbitrator against the absent party upon the evidence offered by the parties present, but not by default or dismissal for failure to appear. If a party is in default for any other reason but no judgment has been entered upon the default pursuant to N.C. R. Civ. P. 55(b) before the hearing, the arbitrator may hear evidence and may issue an award against the party in default. The court may order a rehearing of any case in which an award was made against a party who failed to obtain a continuance of a hearing and failed to appear for reasons beyond the party's control. Such motion for rehearing shall be filed with the court within the time allowed for demanding trial de novo stated in Arb. Rule 9(a).

(m) *No Record of Hearing Made*. No official transcript of an arbitration hearing shall be made. The arbitrator may permit any party to record the arbitration hearing in any manner that does not interfere with the proceeding.

(n) *Parties Must Be Present at Hearings; Representation*. All parties shall be present at hearings ~~in person~~ or be represented at hearings through counsel. Parties may appear pro se as permitted by law.

(o) *Sanctions*. Any party ~~failing to attend an arbitration proceeding in person or through counsel~~who fails to be present at an arbitration hearing and is not represented at the arbitration hearing through counsel shall be subject to those sanctions available to the court in N.C. R. Civ. P. 11, 37(b)(2)(A)–37(b)(2)(D) and N.C.G.S. § 6-21.5 on the motion of a party, report of the arbitrator, or by the court on its own motion.

(p) *Proceedings in Forma Pauperis*. The right to proceed in forma pauperis is not affected by these rules.

(q) *Limits of Hearings*. Arbitration hearings shall be limited to one hour unless the arbitrator determines at the hearing that more time is necessary to ensure fairness and justice to the parties.

(1) A written application for a substantial enlargement of time for a hearing must be filed with the court and the arbitrator if the arbitrator has been assigned, and must be served on opposing parties at the earliest practicable time, and no later than the date for prehearing exchange of information under Arb. Rule 6(d). The court will rule on these applications after consulting the arbitrator if an arbitrator has been assigned.

(2) An arbitrator is not required to receive repetitive or cumulative evidence.

(r) *Hearing Concluded.* The arbitrator shall declare the hearing concluded when all the evidence is in and any arguments the arbitrator permits have been completed. In exceptional cases, the arbitrator has discretion to receive post-hearing briefs, but not evidence, if submitted within three days after the hearing has been concluded.

(s) *Motions.* Designation of an action for arbitration does not affect a party's right to file any motion with the court.

(1) The court, in its discretion, may consider and determine any motion at any time. It may defer consideration of issues raised by motion to the arbitrator for determination in the award. Parties shall state their contentions regarding pending motions referred to the arbitrator in the exchange of information required by Arb. Rule 6(d).

(2) Pendency of a motion shall not be cause for delaying an arbitration hearing unless the court so orders.

(t) *Binding Hearing.* All parties to an action may agree that any award by the arbitrator be binding. Such agreement shall be in writing on a form promulgated by the Administrative Office of the Courts and shall be executed by all parties. The consent shall be filed with the clerk's office in the county in which the action is pending. Parties consenting to a binding hearing may not request a trial de novo after the arbitration award is issued. Once all parties agree to binding arbitration, no party may dismiss an appeal from a magistrate's award or dismiss the action in full except by consent. The clerk or court shall enter judgment on the award at the time the award is filed if the action has not been dismissed by consent.

Comment

Arb. Rule 6(a) references N.C.G.S. § 7A-49.6 ("Proceedings conducted by audio and video transmission"). That statute was added to the General Statutes by Session Law 2021-47.

The 60 days in Arb. Rule 6(a)(1) will allow for discovery, trial preparation, pretrial motions, disposition and

calendaring. A motion to continue a hearing will be heard by a judge mindful of this goal. Continuances may be granted when a party or counsel is entitled to such under law, e.g. N.C. R. Civ. P. 40(b); rule of court, e.g. ~~N.C. Prac. R.~~Gen. R. Prac. 3; or customary practice.

Under Arb. Rule 6(c), both parties are responsible for notifying the court personnel responsible for scheduling arbitration hearings that a consent judgment or dismissal has been filed. The notice required under Arb. Rule 6(c) should be filed with the court personnel responsible for scheduling the arbitration hearings. Failure to do so will result in assessment of the arbitrator fee. The "court official administering the arbitration" is the arbitration coordinator, judicial assistant or other staff member managing the arbitration program, as may vary from county to county.

Arb. Rule 6(d)~~(3)~~ contemplates that the arbitrator shall return all evidence submitted when the hearing is concluded and the award has been made. Original documents and exhibits should not be marked in any way to identify them with the arbitration to avoid possible prejudice in any future trial.

For purposes of Arb. Rule 6(g), the arbitrator shall have such authority to administer oaths if such authorization is consistent with the laws of North Carolina.

As articulated in Arb. Rule 6(i), the arbitrator is to rule upon the evidence presented at the hearing, or lack thereof. Thus an arbitrator may enter a $0 award or an award for the defendant if the evidence presented at the hearing does not support an award for the plaintiff.

Arb. Rule 6(n) requires that all parties be present ~~in person~~ or represented through counsel. The presence of the parties or their counsel is necessary for presentation of the case to the arbitrator. Rule 6(n) does not require that a party or any representative of a party have authority to make binding decisions on the party's behalf in the matters in controversy, beyond those reasonably necessary to present evidence, make arguments and adequately represent the party during the arbitration. Specifically, a representative is not required to have the authority to make binding settlement decisions.

Arb. Rule 6(n) sets forth that parties may appear pro se, as permitted by law. In accordance with applicable state law, only parties that are natural persons may appear pro se at arbitrations. Any business, corporation, limited liability corporation, unincorporated association or other professional parties, including but not limited to, businesses considered to be a separate legal entity shall be represented by counsel in accordance with the North Carolina General Statutes. See Case Notes Below.

The rules do not establish a separate standard for pro se representation in court-ordered arbitrations. Instead, pro se representation in court-ordered arbitrations is governed by applicable principles of North Carolina law in that area. See Arb. Rule 6(n). Conformance of practice in court-ordered arbitrations with the applicable law is ensured by providing that pro se representation be "as permitted by law."

The purpose of Arb. Rule 6(q) is to ensure that hearings are limited and expedited. Failure to limit and expedite the hearings defeats the purpose of these rules. In this connection, note the option in Arb. Rule 6(d) for use of prehearing stipulations and/or sworn or unsworn statements to meet time limits.

Under Arb. Rule 6(r), the declaration that the hearing is concluded by the arbitrator formally marks the end of the hearing. Note Arb. Rule 7(a), which requires the arbitrator to file the award within three days after the hearing is concluded or post-hearing briefs are received. The usual practice should be a statement of the award at the close of the hearing, without submission of briefs. In the unusual case where an arbitrator is willing to receive post-hearing briefs, the arbitrator should specify the points to be addressed promptly and succinctly. Time limits in these rules are governed by N.C. R. Civ. P. 6 and N.C.G.S. §§ 103-4, 103-5.

Under Arb. Rule 6(s)(1), the court will rule on prehearing motions which dispose of all or part of the case on the pleadings, or which relate to procedural management of the case.

No party shall be deemed to have consented to binding arbitration unless it is documented on the proper form, which is executed after the filing date of the action. No executed contract, lien, lease or other legal document, other than the proper form designating the arbitration as binding, shall be used to make an arbitration binding upon either party.

Case Notes.

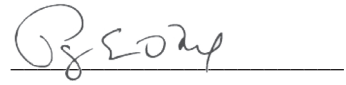
For note discussing representation of parties who are not living human beings, *see Lexis Nexis v. Travishan Corp.*, 155 N.C. App. 205, 573 S.E.2d 547 (2002).

* * *

These amendments to the Rules for Court-Ordered Arbitration become effective on 1 October 2021.

These amendments shall be published in the North Carolina Reports and posted on the rules web page of the Supreme Court of North Carolina.

Ordered by the Court in Conference, this the 25th day of August 2021.



For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 27th day of August 2021.

AMY L. FUNDERBURK
Clerk of the Supreme Court

ORDER AMENDING THE RULES FOR MEDIATED SETTLEMENT CONFERENCES AND OTHER SETTLEMENT PROCEDURES IN SUPERIOR COURT CIVIL ACTIONS

Pursuant to subsection 7A-38.1(c) of the General Statutes of North Carolina, the Court hereby amends the Rules for Mediated Settlement Conferences and Other Settlement Procedures in Superior Court Civil Actions. This order affects Rules 4, 8, 9, 10, and 15.

* * *

Rule 4. Duties of Parties, Attorneys, and Other Participants in Mediated Settlement Conferences

(a) **Attendance.**

(1) **Persons Required to Attend**. The following persons shall attend a mediated settlement conference:

a. Parties to the action, to include the following:

1. All individual parties.

2. Any party that is a nongovernmental entity shall be represented at the mediated settlement conference by an officer, employee, or agent who is not the entity's outside counsel and who has been authorized to decide whether, and on what terms, to settle the action on behalf of the entity, or who has been authorized to negotiate on behalf of the entity and can promptly communicate during the conference with persons who have decision-making authority to settle the action; provided, however, that if a specific procedure is required by law (e.g., a statutory pre-audit certificate) or the entity's governing documents (e.g., articles of incorporation, bylaws, partnership agreement, articles of organization, or operating agreement) to approve the terms of the settlement, then the representative shall have the authority to negotiate and make recommendations to the applicable approval authority in accordance with that procedure.

3. Any party that is a governmental entity shall be represented at the mediated settlement

conference by an employee or agent who is not the entity's outside counsel and who: (i) has authority to decide on behalf of the entity whether and on what terms to settle the action; (ii) has been authorized to negotiate on behalf of the entity and can promptly communicate during the conference with persons who have decision-making authority to settle the action; or (iii) has authority to negotiate on behalf of the entity and to make a recommendation to the entity's governing board, if under applicable law the proposed settlement terms can be approved only by the entity's governing board.

Notwithstanding anything in these rules to the contrary, any agreement reached which involves a governmental entity may be subject to the provisions of N.C.G.S. § 159-28(a).

b. A representative of each liability insurance carrier, uninsured motorist insurance carrier, and underinsured motorist insurance carrier, which may be obligated to pay all or part of any claim presented in the action. Each carrier shall be represented at the mediated settlement conference by an officer, employee, or agent, other than the carrier's outside counsel, who has the authority to make a decision on behalf of the carrier, or who has been authorized to negotiate on behalf of the carrier, and can promptly communicate during the conference with persons who have decision-making authority.

c. At least one counsel of record for each party or other participant whose counsel has appeared in the action.

(2) **Attendance Required Through the Use of Remote Technology**. Any party or person required to attend a mediated settlement conference shall attend the conference using remote technology; for example, by telephone, videoconference, or other electronic means. The conference shall conclude when an agreement is reduced to writing and signed, as provided in subsection (c) of this rule, or when an impasse is declared. Notwithstanding

this remote attendance requirement, the conference may be conducted in person if:

a. the mediator and all parties and persons required to attend the conference agree to conduct the conference in person and to comply with all federal, state, and local safety guidelines that have been issued; or

b. the senior resident superior court judge, upon motion of a party and notice to the mediator and to all parties and persons required to attend the conference, so orders.

(3) **Scheduling**. Participants required to attend the mediated settlement conference shall promptly notify the mediator after designation or appointment of any significant problems that they may have with the dates for conference sessions before the completion deadline, and shall inform the mediator of any problems that arise before an anticipated mediated settlement conference session is scheduled by the mediator. If a scheduling conflict in another court proceeding arises after a conference session has been scheduled by the mediator, then the participants shall promptly attempt to resolve the conflict under Rule 3.1 of the General Rules of Practice for the Superior and District Courts, or, if applicable, the Guidelines for Resolving Scheduling Conflicts adopted by the State-Federal Judicial Council of North Carolina on 20 June 1985.

(4) **Excusing the Attendance Requirement**. Any party or person may be excused from the requirement to attend a mediated settlement conference with the consent of all parties and persons required to attend the conference and the mediator.

(b) **Notifying Lienholders**. Any party or attorney who has received notice of a lien, or other claim upon proceeds recovered in the action, shall notify the lienholder or claimant of the date, time, and location of the mediated settlement conference, and shall request that the lienholder or claimant attend the conference or make a representative available with whom to communicate during the conference.

(c) **Finalizing Agreement.**

(1) If an agreement is reached at the mediated settlement conference, then the parties shall reduce the terms of

the agreement to writing and sign the writing, along with their counsel. By stipulation of the parties and at the parties' expense, the agreement may be electronically recorded. If the agreement resolves all issues in the dispute, then a consent judgment or one or more voluntary dismissals shall be filed with the court by such persons as the parties shall designate.

(2) If the agreement resolves all issues at the mediated settlement conference, then the parties shall give a copy of the signed agreement, consent judgment, or voluntary dismissal to the mediator and to all parties at the conference, and shall file the consent judgment or voluntary dismissal with the court within thirty days of the conference, or within ninety days if the State or a political subdivision of the State is a party to the action, or before expiration of the mediation deadline, whichever is later. In all cases, a consent judgment or voluntary dismissal shall be filed prior to the scheduled trial.

(3) If an agreement that resolves all issues in the dispute is reached prior to the mediated settlement conference, or is finalized while the conference is in recess, then the parties shall reduce the terms of the agreement to writing and sign the writing, along with their counsel, and shall file a consent judgment or voluntary dismissal disposing of all issues with the court within thirty days of the conference, or within ninety days if the State or a political subdivision of the State is a party to the action, or before expiration of the mediation deadline, whichever is later.

(4) A designee may sign the agreement on behalf of a party only if the party does not attend the mediated settlement conference and the party provides the mediator with a written verification that the designee is authorized to sign the agreement on the party's behalf.

~~(4)~~(5) When an agreement is reached upon all issues, all attorneys of record must notify the senior resident superior court judge within four business days of the settlement and advise who will file the consent judgment or voluntary dismissal.

(d) **Payment of the Mediator's Fee**. The parties shall pay the mediator's fee as provided by Rule 7.

(e) **Related Cases**. Upon application of any party or person, the senior resident superior court judge may order that an attorney of record or a party in a pending superior court civil action, or a representative of an insurance carrier that may be liable for all or any part of a claim pending in superior court, shall, upon reasonable notice, attend a mediation conference that may be convened in another pending case, regardless of the forum in which the other case may be pending, provided that all parties in the other pending case consent to the attendance ordered under this rule. Any attorney, party, or representative of an insurance carrier that properly attends a mediation conference under this rule shall not be required to pay any of the mediation fees or costs related to that mediation conference. Any disputed issue concerning an order entered under this rule shall be determined by the senior resident superior court judge who entered the order.

(f) **No Recording**. There shall be no stenographic, audio, or video recording of the mediation process by any participant. This prohibition includes recording either surreptitiously or with the agreement of the parties.

Comment

Comment to Rule 4(a). Parties subject to Chapter 159 of the General Statutes of North Carolina—which provides, among other things, that if an obligation is evidenced by a contract or agreement requiring the payment of money or by a purchase order for supplies and materials, then the contract, agreement, or purchase order shall include on its face a certificate stating that the instrument has been pre-audited to assure compliance with N.C.G.S. § 159-28(a) and that an obligation incurred in violation of N.C.G.S. § 159-28(a) or (a1) is invalid and may not be enforced—should, as appropriate, inform all participants at the beginning of the mediation of the preaudit requirement and the consequences for failing to preaudit under N.C.G.S. § 159-28.

Comment to Rule 4(c). Consistent with N.C.G.S. § 7A-38.1(*l*), if a settlement is reached during a mediated settlement conference, then the mediator shall ensure that the terms of the settlement are reduced to writing and signed by the parties, or by the parties' designees, and ~~their~~ by the parties' attorneys before ending the conference. No settlement shall be enforceable unless it has been reduced to writing and signed by the parties or by the parties' designees.

Cases in which an agreement upon all issues has been reached should be disposed of as expeditiously as possible. This assures that the mediator and the parties move the case toward disposition while honoring the private nature of the mediation process and the mediator's duty of confidentiality. If the parties wish to keep the terms of the settlement confidential, then they may timely file with the court closing documents that do not contain confidential

terms (e.g., voluntary dismissal or a consent judgment resolving all claims). Mediators will not be required by local rules to submit agreements to the court.

Comment to Rule 4(e). Rule 4(e) clarifies a senior resident superior court judge's authority to order a party, attorney of record, or representative of an insurance carrier to attend proceedings in another forum that are related to the superior court civil action. For example, when there are workers' compensation claims being asserted in a case before North Carolina Industrial Commission, there are typically additional claims asserted in superior court against a third-party tortfeasor. Because of the related nature of the claims, it may be beneficial for a party, attorney of record, or representative of an insurance carrier in the superior court civil action to attend the North Carolina Industrial Commission mediation conference in order to resolve the pending claims. Rule 4(e) specifically authorizes a senior resident superior court judge to order a party, attorney of record, or representative of an insurance carrier to attend a proceeding in another forum, provided that all parties in the related matter consent and the persons ordered to attend receive reasonable notice of the proceeding. The *North Carolina Industrial Commission Rules for Mediated Settlement and Neutral Evaluation Conferences* contain a similar provision, which provides that persons involved in a North Carolina Industrial Commission case may be ordered to attend a mediated settlement conference in a related matter.

* * *

Rule 8. Mediator Certification and Decertification

(a) The Commission may receive and approve applications for certification of persons to be appointed as superior court mediators. In order to be certified, an applicant must satisfy the requirements of this subsection.

(1) The applicant must complete: (i) at least forty hours of Commission-certified trial court mediation training, or (ii) at least forty hours of Commission-certified family and divorce mediation training and a sixteen-hour Commission-certified supplemental trial court mediation training.

(2) The applicant must have the following training, experience, and qualifications:

a. An attorney-applicant may be certified if he or she:

1. is a member in good standing of the North Carolina State Bar; or

2. is a member similarly in good standing of the bar of another state and eligible to apply

for admission to the North Carolina State Bar under Chapter 1, Subchapter C, of the North Carolina State Bar Rules and the Rules Governing the Board of Law Examiners and the Training of Law Students, 27 N.C. Admin. Code 1C.0105; demonstrates familiarity with North Carolina court structure, legal terminology, and civil procedure; provides to the Commission three letters of reference about the applicant's good character, including at least one letter from a person with knowledge of the applicant's professional practice; and possesses the experience required by this subsection; and

3. has at least five years of experience after date of licensure as a judge, practicing attorney, law professor, or mediator, or has equivalent experience.

b. A nonattorney-applicant may be certified if he or she:

1. has, as a prerequisite for the forty hours of Commission-certified trial court mediation training, completed a six-hour training provided by a Commission-certified trainer on North Carolina court organization, legal terminology, civil court procedure, the attorney–client privilege, the unauthorized practice of law, and the common legal issues arising in superior court civil actions;

2. has provided to the Commission three letters of reference as to the applicant's good character, including at least one letter from a person with knowledge of the applicant's experience qualifying the applicant under subsection (a)(2)(b)(3) of this rule; and

3. has completed either:

i. a minimum of twenty hours of basic mediation training provided by a trainer acceptable to the Commission and, after completing the twenty-hour training, has mediated at least thirty disputes over

the course of at least three years, or has equivalent experience, and possesses a four-year college degree from an accredited institution, and has four years of a high or relatively high level of professional~~,~~ or management~~, or administrative~~ experience of an executive nature in a professional, business, or governmental entity; or

ii. ten years of a high or relatively high level of professional~~,~~ or management~~, or administrative~~ experience of an executive nature in a professional, business, or governmental entity, and possesses a four-year college degree from an accredited institution.

Any current or former attorney who is disqualified by the attorney licensing authority of any state shall be ineligible for certification under subsections (a)(2)(a) and (a)(2)(b) of this rule.

(3) The applicant must complete the following observations:

a. **All Applicants**. All applicants for certification shall observe two mediated settlement conferences, at least one of which shall be of a superior court civil action.

b. **Nonattorney-Applicants.** Nonattorney-applicants for certification shall observe three mediated settlement conferences, in addition to those required under subsection (a)(3)(a) of this rule, that are conducted by at least two different mediators. At least one of the additional observations shall be of a superior court civil action.

c. **Conferences Eligible for Observation**. Conferences eligible for observation under subsection (a)(3) of this rule shall be those in cases pending before the North Carolina superior courts, the North Carolina Court of Appeals, the North Carolina Industrial Commission, the North Carolina Office of Administrative Hearings, or the federal district courts in North Carolina that are ordered to

mediation or conducted by an agreement of the parties which incorporates the rules of mediation of one of those entities.

Conferences eligible for observation shall also include those conducted in disputes prior to litigation that are mediated by an agreement of the parties and incorporate the rules for mediation of one of the entities named above.

All conferences shall be conducted by a certified superior court mediator under rules adopted by one of the above entities and shall be observed from their beginning to settlement or when an impasse is declared. Observations shall be reported on a Certificate of Observation – Mediated Settlement Conference Program, Form AOC-DRC-07.

All observers shall conform their conduct to the Commission's policy on *Guidelines for Observer Conduct*.

(4) The applicant must demonstrate familiarity with the statutes, rules, and practices governing mediated settlement conferences in North Carolina.

(5) The applicant must be of good moral character and adhere to the Standards of Professional Conduct for Mediators when acting under these rules. On his or her application(s) for certification or application(s) for certification renewal, an applicant shall disclose any:

a. pending criminal charges;

b. criminal convictions;

c. restraining orders issued against him or her;

d. failures to appear;

e. ~~pending or~~ closed grievances or complaints filed with a professional licensing, certifying, or regulatory body, whether in North Carolina, another state, or another country;

f. disciplinary action taken against him or her by a professional licensing, certifying, or regulatory body, whether in North Carolina, another state, or another country, including, but not limited to, disbarment,

revocation, decertification, or suspension of any professional license or certification, including the suspension or revocation of any license, certification, registration, or qualification to serve as a mediator in another state or country, even if stayed;

g. judicial sanctions imposed against him or her in any jurisdiction; ~~or~~

h. civil judgments, tax liens, or bankruptcy filings that occurred within the ten years preceding the date that the initial or renewal application was filed with the Commission.; or

i. pending grievances or complaints filed with a professional licensing, certifying, or regulatory body, whether in North Carolina, another state, or another country.

~~A mediator shall report to the Commission any of the above-enumerated matters arising subsequent to the disclosures reported on the initial or renewal application for certification within thirty days of receiving notice of the matter.~~

If a matter listed in subsections (a)(5)(a) through (a)(5)(h) of this rule arises after a mediator submits his or her initial or renewal application for certification, then the mediator shall report the matter to the Commission no later than thirty days after receiving notice of the matter.

If a pending grievance or complaint described in subsection (a)(5)(i) of this rule is filed after a mediator submits his or her initial or renewal application for certification, then the mediator shall report the matter to the Commission no later than thirty days after receiving notice of the matter or, if a response to the grievance or complaint is permitted by the professional licensing, certifying, or regulatory body, no later than thirty days after the due date for the response.

As referenced in this subsection, criminal charges or convictions (excluding infractions) shall include felonies, misdemeanors, or misdemeanor traffic violations (including driving while impaired) under the law of North

Carolina or another state, or under the law of a federal, military, or foreign jurisdiction, regardless of whether the adjudication was withheld (prayer for judgment continued) or the imposition of a sentence was suspended.

(6) The applicant must submit proof of qualifications set out in this rule on a form provided by the Commission.

(7) The applicant must pay all administrative fees established by the NCAOC upon the recommendation of the Commission.

(8) The applicant must agree to accept the fee ordered by the court under Rule 7 as payment in full of a party's share of the mediator's fee.

(9) The applicant must comply with the requirements of the Commission for completing and reporting continuing mediator education or training.

(10) The applicant must agree, once certified, to make reasonable efforts to assist applicants for mediator certification in completing their observation requirements.

(b) No mediator who held a professional license and relied upon that license to qualify for certification under subsections (a)(2)(a) or (a)(2)(b) of this rule shall be decertified or denied recertification because that mediator's license lapses, is relinquished, or becomes inactive; provided, however, that this subsection shall not apply to any mediator whose professional license is revoked, suspended, lapsed, relinquished, or whose professional license becomes inactive due to disciplinary action or the threat of disciplinary action from his or her licensing authority. Any mediator whose professional license is revoked, suspended, lapsed, or relinquished, or whose professional license becomes inactive, shall report the matter to the Commission.

(c) A mediator's certification may be revoked or not renewed at any time it is shown to the satisfaction of the Commission that a mediator no longer meets the qualifications set out in this rule or has not faithfully observed these rules or those of any district in which he or she has served as a mediator. Any person who is or has been disqualified by a professional licensing authority of any state for misconduct shall be ineligible for certification under this rule. No application for certification renewal shall be denied on the grounds that the mediator's training and experience does not meet the training and experience required

under rules which were promulgated after the date of the applicant's original certification.

Comment

Comment to Rule 8(a)(2). Commission staff has discretion to waive the requirements set out in Rule 8(a)(2)(a)(2) and Rule 8(a)(2)(b)(1), if the applicant can demonstrate sufficient familiarity with North Carolina legal terminology, court structure, and procedure.

Comment to Rule 8(a)(2)(b)(3). Administrative, secretarial, and paraprofessional experience will not generally qualify as "a high or relatively high level of professional or management experience of an executive nature."

* * *

Rule 9. Certification of Mediation Training Programs

(a) Certified training programs for mediators who are seeking certification as a mediator for matters in superior court shall consist of a minimum of forty hours of instruction. The curriculum of such programs shall include the following topics:

(1) Conflict resolution and mediation theory.

(2) Mediation process and techniques, including the process and techniques of trial court mediation.

(3) Communication and information gathering skills.

(4) Standards of conduct for mediators, including, but not limited to, the Standards of Professional Conduct for Mediators.

(5) Statutes, rules, and practices governing mediated settlement conferences in North Carolina.

(6) Demonstrations of mediated settlement conferences.

(7) Simulations of mediated settlement conferences, involving student participation as the mediator, attorneys, and disputants, which shall be supervised, observed, and evaluated by program faculty.

(8) Satisfactory completion of an exam by all students, testing their familiarity with the statutes, rules, and practices governing mediated settlement conferences in North Carolina.

(9) Technology and how to effectively utilize technology during a mediation.

(b) Certified training programs for mediators who are already certified as family financial mediators shall consist of a minimum of sixteen hours. The curriculum of such programs shall include the topics in subsection (a) of this rule and a discussion of the mediation and culture of insured claims. There shall be at least two simulations as described in subsection (a)(7) of this rule.

(c) A training program must be certified by the Commission before a mediator's attendance at the program may be used to satisfy the training requirement under Rule 8(a). Certification does not need to be given in advance of attendance.

Training programs attended prior to the promulgation of these rules or attended in other states may be approved by the Commission if they are in substantial compliance with the standards set forth in this rule.

(d) To complete certification, a training program shall pay all administrative fees required by the NCAOC upon the recommendation of the Commission.

* * *

Rule 10. Other Settlement Procedures

(a) **Order Authorizing Other Settlement Procedures**. Upon receipt of a motion by the parties seeking authorization to utilize a settlement procedure in lieu of a mediated settlement conference, the senior resident superior court judge may order the use of the procedure requested under these rules or under local rules, unless the court finds that the parties did not agree on all of the relevant details of the procedure, including the items in Rule 1(c)(2), or that, for good cause, the selected procedure is not appropriate for the case or the parties.

(b) **Other Settlement Procedures Authorized by These Rules**. In addition to a mediated settlement conference, the following settlement procedures are authorized by these rules:

(1) Neutral evaluation under Rule 11 (a settlement procedure in which a neutral offers an advisory evaluation of the case following summary presentations by each party).

(2) Nonbinding arbitration under Rule 12 (a settlement procedure in which a neutral renders an advisory decision following summary presentations of the case by the parties).

(3) Binding arbitration under Rule 12 (a settlement procedure in which a neutral renders a binding decision following presentations by the parties).

(4) A summary trial (jury or non-jury) under Rule 13 (a settlement procedure that is either: (i) a nonbinding trial in which a privately procured jury or presiding officer renders an advisory verdict following summary presentations by the parties and, in the case of a summary jury trial, a summary of the law presented by a presiding officer; or (ii) a binding trial in which a privately procured jury or presiding officer renders a binding verdict following summary presentations by the parties and, in the case of a summary jury trial, a summary of the law presented by a presiding officer).

(c) **General Rules Applicable to Other Settlement Procedures**.

(1) **When Proceeding Is Conducted**. Other settlement procedures ordered by the court under these rules shall be conducted no later than the date for completion set out in the court's original mediated settlement conference order, unless extended by the senior resident superior court judge.

(2) **Authority and Duties of the Neutral.**

a. **Authority of the Neutral.**

1. **Control of the Proceeding**. The neutral, arbitrator, or presiding officer shall at all times be in control of the proceeding and the procedures to be followed.

2. **Scheduling the Proceeding**. The neutral, arbitrator, or presiding officer shall attempt to schedule the proceeding at a time that is convenient to the participants, attorneys, and the neutral. In the absence of agreement, the neutral shall select the date for the proceeding.

b. **Duties of the Neutral**.

1. **Informing the Parties**. At the beginning of the proceeding, the neutral, arbitrator, or presiding officer shall define and describe for the parties:

i. the process of the proceeding;

ii. the differences between the proceeding and other forms of conflict resolution;

iii. the costs of the proceeding;

iv. the inadmissibility of conduct and statements as provided by N.C.G.S. § 7A-38.1(*l*) and subsection (c)(6) of this rule; and

v. the duties and responsibilities of the neutral and the participants.

2. **Disclosure**. The neutral has a duty to be impartial and to advise all participants of any circumstances bearing on possible bias, prejudice, or partiality.

3. **Reporting Results of the Proceeding**. The neutral, arbitrator, or presiding officer shall report the results of the proceeding to the court using a Report of Neutral Conducting Settlement Procedure Other Than Mediated Settlement Conference or Arbitration in Superior Court Civil Action, Form AOC-CV-817. The NCAOC may require the neutral to provide statistical data for evaluation of other settlement procedures.

4. **Scheduling and Holding the Proceeding**. It is the duty of the neutral, arbitrator, or presiding officer to schedule and conduct the proceeding prior to the completion deadline set out in the court's order. The deadline for completion of the proceeding shall be strictly observed by the neutral, arbitrator, or presiding officer, unless the deadline is changed by a written order of the senior resident superior court judge.

(3) **Extensions of Time**. A party or a neutral may request that the senior resident superior court judge extend the deadline for completion of the settlement procedure. The request for an extension shall state the reasons the extension is sought and shall be served by the movant on the other parties and the neutral. If the court grants the

motion for an extension, then the order shall set a new deadline for the completion of the settlement procedure. A copy of the order shall be delivered to all parties and the neutral by the person who sought the extension.

(4) **Where the Proceeding Is Conducted**. The neutral, arbitrator, or presiding officer shall be responsible for reserving a place agreed to by the parties, setting a time for and making other arrangements for the proceeding, and for giving timely notice to all attorneys and unrepresented parties in writing of the time and location of the proceeding.

(5) **No Delay of Other Proceedings**. Settlement proceedings shall not be the cause for a delay of other proceedings in the case, including, but not limited to, the conduct or completion of discovery, the filing or hearing of motions, or the trial of the case, except by order of the senior resident superior court judge.

(6) **Inadmissibility of Settlement Proceedings**. Evidence of statements made and conduct that occurs in a mediated settlement conference or other settlement proceeding conducted under this rule, whether attributable to a party, mediator, neutral, or neutral-observer present at the settlement proceeding, shall not be subject to discovery and shall be inadmissible in any proceeding in the action or another civil action involving the same claim, except:

a. in proceedings for sanctions under subsection (c) of this rule;

b. in proceedings to enforce or rescind a settlement of the action;

c. in disciplinary proceedings before the North Carolina State Bar or any agency established to enforce the Standards of Professional Conduct for Mediators or standards of conduct for other neutrals; or

d. in proceedings to enforce laws concerning juvenile or elder abuse.

As used in this subsection, "neutral observer" includes persons seeking mediator certification, persons

studying dispute resolution processes, and persons acting as interpreters.

No settlement agreement to resolve any or all issues reached at a proceeding conducted under this rule, or during its recesses, shall be enforceable, unless the agreement has been reduced to writing and signed by the parties or by the parties' designees. No evidence otherwise discoverable shall be inadmissible merely because it is presented or discussed in a conference or other settlement proceeding.

No mediator, neutral, or neutral-observer present at a settlement proceeding shall be compelled to testify or produce evidence in any civil proceeding concerning statements made and conduct that occurs in anticipation of, during, or as a follow-up to a conference or other settlement proceeding under subsection (c) of this rule. This includes proceedings to enforce or rescind a settlement of the action, except to attest to the signing of any agreements, and during proceedings for sanctions under this section, proceedings to enforce laws concerning juvenile or elder abuse, and disciplinary hearings before the North Carolina State Bar or any agency established to enforce the Standards of Professional Conduct for Mediators or standards of conduct for other neutrals.

(7) **No Record Made**. There shall be no record made of any proceedings under these rules, unless the parties have stipulated to binding arbitration or a binding summary trial, in which case any party, after giving adequate notice to opposing parties, may make a record of the proceeding.

(8) **Ex Parte Communications Prohibited**. Unless all parties agree otherwise, there shall be no ex parte communication prior to the conclusion of the proceeding between the neutral and a party or a party's attorney on any matter related to the proceeding, except about administrative matters.

(9) **Duties of the Parties.**

a. **Attendance**. All persons required to attend a mediated settlement conference under Rule 4 shall attend

any other nonbinding settlement procedure authorized by these rules and ordered by the court, except those persons to whom the parties agree and the senior resident superior court judge excuses. Those persons required to attend other settlement procedures which are binding in nature, authorized by these rules, and ordered by the court, shall be those persons to whom the parties agree. Notice of the agreement shall be given to the court and the neutral by filing a Motion to Use Settlement Procedure Other Than Mediated Settlement Conference in Superior Court Civil Action and Order, Form AOC-CV-818.

b. **Finalizing Agreement**.

1. If an agreement that resolves all issues in the dispute is reached at the neutral evaluation, arbitration, or summary trial, then the parties to the agreement shall reduce the terms of the agreement to writing and sign it along with their counsel. A consent judgment or voluntary dismissal shall be filed with the court by such persons as the parties shall designate within fourteen days of the conclusion of the proceeding or before the expiration of the deadline for its completion, whichever is later. The person responsible for filing closing documents with the court shall also sign the report to the court. The parties shall give a copy of their signed agreement, consent judgment, or voluntary dismissal to the neutral, arbitrator, or presiding officer, and all parties at the proceeding.

2. If an agreement that resolves all issues in the dispute is reached prior to the evaluation, arbitration, or summary trial, or while the proceeding is in recess, then the parties shall reduce the terms of the agreement to writing and sign the writing along with their counsel and shall file a consent judgment or voluntary dismissal disposing of all issues with the court within fourteen days of the agreement or

before the expiration of the deadline for completion of the proceeding, whichever is later.

3. A designee may sign the agreement on behalf of a party only if the party does not attend the evaluation, arbitration, or summary trial and the party provides the neutral with a written verification that the designee is authorized to sign the agreement on the party's behalf.

~~3.~~4. When an agreement is reached upon all issues in the dispute, all attorneys of record must notify the senior resident superior court judge within four business days of the settlement and advise the judge of the persons who will sign the consent judgment or voluntary dismissal.

c. **Payment of the Neutral's Fee**. The parties shall pay the neutral's fee as provided by subsection (c)(l2) of this rule.

(10) **Selection of Neutrals in Other Settlement Procedures**. The parties may select any person to serve as a neutral in a settlement procedure authorized under these rules. For arbitration, the parties may either select a single arbitrator or a panel of arbitrators. Notice of the parties' selection shall be given to the court and to the neutral by filing a Motion to Use Settlement Procedure Other Than Mediated Settlement Conference in Superior Court Civil Action and Order, Form AOC-CV-818, within twenty-one days after the entry of the order requiring a mediated settlement conference.

The motion shall state: (i) the name, address, and telephone number of the neutral; (ii) the rate of compensation of the neutral; and (iii) that the neutral and opposing counsel have agreed upon the selection and compensation.

(11) **Disqualification**. Any party may move the resident or presiding superior court judge of the district in which an action is pending for an order disqualifying the neutral and, for good cause, an order disqualifying the neutral shall be entered. Good cause exists if the selected neutral has violated any standards of conduct of the North

Carolina State Bar or any standards of conduct for neutrals adopted by the Supreme Court.

(12) **Compensation of the Neutral**. A neutral's compensation shall be paid in an amount agreed to by the parties and the neutral. Time spent reviewing materials in preparation for the neutral evaluation, conducting the proceeding, and making and reporting the award shall be compensable time.

Unless otherwise agreed by the parties or ordered by the court, the neutral's fee shall be paid in equal shares by the parties. For purposes of this section, multiple parties shall be considered one party when they are represented by the same counsel. The presiding officer and jurors in a summary jury trial are neutrals within the meaning of these rules and shall be compensated by the parties.

(13) **Sanctions for Failure to Attend Other Settlement Procedure or Pay the Neutral's Fee**. Any person required to attend a settlement proceeding or to pay a neutral's fee in compliance with N.C.G.S. § 7A-38.1 and these rules who fails to attend the proceeding or pay the neutral's fee without good cause shall be subject to the contempt power of the court and any monetary sanctions imposed by a resident or presiding superior court judge. The monetary sanctions may include, but are not limited to, the payment of fines, attorneys' fees, the neutral's fee, expenses, and loss of earnings incurred by persons attending the proceeding. A party seeking sanctions against a person or a judge, upon his or her own motion, shall do so in a written motion stating the grounds for the motion and the relief sought. The motion shall be served on all parties and any person against whom sanctions are being sought. If the court imposes sanctions, it shall do so after giving notice to the person, holding a hearing, and issuing a written order that contains both findings of fact that are supported by substantial evidence and conclusions of law.

* * *

Rule 15. Definitions

(a) "Senior resident superior court judge," as used throughout these rules, refers to the judge or, as appropriate, the judge's designee.

The phrase "senior resident superior court judge" also refers to a special superior court judge assigned to any action designated as a mandatory complex business case under N.C.G.S. § 7A-45.4, and to any judge to whom a case is assigned under Rule 2.1 and Rule 2.2 of the General Rules of Practice for the Superior and District Courts.

(b) "NCAOC form" refers to a form prepared, printed, and distributed by the NCAOC to implement these rules, or a form approved by local rule which contains at least the same information as a form prepared by the NCAOC. Proposals for the creation or modification of a form may be initiated by the Commission.

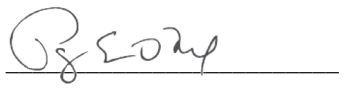
(c) "Designee," as used throughout these rules, refers to a person selected or designated to carry out a duty or role.

* * *

These amendments to the Rules for Mediated Settlement Conferences and Other Settlement Procedures in Superior Court Civil Actions become effective on 1 October 2021.

This order shall be published in the North Carolina Reports and posted on the rules web page of the Supreme Court of North Carolina.

Ordered by the Court in Conference, this the 25th day of August 2021.



For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 27th day of August 2021.

AMY L. FUNDERBURK
Clerk of the Supreme Court

ORDER AMENDING THE RULES OF MEDIATION FOR MATTERS BEFORE THE CLERK OF SUPERIOR COURT

Pursuant to subsection 7A-38.3B(b) of the General Statutes of North Carolina, the Court hereby amends Rule 4 of the Rules of Mediation for Matters Before the Clerk of Superior Court.

* * *

Rule 4. Duties of Parties, Attorneys, and Other Participants in Mediations

(a) **Attendance**.

(1) All persons ordered by the clerk to attend a mediation conducted under these rules shall attend the mediation using remote technology; for example, by telephone, videoconference, or other electronic means. The mediation shall conclude when an agreement is reduced to writing and signed, as provided in subsection (b) of this rule, or when an impasse is declared. Notwithstanding this remote attendance requirement, the mediation may be conducted in person if:

a. the mediator and all persons required to attend the mediation agree to conduct the mediation in person and to comply with all federal, state, and local safety guidelines that have been issued; or

b. the clerk, upon motion of a person required to attend the mediation and notice to the mediator and to all other persons required to attend the mediation, so orders.

(2) Any nongovernmental entity ordered to attend a mediation conducted under these rules shall be represented at the mediation by an officer, employee, or agent who is not the entity's outside counsel and who has authority to decide on behalf of the entity whether, and on what terms, to settle the matter.

(3) Any governmental entity ordered to attend a mediation conducted under these rules shall be represented at the mediation by an employee or agent who is not the entity's outside counsel and who has authority to decide on behalf of the entity whether, and on what terms, to settle the matter; provided, however, that if proposed settlement terms can be approved only by a governing board,

the employee or agent shall have authority to negotiate on behalf of the governing board.

(4) An attorney ordered to attend a mediation under these rules has satisfied the attendance requirement when at least one counsel of record for any person ordered to attend has attended the mediation.

(5) Other persons may participate in a mediation at the discretion of the mediator.

(6) Persons ordered to attend a mediation shall promptly notify the mediator, after selection or appointment, of any significant problems they have with the dates for mediation sessions before the completion deadline, and shall inform the mediator of any problems that arise before an anticipated mediation session is scheduled by the mediator.

(7) Any person may be excused from the requirement to attend a mediation with the consent of all persons required to attend the mediation and the mediator.

(b) **Finalizing Agreement**.

(1) If an agreement is reached at the mediation, in matters that, as a matter of law, may be resolved by the parties by agreement, then the parties to the agreement shall reduce the terms of the agreement to writing and sign the writing along with their counsel. The parties shall designate a person who will file a consent judgment or a voluntary dismissal with the clerk, and that person shall sign the mediator's report. If an agreement is reached prior to or during a recess of the mediation, then the parties shall inform the mediator and the clerk that the matter has been settled and, within ten calendar days of the agreement, file a consent judgment or voluntary dismissal with the court.

A designee may sign the agreement on behalf of a party only if the party does not attend the mediation and the party provides the mediator with a written verification that the designee is authorized to sign the agreement on the party's behalf.

(2) In all other matters, including guardianship and estate matters, if an agreement is reached upon some or all of the issues at the mediation, then the persons ordered to attend the mediation shall reduce the terms of the

agreement to writing and sign the writing along with their counsel, if any. Such agreements are not binding upon the clerk, but may be offered into evidence at the hearing of the matter and may be considered by the clerk for a just and fair resolution of the matter. Evidence of statements made and conduct occurring in a mediation where an agreement is reached is admissible under N.C.G.S. § 7A-38.3B(g)(3).

All written agreements reached in such matters shall include the following language in a prominent location in the document: "This agreement is not binding on the clerk but will be presented to the clerk as an aid to reaching a just resolution of the matter."

(c) **Payment of the Mediator's Fee**. The persons ordered to attend the mediation shall pay the mediator's fee as provided by Rule 7.

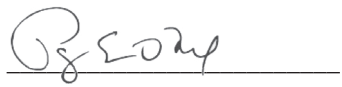
(d) **No Recording**. There shall be no stenographic, audio, or video recording of the mediation process by any participant. This prohibition includes recording either surreptitiously or with the agreement of the parties.

* * *

This amendment to the Rules of Mediation for Matters Before the Clerk of Superior Court becomes effective on 1 October 2021.

This order shall be published in the North Carolina Reports and posted on the rules web page of the Supreme Court of North Carolina.

Ordered by the Court in Conference, this the 25th day of August 2021.



For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 27th day of August 2021.

AMY L. FUNDERBURK
Clerk of the Supreme Court

ORDER AMENDING THE RULES OF MEDIATION FOR MATTERS IN DISTRICT CRIMINAL COURT

Pursuant to subsection 7A-38.3D(d) of the General Statutes of North Carolina, the Court hereby amends Rule 7 of the Rules of Mediation for Matters in District Criminal Court.

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Rule 7. Mediator Certification and Decertification

(a) The Commission may receive and approve applications for the certification of persons to be appointed as district criminal court mediators. In order to be certified, an applicant must satisfy the requirements of this subsection.

(1) The applicant must be affiliated, at the time of application, with a community mediation center established under N.C.G.S. § 7A-38.5 as either a volunteer or staff mediator, and must have received the community mediation center's endorsement that he or she possesses the training, experience, and skills necessary to mediate criminal matters in district court.

(2) The applicant must have the following training and experience:

a. The applicant must:

1. have a four-year degree from an accredited college or university; have four years of post-high school education through an accredited college, university, or junior college; have four years of full-time work experience; or have any combination thereof;

2. have two years of experience as a staff or volunteer mediator at a community mediation center; or

3. have an Advanced Practitioner Designation from the Association for Conflict Resolution.

b. The applicant must have completed either:

1. twenty-four hours of training in a Commission-certified district criminal court mediation training program; or

2. forty hours of Commission-certified superior court or family financial mediation training

and four hours of additional training about the rules, procedures, and practices for mediating criminal matters in district court.

c. The applicant must:

1. observe at least two court-referred district court mediations for criminal matters, conducted by a mediator certified under these rules; and

2. co-mediate or solo-mediate at least three court-referred district court mediations for criminal matters, under the observation of staff affiliated with a community mediation center whose district criminal court mediation training program has been certified by the Commission under Rule 8.

The observation, co-mediation, and solo-mediation requirements set forth in this subsection may be waived in the event the applicant demonstrates that she or he has at least five years of experience mediating criminal matters in district court, and the center which the applicant has served verifies the experience claimed.

(3) The applicant must demonstrate familiarity with the statutes, rules, and practices governing mediations for criminal matters in district court in North Carolina;

(4) The applicant must be of good moral character and adhere to the Standards of Professional Conduct for Mediators when acting under these rules. On his or her application(s) for certification or application(s) for certification renewal, an applicant shall disclose any:

a. pending criminal charges;

b. criminal convictions;

c. restraining orders issued against him or her;

d. failures to appear;

e. ~~pending or~~ closed grievances or complaints filed with a professional licensing, certifying, or regulatory body, whether in North Carolina, another state, or another country;

f. disciplinary action taken against him or her by a professional licensing, certifying, or regulatory body, whether in North Carolina, another state, or another country, including, but not limited to, disbarment, revocation, decertification, or suspension of any professional license or certification, including the suspension or revocation of any license, certification, registration, or qualification to serve as a mediator in another state or country, even if stayed;

g. judicial sanctions imposed against him or her in any jurisdiction; ~~or~~

h. civil judgments, tax liens, and bankruptcy filings that occurred within the ten years preceding the date that the initial or renewal application was filed with the Commission.; or

i. pending grievances or complaints filed with a professional licensing, certifying, or regulatory body, whether in North Carolina, another state, or another country.

~~A mediator shall report to the Commission any of the above-enumerated matters arising subsequent to the disclosures reported on the initial or renewal application for certification within thirty days of receiving notice of the matter.~~

If a matter listed in subsections (a)(4)(a) through (a)(4)(h) of this rule arises after a mediator submits his or her initial or renewal application for certification, then the mediator shall report the matter to the Commission no later than thirty days after receiving notice of the matter.

If a pending grievance or complaint described in subsection (a)(4)(i) of this rule is filed after a mediator submits his or her initial or renewal application for certification, then the mediator shall report the matter to the Commission no later than thirty days after receiving notice of the matter or, if a response to the grievance or complaint is permitted by the professional licensing, certifying, or regulatory body, no later than thirty days after the due date for the response.

As referenced in this subsection, criminal charges or convictions (excluding infractions) shall include

felonies, misdemeanors, or misdemeanor traffic violations (including driving while impaired) under the law of North Carolina or another state, or under the law of a federal, military, or foreign jurisdiction, regardless of whether the adjudication was withheld (prayer for judgment continued) or the imposition of a sentence was suspended.

(5) The applicant must commit to serving as a district court mediator under the direct supervision of a community mediation center authorized under N.C.G.S. § 7A-38.5 for a period of at least two years.

(6) The applicant must comply with the requirements of the Commission for continuing mediator education and training.

(7) The applicant must submit proof of qualifications set out in this rule on a form provided by the Commission.

(b) The Mediation Network of North Carolina, or individual community mediation centers participating in the program, shall assist the Commission in implementing the certification process established in this rule by:

(1) documenting subsection (a) of this rule for the mediator and the Commission;

(2) reviewing the documentation with the mediator in a face-to-face meeting scheduled no less than thirty days from the mediator's request to apply for certification;

(3) making a written recommendation on the applicant's certification to the Commission, which shall come from center staff familiar with the applicant and the applicant's character and experience; and

(4) forwarding the documentation for subsection (a) of this rule and the recommendation to the Commission, along with the mediator's completed certification application form.

(c) A mediator's certification may be revoked or not renewed if, at any time, it is shown to the satisfaction of the Commission that a mediator no longer meets the qualifications described in this rule or has not faithfully observed these rules or those of any district in which he or she has served as a mediator. Any person who is or has been disqualified by a professional licensing authority of any state for misconduct shall be

ineligible for certification under this rule. Certification renewal shall be required every two years.

(d) A community mediation center may withdraw its affiliation with a mediator who has been certified under these rules. Such disaffiliation does not revoke the mediator's certification. A mediator's certification is portable, and a mediator may agree to be affiliated with a different center. However, to mediate criminal matters in district court under this program, a mediator must be affiliated with the community mediation center providing services in that judicial district. A mediator may be affiliated with more than one center and provide services in the county served by those centers.

A community mediation center that receives or initiates a complaint against a mediator who is affiliated with its program and certified under these rules shall notify the Commission and forward a copy of the complaint to the Commission within thirty days of its receipt by the center, regardless of whether the center was able to successfully resolve the complaint. For purposes of this rule, a "complaint" is a concern raised by a mediation participant, court official, attorney, or community mediation center staff member or volunteer that suggests: (i) that the mediator may have engaged in conduct that violates these rules, the Standards of Professional Conduct for Mediators, or any local court rules adopted to implement the program in a district the mediator serves; or (ii) that the mediator has engaged in conduct that raises an issue about the mediator's character or practice. If a community mediation center withdraws its affiliation with a mediator who has been certified under these rules, then the community mediation center shall notify the Commission within thirty days of the disaffiliation. The center shall cooperate with the Commission if it investigates any such complaints.

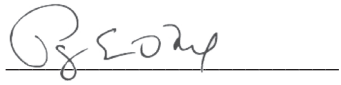
(e) Commission staff shall notify the executive director of the Mediation Network of North Carolina, and the executive director of the community mediation center that is sponsoring the application of an applicant seeking certification as a district criminal court mediator, of any matter regarding the character, conduct, or fitness to practice of the applicant. Staff shall notify the executive director of the Mediation Network of North Carolina and the executive director of the community mediation center with whom a mediator is affiliated of any finding of probable cause by the Commission under Rule 9 of the Rules of the Dispute Resolution Commission, after review of any complaint filed against the mediator alleging an issue of character, conduct, or fitness to practice.

* * *

These amendments to the Rules of Mediation for Matters in District Criminal Court become effective on 1 October 2021.

This order shall be published in the North Carolina Reports and posted on the rules web page of the Supreme Court of North Carolina.

Ordered by the Court in Conference, this the 25th day of August 2021.



For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 27th day of August 2021.

AMY L. FUNDERBURK
Clerk of the Supreme Court

ORDER AMENDING THE RULES OF THE DISPUTE RESOLUTION COMMISSION

Pursuant to subsection 7A-38.2(b) of the General Statutes of North Carolina, the Court hereby amends Rule 10 of the Rules of the Dispute Resolution Commission.

* * *

Rule 10. The Mediator Certification and Training Committee

(a) **Appointment of the Mediator Certification and Training Committee**. The Commission's chair shall appoint a standing committee entitled the Mediator Certification and Training Committee to review the matters set forth in subsection (b) of this rule.

(b) **Matters to Be Considered by the Mediator Certification and Training Committee**. The Mediator Certification and Training Committee shall review and consider matters arising under this subsection.

(1) Commission staff may raise with the Mediator Certification and Training Committee's chair matters relating to the issuance of provisional pre-training approvals and that pertain to an applicant's education, work experience, training, or any other requirement for mediator certification unrelated to moral character, conduct, or fitness to practice, including a request that the chair review a staff determination not to issue a provisional pre-training approval.

(2) Commission staff may raise with the Mediator Certification and Training Committee's chair or the full committee matters that relate to the education, work experience, training, or other qualifications of an applicant for mediator certification unrelated to moral character, conduct, or fitness to practice. Appeals of staff determinations to deny an application based on a deficiency in the applicant's education, work experience, and/or training, or his or her failure to meet other requirements for certification unrelated to moral character, conduct, or fitness to practice, shall be brought before the full committee. Appeals shall be in writing and be sent to the Commission's office within thirty days of the date of the actual delivery of the notice of denial to the applicant or within thirty days of the date of the last attempted delivery by the U.S. Postal Service.

(3) Commission staff may raise with the Mediator Certification and Training Committee's chair or the full committee matters that pertain to applications for mediator training program certification or certification renewal that are unrelated to the moral character, conduct, or fitness to practice of training program personnel. Appeals of staff decisions to deny an application for mediator training program certification or certification renewal shall be brought before the full committee. Appeals shall be in writing and be sent to the Commission's office within thirty days of the date of the actual delivery of the notice of denial to the applicant or within thirty days of the date of the last attempted delivery by the U.S. Postal Service.

(c) **Commission Staff Review of Qualifications.**

(1) **Review of Provisional Pre-training Approvals.** Commission staff shall review requests for the issuance of provisional pre-training approvals, seeking guidance from the Mediator Certification and Training Committee chair, as necessary, and shall issue approvals in instances where the person seeking the approval appears to meet all education, work experience, and other requirements established for mediator certification by program rules and Commission policies, except that any matters relating to the moral character, conduct, or fitness to practice of the person requesting the approval shall be put before the Grievance and Disciplinary Committee or its chair under Rule 9. Staff may contact those requesting approvals, any third party or entity with relevant information about the requesting person, and may consider any other information acquired during the review process that bears on the requesting person's qualifications. If, after review, the chair determines that the person requesting the provisional pre-training approval does not meet the requisite criteria for certification established by program rules and Commission policies, then the chair shall instruct staff not to issue the pre-training approval. That determination shall be final and is not subject to appeal by the person requesting the provisional pre-training approval.

(2) **Review of Information Obtained During the Mediator Certification Process**. Commission staff

shall review all applications for mediator certification to determine whether the applicant meets the qualifications for certification unrelated to moral character, conduct, or fitness to practice set forth in program rules adopted by the Supreme Court for mediated settlement conferences or mediation programs under the jurisdiction of the Commission and any policies adopted by the Commission for the purpose of implementing those rules. Staff may contact an applicant to request additional information, may contact third parties or entities with relevant information about the applicant, and may consider any other information acquired during the review process that bears on the applicant's eligibility for certification.

(3) **Review of Mediator Training Program Certification Applications and Certification Renewal Applications**. Commission staff shall review all mediator training program applications for certification and certification renewal, including reviewing mediator training program agendas, handouts, role plays, and trainer qualifications, to ensure compliance with program rules and Commission policies relating to mediator training programs, except that any matters relating to the moral character, conduct, or fitness to practice of training program personnel shall be put before the Grievance and Disciplinary Committee or its chair under Rule 9. Staff may seek clarification and additional information from training program personnel and training program registrants and attendees, as necessary.

(d) **Mediator Certification and Training Committee Review.**

(1) **Duty to Review**. The Mediator Certification and Training Committee shall review all matters brought before it by Commission staff under the provisions of subsections (b)(2) and (b)(3) of this rule. The chair may, in his or her discretion, appoint members of the committee to serve on a subcommittee to review a particular matter brought to the committee by staff. The chair or his or her designee may issue subpoenas for the attendance of witnesses and for the production of books, papers, materials, or other documentary evidence deemed necessary to any such review. The chair or designee may contact the following persons and entities for information concerning an applicant for mediator certification, mediator training

program certification, or mediator training program certification renewal:

a. All references, employers, colleges, professional licensing or certification bodies, and other individuals or entities cited in applications and any additional persons or entities identified by Commission staff during the course of its review as having relevant information about the qualifications of an applicant for mediator certification, mediator training program certification, or mediator training program certification renewal.

b. Personnel affiliated with an applicant for mediator training program certification or mediator training program certification renewal, and those who registered for or have completed the training program.

All information in Commission files pertaining to requests for provisional pre-training approvals, initial certification applications of a mediator or mediator training program, or renewals of such certifications shall be confidential, except as provided in N.C.G.S. § 7A-38.2(h) or these rules.

(2) **Probable Cause Determination**. The members of the Mediator Certification and Training Committee who are eligible to vote shall deliberate to determine whether probable cause exists to believe that an applicant for mediator certification, mediator training program certification, or mediator training program certification renewal:

a. does not meet the qualifications for mediator certification unrelated to moral character, conduct, or fitness to practice as set forth in program rules adopted by the Supreme Court for mediated settlement conferences or mediation programs under the jurisdiction of the Commission or the policies adopted by the Commission for the purpose of implementing those rules; or

b. does not meet the requirements for mediator training program certification or mediator training program certification renewal unrelated to moral character, conduct, or fitness to practice as set forth in program rules adopted by the Supreme Court for mediated settlement conferences or mediation

programs under the jurisdiction of the Commission or the policies adopted by the Commission for the purpose of implementing those rules.

If probable cause is found, then the application shall be denied.

(3) **Authority of Mediator Certification and Training Committee to Deny an Application for Certification or Mediator Training Program Certification Renewal.**

a. If a majority of the Mediator Certification and Training Committee members who are reviewing a matter and eligible to vote find no probable cause under subsection (d)(2) of this rule, then Commission staff shall be instructed to certify the applicant for mediator certification or to certify or recertify the mediator training program.

b. If a majority of the Mediator Certification and Training Committee members reviewing a matter and eligible to vote finds probable cause under subsection (d)(2) of this rule, then the committee shall deny the application for mediator certification or mediator training program certification or mediator training program certification renewal. The committee's determination to deny the application shall be in writing, shall set forth the deficiencies the committee found in the application, and shall be forwarded to the applicant. Notification of the determination shall be by Certified Mail, return receipt requested, and such service shall be deemed sufficient for purposes of these rules. A copy of the notice shall also be sent to the applicant through the U.S. Postal Service by First-Class Mail.

c. If the Mediator Certification and Training Committee denies an application for mediator certification, mediator training program certification, or mediator training program certification renewal, then the applicant may appeal the denial to the Commission within thirty days from the date of the actual delivery of the notice of denial to the applicant or within thirty days from the date of the last attempted delivery by the U.S. Postal Service. Notification of an appeal must be in writing and directed to the

Commission's office. If no appeal is filed within thirty days as set out herein, then the applicant shall be deemed to have accepted the committee's findings and determination.

(e) **Appeal of the Denial of Application for Mediator Certification, Mediator Training Program Certification, or Mediator Training Program Certification Renewal to the Commission.**

(1) **The Commission Shall Meet to Consider Appeals**. In the discretion of the Commission's chair, an appeal by an applicant to the Commission of a Mediator Certification and Training Committee determination under subsection (d)(2) of this rule shall be heard either by (i) a five-member panel of Commission members chosen by the chair or his or her designee, or (ii) the members of the full Commission. Any members of the committee who participated in issuing the committee's determination shall be recused and shall not participate in the hearing. Under Rule 3(c), members of the Commission shall recuse themselves from hearing the matter when they cannot act impartially. No matter shall be heard and decided by less than three Commission members.

(2) **Conduct of the Hearing.**

a. At least thirty days prior to the hearing before the Commission or panel, Commission staff shall forward to the appealing party, special counsel to the Commission, if appointed, and members of the Commission or panel who will hear the matter, a copy of all documents considered by the Mediator Certification and Training Committee and the names of the members of the Commission or panel who will hear the matter. Any written challenge questioning the neutrality of a member of the Commission or panel shall be directed to and decided by the Commission's chair or designee. A written challenge shall be filed with the Commission no later than seven days from the date the person filing the challenge received notice of the members who will hear the appeal.

b. Hearings conducted by the Commission or a panel under this rule shall be de novo.

c. If, in the discretion of the Commission's chair, a panel is empaneled to hear the appeal, then the Commission's chair or designee shall appoint one of the members of the panel to serve as the presiding officer at the hearing before the panel. The Commission's chair or designee shall serve as the presiding officer at a hearing before the full Commission. The presiding officer shall have such jurisdiction and powers as are necessary to conduct a proper and efficient hearing and disposition of the matter on appeal. The presiding officer may administer oaths and may issue subpoenas for the attendance of witnesses and the production of books, papers, or other documentary evidence.

d. Nothing herein shall restrict the chair of the Commission from serving on a panel or serving as its presiding officer at any hearing held under the provisions of subsection (e) of this rule.

e. Special counsel supplied by the North Carolina Attorney General, at the request of the Commission or otherwise employed by the Commission, may present evidence in support of the denial of certification or recertification.

f. The Commission or panel, through its counsel, and the applicant or the applicant's representative may present evidence in the form of sworn testimony and/or written documents. The Commission or panel, through its counsel, and the applicant may cross-examine any witness called to testify at the hearing. The Rules of Evidence shall not apply, except as to privilege, but shall be considered as a guide toward a full and fair development of the facts. Commission or panel members may question any witness called to testify at the hearing. The Commission or panel shall consider all evidence presented and give the evidence appropriate weight and effect.

g. Hearings shall be conducted in private unless the applicant requests a public hearing.

h. An applicant and any witnesses or others identified as having relevant information about the matter may appear at the hearing with or without counsel.

i. In the event that the applicant fails to appear without good cause, the Commission or panel shall proceed to hear from the witnesses who are present and make a determination based on the evidence presented at the proceeding.

j. Proceedings before the Commission or panel shall be conducted informally, but with decorum.

(3) **Date of the Hearing**. An appeal of any determination by the Mediator Certification and Training Committee to deny an application for mediator certification, mediator training program certification, or mediator training program certification renewal shall be heard by the Commission no later than 180 days from the date the notice of appeal is filed with the Commission, unless waived in writing by the applicant.

(4) **Notice of the Hearing**. The Commission's office shall serve on all parties by Certified Mail, return receipt requested, notice of the date, time, and place of the hearing no later than sixty days prior to the hearing, and such service shall be deemed sufficient for the purposes of these rules. A copy of the hearing notice shall also be sent through the U.S. Postal Service by First-Class Mail.

(5) **Ex Parte Communications**. With the exception of Commission staff, no person shall have any ex parte communication with a member of the Commission concerning the subject matter of the appeal. Communications regarding scheduling matters shall be directed to staff.

(6) **Attendance**. The presiding officer may, in his or her discretion, permit an attorney to represent a party by telephone or through video conference or allow witnesses to testify by telephone or through video conference, with such limitations and conditions as are just and reasonable. If an attorney or witness wishes to appear by telephone or video conference, then he or she shall notify Commission staff at least twenty days prior to the proceeding. At least five days prior to the proceeding, staff must be provided with the contact information of those who will participate by telephone or video conference.

(7) **Witnesses**. The presiding officer shall exercise his or her discretion with respect to the attendance and number of witnesses who appear, voluntarily or involuntarily, for

the purpose of ensuring the orderly conduct of the proceeding. At least ten days prior to the hearing, each party shall forward to the Commission's office and to all other parties the names of all witnesses who each intends to call to testify.

(8) **Rights of the Applicant at the Hearing**. At the hearing, the applicant may:

a. appear personally and be heard;

b. be represented by counsel;

c. call and examine witnesses;

d. offer exhibits; and

e. cross-examine witnesses.

(9) **Transcript**. The Commission shall retain a court reporter to keep a record of the proceeding. Any applicant who wishes to obtain a transcript of the record may do so at his or her own expense by contacting the court reporter directly. The only official record of the proceeding shall be the one made by the court reporter retained by the Commission. Copies of a tape, noncertified transcript, or record made by a court reporter retained by a party are not part of the official record.

(10) **Commission Deliberation**. The members of the Commission or panel shall deliberate to determine whether clear, cogent, and convincing evidence exists to believe that the education, work experience, training, or other qualifications of an applicant for mediator certification unrelated to moral character, conduct, or fitness to practice, fail to meet the requirements for certification set forth in program rules and/or Commission policies, or whether the qualifications of a mediator training program seeking certification or certification renewal fail to meet any of the requirements for certification or certification renewal unrelated to the moral character, conduct, or fitness to practice of mediator training program personnel set forth in program rules and/or Commission policies.

(11) **Commission Decision**. After the hearing, a majority of the Commission members hearing the appeal or the panel may find that:

a. there is not clear, cogent, and convincing evidence to support a denial of certification, and instruct

Commission staff to certify the applicant for mediator certification or to certify or recertify the applicant for mediator training program certification; or

b. there is clear, cogent, and convincing evidence that grounds exist to deny the application for mediator certification or mediator training program certification or mediator training program certification renewal.

The Commission or panel shall set forth its findings of fact, conclusions of law, and decision to deny certification or certification renewal in writing and serve its decision on the applicant within sixty days from the date the hearing is concluded. A copy of the decision shall be sent by Certified Mail, return receipt requested, and such service shall be deemed sufficient for purposes of these rules. A copy of the decision shall also be sent through the U.S. Postal Service by First-Class Mail.

(12) **Appeals**. The Superior Court, Wake County, shall have jurisdiction over appeals of Commission or panel decisions denying an application for certification of a mediator or mediator training program or mediator training program renewal. The decision denying certification or renewal of mediator training program certification under this rule shall be reviewable upon appeal if the entire record, as submitted, is reviewed to determine whether the decision is supported by substantial evidence. A notice of appeal shall be filed in the Superior Court, Wake County, no later than thirty days from the date of the actual delivery to the applicant of the decision denying certification or mediator training program certification renewal, or within thirty days from the last attempted delivery by the U.S. Postal Service.

(13) **New Application Following Denial of Initial Application for Certification or Mediator Training Program Certification Renewal**. An applicant whose application for mediator or mediator training program certification has been denied, or a mediator training program whose application for certification renewal has been denied, may reapply for certification under this rule.

Except as otherwise provided by the Mediator Certification and Training Committee, Commission, or a

panel of the Commission, no new application for mediator certification following a denial may be tendered within two years of the date of the denial of the application for mediator certification. A new application for mediator training program certification may be tendered at any time the applicant believes that the program has met the qualifications for mediator training program certification.

a. A new application following a denial shall be made in writing, verified by the applicant, and filed with the Commission's office.

b. The new application following a denial shall contain:

   1. the name and address of the applicant;

   2. a concise statement of the reasons upon which the denial was based;

   3. a concise statement of facts alleged to meet respondent's burden of proof as set forth in subsection (e)(13)(g) of this rule; and

   4. a statement consenting to a criminal background check, signed by the applicant or petitioner; or, if the applicant or petitioner is a mediator training program, by the trainers or instructors affiliated with the program.

c. The new application for certification may also contain a request for a hearing on the matter to consider any additional evidence that the applicant wishes to submit. An application from a mediator training program for certification or certification renewal may contain a request for a hearing on the matter to consider any additional evidence regarding the effectiveness of the program and/or the qualifications of its personnel.

d. Commission staff shall refer the new application to the Commission for review. In the discretion of the Commission's chair, the chair or designee may (i) appoint a five-member panel of Commission members to review the matter, or (ii) put the matter before the Commission for review. The panel shall not include any members of the Commission who were involved in a prior determination involving the applicant or petitioner. Members of the Commission

shall recuse themselves from reviewing any matter if they cannot act impartially. Any challenges questioning the neutrality of a member reviewing the matter shall be decided by the Commission's chair or designee. No matter shall be heard and decided by less than three Commission members.

e. If the applicant does not request a hearing under subsection (e)(13)(c) of this rule, then the Commission or panel shall review the application and shall decide whether to grant or deny the new application for mediator certification or mediator training program certification or certification renewal after denial within ninety days from the filing of the new application. That decision shall be final.

If the applicant requests a hearing, then it shall be held within 180 days from the filing of the new application, unless the time limit is waived by the applicant in writing. The Commission shall conduct the hearing consistent with subsection (e)(2) of this rule. In the discretion of the chair of the Commission, the hearing shall be conducted before the Commission or a panel appointed by the chair. At the hearing, the applicant may:

1. appear personally and be heard;
2. be represented by counsel;
3. call and examine witnesses;
4. offer exhibits; and
5. cross-examine witnesses.

f. At the hearing, the Commission may call witnesses, offer exhibits, and examine the applicant and witnesses.

g. The burden of proof shall be upon the applicant to establish by clear, cogent, and convincing evidence that:

1. the applicant has satisfied the qualifications that led to the denial;
2. the applicant has completed any paperwork required for certification, including, but not

limited to, the completion of an approved application form and execution of a release to conduct a background check, and paid any required certification fees; and

3. the applicant, if a mediator training program, has corrected any deficiencies as required by enabling legislation, program rules, or Commission policies, and has addressed and resolved any issues related to the qualifications of any persons affiliated with the program unrelated to moral character, conduct, or fitness to practice.

h. If the applicant has established that the conditions set forth in subsection (e)(13)(g) of this rule have been met by clear, cogent, and convincing evidence, and is entitled to have the application approved, then the Commission shall certify the applicant.

i. The Commission or panel shall set forth its decision to certify the applicant or to deny certification in writing, making findings of fact and conclusions of law. The decision shall be sent by Certified Mail, return receipt requested, within sixty days from the date of the hearing. Such service shall be deemed sufficient for purposes of these rules. A copy of the decision shall also be sent through the U.S. Postal Service by First-Class Mail.

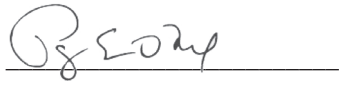
j. The Superior Court, Wake County, shall have jurisdiction over appeals of Commission decisions to deny certification or certification renewal under subsection (e)(13) of this rule. A decision denying certification or certification renewal under this section shall be reviewable upon appeal, and the entire record, as submitted, shall be reviewed to determine whether the decision is supported by substantial evidence. Notice of appeal shall be filed in the Superior Court, Wake County, no later than thirty days from the date of the actual delivery of the decision to the applicant, or thirty days from the date of the last attempted delivery by the U.S. Postal Service. A copy of the decision shall also be sent to applicant through the U.S. Postal Service by First-Class Mail.

* * *

These amendments to the Rules of the Dispute Resolution Commission become effective on 1 October 2021.

This order shall be published in the North Carolina Reports and posted on the rules web page of the Supreme Court of North Carolina.

Ordered by the Court in Conference, this the 25th day of August 2021.



For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 27th day of August 2021.

AMY L. FUNDERBURK
Clerk of the Supreme Court

ORDER AMENDING THE RULES FOR SETTLEMENT PROCEDURES IN DISTRICT COURT FAMILY FINANCIAL CASES

Pursuant to subsection 7A-38.4A(k) and subsection 7A-38.4A(*o*) of the General Statutes of North Carolina, the Court hereby amends the Rules for Settlement Procedures in District Court Family Financial Cases. This order affects Rules 4, 8, and 9.

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Rule 4. Duties of Parties, Attorneys, and Other Participants in Mediated Settlement Conferences

(a) **Attendance**.

(1) **Persons Required to Attend**. The following persons shall attend a mediated settlement conference:

a. The parties.

b. At least one counsel of record for each party whose counsel has appeared in the case.

(2) **Attendance Required Through the Use of Remote Technology**. Any party or person required to attend a mediated settlement conference shall attend the conference using remote technology; for example, by telephone, videoconference, or other electronic means. The conference shall conclude when an agreement is reduced to writing and signed, as provided in subsection ~~(b)~~(c) of this rule, or when an impasse is declared. Notwithstanding this remote attendance requirement, the conference may be conducted in person if:

a. the mediator and all parties and persons required to attend the conference agree to conduct the conference in person and to comply with all federal, state, and local safety guidelines that have been issued; or

b. the court, upon motion of a party and notice to the mediator and to all parties and persons required to attend the conference, so orders.

(3) **Excusing the Attendance Requirement**. Any party or person may be excused from the requirement to attend a mediated settlement conference with the consent of all parties and persons required to attend the conference and the mediator.

(b) **Scheduling**. Participants required to attend the mediated settlement conference shall promptly notify the mediator, after selection or appointment, of any significant problems that they may have with the dates for mediated settlement conference sessions before the completion deadline, and shall inform the mediator of any problems that arise before an anticipated conference session is scheduled by the mediator. If a scheduling conflict in another court proceeding arises after a conference session has been scheduled by the mediator, then participants shall promptly attempt to resolve the conflict under Rule 3.1 of the General Rules of Practice for the Superior and District Courts, or, if applicable, the Guidelines for Resolving Scheduling Conflicts adopted by the State-Federal Judicial Council of North Carolina on 20 June 1985.

(c) **Finalizing Agreement**.

(1) If an agreement is reached at the mediated settlement conference, then the parties shall reduce the essential terms of the agreement to writing.

a. If the parties conclude the mediated settlement conference with a written document containing all of the terms of their agreement for property distribution and do not intend to submit their agreement to the court for approval, then the agreement shall be signed by all parties and formally acknowledged as required by N.C.G.S. § 50-20(d). If the parties conclude the conference with a written document containing all of the terms of their agreement and intend to submit their agreement to the court for approval, then the agreement shall be signed by all parties, but need not be formally acknowledged. In all cases, the mediator shall report a settlement to the court and include in the report the name of the person responsible for filing closing documents with the court.

b. If the parties reach an agreement at the mediated settlement conference regarding property distribution and do not intend to submit their agreement to the court for approval, but are unable to complete a final document reflecting their settlement or have it signed and acknowledged as required by N.C.G.S. § 50-20(d), then the parties shall produce a written summary of their understanding and use it to guide them in writing any agreements as may be required

to give legal effect to their understanding. If the parties intend to submit their agreement to the court for approval, then the agreement must be in writing and signed by the parties, but need not be formally acknowledged. The mediator shall facilitate the production of the summary and shall either:

1. report to the court that the matter has been settled and include in the report the name of the person responsible for filing closing documents with the court; or
2. declare, in the mediator's discretion, a recess of the mediated settlement conference.

If a recess is declared, then the mediator may schedule another session of the conference if the mediator determines that it would assist the parties in finalizing a settlement.

(2) In all cases where an agreement is reached after being ordered to mediation, whether prior to, or during, the mediation, or during a recess, the parties shall file a consent judgment or voluntary dismissal with the court within thirty days of the agreement or before the expiration of the mediation deadline, whichever is later. The mediator shall report to the court that the matter has been settled and who reported the settlement.

(3) An agreement regarding the distribution of property, reached at a proceeding conducted under this section or during a recess of the mediated settlement conference, which has not been approved by a court, shall not be enforceable unless it has been reduced to writing, signed by the parties, and acknowledged as required under N.C.G.S. § 50-20(d).

(d) **Payment of the Mediator's Fee**. The parties shall pay the mediator's fee as provided by Rule 7.

(e) **No Recording**. There shall be no stenographic, audio, or video recording of the mediation process by any participant. This prohibition includes recording either surreptitiously or with the agreement of the parties.

Comment

Comment to Rule 4(c). Consistent with N.C.G.S. § 7A-38.4A(j), no settlement shall be enforceable unless it has been reduced to writing and signed by the parties. When a settlement is reached during a mediated settlement conference, the mediator shall ensure that the terms of the agreement are reduced to writing and signed by the parties and their attorneys before ending the conference.

Cases in which an agreement on all issues has been reached should be disposed of as expeditiously as possible. This assures that the mediator and the parties move the case toward disposition while honoring the private nature of the mediation process and the mediator's duty of confidentiality. If the parties wish to keep the terms of the settlement confidential, then they may timely file closing documents with the court, as long as those documents do not contain confidential terms (e.g., a voluntary dismissal or consent judgment resolving all claims). Mediators will not be required by local rules to submit agreements to the court.

* * *

Rule 8. Mediator Certification and Decertification

(a) The Commission may receive and approve applications for certification of persons to be appointed as mediators for family financial matters in district court. In order to be certified, an applicant must satisfy the requirements of this subsection.

(1) The applicant for certification must have a basic understanding of North Carolina family law. Applicants should be able to demonstrate that they have completed at least twelve hours of basic family law education by:

a. attending workshops or programs on topics such as separation and divorce, alimony and postseparation support, equitable distribution, child custody and support, and domestic violence;

b. completing an independent study on these topics, such as viewing or listening to video or audio programs on family law topics; or

c. having equivalent North Carolina family law experience, including work experience that satisfies one of the categories set forth in the Commission's policy on interpreting Rule 8(a)(1) (e.g., the applicant is an experienced family law judge or board certified family law attorney).

(2) The applicant for certification must:

a. have an Advanced Practitioner Designation from the Association for Conflict Resolution (ACR) and have earned an undergraduate degree from an accredited four-year college or university; or

b. have completed either (i) forty hours of Commission-certified family and divorce mediation training; or (ii) forty hours of Commission-certified trial court mediation training and sixteen hours of Commission-certified supplemental family and divorce mediation training; and be

1. a member in good standing of the North Carolina State Bar or a member similarly in good standing of the bar of another state and eligible to apply for admission to the North Carolina State Bar under Chapter 1, Subchapter C, of the North Carolina State Bar Rules and the Rules Governing the Board of Law Examiners and the Training of Law Students, 27 N.C. Admin. Code 1C.0105, with at least five years of experience after the date of licensure as a judge, practicing attorney, law professor, or mediator, or must possess equivalent experience;

2. a licensed psychiatrist under N.C.G.S. § 90-9.1, with at least five years of experience in the field after the date of licensure;

3. a licensed psychologist under N.C.G.S. §§ 90-270.1 to -270.22, with at least five years of experience in the field after the date of licensure;

4. a licensed marriage and family therapist under N.C.G.S. §§ 90-270.45 to -270.63, with at least five years of experience in the field after the date of licensure;

5. a licensed clinical social worker under N.C.G.S. § 90B-7, with at least five years of experience in the field after the date of licensure;

6. a licensed professional counselor under N.C.G.S. §§ 90-329 to -345, with at least five

years of experience in the field after the date of licensure; or

7. an accountant certified in North Carolina, with at least five years of experience in the field after the date of certification.

c. Any person who has not been certified as a mediator pursuant to these rules may be certified without compliance with subsection (a)(2)(b) and subsection (a)(5) of this rule if

1. the applicant for certification is a member in good standing of the North Carolina State Bar or a member similarly in good standing of the bar of another state and eligible to apply for admission to the North Carolina State Bar under Chapter 1, Subchapter C, of the North Carolina State Bar Rules and the Rules Governing the Board of Law Examiners and the Training of Law Students, 27 N.C. Admin. Code 1C.0105, with at least five years of experience after the date of licensure as a judge, practicing attorney, law professor, or mediator, or must possess equivalent experience; and meets the following additional requirements:

i. the applicant applies for certification within one year from 10 June 2020;

ii. the applicant has, by selection of the parties, mediated at least ten family financial settlement cases in the North Carolina District Court within the last five years, as shown by proof satisfactory to the Commission staff; and

iii. the applicant has taken a sixteen-hour supplemental family and divorce mediation training program approved by the Commission wherein the statutes, program rules, advisory opinions, and ethics, including the Standards of Professional Conduct for Mediators, are discussed;

or

2. the applicant for certification is a nonattorney who meets one of the required licensures set forth in subsection (a)(2)(b)(2) through subsection (a)(2)(b)(7) of this rule, and meets the following additional requirements:

   i. the applicant applies for certification within one year from 10 June 2020;

   ii. the applicant has, by selection of the parties, mediated at least fifteen family financial settlement cases in the North Carolina District Court within the last five years, as shown by proof satisfactory to the Commission staff; and

   iii. the applicant has taken a forty-hour family and divorce mediation training course and the six-hour training on North Carolina legal terminology, court structure, and civil procedure course approved by the Commission.

(3) If the applicant is not licensed to practice law in one of the United States, then the applicant must have completed six hours of training on North Carolina legal terminology, court structure, and civil procedure, provided by a Commission-certified trainer. An attorney licensed to practice law in a state other than North Carolina shall satisfy this requirement by completing a self-study course, as directed by Commission staff.

(4) If the applicant is not licensed to practice law in North Carolina, then the applicant must provide three letters of reference to the Commission about the applicant's good character, including at least one letter from a person with knowledge of the applicant's professional practice and experience qualifying the applicant under subsection (a) of this rule.

(5) The applicant must have observed, as a neutral observer and with the permission of the parties, two mediations involving a custody or family financial issue conducted by a mediator who (i) is certified under these rules, (ii) has an Advanced Practitioner Designation from the ACR, or (iii) is a mediator certified by the NCAOC for custody

matters. Mediations eligible for observation shall also include mediations conducted in matters prior to litigation of family financial disputes that are mediated by agreement of the parties and incorporate these rules.

If the applicant is not an attorney licensed to practice law in one of the United States, then the applicant must observe three additional mediations involving civil or family-related disputes, or disputes prior to litigation that are conducted by a Commission-certified mediator and are conducted pursuant to a court order or an agreement of the parties incorporating the mediation rules of a North Carolina state or federal court.

All mediations shall be observed from their beginning until settlement, or until the point that an impasse has been declared, and shall be reported by the applicant on a Certificate of Observation - Family Financial Settlement Conference Program, Form AOC-DRC-08. All observers shall conform their conduct to the Commission's policy on *Guidelines for Observer Conduct*.

(6) The applicant must demonstrate familiarity with the statutes, rules, standards of practice, and standards of conduct governing mediated settlement conferences conducted in North Carolina.

(7) The applicant must be of good moral character and adhere to the Standards of Professional Conduct for Mediators when acting under these rules. On his or her application(s) for certification or application(s) for certification renewal, an applicant shall disclose any:

a. pending criminal charges;

b. criminal convictions;

c. restraining orders issued against him or her;

d. failures to appear;

e. ~~pending or~~ closed grievances or complaints filed with a professional licensing, certifying, or regulatory body, whether in North Carolina, another state, or another country;

f. disciplinary action taken against him or her by a professional licensing, certifying, or regulatory body, whether in North Carolina, another state, or

another country, including, but not limited to, disbarment, revocation, decertification, or suspension of any professional license or certification, including the suspension or revocation of any license, certification, registration, or qualification to serve as a mediator in another state or country, even if stayed;

g. judicial sanctions imposed against him or her in any jurisdiction; ~~or~~

h. civil judgments, tax liens, or bankruptcy filings that occurred within the ten years preceding the date that the initial or renewal application was filed with the Commission.; or

i. pending grievances or complaints filed with a professional licensing, certifying, or regulatory body, whether in North Carolina, another state, or another country.

~~A mediator shall report to the Commission any of the above-enumerated matters arising subsequent to the disclosures reported on the initial or renewal application for certification within thirty days of receiving notice of the matter.~~

If a matter listed in subsections (a)(7)(a) through (a)(7)(h) of this rule arises after a mediator submits his or her initial or renewal application for certification, then the mediator shall report the matter to the Commission no later than thirty days after receiving notice of the matter.

If a pending grievance or complaint described in subsection (a)(7)(i) of this rule is filed after a mediator submits his or her initial or renewal application for certification, then the mediator shall report the matter to the Commission no later than thirty days after receiving notice of the matter or, if a response to the grievance or complaint is permitted by the professional licensing, certifying, or regulatory body, no later than thirty days after the due date for the response.

As referenced in this subsection, criminal charges or convictions (excluding infractions) shall include felonies, misdemeanors, or misdemeanor traffic violations (including driving while impaired) under the law of North

Carolina or another state, or under the law of a federal, military, or foreign jurisdiction, regardless of whether adjudication was withheld (prayer for judgment continued) or the imposition of a sentence was suspended.

(8) The applicant must submit proof of the qualifications set out in this rule on a form provided by the Commission.

(9) The applicant must pay all administrative fees established by the NCAOC upon the recommendation of the Commission.

(10) The applicant must agree to accept the fee ordered by the court under Rule 7 as payment in full of a party's share of the mediator's fee.

(11) The applicant must comply with the requirements of the Commission for completing and reporting continuing mediator education or training.

(12) The applicant must agree, once certified, to make reasonable efforts to assist applicants for mediator certification in completing their observation requirements.

(b) No mediator who held a professional license and relied upon that license to qualify for certification under subsection (a)(2)(b) of this rule shall be decertified or denied recertification because the mediator's license lapses, is relinquished, or becomes inactive; provided, however, that this subsection shall not apply to a mediator whose professional license is revoked, suspended, lapsed, or relinquished, or whose professional license becomes inactive due to disciplinary action, or the threat of disciplinary action, from the mediator's licensing authority. Any mediator whose professional license is revoked, suspended, lapsed, relinquished, or whose professional license becomes inactive shall report the matter to the Commission.

(c) A mediator's certification may be revoked or not renewed at any time if it is shown to the satisfaction of the Commission that a mediator no longer meets the qualifications set out in this rule or has not faithfully observed these rules or those of any judicial district in which he or she has served as a mediator. Any person who is or has been disqualified by a professional licensing authority of any state for misconduct shall be ineligible for certification under this rule. No application for certification renewal shall be denied on the ground that the mediator's training and experience does not satisfy a training and experience requirement promulgated after the date of the mediator's original certification.

Comment

Comment to Rule 8(a)(3). Commission staff has discretion to waive the requirements set out in Rule 8(a)(3) if an applicant can demonstrate sufficient familiarity with North Carolina legal terminology, court structure, and civil procedure.

* * *

Rule 9. Certification of Mediation Training Programs

(a) Certified training programs for mediators who are seeking certification under Rule 8(a)(2)(b) shall consist of a minimum of forty hours of instruction. The curriculum of such programs shall include the following topics:

(1) Conflict resolution and mediation theory.

(2) Mediation process and techniques, including the process and techniques of mediating family and divorce matters in district court.

(3) Communication and information gathering.

(4) Standards of conduct for mediators, including, but not limited to, the Standards of Professional Conduct for Mediators.

(5) Statutes, rules, and practices governing mediated settlement conferences for family financial matters in district court.

(6) Demonstrations of mediated settlement conferences, both with and without attorney involvement.

(7) Simulations of mediated settlement conferences, involving student participation as the mediator, attorneys, and disputants, which shall be supervised, observed, and evaluated by program faculty.

(8) An overview of North Carolina law as it applies to child custody and visitation, equitable distribution, alimony, child support, and postseparation support.

(9) An overview of family dynamics, the effect of divorce on children and adults, and child development.

(10) Protocols for screening cases for issues involving domestic violence and substance abuse.

(11) Satisfactory completion of an exam by all students testing their familiarity with the statutes, rules, and practices governing settlement procedures for family financial matters in district court.

(12) Technology and how to effectively utilize technology during a mediation.

(b) Certified training programs for mediators certified under Rule 8(a) shall consist of a minimum of sixteen hours of instruction and the curriculum shall include the topics listed in subsection (a) of this rule. There shall be at least two simulations as required by subsection (a)(7) of this rule.

(c) A training program must be certified by the Commission before a mediator's attendance at the program may be used to satisfy the training requirement under Rule 8(a). Certification does not need to be given in advance of attendance. Training programs attended prior to the promulgation of these rules, attended in other states, or approved by the ACR may be approved by the Commission if they are in substantial compliance with the standards set forth in this rule. The Commission may require attendees of an ACR-approved program to demonstrate compliance with the requirements of subsections (a)(5) and (a)(8) of this rule.

(d) To complete certification, a training program shall pay all administrative fees required by the NCAOC, in consultation with the Commission.

* * *

These amendments to the Rules for Settlement Procedures in District Court Family Financial Cases become effective on 1 October 2021.

This order shall be published in the North Carolina Reports and posted on the rules web page of the Supreme Court of North Carolina.

Ordered by the Court in Conference, this the 25th day of August 2021.

For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 27th day of August 2021.

AMY L. FUNDERBURK
Clerk of the Supreme Court

ORDER AMENDING THE STANDARDS OF PROFESSIONAL CONDUCT FOR MEDIATORS

Pursuant to subsection 7A-38.2(a) of the General Statutes of North Carolina, the Court hereby amends Standard 3 of the Standards of Professional Conduct for Mediators.

* * *

Standard 3. Confidentiality

A mediator shall, subject to exceptions set forth below, maintain the confidentiality of all information obtained within the mediation process.

(a) A mediator shall not disclose to any nonparticipant, directly or indirectly, any information communicated to the mediator by a participant within the mediation process, whether the information is obtained before, during, or after the mediated settlement conference. A mediator's filing of a copy of an agreement reached in mediation with the appropriate court, under a statute that mandates such filing, shall not be considered to be a violation of this subsection.

(b) A mediator shall not disclose to any participant, directly or indirectly, any information communicated to the mediator in confidence by any other participant in the mediation process, whether the information is obtained before, during, or after the mediated settlement conference, unless the other participant gives the mediator permission to do so. A mediator may encourage a participant to permit disclosure but, absent permission, the mediator shall not disclose the information.

(c) A mediator shall not disclose to court officials or staff any information communicated to the mediator by a participant within the mediation process, whether before, during, or after the mediated settlement conference, including correspondence or communications regarding scheduling or attendance, except as required to complete a report of mediator form; provided, however, that when seeking to collect a fee for services, the mediator may share correspondence or communications from a participant relating to the fees of the mediator. Report of mediator forms are available on the North Carolina Administrative Office of the Court's website at https://www.nccourts.gov.

(d) Notwithstanding the confidentiality provisions set forth in subsections (a), (b), and (c) of this standard, a mediator may report otherwise confidential conduct or statements made before, during, or after mediation in the following circumstances:

(1) If a mediator believes that communicating certain procedural matters to court officials or staff will aid the mediation, then, with the consent of the parties to the mediation, the mediator may do so. In making a permitted disclosure, a mediator shall refrain from expressing his or her personal opinion about a participant or any aspect of the case to court officials or staff.

(2) If a statute requires or permits a mediator to testify, give an affidavit, or tender a copy of an agreement reached in mediation to the official designated by the statute, then the mediator may do so.

If, under the Rules for Settlement Procedures in District Court Family Financial Cases or the Rules for Mediated Settlement Conferences and Other Settlement Procedures in Superior Court Civil Actions, a hearing is held on a motion for sanctions for failure to attend a mediated settlement conference, or for failure to pay the mediator's fee, and the mediator who mediated the dispute testifies, either as the movant or under a subpoena, then the mediator shall limit his or her testimony to facts relevant to a decision about the sanction sought and shall not testify about statements made by a participant that are not relevant to that decision.

(3) If a mediator is subpoenaed and ordered to testify or produce evidence in a criminal action or proceeding as provided in N.C.G.S. § 7A-38.1(1), N.C.G.S. § 7A-38.4A(j), and N.C.G.S. § 7A-38.3B(g), then the mediator may do so.

(4) If public safety is at issue, then a mediator may disclose otherwise confidential information to participants, nonparticipants, law enforcement personnel, or other persons potentially affected by the harm, if:

a. a party to, or a participant in, the mediation has communicated to the mediator a threat of serious bodily harm or death to any person, and the mediator has reason to believe the party has the intent and ability to act on the threat;

b. a party to, or a participant in, the mediation has communicated to the mediator a threat of significant damage to real or personal property, and the mediator has reason to believe the party has the intent and ability to act on the threat; or

c. a party or other participant's conduct during the mediation results in direct bodily injury or death to a person.

(5) If a party to, or a participant in, a mediation has filed a complaint with ~~either~~ the Commission, ~~or~~ the North Carolina State Bar, or another professional licensing board established by the North Carolina General Assembly regarding a mediator's professional conduct, moral character, or fitness to practice as a mediator, then the mediator may reveal otherwise confidential information for the purpose of defending himself or herself against the complaint.

(6) If a party to, or a participant in, a mediation has filed a lawsuit against a mediator for damages or other relief regarding the mediator's professional conduct, moral character, or fitness to practice as a mediator, then the mediator may reveal otherwise confidential information for the purpose of defending himself or herself in the action.

(7) With the permission of all parties, a mediator may disclose otherwise confidential information to an attorney who now represents a party in a case previously mediated by the mediator and in which no settlement was reached. The disclosure shall be intended to help the newly involved attorney understand any offers extended during the mediation process and any impediments to settlement. A mediator who discloses otherwise confidential information under this subsection shall take great care, especially if some time has passed, to ensure that their recall of the discussion is clear, that the information is presented in an unbiased manner, and that no confidential information is revealed.

(8) If a mediator is a lawyer licensed by the North Carolina State Bar and another lawyer makes statements or engages in conduct that is reportable under subsection (d)(4) of this standard, then the mediator shall report the statements or conduct to either the North Carolina State Bar or the court having jurisdiction over the matter, in accordance with Rule 8.3(e) of the North Carolina Rules of Professional Conduct.

(9) If a mediator concludes that, as a matter of safety, the mediated settlement conference should be held in a secure location, such as the courthouse, then the mediator may seek the assistance of court officials or staff in securing a location, so long as the specific circumstances of the parties' dispute are not identifiable.

(10) If a mediator or mediator-observer witnesses concerning behavior of an attorney during a mediation, then that behavior may be reported to the North Carolina Lawyer Assistance Program for the purpose of providing assistance to the attorney for alcohol or substance abuse.

In making a permitted disclosure under this standard, a mediator should make every effort to protect the confidentiality of noncomplaining parties or participants in the mediation, refrain from expressing his or her personal opinion about a participant, and avoid disclosing the identities of the participants or the specific circumstances of the parties' dispute.

(e) "Court officials or staff," as used in this standard, includes court officials or staff of North Carolina state and federal courts, state and federal administrative agencies, and community mediation centers.

(f) The duty of confidentiality as set forth in this standard encompasses information received by the mediator and then disseminated to a nonmediator employee or nonmediator associate who is acting as an agent of the mediator.

(1) A mediator who individually or together with other professionals employs and/or utilizes a nonmediator in the practice, firm, or organization shall make reasonable efforts to ensure that the practice, firm, or organization has provided reasonable assurance that the nonmediator's conduct is compatible with the professional obligations of the mediator.

a. A mediator having direct, or indirect, supervisory authority over the nonmediator shall make reasonable efforts to ensure that the nonmediator's conduct is compatible with the ethical obligations of the mediator.

b. A mediator may share confidential files with the nonmediator provided the mediator properly supervises the nonmediator to ensure the preservation of party confidences.

c. A mediator shall be responsible for the nonmediator's actions, or inactions, that would be a violation of these standards if:

1. the mediator orders or, with the knowledge of the specific conduct, ratifies the conduct; or

2. the mediator has managerial or direct supervisory authority over the nonmediator and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action to avoid the consequences.

(2) A mediator who individually or together with other professionals employs and/or utilizes a nonmediator in the practice, firm, or organization shall make reasonable efforts to ensure that the nonmediator's conduct is compatible with the provisions set forth in subsections (c) and (d) of this standard.

(g) Nothing in this standard prohibits the use of information obtained in a mediation for instructional purposes or for the purpose of evaluating or monitoring the performance of a mediator, mediation organization, or dispute resolution program, so long as the parties or the specific circumstances of the parties' controversy are not identifiable.

Comment

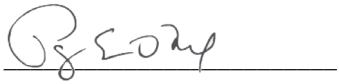
Comment to Standard 3(f). Mediators may employ associates and/or assistants in their practice, including secretaries, law student interns, and paraprofessionals. The associates and assistants, whether employees or independent contractors, act for the mediator in rendition of the mediator's professional services. A mediator must give the associates and assistants appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose information relating to a mediation case. The measures employed in supervising nonmediators should take account of the fact that nonmediators do not have mediation training and are not subject to professional discipline by the Commission.

* * *

This amendment to the Standards of Professional Conduct for Mediators becomes effective on 1 October 2021.

This order shall be published in the North Carolina Reports and posted on the rules web page of the Supreme Court of North Carolina.

Ordered by the Court in Conference, this the 25th day of August 2021.



For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 27th day of August 2021.

AMY L. FUNDERBURK
Clerk of the Supreme Court

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Courtroom restraints—issue raised in MAR—record insufficient—evidentiary hearing required—On defendant's post-conviction claim that his constitutional rights were violated when he was shackled during his trial for first-degree murder (for which he was convicted and sentenced to death), the trial court erred by summarily dismissing the issue as procedurally barred. Since the record was devoid of information establishing that defendant was actually restrained in the courtroom, that the shackles were visible to the jury, and that defense counsel was aware that the restraints were visible to the jury, an evidentiary hearing was required to develop the necessary factual foundation before the claim could be resolved. **State v. Allen, 286.**

Effective assistance of counsel—murder trial—sentencing phase—The trial court properly dismissed defendant's post-conviction ineffective assistance of counsel claims pertaining to the sentencing phase of his first-degree murder trial where, after the trial court conducted an evidentiary hearing, its findings were supported by evidence and in turn supported its conclusion that defense counsel's performance was not deficient and, even if it was, defendant could not demonstrate he suffered prejudice. **State v. Allen, 286.**

Effective assistance of counsel—summary dismissal of claims—factual disputes—evidentiary hearing required—Where defendant's post-conviction claims that he received ineffective assistance of counsel in his trial for first-degree murder, for which defendant was convicted and sentenced to death, raised factual disputes, the trial court erred by summarily dismissing those claims because defendant presented facts that, if true, would entitle him to relief. Defendant presented evidence that his counsel's decision not to investigate the crime scene evidence, from which different interpretations could be drawn, was not a reasonable strategic choice, and that he was prejudiced by being deprived of the opportunity to rebut the main witness's account of how the victim was killed. The matter was remanded for an evidentiary hearing with instructions for the trial court, if it concluded counsel's performance was deficient, to consider how any deficiencies prejudiced defendant when considered both individually and cumulatively. **State v. Allen, 286.**

False and misleading testimony—State's witness—MAR claim—Defendant was not entitled to post-conviction relief (after being convicted and sentenced to death for first-degree murder) on his claim that the State violated his constitutional rights by knowingly presenting false testimony through the main prosecution witness, because even assuming the claim was not procedurally barred for having been raised on direct appeal, there was nothing in the record to show the State knew the witness's testimony was false. **State v. Allen, 286.**

North Carolina—general warrants—orders imposing satellite-based monitoring—Orders entered pursuant to the statutory satellite-based monitoring (SBM)

CONSTITUTIONAL LAW—Continued

program do not constitute general warrants, which are prohibited by Art. I, sec. 20 of the North Carolina constitution, and therefore do not violate the state constitution on that basis. **State v. Hilton, 692.**

Right to silence—notice of intent to raise affirmative defense—preemptive impeachment by State—unconstitutional—Defendant's pretrial notice of intent to raise the affirmative defense of duress, given in a methamphetamine trafficking prosecution to comply with N.C.G.S. § 15A-905(c)(1), did not cause the forfeiture of her Fifth Amendment right to silence, and the State should not have been permitted to preemptively impeach her—by asking a police detective whether defendant made any statements about another man who had just been arrested when she handed over the drugs—during its case-in-chief when she had not testified at that point in the trial. **State v. Shuler, 337.**

CONTRACTS

Breach—conflicts in evidence—additional findings of fact required—remand appropriate—In an action for breach of contract (involving a tree company that had been contracted to mulch trees up to six to eight inches in diameter), the Court of Appeals appropriately remanded the matter to the trial court for additional findings of fact where the lower court's findings, upon which rested its conclusion that there was no breach of contract, did not resolve conflicts in the evidence regarding which of two methods the tree company used to measure the size of the trees. **Carolina Mulching Co. v. Raleigh-Wilmington Invs. II, LLC, 100.**

CRIMINAL LAW

Post-conviction relief—access to medical records—limited evidentiary hearing—dismissal of claim—The trial court properly dismissed defendant's post-conviction claim seeking relief (after being convicted of first-degree murder) for his counsel being denied access to certain prior treatment records of the main prosecution witness. The trial court's conclusion, made after a limited evidentiary hearing, that defendant could not demonstrate prejudice—because the records did not indicate the witness had a relevant mental health condition and they did not include evidence of substance abuse not already disclosed by the witness at trial—was supported by its findings of fact, which were in turn supported by evidence. **State v. Allen, 286.**

Post-conviction relief—short-form indictment—first-degree murder—issue procedurally barred—Defendant's post-conviction claim that a short-form indictment was insufficient to confer jurisdiction on the trial court for his first-degree murder trial was procedurally barred where he raised the issue on direct appeal. **State v. Allen, 286.**

DAMAGES AND REMEDIES

Punitive—sufficiency of pleading—willful or wanton conduct—In a wrongful death action filed against individual employees of a state university, the complaint contained sufficient allegations to put defendants on notice for punitive damages, based on willful and wanton conduct (N.C.G.S. § 1D-15(a)), where the allegations stated that defendants' negligent acts or omissions in failing to properly drain a chiller and refill it with antifreeze, particularly given warning signs posted on the

DAMAGES AND REMEDIES—Continued

chiller, could cause injury in the event the pipe froze and became pressurized, and that their conduct demonstrated a conscious disregard of the safety of others. **Est. of Long v. Fowler, 138.**

IMMUNITY

Sovereign—individual versus official capacity—dismissal improper—In a wrongful death action filed against individual employees of a state university, the trial court erred by dismissing the action after determining that the employees were entitled to sovereign immunity based on their status as state employees, since the employees were sued in their individual capacities, even if their alleged negligent acts were performed in the scope of their employment. **Est. of Long v. Fowler, 138.**

JUDGES

Impermissible expression of opinion—in presence of jury—prejudice analysis—jury instructions and evidence—In a trial for assault on a female, even assuming that the trial court violated N.C.G.S. §§ 15A-1222 and 15A-1232 by improperly expressing its opinion during jury instructions that defendant assaulted the victim, defendant could not show prejudice where the trial court's instructions as a whole made clear that only the jury could make the factual determination of whether defendant assaulted the victim and where the State's evidence satisfied the elements of the crime. **State v. Austin, 272.**

Impermissible expression of opinion—in presence of jury—preservation—standard of review—Defendant's argument that the trial court improperly expressed an opinion on the evidence in violation of N.C.G.S. §§ 15A-1222 and 15A-1232 while instructing the jury was preserved by operation of law due to the mandatory nature of the statutory prohibitions, and thus the alleged error was subject to review for prejudicial error pursuant to N.C.G.S. § 15A-1443(a). **State v. Austin, 272.**

JURISDICTION

Personal—minimum contacts—cell phone calls—no knowledge recipient in N.C.—Defendant lacked the requisite minimum contacts with the state of North Carolina to be subject to the exercise of personal jurisdiction in a domestic violence protection order (DVPO) proceeding where defendant, who had previously been in a romantic relationship with plaintiff outside of North Carolina, called plaintiff's cell phone many times on the evening that plaintiff had moved from South Carolina to North Carolina—when there was no evidence that defendant knew or had reason to know that plaintiff was in North Carolina. Because he did not know plaintiff was in North Carolina, defendant's phone calls did not constitute purposeful availment of the benefits and protections of the laws of North Carolina. In addition, plaintiff's argument that the "status exception" doctrine allowed exercise of personal jurisdiction was rejected. **Mucha v. Wagner, 167.**

MOTOR VEHICLES

Insurance—underinsured motorist coverage—applicable limit—interpolicy stacking—A North Carolina resident injured in an out-of-state car accident as a passenger in a car owned and operated by a Tennessee resident and insured by a

MOTOR VEHICLES—Continued

Tennessee insurer, where that driver's negligence caused the accident, was entitled to collect underinsured motor vehicle (UIM) coverage benefits from her North Carolina insurer. Based on North Carolina law allowing interpolicy stacking when calculating applicable policy limits (pursuant to N.C.G.S. § 20-279.21(b)(4)), the Tennessee policy's UIM coverage limit constituted an "applicable limit" and, because the stacked UIM coverage limits exceeded the sum of the applicable bodily injury coverage limits, the car owned by the Tennessee resident was an underinsured motor vehicle as defined in North Carolina. **N.C. Farm Bureau Mut. Ins. Co. v. Lunsford, 181.**

NATIVE AMERICANS

Indian Child Welfare Act—termination of parental rights order—failure to make proper inquiry—Where the trial court's order terminating a mother's parental rights to her child did not address whether it made the required inquiry, pursuant to 25 C.F.R. § 23.107(a), regarding whether the child was an Indian child as defined by the Indian Child Welfare Act, and the inquiry did not appear in the record, the matter was remanded for compliance with the Act. **In re A.L., 396.**

Indian Child Welfare Act—tribal notice requirements—post-termination of parental rights documentation—noncompliance cured—Where the trial court terminated respondent-mother's parental rights to her son without fully complying with the notice requirements of the Indian Child Welfare Act (ICWA), but the court held post-termination proceedings and made detailed findings of fact—regarding the social services agency's due diligence in confirming the child's non-eligibility status with numerous Indian tribes and seeking assistance from the federal Bureau of Indian Affairs for a non-responsive tribe—before concluding that the minor child was not an Indian child under ICWA, the trial court cured its initial noncompliance. **In re D.J., 565.**

NEGLIGENCE

Sufficiency of pleading—proximate cause—burst pipes—In a wrongful death action filed against individual employees of a state university, the complaint adequately pled proximate cause through allegations that the employees knew or should have known, given warning signs posted outside a chiller, that their negligent acts in failing to properly drain the chiller and refill it with antifreeze could cause injury in the event the pipe froze and became pressurized. Therefore, the trial court improperly dismissed the action for failure to state a claim. **Est. of Long v. Fowler, 138.**

PUBLIC RECORDS

North Carolina Railroad Company—private company—State sole shareholder—not subject to Public Records Act—The North Carolina Railroad Company—a private company whose sole shareholder was the State of North Carolina and which was organized and operated for the benefit of the public—was not an agency or subdivision of the North Carolina government subject to the Public Records Act. Although, among other things, the State was the company's sole shareholder, the State selected the company's board members, and the State would receive the company's assets in the event of the company's dissolution, nonetheless the General Assembly indicated its intent in relevant legislation that the company should not be considered an entity of the State, and decisions of other State entities also supported this conclusion. Furthermore, the company consistently maintained

PUBLIC RECORDS—Continued

its separate corporate identity and made decisions independently, demonstrating that the State's exercise of authority over the company was in its capacity as shareholder rather than as sovereign. **S. Env't Law Ctr. v. N.C. Railroad Co., 202.**

REFORMATION OF INSTRUMENTS

Admissions—attempt to contradict by affidavit—summary judgment—In an action by plaintiff bank for reformation of a deed based on mutual mistake, defendant property owner could not use her affidavit to contradict her binding admissions and thereby create an issue of material fact as to the parties' intent for the deed of trust to secure repayment of the promissory note executed during a refinance. **Wells Fargo Bank, N.A. v. Stocks, 342.**

SATELLITE-BASED MONITORING

Lifetime—reasonableness balancing test—aggravated offenders—The imposition of lifetime satellite-based monitoring (SBM) on defendant after the end of his post-release supervision was not an unconstitutional search in violation of the Fourth Amendment because defendant had been convicted of first-degree statutory rape and first-degree statutory sexual offense, making him an aggravated offender as defined by N.C.G.S. § 14-208.6(1a). Lifetime SBM as applied to aggravated offenders is reasonable in light of the State's paramount interest in protecting the public (particularly children), the SBM program's efficacy as a deterrent for recidivism, and the minimal nature of the intrusion required by SBM monitoring given the diminished expectation of privacy by aggravated offenders. **State v. Hilton, 692.**

SEARCH AND SEIZURE

Traffic stop—Terry search for weapons in vehicle—totality of circumstances—history of violent crime—A police officer who initiated a traffic stop of defendant for a fictitious license plate had reasonable suspicion to justify a *Terry* search for weapons in the areas of the vehicle that were under defendant's immediate control where the traffic stop occurred at night in a high-crime area, defendant appeared very nervous, defendant bladed his body when he accessed his center console to look for registration papers, and defendant's criminal history indicated a trend in violent crime. Further, the traffic stop was not unconstitutionally prolonged where the officer stopped defendant's vehicle, spoke with defendant, performed a routine records check that showed defendant's violent criminal history, and then performed the *Terry* search of the vehicle for weapons. **State v. Johnson, 236.**

STATUTES OF LIMITATION AND REPOSE

Three years—N.C.G.S. § 1-52(9)—mutual mistake—deed reformation—In an action for reformation of a deed of trust brought by a bank, the cause of action accrued when the bank should have discovered the drafting error (listing the wrong family member as the borrower), and its first opportunity to do so was after the borrower defaulted, even though the document was drafted with the error years earlier. Therefore, the three-year statute of limitations in N.C.G.S. § 1-52(9) applied because the action was to reform the instrument due to mutual mistake, and the bank's action was timely filed within three years of the default and the bank's subsequent investigation of the loan instruments to prepare for foreclosure. **Wells Fargo Bank, N.A. v. Stocks, 342.**

TAXATION

Ad valorem taxes—true value—appraisal methodology—functional and economic obsolescence—The Property Tax Commission properly accepted a county's valuation method to determine the true value of business personal property (used grocery store equipment) for purposes of an ad valorem tax assessment. The Commission's factual determinations regarding whether the appraisal properly accounted for functional and economic obsolescence were supported by substantial evidence in the form of an appraiser's testimony, and the Commission was justified in declining to adopt the business's approach of relying on market sales to determine the extent of depreciation adjustments. **In re Harris Teeter, LLC, 108.**

TERMINATION OF PARENTAL RIGHTS

Adjudication evidence—sufficiency—adoption of allegations in petition—oral testimony—The trial court did not err, in determining whether grounds existed to terminate a mother's parental rights, when it relied on a social worker's oral testimony that adopted the allegations in the termination petition. In so doing, the trial court did not improperly rely on the petition itself as the only adjudication evidence. **In re Z.G.J., 500.**

Adjudication—findings of fact—sufficiency of evidence—The adjudicatory findings of fact in an order terminating respondent-mother's parental rights to her two children (based on neglect and willful failure to make reasonable progress) were supported by clear, cogent, and convincing evidence regarding respondent's failure to take advantage of multiple opportunities to engage in services for her substance abuse and mental health issues, her lack of progress in various treatment programs, and the effect of her behavior on her son's mental health. **In re M.S.E., 40.**

Appointment of guardian ad litem—parent failed to file answer to petition—trial court's discretion—Even assuming the issue was preserved for appellate review, in a private termination of parental rights proceeding where the mother failed to file an answer to the termination petitions but later decided to contest the matter, the record gave no indication that the trial court acted under a misapprehension of law or failed to exercise its discretion when it did not appoint a guardian ad litem for the children. **In re M.J.M., 477.**

Best interests of the child—dispositional findings of fact—abuse of discretion analysis—The trial court did not abuse its discretion by determining that termination of respondent-mother's rights to her children was in their best interests where the court's findings addressed the statutory factors in N.C.G.S. § 7B-1110(a) and were supported by competent evidence or reasonable inferences from that evidence, including findings that the bond between respondent and her daughter had lessened over time, and that respondent's behavior played a part in her son's mental health issues. The trial court was not required to make findings regarding every dispositional alternative it considered, and its findings demonstrated a reasoned decision. **In re M.S.E., 40.**

Best interests of the child—dispositional findings—sufficiency of evidence—weighing of factors—The trial court did not abuse its discretion by determining that termination of respondent-mother's parental rights, and not other dispositional alternatives, was in the best interests of respondent's children where the court's findings of fact—including the poor bond between respondent and her children and the negative impact of respondent's visits on the children—were supported by competent evidence and showed the court properly addressed and weighed the various dispositional factors contained in N.C.G.S. § 7B-1110(a). **In re T.A.M., 64.**

TERMINATION OF PARENTAL RIGHTS—Continued

Best interests of the child—need for permanency—no misapprehension of the law—dispositional factors—The trial court did not abuse its discretion in concluding that terminating a mother's parental rights was in her two-year-old child's best interests, where the mother had previously executed a relinquishment of her rights conditioned upon her sister and brother-in-law adopting the child. Because the relinquishment statutes permitted the mother to revoke her relinquishment or challenge its validity, the court reasonably considered possible hindrances to the adoption process, and therefore did not act under a misapprehension of the law in finding termination necessary to ensure the child received a permanent plan of care. Furthermore, the court properly considered the child's young age and high likelihood of adoption (dispositional factors under N.C.G.S. § 7B-1110(a)) given that two families were already willing to adopt him. **In re M.R.J., 648.**

Best interests of the child—potential relative placement—dispositional findings —The trial court did not abuse its discretion by determining that termination of a father's parental rights was in his daughter's best interests where, one month before the termination hearing, the father requested that the department of social services consider his third cousin as a potential placement for the child. Although the court was not required to consider the availability of relative placement when making its best interests determination, the court's dispositional findings—including that the proposed placement was not appropriate and that the daughter already had a strong bond with her foster parents—showed that the court adequately considered all critical circumstances regarding the daughter's placement. **In re E.S., 8.**

Best interests of the child—statutory factors—child's consent to adoption—bond with mother—The trial court did not abuse its discretion by determining that termination of a mother's parental rights was in her fifteen-year-old daughter's best interests. The trial court was not required to consider the daughter's consent to adoption under N.C.G.S. § 48-3-601(1) (requiring minors over twelve years old to consent to adoption) when entering its disposition pursuant to N.C.G.S. § 7B-1110. Further, in considering the statutory factors under section 7B-1110(a), the trial court properly considered the bond between the mother and her daughter and was not required to make written findings about that factor because the evidence on the issue was uncontested. **In re E.S., 8.**

Best interests of the children—statutory factors—children's bond with parent—likelihood of adoption—The trial court did not abuse its discretion in concluding that termination of a father's parental rights was in the best interests of his two children, where the court properly considered each dispositional factor under N.C.G.S. § 7B-1110(a). The court acknowledged the children's strong bond with their father while finding the children had also bonded with their foster family, their foster parents were willing to adopt both siblings, and the younger sibling's behavioral issues (he suffered from adjustment disorder and post-traumatic stress disorder, which resulted in sleep deprivation, tantrums, hitting, and other problematic behaviors) did not make adoption unlikely because the foster parents were willing to provide him with the necessary therapy and medical treatment to address those issues. **In re K.B., 601.**

Bifurcated hearing—adjudication phase—evidence of reasonable progress—necessary only up to adjudication—Where the trial court agreed to hold a bifurcated termination of parental rights hearing and the adjudication and disposition hearings were held several months apart, the court was not required, for purposes of the ground of failure to make reasonable progress (N.C.G.S. § 7B-1111(a)(2)), to

TERMINATION OF PARENTAL RIGHTS—Continued

make findings regarding respondent-mother's progress on her case plan in the several months between the two hearings. Since the court concluded the adjudication phase at the end of the first hearing date when it found that grounds for termination had been established, it was respondent's obligation to move to reopen the adjudication phase if she wanted to present additional adjudication evidence at the later hearing date before the court began the dispositional phase. **In re B.J.H., 524.**

Competency of parent—guardian ad litem—Rule 17—abuse of discretion analysis—In a termination of parental rights matter, the trial court did not abuse its discretion by failing to sua sponte conduct a competency hearing to determine whether respondent-mother needed a Rule 17 guardian ad litem. Although respondent's psychological evaluation recommended various types of assistance after stating that respondent had borderline intellectual functioning, the evaluation also noted several positive attributes of respondent including her resourcefulness. Further, the trial court had ample opportunity to observe respondent at multiple hearings, including during respondent's testimony, and respondent exhibited appropriate judgment prior to the hearings when she told the social services agency that she did not feel ready to take her children back and asked that they remain in their relative placement. **In re M.S.E., 40.**

Dispositional stage—best interests of the child—evidentiary standard not stated—In a termination of parental rights matter in which the adjudicatory and dispositional stages were combined but the trial court did not delineate the different standards of proof for each stage, the entirety of the proceedings clearly showed that the trial court understood and applied the proper evidentiary standard before assessing whether termination of respondent-father's parental rights was in the best interests of the child, where the court considered each dispositional factor in N.C.G.S. § 7B-1110. Even if the court improperly used the clear, cogent, and convincing standard at disposition, use of that heightened standard for petitioner-agency to overcome caused no prejudice to respondent. **In re M.Y.P., 667.**

Effective assistance of counsel—failure to advise—steps to establish paternity—findings not challenged—meritless—In an appeal from an order terminating respondent-father's parental rights to his child in which respondent did not challenge the findings or conclusion regarding the ground of failure to establish paternity (N.C.G.S. § 7B-1111(a)(5)), the Supreme Court rejected respondent's argument alleging that he received ineffective assistance of counsel due to his counsel's failure to advise him on or assist him with establishing paternity. Respondent's professed ignorance of his legal duty as a parent to establish paternity did not excuse his failure to fulfill that duty, and therefore respondent failed to demonstrate that there was a reasonable probability that, absent counsel's alleged failure to advise him regarding that duty, a different result would have been reached at the hearing. **In re B.S., 1**.

Findings of fact—sufficiency—mere recitations of testimony—conflicting evidence—When reversing an order terminating a father's parental rights to his son on grounds of neglect, dependency, and abandonment, the Supreme Court disregarded multiple findings of fact in the order that either failed to resolve material conflicts in the evidence or constituted (or potentially constituted) mere recitations of testimony rather than proper factual determinations by the trial court, including findings regarding the father's child support payments, the father's relationship with and efforts to contact his son, and the maternal grandparents' efforts to prevent the father from communicating with the child. **In re D.T.H., 576.**

TERMINATION OF PARENTAL RIGHTS—Continued

Grounds for termination—abandonment—insufficiency of findings—unresolved factual disputes—An order terminating a father's parental rights to his son on grounds of abandonment (N.C.G.S. § 7B-1111(a)(7)) was reversed and remanded for entry of further findings, where the trial court failed to make findings addressing the father's conduct during the determinative six-month period before the termination petition was filed, and where the court's findings did not resolve key factual disputes over the amount of contact the father had had with the child and whether such contact was limited because of the father's willful relinquishment of his parental duties or because of the grandparents' efforts to prevent him from communicating with his son. **In re D.T.H., 576.**

Grounds for termination—dependency—required findings—alternative care arrangement—The trial court erred in terminating a father's parental rights on grounds of dependency (N.C.G.S. § 7B-1111(a)(6)), where the court failed to enter any written findings addressing whether the father "lacked an alternative child care arrangement" for his son, and where the record did not contain any evidence that the father lacked an alternative child care arrangement. **In re D.T.H., 576.**

Grounds for termination—failure to make reasonable progress—drug relapses—The trial court did not err in terminating a mother's parental rights to her daughter for willful failure to make reasonable progress to correct the conditions that led to the child's removal (N.C.G.S. § 7B-1111(a)(2)) based on evidence that the mother's substance abuse continued for at least three and a half years during the pendency of this case. Although the mother argued that relapses for addicts are common and therefore her limited progress was not unreasonable, the court's findings regarding the mother's inability to successfully complete rehabilitation or maintain sobriety for any significant amount of time supported its conclusion that her progress was not reasonable. **In re A.L., 396.**

Grounds for termination—failure to make reasonable progress—findings and conclusion as to father—The trial court properly terminated respondent-father's parental rights to his two children on the basis that his failure to make reasonable progress to correct the conditions that led to the children's removal (N.C.G.S. § 7B-1111(a)(2)) was willful where, although respondent did not sign the case plan prepared for him, he orally agreed to its requirements and was on notice that he needed to address issues with substance abuse, mental health, housing, employment, and parenting, as evidenced by prior orders in the case. Any discrepancy between findings in permanency planning orders, of which the trial court took judicial notice, and testimony at the termination hearing were for the trial court to resolve. Sufficient evidence was presented to support the court's findings, which in turn supported the court's conclusion that respondent's lack of progress over twenty-seven months was grounds for termination. **In re B.J.H., 524.**

Grounds for termination—failure to make reasonable progress—findings and conclusion as to mother—The trial court properly terminated respondent-mother's parental rights to her two children on the basis that she willfully failed to make reasonable progress to correct the conditions that led to the children's removal (N.C.G.S. § 7B-1111(a)(2)) after making detailed findings, supported by the evidence, regarding respondent's noncompliance or lack of progress with her case plan, including aspects related to her substance abuse, mental health, housing, and employment. The trial court's determination that respondent's progress was extremely limited and not reasonable was amply supported by the facts. **In re B.J.H., 524.**

TERMINATION OF PARENTAL RIGHTS—Continued

Grounds for termination—failure to make reasonable progress—findings—evidentiary support—The trial court did not err by terminating a mother's parental rights to her daughter based on the mother's willful failure to make reasonable progress to correct the conditions which led to the child's removal (N.C.G.S. § 7B-1111(a)(2)) where there was clear, cogent, and convincing evidence, in addition to the mother's stipulations, regarding the mother's extensive history of substance abuse for which she received inadequate treatment, her refusal to submit to drug screens on multiple occasions, her incomplete mental health treatment, her housing instability, and her lack of consistent employment. **In re A.S.D., 425.**

Grounds for termination—failure to make reasonable progress—nexus between case plan and conditions that led to removal—The trial court's order terminating respondent-father's parental rights to the youngest child based on failure to make reasonable progress was supported by unchallenged findings, which showed that respondent-father failed to complete parenting classes, tested positive for controlled substances and refused at least four drug screenings, and was not incarcerated for seven months while his child was in DSS custody. Although respondent argued that he did make reasonable progress where the only condition relating to him that led to the child's removal—that his paternity had not been established—had since been corrected, there was a sufficient nexus between the substance abuse and mental health components of respondent's case plan and the conditions that led to the child's removal from the home, because the child had been removed from respondent-mother's care based on neglect caused by exposure to substance abuse. **In re M.S., 30.**

Grounds for termination—failure to pay a reasonable portion of the cost of care—sufficiency of findings—determinative time period—The trial court erred in concluding that a mother's parental rights were subject to termination on the grounds of failure to pay a reasonable portion of the cost of care where the court's findings did not specifically address the six-month period immediately preceding the filing of the termination petition. **In re Z.G.J., 500.**

Grounds for termination—failure to pay a reasonable portion of the cost of care—willfulness—notice of obligation—The trial court's unchallenged findings of fact supported its decision to terminate both parents' rights to their son on the basis that, for a continuous period of six months prior to the filing of the termination petition, they failed to pay a reasonable portion of the cost of care for their child although able to do so (N.C.G.S. § 7B-1111(a)(3)). The Supreme Court declined to revisit its holding in *In re S.E.*, 373 N.C. 360 (2020), which interpreted this statutory provision as not requiring notice to parents regarding their obligation to provide support. **In re D.C., 556.**

Grounds for termination—failure to pay reasonable portion of cost of care—no contribution—The termination of respondent-father's parental rights for failure to pay a reasonable portion of the cost of care for the juvenile was affirmed where the trial court found that respondent was employed and earned between $200 and $800 per week but did not provide any financial support for the child during the six months prior to the filing of the petition and the findings were supported by clear, cogent, and convincing evidence. **In re J.E.E.R., 23.**

Grounds for termination—neglect—by abandonment—insufficiency of findings—unresolved factual disputes—An order terminating a father's parental rights to his son on grounds of neglect by abandonment (N.C.G.S. § 7B-1111(a)(1))

TERMINATION OF PARENTAL RIGHTS—Continued

was reversed and remanded, where the trial court's findings failed to resolve key factual disputes over the amount of contact the father had had with the child and whether such contact was limited because of the father's willful relinquishment of his parental duties or because of the grandparents' efforts to prevent him from communicating with his son. **In re D.T.H., 576.**

Grounds for termination—neglect—failure to make reasonable progress—dependency—determinative time period—The trial court erred in concluding that a mother's parental rights were subject to termination on the grounds of neglect, failure to make reasonable progress, and dependency where the trial court relied solely on evidence of circumstances existing more than a year before the hearing—a social worker's oral testimony adopting the allegations in the termination petition—in making its factual findings. There was no evidence from the determinative time period for each of the grounds for termination, and evidence presented during the disposition hearing could not cure the error. **In re Z.G.J., 500.**

Grounds for termination—neglect—failure to make reasonable progress—evidence before and after the termination petition—In determining that a father's parental rights were subject to termination pursuant to N.C.G.S. § 7B-1111(a)(1) (neglect) and (a)(2) (failure to make reasonable progress), the trial court properly considered the totality of the evidence—both before and after the filing of the termination petition, despite the father's argument to the contrary on appeal—and determined that the events occurring after the petition's filing were unpersuasive and inadequate to overcome evidence supporting termination. **In re K.N., 450.**

Grounds for termination—neglect—likelihood of future neglect—The trial court properly terminated respondent-mother's parental rights on the ground of neglect where its findings of fact, which were either unchallenged or supported by clear, cogent, and convincing evidence, supported the court's conclusion that there was a likelihood of future neglect of respondent's two children if they were returned to her care, based on respondent's lack of progress in addressing her ongoing substance abuse, mental health issues, and parenting skills, and her inability to acknowledge her role in her son's mental health struggles. **In re M.S.E., 40.**

Grounds for termination—neglect—likelihood of future neglect—pattern of exposure to child sex abusers—An order terminating a mother's parental rights to her two daughters was affirmed where the trial court's findings—all of which, with one exception, were supported by clear, cogent, and convincing evidence—showed a high likelihood of repeated neglect if the children returned home. Specifically, the court found a pattern in which the mother exposed her daughters to men with histories of child sexual abuse, those men sexually abused the daughters, the daughters were adjudicated neglected and removed from the home, the mother cooperated with social services such that the children were returned to her care, and then the cycle would recommence. Moreover, evidence showed that the mother's cognitive limitations, dependent personality, and tendency to disbelieve her children's abuse allegations rendered her incapable of protecting the children from future abuse. **In re L.H., 625.**

Grounds for termination—neglect—likelihood of future neglect—substantial risk of impairment—sufficiency of evidence—An order terminating a mother's parental rights to her children was affirmed where the trial court's findings—supported by clear, cogent, and convincing evidence—showed a likelihood of future neglect if the children were returned to the mother's care, because she failed

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to make progress in her social services case plan; failed to address her substance abuse, mental health issues, and history of domestic violence; failed to keep a safe and stable home; and disregarded social services' concerns with her having unsupervised contact with the children. Evidence also supported a finding that the children were physically, mentally, or emotionally impaired (or at a substantial risk of such impairment) as a result of the mother's neglect, where both children suffered from adjustment disorder and various behavioral issues. **In re K.B., 601.**

Grounds for termination—neglect—likelihood of future neglect—unstable housing and domestic violence—The trial court did not err by determining that a mother's parental rights were subject to termination on the grounds of neglect where the court's findings were supported by the evidence, which demonstrated that the mother was likely to repeat her prior neglect if the child were returned to her care, based on the mother's lack of stable housing and unresolved domestic violence issues. Although the mother had made some progress on her case plan, at the time of the hearing she was sharing a studio apartment with a male coworker and was not on the lease, and she had failed to demonstrate an understanding of her domestic violence issues and how to protect herself and her child in the future. **In re M.A., 462.**

Grounds for termination—neglect—likelihood of repetition of neglect—findings—After disregarding numerous findings of fact that were mere recitations of testimony or that did not accurately reflect the record evidence, the Supreme Court nevertheless affirmed the trial court's order terminating a mother's parental rights to her son based on neglect (N.C.G.S. § 7B-1111(a)(1)) where the remaining findings were supported by clear, cogent, and convincing evidence regarding the mother's limited progress on various aspects of her case plan, her continued contact with the child's father despite his acts of abusive behavior, and her inability to grasp or tendency to minimize the severity of the issues preventing reunification with her child. The trial court did not impermissibly shift the burden of proof to the mother, it adequately considered evidence of changed circumstances between the child's removal and the termination hearing, and it supported its conclusion that there was a likelihood of repetition of neglect with sufficient findings of fact. **In re A.C., 377.**

Grounds for termination—neglect—repetition of neglect—findings—The trial court properly determined that grounds existed to terminate respondent-father's parental rights to his child based on neglect despite a few unsupported findings, given other supported findings establishing that the child was previously neglected and that there was a likelihood of the repetition of neglect if the child were returned to respondent's care. The two-year-old was removed from the home after being left alone in an unfurnished apartment for at least several hours; respondent had a history of untreated and continuing substance abuse; respondent's lack of progress on his case plan left issues regarding domestic violence, lack of stable housing, and mental illness unresolved; and his visits with the child were sporadic. **In re M.Y.P., 667.**

Grounds for termination—parental rights terminated as to another child—lack of safe home—no protection from abusive individuals—The trial court properly terminated a mother's parental rights to her son on the basis that her parental rights had been terminated involuntarily to two of her other children and she lacked the ability to establish a safe home (N.C.G.S. § 7B-1111(a)(9)), after making findings, which were based on clear, cogent, and convincing evidence, that she had a pattern of exposing her children to abusive individuals and lacked insight into her son's sexual abuse and the effect it had on him, that she had not made sufficient

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progress with her own mental health treatment, and that she was unable to provide safe and stable housing for her son. The court's findings in turn supported its conclusion that grounds existed to terminate and that termination of the mother's parental rights was in the best interest of her son. **In re T.M.B., 683.**

Grounds for termination—willful abandonment—determinative six-month period—lack of findings—The trial court's order terminating a father's parental rights to his son was vacated and the matter remanded for further findings where the court's findings did not adequately address the father's actions during the determinative six-month time period (immediately preceding the filing of the termination petition) for purposes of the ground of willful abandonment (N.C.G.S. § 7B-1111(a)(7)). Although the court heard evidence during adjudication from which it could have made relevant findings, and did make findings addressing this issue in the dispositional portion of the termination order, the dispositional findings were subject to a different standard of review and could not be used to support the adjudication. **In re K.J.E., 620.**

Grounds for termination—willful abandonment—failure to pay for care required by decree or custody agreement—sufficiency of findings—In a private termination of parental rights action, the evidence did not support the trial court's finding that the father, who was incarcerated during the relevant time period, had willfully abandoned his child where the father testified that he spoke with his daughter every other weekend and where the petitioner, who had custody of the child, testified that the father called on Christmas. Even if the father's testimony were found not credible, the petitioner's testimony did not establish willful abandonment. The evidence also did not support the trial court's finding that the father had willfully failed to pay for care, support, or education as required by a decree or custody agreement where there was no evidence of any decree or custody agreement making such a requirement. **In re S.C.L.R., 484.**

Grounds for termination—willful abandonment—sufficiency of findings—relevant six-month period—The trial court's order terminating respondent-father's parental rights on the grounds of willful abandonment was affirmed where the unchallenged findings of fact showed that for over a year prior to the filing of the motion to terminate respondent had not visited the child, he refused to work his case plan or take any of the steps required to reunite with the child, and did not make any effort to maintain a parental bond with the child. Respondent's attempts to comply with the case plan after the filing of the petition did not bar an ultimate finding of willful abandonment because they did not occur during the determinative period for adjudicating willful abandonment—the six consecutive months preceding the filing of the petition. **In re I.J.W., 17.**

Grounds for termination—willful abandonment—sufficiency of findings—willfulness—The Supreme Court rejected a mother's argument that the trial court failed to make any factual finding that her conduct was willful and therefore that the court erred by concluding her parental rights were subject to termination on the grounds of willful abandonment. Even though it was labeled as a conclusion of law, the trial court did make a finding that the mother had willfully abandoned the child. In addition, the Court rejected the mother's challenge to the sufficiency of the findings because the findings reflected that she had failed to do anything to express love, affection, and parental concern during the determinative period. **In re S.C.L.R., 484.**

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Grounds for termination—willful failure to make reasonable progress—failure to enter into a case plan—The trial court did not err by determining that grounds existed to terminate the parental rights of the father of the two oldest children based on a willful failure to make reasonable progress where the unchallenged findings showed that he did not enter into a case plan with DSS to establish the goals he needed to achieve prior to reunification—despite several opportunities to do so—and that he was not incarcerated for nine of the twenty months the children were in DSS custody. **In re M.S., 30.**

Grounds for termination—willful failure to pay a reasonable portion of cost of care—voluntary support agreement—The trial court did not err by terminating a mother's parental rights to her three children on the basis that she willfully failed to pay a reasonable portion of the cost of the children's care (N.C.G.S. § 7B-1111(a)(3)), where the mother signed a voluntary support agreement in which she agreed to pay $112.00 per month and she had past periods of employment, but during the determinative six-month period immediately preceding the filing of the termination petition, she was unemployed, paid nothing toward the cost of the children's care, and never moved to modify the support agreement. **In re A.P.W., 405.**

Jurisdiction—standing to initiate termination proceedings—"county director" of social services—Uniform Child Custody Jurisdiction and Enforcement Act—Wake County Human Services (WCHS) had standing under N.C.G.S. § 7B-1103(a)(3) to petition to terminate a mother's parental rights because her child—who lived in South Carolina when WCHS filed the petition in Wake County—was placed in WCHS's custody by a "trial court of competent jurisdiction" where the Wake County District Court met the jurisdictional prerequisites under the Uniform Child Custody Jurisdiction and Enforcement Act and where the petition had been properly verified. Furthermore, neither the definition of "director" found in N.C.G.S. § 7B-101(10) nor the county-specific allocation of social services under N.C.G.S. § 153A-257(a) imposes a geographical limit on which "county director" may initiate termination proceedings under N.C.G.S § 7B-401.1(a). Therefore, the District Court had subject matter jurisdiction over the termination matter. To the extent the mother's appellate arguments addressed venue rather than jurisdiction, those arguments were unpreserved and lacked merit. **In re M.R.J., 648.**

Motion to continue—to secure witness testimony—insufficient offer of proof—no prejudice—In a termination of parental rights matter, respondent-mother's motion to continue the hearing in order to secure a witness—who was expected to relate the services respondent was engaged in at a local health center—was properly denied where the offer of proof by respondent's counsel was vague and did not forecast what the witness's testimony would be, and where there was no dispute that respondent received services at the health center. Respondent waived any constitutional argument by not raising the issue before the trial court, and did not demonstrate she was prejudiced by the court's decision. **In re D.J., 565.**

Multiple grounds for termination—adjudicatory stage—statements of trial court—no misapprehension of law—In a termination of parental rights hearing in which four grounds for termination were alleged, the trial court's statement at the end of adjudication that "We're here for — not for [respondents]. We're here for this child." did not reflect a misapprehension of the law by viewing the parents and child as adversaries. The court's full statement indicated its understanding that the parents' constitutionally protected rights as parents were paramount until grounds for termination were proven, at which point the matter would move to disposition. **In re D.C., 556.**

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No-merit brief—elimination of reunification from permanent plan—failure to make reasonable progress—The elimination of reunification with the father from his child's permanent plan and the subsequent termination of the father's parental rights on the grounds of failure to make reasonable progress were affirmed where the father's counsel filed a no-merit brief, the order eliminating reunification comported with the requirements of N.C.G.S. § 7B-906.2(b), and the termination order was supported by clear, cogent, and convincing evidence and based on proper legal grounds. **In re D.M., 435.**

No-merit brief—multiple grounds for termination—record support—The termination of a father's parental rights to his son based on five separate statutory grounds was affirmed where the father's counsel filed a no-merit brief, the father did not file any written arguments, the termination order's findings of fact had ample record support, and there was no error in the trial court's determination that the father's parental rights were subject to termination and that termination would be in the son's best interest. **In re J.L.F., 445.**

No-merit brief—neglect—willful failure to make reasonable progress—The termination of a mother's parental rights—based on grounds of neglect and willful failure to make reasonable progress—was affirmed where the mother's counsel filed a no-merit brief, the termination order's findings of fact had ample record support, and where those findings supported the trial court's conclusions. To permit appellate review, the Supreme Court invoked Appellate Rule 2 to suspend the requirements under Rule 3.1(a) (that counsel provide copies of the no-merit brief, transcript, and record on appeal to the mother and to inform her of her right to file a pro se brief) where the mother's counsel made exhaustive efforts to contact her but to no avail. **In re Z.R., 92.**

No-merit brief—termination on multiple grounds—The termination of a mother's parental rights on the grounds of neglect, failure to make reasonable progress, failure to pay a reasonable portion of the cost of care, and dependency was affirmed where the mother's counsel filed a no-merit brief and the termination order was supported by clear, cogent, and convincing evidence and was based on proper legal grounds. **In re J.E.H., 440.**

No-merit brief—termination on multiple grounds—The termination of a mother's parental rights to her two children on multiple grounds was affirmed where her counsel filed a no-merit brief, the trial court's findings of fact had sufficient record support, those findings both supported termination on at least one ground and adequately addressed the dispositional issues delineated in N.C.G.S. § 7B-1110(a), and the trial court had a rational basis for concluding that termination of the mother's rights was in the children's best interests. **In re J.D.D.J.C., 593.**

No-merit brief—termination on multiple grounds—competent evidence and proper legal grounds—The termination of respondent-mother's parental rights based on neglect, willful failure to make reasonable progress, and being incapable of providing proper care and supervision of the children was affirmed where the mother's counsel filed a no-merit brief and the termination order was supported by competent evidence and based on proper legal grounds. **In re M.S., 30.**

Parental right to counsel—motion to withdraw—lack of contact—granted in parent's absence—In a termination of parental rights proceeding, the trial court did not abuse its discretion by allowing respondent-father's appointed counsel to withdraw from representation at a hearing in which respondent failed to appear.

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Respondent had been advised multiple times by the court of his responsibility to maintain contact with his attorney, the department of social services made diligent efforts to locate respondent, respondent appeared to actively avoid being found or receiving communications, he failed to appear at several hearings, and counsel related to the court that she spoke to respondent and he did not object to her motion. **In re T.A.M., 64.**

Pleadings—sufficiency—private termination action—reference to court order—The petition in a private termination of parental rights action comported with statutory pleading requirements (N.C.G.S. § 7B-1104(2)) where the petition stated petitioners' names and address, alleged that custody had been granted to them, and referenced the custody order establishing that the child had resided with them for two years. **In re S.C.L.R., 484.**

Standard of proof—clear, cogent, and convincing evidence—not stated in open court or in written findings—insufficient evidence to support grounds—The order terminating a father's parental rights to his child was reversed where the trial court did not state the standard of proof (clear, cogent, and convincing) either in open court or in its written findings, as required by N.C.G.S. § 7B-1109, and where insufficient evidence was presented to support the alleged grounds of failure to make reasonable progress (there was no evidence that the child had been in a court-ordered placement for at least twelve months prior to the termination petition being filed), failure to pay support (there was no evidence that the child's mother had been awarded custody or that the father was required by decree or custody agreement to pay support), or failure to legitimate (there was no evidence that the child was born out of wedlock). Where petitioner (the child's maternal grandmother) did not allege neglect or abandonment or seek a ruling on those grounds, her arguments pertaining to them were not properly considered on appeal. **In re M.R.F., 638.**

Subject matter jurisdiction—standing—petition filed by department of social services—The trial court had subject matter jurisdiction to terminate a mother's parental rights where the county department of social services (DSS) had standing to file the termination petition because it had been given custody of the child by a court of competent jurisdiction (N.C.G.S. § 7B-1103(a)). The social worker's testimony that she was the petitioner, when considered in context, did not mean that the petition was filed in the social worker's individual capacity. **In re Z.G.J., 500.**

Subject matter jurisdiction—UCCJEA—home state—record evidence—The trial court had subject matter jurisdiction to terminate the parental rights of a father who was living out of state where, although the court did not make an explicit finding that it had jurisdiction under the Uniform Child Custody Jurisdiction and Enforcement Act (N.C.G.S. § 50A-201), the record established that the Act's jurisdictional requirements were satisfied. The children's home state was North Carolina at the time the termination proceedings commenced, and the children had been living in North Carolina with their foster parents for more than six consecutive months immediately preceding the commencement of the proceedings. **In re K.N., 450.**

Subject matter jurisdiction—where child resides with guardian—underlying juvenile case—In a private termination proceeding, the trial court had subject matter jurisdiction to enter an order terminating a mother's parental rights to her child where the child's legal permanent guardian filed the termination petition in the county in which she resided with the child (Robeson), satisfying the jurisdictional

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requirements of N.C.G.S. § 7B-1101. A different county's jurisdiction over the child's underlying juvenile case did not prevent the Robeson County court from having jurisdiction over the termination petition. **In re M.J.M., 477.**