NORTH CAROLINA REPORTS

VOLUME 379

SUPREME COURT OF NORTH CAROLINA

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CITE THIS VOLUME

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THE SUPREME COURT
OF
NORTH CAROLINA

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TRIAL JUDGES OF THE GENERAL COURT OF JUSTICE

SUPERIOR COURT DIVISION

DISTRICT	JUDGES	ADDRESS
	First Division	
1	Jerry R. Tillett	Manteo
	Eula Reid	Elizabeth City
2	Wayland Sermons	Washington
3A	Marvin K. Blount, III	Greenville
	Jeffery B. Foster	Greenville
6A	Norlan Graves	Roanoke Rapids
6B	Cy A. Grant, Sr.	Ahoskie
7A	Quentin T. Sumner	Rocky Mount
7BC	Lamont Wiggins	Rocky Mount
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9	John Dunlow	Oxford
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14	Orlando F. Hudson, Jr.	Durham
	Michael O'Foghludha	Durham
	Josephine Kerr Davis	Durham
	Brian K. Wilks	Durham
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3B	Joshua W. Wiley	New Bern
	Clinton D. Rowe	New Bern
4	Charles H. Henry	Jacksonville
	Henry L. Stevens	Wallace
5	Phyllis M. Gorham	Wilmington
	R. Kent Harrell	Burgaw
	Frank Jones	Wilmington
8A	Imelda J. Pate	Kinston
8B	William W. Bland	Goldsboro
13A	Douglas B. Sasser	Whiteville
13B	Jason C. Disbrow	Southport
16B	James Gregory Bell	Lumberton
	Tiffany P. Powers	Lumberton
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10	Paul C. Ridgeway	Raleigh
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	A. Graham Shirley	Raleigh
	Rebecca W. Holt	Raleigh
	Vinston M. Rozier	Raleigh
	Keith O. Gregory	Raleigh

DISTRICT	JUDGES	ADDRESS
11A	C. Winston Gilchrist	Lillington
11B	Thomas H. Lock	Smithfield
12	James F. Ammons, Jr.	Fayetteville
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	Gale M. Adams	Fayetteville
	Mark A. Sternlicht	Fayetteville
15A	D. Thomas Lambeth	Burlington
	Andy Hanford	Graham
16A	Stephan R. Futrell	Rockingham
	Dawn Layton	Rockingham
19B	Vance Bradford Long[1]	Asheboro
	James P. Hill[2]	Asheboro
19D	James M. Webb	Southern Pines
	Michael A. Stone	Laurinburg
20A	Kevin M. Bridges	Oakboro
	Patrick Nadolski	Mount Gilead
20B	Jonathan Perry	Monroe
	N. Hunt Gwyn	Monroe
	Fourth Division	
15B	R. Allen Baddour	Chapel Hill
	Alyson A. Grine	Chapel Hill
17A	Edwin Graves Wilson, Jr.	Eden
	Stanley L. Allen	Sandy Ridge
17B	Angela B. Puckett	Westfield
18	John O. Craig, III	High Point
	R. Stuart Albright	Greensboro
	Susan Bray	Greensboro
	William Wood	Greensboro
	Lora C. Cubbage	Greensboro
19A	Martin B. McGee	Concord
19C	Timothy Gould	Salisbury
21	L. Todd Burke	Winston-Salem
	David L. Hall	Winston-Salem
	Eric C. Morgan	Kernersville
	Richard S. Gottlieb	Winston-Salem
22A	Joseph Crosswhite	Statesville
	William Long	Statesville
22B	Mark E. Klass	Lexington
	Lori Hamilton	Mocksville
23	Michael Duncan	Wilkesboro
	Fifth Division	
24	Gary Gavenus	Burnsville
	R. Gregory Horne	Boone
25A	Robert C. Ervin	Morganton
	Daniel A. Kuehnert	Morganton
25B	Nathaniel J. Poovey	Newton
	Gregory R. Hayes	Hickory

DISTRICT	JUDGES	ADDRESS
26	Carla Archie	Charlotte
	Lisa C. Bell	Charlotte
	Karen Eady-Williams	Charlotte
	Donnie Hoover[3]	Charlotte
	Louis A. Trosch	Charlotte
	George Bell	Charlotte
	Casey Viser	Charlotte
	Kimberly Best[4]	Charlotte
	Reggie McKnight[5]	Charlotte
27A	David Phillips	Gastonia
	Jesse B. Caldwell, IV	Gastonia
27B	Forrest Donald Bridges	Shelby
	W. Todd Pomeroy	Lincolnton
28	Alan Z. Thornburg	Asheville
29A	J. Thomas Davis	Forest City
29B	Peter B. Knight	Hendersonville
30A	William H. Coward	Highlands
30B	Bradley B. Letts	Hazelwood

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Mark A. Davis	Raleigh
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Calvin Murphy	Charlotte
J. Richard Parker	Manteo
William R. Pittman	Raleigh
Mark Powell	Hendersonville
Ronald E. Spivey	Winston-Salem
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Tanya T. Wallace	Rockingham

RETIRED/RECALLED JUDGES

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J. Carlton Cole[8]	Hertford
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C. Preston Cornelius	Mooresville
Lindsay R. Davis	Greensboro
Richard L. Doughton	Sparta
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Larry G. Ford	Salisbury
James L. Gale	Greensboro
Walter Godwin	Tarboro
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Thomas D. Haigwood	Greenville
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John W. Smith	Raleigh
James C. Spencer	Burlington
Mary Ann Tally	Fayetteville
Anna Mills Wagoner[9]	Salisbury
Ralph A. Walker, Jr.	Raleigh
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

DISTRICT	JUDGES	ADDRESS
1	Edgar L. Barnes (Chief)	Manteo
	Amber Davis	Wanchese
	Eula E. Reid[1]	Elizabeth City
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	Meader W. Harris, III	Edenton
	Jennifer K. Bland[2]	Elizabeth City
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	Keith B. Mason	Washington
3A	G. Galen Braddy (Chief)	Grimesland
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	Lee F. Teague	Greenville
	Wendy S. Hazelton	Greenville
	Daniel H. Entzminger	Greenville
	Mario Perez[3]	Greenville
3B	L. Walter Mills (Chief)	New Bern
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	Andrew Wigmore	Beaufort
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4	Sarah Cowen Seaton (Chief)[5]	Jacksonville
	James L. Moore (Chief)[6]	Jacksonville
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	Christopher J. Welch	Jacksonville
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	Robert H. Gilmore	Clinton
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5	J. H. Corpening, II (Chief)	Wilmington
	James H. Faison, III	Wilmington
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	Melinda Haynie Crouch	Wrightsville Beach
	Jeffrey Evan Noecker	Wilmington
	Chad Hogston	Wilmington
	Robin W. Robinson	Wilmington
	Lindsey L. McKee	Wilmington
6	Brenda G. Branch (Chief)	Roanoke Rapids
	W. Turner Stephenson, III	Roanoke Rapids
	Teresa R. Freeman	Roanoke Rapids
	Vershenia B. Moody	Windsor
7	William Charles Farris (Chief)	Wilson
	Pell C. Cooper	Rocky Mount
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	Wayne S. Boyette	Tarboro
	Elizabeth Freshwater Smith	Wilson

DISTRICT	JUDGES	ADDRESS
	Joseph E. Brown, III	Wilson
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8	Elizabeth A. Heath (Chief)	Kinston
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	Ericka Y. James[8]	Goldsboro
	Curtis Stackhouse	Goldsboro
	Annette W. Turik	Kinston
	Jonathon Sergeant	Kinston
	Justin L. Minshew[9]	Goldsboro
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	Adam S. Keith	Louisburg
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	Benjamin S. Hunter	Louisburg
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	Kris D. Bailey	Cary
	Lori G. Christian	Raleigh
	Christine M. Walczyk	Raleigh
	Eric Craig Chasse	Raleigh
	Anna Elena Worley	Raleigh
	Margaret Eagles	Raleigh
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	Mark L. Stevens	Raleigh
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	Damion McCullers[12]	Raleigh
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	Resson O. Faircloth, II	Erwin
	Caron H. Stewart[14]	Smithfield
	Mary H. Wells	Smithfield
	Joy A. Jones	Smithfield
	Jerry F. Wood	Selma
	Jason H. Coats	Smithfield
	Terry F. Rose	Smithfield
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	David H. Hasty	Fayetteville
	Lou Oliveria	Fayetteville

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13	Scott Ussery (Chief)	Elizabethtown
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16A	Amanda L. Wilson (Chief)	Rockingham
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16B	Angelica C. McIntyre (Chief)	Lumberton
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	Dale G. Desse	Maxton
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	Marion M. Boone	Dobson
	Gretchen H. Kirkman[24]	Mt. Airy
	Thomas B. Langan	King
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	Angela B. Fox	Greensboro
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	Jonathan G. Kreider[26]	Greensboro
	Tonia A. Cutchin	Greensboro
	William B. Davis	Greensboro
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	Larry L. Archie	Greensboro
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	Kevin D. Smith	Greensboro
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19A	Christy E. Wilhelm (Chief)	Concord
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	Nathaniel E. Knust	Concord
	Juanita Boger-Allen	Concord
	Steve Grossman	Concord
	Michael G. Knox	Concord
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	Robert M. Wilkins	Asheboro
	Sarah N. Lanier	Asheboro
	Barron Thompson	Asheboro
19C	Charles E. Brown (Chief)	Salisbury
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	Kevin G. Eddinger	Salisbury
	Roy Marshall Bickett, Jr.	Salisbury
	James Randolph	Salisbury
19D	Donald W. Creed, Jr. (Chief)	Asheboro
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	Warren McSweeney	Carthage
	Steve Bibey	Carthage
20A	John R. Nance (Chief)	Albemarle
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	Phillip Cornett	Norwood
20B	Erin S. Hucks (Chief)[28]	Monroe
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	Joseph J. Williams	Monroe
	Stephen V. Higdon	Monroe
	Matthew B. Smith	Monroe
21	Lisa V. L. Menefee (Chief)[29]	Winston-Salem
	Victoria Lane Roemer (Chief)[30]	Winston-Salem
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	Denise S. Hartsfield	Winston-Salem
	Camille D. Banks-Payne	Winston-Salem
	David Sipprell	Winston-Salem
	Gordon A. Miller	Winston-Salem
	Theodore Kazakos	Winston-Salem
	Carrie F. Vickery	Winston-Salem
	George M. Cleland[31]	Winston-Salem

DISTRICT	JUDGES	ADDRESS
	Whit Davis	Winston-Salem
	Valene K. McMasters[32]	Winston-Salem
	Frederick B. Adams, II[33]	Winston-Salem
22A	L. Dale Graham (Chief)	Taylorsville
	Edward L. Hendrick, IV	Taylorsville
	Christine Underwood	Olin
	Carole A. Hicks	Statesville
	Bryan A. Corbett	Statesville
	Thomas R. Young	Statesville
22B	Jimmy L. Myers (Chief)	Advance
	Mary C. Paul	Thomasville
	Carlton Terry	Advance
	Carlos Jané	Lexington
	Rosalind Baker[34]	Lexington
	Jon Wade Myers[35]	Lexington
23	David V. Byrd (Chief)	Wilkesboro
	William Finley Brooks	Wilkesboro
	Robert Crumpton	Wilkesboro
	Donna L. Shumate	Sparta
24	Theodore Wright McEntire (Chief)	Spruce Pine
	Hal Gene Harrison	Spruce Pine
	Rebecca E. Eggers-Gryder	Boone
	Larry B. Leake	Marshall
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	Amy Sigmon Walker	Newton
	Robert A. Mullinax, Jr.	Newton
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	Clifton H. Smith	Hickory
	David W. Aycock	Hickory
	Wesley W. Barkley	Newton
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	Andrea C. Plyler	Hudson
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	Rickye McKoy-Mitchell	Charlotte
	Christy Townley Mann	Charlotte
	Paige B. McThenia	Charlotte
	Kimberly Y. Best-Staton[36]	Charlotte
	Jena P. Culler	Charlotte
	Tyyawdi M. Hands	Charlotte
	Sean Smith	Charlotte
	Matt Osman	Charlotte
	Gary Henderson	Charlotte
	Aretha V. Blake	Charlotte
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	Faith Fickling	Charlotte
	Roy H. Wiggins	Charlotte
	Karen D. McCallum	Charlotte
	Michael J. Standing	Charlotte
	Paulina N. Havelka	Charlotte
	Jonathon R. Marvel	Charlotte
	Reggie McKnight[37]	Charlotte
	C. Renee Little	Charlotte

DISTRICT	JUDGES	ADDRESS
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	Angela G. Hoyle	Belmont
	James A. Jackson	Gastonia
	Michael K. Lands	Gastonia
	Pennie M. Thrower	Gastonia
	Craig R. Collins	Gastonia
	Donald Rice	Cramerton
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	Justin K. Brackett	Shelby
	Micah J. Sanderson	Denver
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	Jamie Hodges	Lincolnton
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	Patricia Kaufmann Young	Asheville
	Julie M. Kepple	Asheville
	Andrea Dray	Asheville
	Ward D. Scott	Asheville
	Edwin D. Clontz	Candler
	Susan Marie Dotson-Smith	Asheville
29A	Robert K. Martelle (Chief)	Rutherfordton
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	Ellen Shelley	Marion
	Michelle McEntire	Graham
	Corey J. MacKinnon	Marion
29B	Thomas M. Brittain, Jr. (Chief)	Mills River
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	Kimberly Gasperson-Justice	Hendersonville
	Gene B. Johnson	Hendersonville
30	Roy T. Wijewickrama (Chief)	Waynesville
	Monica Hayes Leslie	Waynesville
	Donna Forga	Clyde
	Kristina L. Earwood	Waynesville
	Tessa S. Sellers	Murphy
	Kaleb Wingate	Waynesville

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Joseph A. Blick	Greenville
Jacqueline L. Brewer	Apex
Deborah P. Brown	Mooresville
Joseph M. Buckner	Chapel Hill
Susan R. Burch[39]	Greensboro
William M. Cameron	Richlands
William F. Fairley[40]	Southport
Thomas G. Foster, Jr.[41]	Pleasant Green
Nancy E. Gordon	Durham
Joyce A. Hamilton	Raleigh
Paul A. Hardison	Jacksonville

JUDGES	ADDRESS
P. Gwynnett Hilburn	Greenville
James T. Hill	Durham
Richlyn D. Holt	Waynesville
Shelly S. Holt	Wilmington
Jeanie Houston[42]	Yadkinville
F. Warren Hughes	Burnsville
Laurie L. Hutchins[43]	Winston-Salem
A. Elizabeth Keever	Fayetteville
David A. Leech	Greenville
Harold Paul McCoy, Jr.	Halifax
Lawrence McSwain	Greensboro
Regan A. Miller	Charlotte
Charles M. Neaves	Elkin
Thomas R.J. Newbern	Aulander
Ali B. Paksoy	Shelby
Dennis J. Redwing	Gastonia
Joseph E. Setzer, Jr.	Franklinton
William G. Stewart[44]	Wilson
Jerry Waddell	Bryson City
Fredrick B. Wilkins, Jr.	Reidsville
Larry J. Wilson[45]	Shelby

RETIRED/RECALLED JUDGES

Claude W. Allen, Jr.	Oxford
Sarah P. Bailey[46]	Rocky Mount
J. Henry Banks	Henderson
George A. Bedsworth	Winston-Salem
Robert M. Brady[47]	Lenoir
David B. Brantley[48]	Goldsboro
Samuel Cathey	Charlotte
Ronald L. Chapman	Charlotte
H. Thomas Church[49]	Statesville
Albert A. Corbett, Jr.	Smithfield
Linda Falls	Durham
Daniel Fredrick Finch	Oxford
Louis F. Foy, Jr.	Pollocksville
James R. Fullwood	Raleigh
Mark E. Galloway	Roxboro
Lloyd M. Gentry[50]	Pelham
Samuel G. Grimes	Washington
Jane V. Harper[51]	Charlotte
John H. Horne, Jr.	Laurinburg
William K. Hunter	High Point
Jerry A. Jolly	Tabor City
William C. Lawton	Raleigh
Jacquelyn L. Lee[52]	Four Oaks
William L. Long	Chapel Hill
James E. Martin	Greenville
Fritz Y. Mercer, Jr.	Summerfield
Nancy C. Phillips	Elizabethtown

JUDGES	ADDRESS
Anne B. Salisbury[53]	Cary
Jan H. Samet	Greensboro
J. Larry Senter	Raleigh
Margaret L. Sharpe	Greensboro
R. Dale Stubbs[54]	Clayton
Leonard W. Thagard	Clinton
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.

ATTORNEY GENERAL OF NORTH CAROLINA

Attorney General
JOSH STEIN

Chief of Staff
Seth Dearmin

First Assistant Attorney General and General Counsel
Swain Wood

Civil Bureau Chief
Reuben F. Young

Criminal Bureau Chief
Leslie Cooley Dismukes

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Laura Brewer

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Sripriya Narasimhan

Deputy General Counsel
Tiffany Lucas

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Bradford Sneeden

Senior Policy Counsel
Steve Mange

Solicitor General
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Senior Deputy Attorneys General

Kevin Anderson
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Amar Majmundar
Alana Danielle Marquis-Elder
Elizabeth L. McKay
Donna D. Smith

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CASES REPORTED

ORDERS

ORDERS

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

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

CROSS-REFERENCE TABLE[1]

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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

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CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

SHELLEY BANDY, PLAINTIFF AND THIRD-PARTY DEFENDANT

STATE OF NORTH CAROLINA, INTERVENOR–PLAINTIFF

v.

A PERFECT FIT FOR YOU, INC., MARGARET A. GIBSON, AND RONALD WAYNE GIBSON, DEFENDANTS

v.

A PERFECT FIT FOR YOU, INC., APPELLANT/INTERVENOR–DEFENDANT AND THIRD-PARTY PLAINTIFF

v.

MARGARET A. GIBSON, RONALD WAYNE GIBSON, R. WAYNE GIBSON, INC., AND RW & MA, LLC, CROSS-CLAIM AND THIRD-PARTY DEFENDANTS

No. 429A20

Filed 29 October 2021

1. Receivership—attorney fees—authorization—denial—impermissible basis

The trial court abused its discretion in denying a court-appointed receiver's request for authorization to pay an attorney's fees for work performed for the receivership, where the sole basis of the denial was the receiver's and the attorney's failure to obey the trial court's prior order concerning how invoices should be submitted to the court.

2. Attorneys—sanctions—notice and opportunity to be heard—evidentiary support—receivership

The trial court's order denying a court-appointed receiver's request for authorization to pay an attorney's fees for work done for the receivership, when construed as an order imposing sanctions

against the attorney for failure to obey a previous order dictating how invoices should be submitted to the court, was legally deficient where the trial court failed to provide notice and an opportunity to be heard to the attorney being sanctioned, and where the order's finding that the attorney had disobeyed the prior order was unsupported by the evidence.

3. Receivership—attorney fees—authorization—denial—sufficiency of findings

After the trial court denied a court-appointed receiver's request for authorization to pay outside counsel for certain work performed on behalf of the receivership, the trial court erred by denying the receiver's requests for authorization to pay outside counsel for work performed in prosecuting the appeal of that order, where the trial court's denial was based solely on the finding that the fees incurred for the appeal would diminish the receivership's assets.

Appeal pursuant to N.C.G.S. § 7A-27(a)(2) from final orders entered on 6 November 2019, 6 March 2020, 24 March 2020, 30 April 2020, 29 May 2020, 26 June 2020, 22 July 2020, 14 September 2020, and 5 October 2020 by Judge Gregory P. McGuire, Special Superior Court Judge for Complex Business Cases, after the case was designated a mandatory complex business case by the Chief Justice pursuant to N.C.G.S. § 7A-45.4(b). This matter was calendared for argument in the Supreme Court on 6 October 2021 but determined on the record and briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

Philip J. Mohr and Brent F. Powell for appellants A Perfect Fit For You, Inc., Douglas M. Goines as Receiver, and the Law Firm of Womble Bond Dickinson (US), LLP.

No brief filed for appellees.

EARLS, Justice.

¶ 1 The question before us is whether the Business Court erred in refusing to authorize the court-appointed receiver for the company A Perfect Fit For You, Inc. (A Perfect Fit) to pay fees to the law firm Womble Bond Dickinson (US), LLP (Womble) for services rendered by one of the firm's attorneys, Philip J. Mohr. The Business Court did not refuse to authorize the receiver to pay Womble's fees on the basis of any finding relating to the nature or quantity of the legal services Mr. Mohr provided. Instead,

the Business Court refused authorization solely on the basis of its conclusion that Mr. Mohr and the receiver had "flagrant[ly] disregard[ed] . . . the requirements imposed by" a previous court order which established the process the receiver and Womble were required to follow when seeking authorization for fee payments.

¶ 2 Appellants argue that the Business Court abused its discretion in refusing to authorize fee payments based upon an assessment of the receiver's and Mr. Mohr's purported lack of compliance with a court order. In the alternative, appellants argue that the Business Court's order should be construed as an order imposing sanctions against Womble without prior notice and an opportunity to be heard, in violation of Womble's due process rights under the Fourteenth Amendment to the United States Constitution and article I, section 19 of the North Carolina Constitution. In addition, appellants also challenge the Business Court's denial of the receiver's subsequent requests for authorization to pay fees for work performed by Womble on its appeal of the orders refusing to authorize fee payments for the services rendered by Mr. Mohr.

¶ 3 We hold that the Business Court's decision to deny authorization for the receiver to pay Womble fees incurred for Mr. Mohr's work was an abuse of discretion. In addition, the Business Court's order could not permissibly impose monetary sanctions on Womble because the record indicates that the party being sanctioned did not have prior notice and an opportunity to be heard. Finally, it was error to deny the receiver's request for permission to pay Womble's fee-litigation fees without making necessary findings specifically regarding the value to the receivership, or lack thereof, of the work which generated these fees. Accordingly, we reverse the Business Court's order refusing to authorize payment of fees to Womble for Mr. Mohr's work and the relevant Business Court orders denying the receiver's request to pay Womble's fee-litigation fees and remand this case to the Business Court for further proceedings not inconsistent with this opinion.

I. Appointment of the receiver and the services rendered by Womble.

¶ 4 In 2016, Shelley Bandy filed a complaint and ex parte request for appointment of a receiver over A Perfect Fit, a medical equipment company located in Carteret County. On the day the complaint was filed, Senior Resident Superior Court Judge Benjamin G. Alford entered a temporary restraining order and an order appointing M. Douglas Goines as the company's receiver. Judge Alford subsequently entered an order granting a preliminary injunction and appointing a receiver which provided that

Mr. Goines would "continue as receiver, vested with full powers granted under statute to take possession of and manage the business, books, and profits of the corporation . . . until further Order of this Court." The matter was later designated a mandatory complex business case and transferred to the North Carolina Business Court.

¶ 5 After taking over A Perfect Fit, the receiver became concerned that the company may have fraudulently billed nearly $12 million in claims to the Medicaid program. The receiver hired Womble to conduct a comprehensive audit of the company's records. The audit revealed that the company lacked sufficient funds to pay back the $12 million the receiver believed the company had fraudulently obtained. Shortly thereafter, the State of North Carolina filed an intervenor complaint against A Perfect Fit seeking to recoup the nearly $12 million in allegedly fraudulent claims. In November 2017, the United States Department of Justice issued a "target letter" advising the company that it was the target of a federal criminal investigation. One month later, the United States Attorney for the Eastern District of North Carolina and the North Carolina Attorney's General's Office filed a civil recoupment action in federal court. The Business Court entered a stay of its proceedings pending resolution of the federal matter.

¶ 6 Until the Business Court stayed proceedings, the receiver had paid Womble's fees as an ordinary business expense without seeking permission from the court. However, on 5 March 2018, the Business Court entered an order providing that the receiver would henceforth be required to "submit bills for its outside counsel fees to the court for review on a go-forward basis." Subsequently, counsel from Womble submitted invoices for work performed for the receiver on behalf of the receivership. The court authorized the receiver to pay the invoices and clarified that "[t]he Receiver, *and not outside counsel*, should submit the request for authorization to pay outside counsel's fees and costs." (Emphasis added.)

¶ 7 In September 2018, a hurricane caused extensive damage to A Perfect Fit's storefront, ultimately causing the business to cease operations. Around that same time, some of the named defendants indicated they were close to reaching a tentative settlement with the United States Department of Justice and the State of North Carolina.

¶ 8 In July 2019, the Business Court entered an order calendaring a status conference. At the conference, the Business Court asked Mr. Mohr why the court had not received any invoices for work performed by Womble since 2018. Mr. Mohr responded that no invoices had been

submitted because the parties were engaged in settlement negotiations which, if successful, would have eventually required court approval. Mr. Mohr also noted that, pursuant to the Business Court's previous order on attorney's fees, only the receiver was authorized to submit invoices to the court. The receiver separately explained that he had misunderstood what the order on attorney's fees required and had not intentionally failed to comply with the procedure it set out. During the conference, the Business Court "expressed its frustration that by not submitting the bills from counsel and the Receiver on a timely basis, that it placed a difficult burden on the Court to suddenly have to review several months of bills all at one time."

¶ 9 After the status conference, the Business Court entered an order lifting its earlier stay of proceedings. The receiver then submitted all of Womble's outstanding invoices, totaling approximately $70,600 in fees. On 6 November 2019, the court entered an order authorizing payment of all of Womble's fees except for those arising from work performed by Mr. Mohr, finding that "the time expended by the[ ] attorneys [other than Mr. Mohr] was reasonably necessary to the Receiver to fulfill his duties." With regard to the fees incurred for work performed by Mr. Mohr, the Business Court explained that it would "decline[ ] to approve payment of the $59,355.00 in legal fees incurred because of Mohr's work" due to "the Receiver's and Mohr's flagrant disregard for the requirements imposed by the Order on Attorneys' Fees [which] warrants a significant reduction in the fees, and that reduction should be borne by Mohr." Appellants filed a timely notice of appeal.

¶ 10 On 30 January 2020, as appellants' initial appeal was pending before this Court, the receiver submitted Womble's December 2019 invoice, which included a request to pay Womble's fees for work performed on the appeal of the order refusing to authorize the payment of fees for work performed by Mr. Mohr. The Business Court subsequently entered an order approving payment of all fees incurred upon the finding that "the requested attorneys' fees and expenses were incurred for services reasonably rendered by [Womble] to the Receiver for the benefit of Perfect Fit."

¶ 11 On 27 February 2020, the receiver again submitted an invoice to the court, again including a request for authorization to pay fees for work performed by Womble on the fee-recoupment appeal. This time, the Business Court refused to authorize payment of fees incurred by Womble relating to the appeal, concluding that

> the attorneys' fees related to the Appeal were not incurred for services reasonably rendered by

> [Womble] to the Receiver for the benefit of Perfect Fit. To the contrary, the Appeal, if successful, would benefit only [Womble] and would reduce the assets of Perfect Fit. The fees incurred for this work should be borne by [Womble], and not Perfect Fit. Accordingly, the Court, in its discretion, declines to approve payment of the $5,030.50 in legal fees incurred because of work done by [Womble] on the Appeal.

The Business Court acknowledged in its order "that it previously approved the payment of a small amount of [Womble's] fees for work it performed on the Appeal" but characterized this approval as resulting from an "inadvertent oversight." Appellants filed a timely notice of appeal of this order.

¶ 12 Thereafter, on 24 March 2020, 30 April 2020, 29 May 2020, 26 June 2020, 22 July 2020, 14 September 2020, and 5 October 2020, the Business Court entered orders denying the receiver's request for authorization to pay Womble for legal services performed by its attorneys relating to the fee-recoupment appeals. The present case encompasses the appellants' consolidated appeals from both the initial order refusing to authorize the receiver to pay Mr. Mohr's fees as well as all subsequent Business Court orders denying the receiver's requests to pay fees incurred for work performed by Womble in relation to the fee-recoupment appeals.[1]

II. Legal Analysis.

A. The Business Court's decision was an abuse of discretion because it was based on a legally extraneous factual finding.

¶ 13 **[1]** When an attorney performs legal services for a receiver in connection with the receiver's administration of a receivership, the attorney may recoup "reasonable and proper compensation for . . . services which require legal knowledge and skill and which were rendered to the receiver for the benefit of the receivership." *Lowder v. All Star Mills, Inc.*, 309 N.C. 695, 707 (1983). Still, "those employed by a receiver to assist in the administration of a receivership should understand that their compensation is subject to trial court review and approval." *Id.* A trial court is vested with the discretionary authority to, in the first instance, "fix[ ] the compensation, if any, to be allowed for the services of an

1. On 19 October 2020, this Court allowed appellants' motion to consolidate the various appeals and ordered that any subsequent notices of appeal related to any subsequent order denying Womble's fees related to work performed on the appeals should be filed as a supplement to the record on appeal or as an appendix to the briefs.

attorney for a receiver," and a trial court's decision on this issue is accorded deference on appeal. *King v. Premo & King, Inc.*, 258 N.C. 701, 712 (1963) (quoting 75 C.J.S. *Receivers* § 384a, at 1049). "[N]evertheless[, the trial court's] discretion must be properly exercised and not abused, and the matter is discretionary only in the sense that there are no fixed rules for determining the proper amount, and not in the sense that the court is at liberty to award more [or less] than fair and reasonable compensation." *Id.*

¶ 14 Put another way, a trial court's discretion to grant or deny a receiver's request for authorization to pay fees to retained outside counsel is generally limited to (1) determining whether outside counsel rendered "services which require legal knowledge and skill and which were rendered to the receiver for the benefit of the receivership" and (2) determining the amount which comprises "reasonable and proper compensation for" the services outside counsel performed. *Lowder*, 309 N.C. at 707. When a trial court enters an order granting or denying a request to pay fees which contains adequate factual findings supporting its conclusions on these two questions, the trial court's determination is "prima facie correct," *King*, 258 N.C. at 712, and will not be disturbed on appeal absent a showing that the court's decision was "manifestly unsupported by reason or . . . so arbitrary that it could not have been the result of a reasoned decision," *Briley v. Farabow*, 348 N.C. 537, 547 (1998).

¶ 15 In its order denying the receiver's request to pay Mr. Mohr's fees, the Business Court did not enter findings addressing either of these two questions. The Business Court did not find that Mr. Mohr had not rendered legal services to the receiver for the benefit of the receivership. Nor did the Business Court find that it would be reasonable and proper to provide Mr. Mohr with zero compensation for any such services he may have rendered. Instead, the Business Court denied the receiver's request for authorization solely based upon what the court perceived to be the receiver's and Mr. Mohr's failure to adhere to the requirements of its prior order dictating how invoices for attorney's fees should be submitted to the court. Absent any explanation as to how this finding related to the Business Court's assessment of the legal services Mr. Mohr provided to the receiver, or to what would comprise reasonable and proper compensation for those services, this is not a permissible justification for denying a receiver's request to authorize the payment of fees to outside counsel.

¶ 16 A trial court's decision is necessarily an abuse of discretion when it reaches a conclusion based solely upon findings of fact which are

irrelevant to the legal question the court is tasked with addressing. *See Da Silva v. WakeMed*, 375 N.C. 1, 5 n.2 (2020) ("[A]n error of law is an abuse of discretion."); *see also King*, 258 N.C. at 712 ("[An appellate court] will not alter or modify [an order authorizing or refusing to authorize payment of fees] unless *based on the wrong principle*, or clearly inadequate or excessive" (emphasis added)). In this case, by answering the question of whether Womble was entitled to recoup its fees for Mr. Mohr's work solely by reference to the receiver's and Mr. Mohr's purported failure to properly submit Womble's invoices for court approval—rather than by conducting an analysis of the legal work Mr. Mohr performed for the receiver—the Business Court's decision constituted an abuse of discretion.

B. The Business Court's order impermissibly imposed sanctions without providing notice and an opportunity to be heard to the party being sanctioned.

¶ 17 **[2]** Although the Business Court's assessment of Mr. Mohr's compliance with its prior order on attorney's fees cannot support the court's conclusion that Womble was not entitled to payment for Mr. Mohr's work, a trial court does possess the inherent authority to sanction parties and attorneys for misconduct during the course of litigation. Under appropriate circumstances, a trial court may impose sanctions, including monetary sanctions, either on motion of a party or sua sponte. *See*, *e.g.*, *State v. Defoe*, 364 N.C. 29, 34 (2010) ("[T]rial courts of this State have inherent authority to enforce procedural and administrative rules . . . ."); *see also Grubbs v. Grubbs*, No. COA16-129, 2017 WL 892564, at *14 (N.C. Ct. App. Mar. 7, 2017)) ("A judge's power to admonish counsel or parties can be either *sua sponte* or subject to a motion from a party, such as a show cause motion or Rule 11 sanctions."). Further, in certain cases, a trial court may sanction a party or attorney for failing to comply with a prior court order governing the party's or attorney's conduct during litigation. *See Daniels v. Montgomery Mut. Ins. Co.*, 320 N.C. 669, 674 (1987) (holding it to be "within the inherent power of the trial court to order plaintiff to pay defendant's reasonable costs including attorney's fees for failure to comply with a court order"); *see also Red Valve, Inc. v. Titan Valve, Inc.*, No. 18 CVS 1064, 2019 WL 4182521, at *17 (N.C. Super. Ct. Sept. 3, 2019) (ordering sanctions based upon a party's "failure to comply with the legal duties imposed by the [Business] Court's orders and applicable law, which individually and collectively reflect [the party's] utter disregard for the [court's] authority and the legal process"), *aff'd per curiam*, 376 N.C. 798, 2021-NCSC-17. Thus, we must also consider whether the Business Court's order can be sustained as an

order imposing monetary sanctions on Womble based upon Mr. Mohr's purported violation of the prior order which specified how the parties should submit Womble's invoices to the court.[2]

¶ 18 There are two legal requirements governing the trial court's entry of an order imposing sanctions against a party or attorney which are relevant in this case. First, before an order imposing sanctions against a party is entered, the party whose conduct is being sanctioned must be provided with notice of the basis upon which sanctions are being sought and an opportunity to be heard. *See Griffin v. Griffin*, 348 N.C. 278, 280 (1998) ("In order to pass constitutional muster, the person against whom sanctions are to be imposed must be advised in advance of the charges against him."); *see also Egelhof ex rel. Red Hat, Inc. v. Szulik*, 193 N.C. App. 612, 616 (2008) (explaining that "North Carolina has consistently required" that the party against whom sanctions have been sought be provided "an opportunity to be heard" before an order imposing sanctions is entered). Second, the trial court's conclusion that sanctions should be imposed against a party or attorney must be "supported by its findings of fact, and . . . the findings of fact [must be] supported by a sufficiency of the evidence." *Turner v. Duke Univ.*, 325 N.C. 152, 165 (1989). In light of these two requirements, we conclude that even if we were to treat the Business Court's order as an order imposing sanctions against Womble—and even if we were to assume that the Business Court possessed the authority to withhold authorization of payments to Womble as a penalty for Mr. Mohr's conduct—the challenged order still fails to meet the applicable legal requirements.

¶ 19 First, at no time did the Business Court provide Mr. Mohr or Womble with notice that it was considering imposing sanctions based upon Mr. Mohr's purported failure to comply with a court order. Although the Business Court did "express[ ] its frustration" regarding what it viewed to be the receiver's and Mr. Mohr's tardiness in submitting fee invoices, the court did not provide notice to the parties that it was considering imposing sanctions and did not provide "notice of the bases of the

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2. Not every court order denying a receiver's request to pay outside counsel's fees is immediately appealable. However, in this case, the Business Court's order can reasonably be construed as an order imposing monetary sanctions on Womble. In addition, the Business Court's order only denied the receiver's request to pay outside counsel's fees in part—the order also granted the receiver's request to pay fees incurred by counsel for work not performed by Mr. Mohr, thus dissipating the pool of assets of the receivership from which Womble could ultimately be paid. Therefore, under these circumstances, we conclude that this Court has jurisdiction over the challenged orders pursuant to N.C.G.S. § 7A-27(a)(2). *See Battery Park Bank v. W. Carolina Bank*, 126 N.C. 531 (1900).

sanctions." *Walsh v. Cornerstone Health Care, P.A.*, 265 N.C. App. 672, 678 (2019) (quoting *Egelhof v. Szulik*, 193 N.C. App. 612, 616 (2008)); *see also Griffin*, 348 N.C. at 280 ("The bases for the sanctions must be alleged."). Further, the fact that Mr. Mohr was present at a hearing where he disputed the Business Court's characterization of his conduct "without knowing in advance the sanctions which might be imposed does not show a proper notice was given." *Griffin*, 348 N.C. at 280. Allowing the Business Court's order to deprive Womble of fees its attorney earned without notice and an opportunity to be heard as a sanction for its attorney's conduct would violate Womble's due process rights as "guaranteed by the Fourteenth Amendment of the United States Constitution." *Id.* (quoting *McDonald's Corp. v. Dwyer*, 338 N.C. 445, 448 (1994)).

¶ 20 Second, the finding that Mr. Mohr "flagrant[ly] disregard[ed] . . . the requirements imposed by" the order on attorney's fees is unsupported by the record evidence. The order Mr. Mohr purportedly violated required *the receiver* to submit invoices to the court and specifically *forbade* "outside counsel" from "submit[ting] the request for authorization to pay outside counsel fees and costs." Although Mr. Mohr represented to the Business Court that he "would take the responsibility for not following up with the Receiver to make sure that the Receiver understood that he had to submit Womble's bills to the [Business] Court for approval," nothing in the record suggests that Mr. Mohr himself undertook any action which constituted a violation of the Business Court's order. Indeed, under the terms of the order he purportedly violated, Mr. Mohr was prohibited from doing precisely that which the Business Court apparently penalized him for not doing.

¶ 21 Whether construed as an order refusing to authorize the receiver to pay Womble's fees or as an order imposing sanctions on Womble for Mr. Mohr's failure to adhere to the requirements of a prior court order, the order is legally deficient. Accordingly, we reverse the order entered on 6 November 2019 and remand to the Business Court for further proceedings consistent with this opinion, including the entry of the findings and conclusions necessary to address the questions of (1) whether Mr. Mohr rendered "services which require legal knowledge and skill and which were rendered to the receiver for the benefit of the receivership" and (2) determining the amount which comprises "reasonable and proper compensation for" any such services Mr. Mohr performed. *Lowder*, 309 N.C. at 707.

C. The Business Court erred in denying the receiver's request to pay Womble's fees for its fee-recoupment litigation solely on the basis that authorizing payment would deplete A Perfect Fit's assets.

¶ 22 **[3]** Appellants also challenge the Business Court's orders refusing to authorize the receiver to pay fees incurred by Womble in the course of prosecuting this appeal. After the Business Court entered an order refusing to authorize the receiver to pay Womble's fees for work undertaken by Mr. Mohr, Womble and the receiver appealed. Subsequently, Womble's attorneys performed work on this appeal, which they billed to the receiver. In turn, the receiver requested authorization from the Business Court to pay Womble for this work. The first time the receiver sought authorization from the Business Court, it was granted. On every occasion thereafter, the Business Court denied authorization.

¶ 23 This Court has not previously considered whether outside counsel is entitled to compensation for work on litigation related to the fees originally incurred for legal services rendered to a receiver. However, as we have previously stated, outside counsel retained by a receiver is only entitled to "[r]easonable and proper compensation" for legal services "rendered to the receiver *for the benefit of the receivership*." *King*, 258 N.C. at 711 (emphasis added). The trial court's decision to grant or deny a fee payment request "must rest on facts showing actual benefits." *Id.* at 712 (quoting 75 C.J.S. *Receivers* § 384a, at 1049). Accordingly, a trial court's decision to grant or deny a receiver's request to pay outside counsel's fee-litigation fees requires a fact-intensive inquiry. It is not susceptible to a per se rule. We express no opinion on the propriety of authorizing payment of fee-litigation fees as a general matter. Instead, this question must be resolved in the first instance by the trial court on a case-by-case basis after an examination of the purpose and nature of the services rendered by outside counsel and their relationship to the interests of the receivership.

¶ 24 In this case, the sole factual finding supporting the Business Court's repeated denials of the receiver's requests for authorization to pay Womble's fee-litigation fees was the court's determination that these fees "were not incurred for services reasonably rendered by [Womble] to the Receiver for the benefit of Perfect Fit. To the contrary, the Appeal, if successful, would benefit only [Womble] and would reduce the assets of Perfect Fit." This finding rests on the erroneous presumption that legal services rendered in the furtherance of any outcome which would result in the diminution of a receivership's assets is necessarily contrary to the interests of the receivership.

¶ 25 As this Court has previously recognized, there may be circumstances under which an attorney's actions benefit a receivership even without contributing to an increase in the receivership's assets. *See*, *e.g.*, *In re Will of Ridge*, 302 N.C. 375, 384 (1981) (concluding that the trial court did not abuse its discretion in authorizing fee payments to outside counsel for services rendered in pursuit of an unsuccessful legal claim). Further, as sister courts have recognized in various contexts, applying a per se rule prohibiting attorneys from recouping fee-litigation fees could ultimately harm parties in need of able legal representation by reducing the pool of attorneys willing to provide vigorous representation on critically important matters. *See*, *e.g.*, *In re Estate of Trynin*, 49 Cal. 3d 868, 871 (1989) (explaining that an outright prohibition on awarding fee-litigation fees for representatives of decedents' estates would "ultimately be deleterious to [the estates] because attorneys would be reluctant to perform [necessary] services . . . if the compensation awarded for their services could be effectively diluted or dissipated by the expense of defending unjustified objections to their fee claims"); *see also In re Estate of Bockwoldt*, 814 N.W.2d 215, 223 (Iowa 2012) (declining to impose a categorical rule against authorizing fee-litigation fee payments).

¶ 26 In a case where an attorney retained by a receiver pursues litigation in an effort to recoup fees that prove to have been extravagant or unreasonable, it is doubtful the attorney will be able to demonstrate that his or her efforts were for the benefit of the receivership. However, in a case such as this one where there has been no finding that outside counsel's fees were unreasonable, the mere fact that authorizing the receiver to pay counsel's fee-litigation fees will diminish the receivership's assets does not itself establish that counsel's services were not rendered for the benefit of the receivership. Accordingly, we conclude that the Business Court's finding that payment of Womble's fee-litigation fees "would reduce the assets of Perfect Fit" is insufficient to support the conclusion that the services Womble rendered did not benefit A Perfect Fit. We remand to the Business Court for further proceedings not inconsistent with this opinion, including reconsideration of the applications for authorization to pay the fee-litigation fees under the proper legal standard.

III. Conclusion

¶ 27 When a receiver seeks authorization from a trial court to pay fees for services rendered by outside counsel, it is within the discretion of the trial court to determine what comprises "reasonable and proper compensation for . . . services which require legal knowledge and skill and which were rendered to the receiver for the benefit of the receiver-

ship." *Lowder*, 309 N.C. at 707. Nevertheless, in this case, the Business Court's decision constituted an abuse of discretion because it denied the receiver's request for authorization to pay fees to Womble for services performed by one of its attorneys based only upon the court's conclusion that the attorney failed to comply with procedural requirements imposed by a prior court order. Moreover, while a court generally possesses the authority to impose monetary sanctions on an attorney for failing to comply with a prior court order under appropriate circumstances, the Business Court could not impose sanctions against Mr. Mohr and Womble without providing them with notice of the basis for imposing sanctions and an opportunity to be heard, and not on the basis of conduct which the record demonstrates did not violate the order Mr. Mohr purportedly disregarded. In addition, the Business Court's conclusion that Womble's efforts to recoup its fees did not benefit A Perfect Fit cannot be sustained solely upon the finding that authorizing payment of the fees would diminish A Perfect Fit's assets.

¶ 28 Accordingly, we reverse the Business Court's order entered on 6 November 2019 in which the Business Court refused to authorize the receiver to pay fees for services rendered by Mr. Mohr and the Business Court's orders entered on 6 March 2020, 24 March 2020, 30 April 2020, 29 May 2020, 26 June 2020, 22 July 2020, 14 September 2020, and 5 October 2020 in which the Business Court refused to authorize the receiver to pay Womble's fee-litigation fees. We remand to the Business Court for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

COPELAND v. AMWARD HOMES OF N.C., INC.

[379 N.C. 14, 2021-NCSC-118]

WILLIAM EVERETT COPELAND IV AND CATHERINE ASHLEY F. COPELAND, CO-ADMINISTRATORS OF THE ESTATE OF WILLIAM EVERETT COPELAND
v.
AMWARD HOMES OF N.C., INC.; CRESCENT COMMUNITIES, LLC; AND CRESCENT HILLSBOROUGH, LLC

No. 56PA20

Filed 29 October 2021

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 269 N.C. App. 143, 837 S.E.2d 903 (2020), reversing and remanding an order of summary judgment entered on 7 May 2018 by Judge W. Osmond Smith III in Superior Court, Orange County. On 15 December 2020, the Supreme Court allowed plaintiffs' conditional petition for discretionary review. Heard in the Supreme Court on 1 September 2021.

Edwards Kirby, LLP, by William B. Bystrynski and David F. Kirby, and Holt Sherlin LLP, by C. Mark Holt and David L. Sherlin, for plaintiffs.

Cranfill Sumner LLP, by Steven A. Bader and F. Marshall Wall, for defendants Crescent Communities, LLC, and Crescent Hillsborough, LLC.

Pinto Coates Kyre & Bowers, PLLC, by Jon Ward, and Erwin Byrd for Amicus Curiae North Carolina Advocates for Justice.

Roberts & Stevens, PA, by David C. Hawisher, for Amicus Curiae North Carolina Association of Defense Attorneys.

PER CURIAM.

DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

IN RE B.R.L.

[379 N.C. 15, 2021-NCSC-119]

IN THE MATTER OF B.R.L.

No. 460A20

Filed 29 October 2021

1. Termination of Parental Rights—grounds for termination—willful abandonment—visitation requests by parent

In a private termination of parental rights action, the trial court's findings of fact did not support its conclusion that a mother willfully abandoned her son pursuant to N.C.G.S. § 7B-1111(a)(7), where the mother's actions—by requesting visits with her son multiple times, visiting with him twice, and filing a pro se motion for review seeking increased visitation—did not demonstrate an intent to forego all parental claims to her son.

2. Termination of Parental Rights—grounds for termination—neglect—likelihood of future neglect—no findings

In a private termination of parental rights action, the trial court's decision to terminate a mother's parental rights to her son on the ground of neglect (N.C.G.S. § 7B-1111(a)(1)) was not supported by any findings regarding the likelihood of repetition of neglect if the son were returned to his mother's care. The termination order was reversed and the matter remanded for further factual findings.

Justice BERGER dissenting.

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

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from orders entered on 14 August 2020 by Judge Marion M. Boone in District Court, Surry 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.

Edward Eldred for respondent-appellant mother.

J. Clark Fischer for petitioner-appellees.

No brief filed on behalf of the Guardian ad Litem.

EARLS, Justice.

¶ 1 Respondent, the mother of minor child B.R.L. (Billy)[1], appeals from a trial court order terminating her parental rights on the grounds of neglect and willful abandonment. Because we hold the trial court erred in concluding that grounds existed to terminate respondent's parental rights based on willful abandonment, and because we hold that the trial court failed to make any findings regarding the likelihood of future neglect, we reverse the trial court's order and remand the case to allow further factfinding on the ground of neglect.

I. Factual Background

¶ 2 This is a private termination matter involving respondent and Billy's paternal grandparents, Mr. and Mrs. H. (petitioners). On 4 May 2017, the Surry County Department of Social Services (DSS) filed a petition alleging Billy was a neglected juvenile. The petition alleged that on 5 January 2017, DSS received a report that Billy was living in an injurious environment due to domestic violence, substance abuse, and improper supervision. Both Billy and his older sister had tested positive for controlled substances at birth.

¶ 3 The petition also alleged that respondent and Billy's father engaged in criminal activity and drug use while the children were present. On 18 March 2017, the parents were arrested for shoplifting, and the children were placed into a temporary safety placement by the parents. On 23 March 2017, while responding to a call of possible drug activity at a Dollar General store, law enforcement officers found marijuana and methamphetamines, along with other drug paraphernalia, in a location accessible to the children in their parents' vehicle.

¶ 4 Following a 30 March 2017 Child and Family Team Meeting, the parents entered into a Family Services Agreement to address substance abuse, domestic violence, and parenting skills. DSS alleged that, at the time of the filing of the juvenile petition in May 2017, the parents had not begun working towards achieving the goals necessary to alleviate the risk of harm to Billy.

¶ 5 On 12 June 2017, the parents were arrested in South Carolina on drug charges. Respondent was incarcerated until 14 September 2017.

¶ 6 A hearing on the juvenile petition was held on 12 October 2017. On 31 October 2017, the trial court entered an order adjudicating Billy as a neglected juvenile. In a separate dispositional order entered that same day, the court awarded physical and legal custody of Billy to petitioners. The court found that respondent had acted inconsistently with her

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

constitutionally protected status as a parent and was not fit to have custody of Billy. Respondent was granted two hours of supervised visitation once per month to be supervised by petitioners, which could be expanded at the discretion of petitioners. The court changed the permanent plan to legal custody with a relative and determined the permanent plan had been achieved, relieved DSS of further involvement in the matter, and waived further hearings.

¶ 7 On 25 April 2018, respondent was arrested for a probation violation in Surry County, North Carolina. Respondent remained incarcerated from 25 April through 4 August 2018. On 21 August 2018, respondent requested a visit alone with Billy. Petitioners agreed to meet but denied respondent's request for an unsupervised visit. Respondent visited with Billy on 22 August 2018.

¶ 8 Respondent visited with Billy again on 18 September 2018. However, she arrived one hour late to her two-hour visit. On 29 September 2018, respondent was arrested for a probation violation. Respondent admitted the violation, and her previously suspended sentence was activated. Respondent remained incarcerated until 26 March 2019.

¶ 9 On 11 June 2019, respondent filed a motion for review in the case requesting more visitation with Billy. A hearing was scheduled on the motion for 18 July 2019. On 11 July 2019, petitioners filed a motion to continue, and the matter was continued to 17 September 2019 but ultimately not held before the termination hearing.

¶ 10 Also on 11 July 2019, petitioners filed a petition to terminate respondent's parental rights alleging the grounds of neglect, willful failure to make reasonable progress to correct the conditions that led to the child's removal from the home, and willful abandonment.[2] N.C.G.S. § 7B-1111(a)(1)–(2), and (7) (2019). Following hearings on 9 December 2019 and 5 June 2020, the trial court entered an order on 14 August 2020 concluding that grounds existed to terminate respondent's parental rights based on neglect and willful abandonment. In a separate dispositional order entered the same day, the court concluded that termination of respondent's parental rights was in Billy's best interests. Accordingly, the trial court terminated respondent's parental rights. Respondent appealed.

II. Willful Abandonment

¶ 11 **[1]** We review a trial court's adjudication that grounds exist to terminate parental rights "to determine whether the findings are supported

2. Petitioners also sought to terminate the parental rights of Billy's father; however, he did not appeal and is not a party to this appeal.

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). "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)).

¶ 12 Our statutes are clear that before terminating parental rights on the grounds of willful abandonment, a trial court must find that the petitioner has presented clear, cogent, and convincing evidence the 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). While the question of willful intent is a factual one for the trial court to decide based on the evidence presented, *In re B.C.B.*, 374 N.C. 32, 35 (2020), and while the trial court's factual determination is owed deference, it remains our responsibility as the reviewing court to examine whether the evidence in the case supports the trial court's findings and whether, as a legal matter, the trial court's factual findings support its conclusions of law, *In re Montgomery*, 311 N.C. 101, 111 (1984).

¶ 13 Here, the evidence does not support the trial court's finding that respondent willfully abandoned Billy during the relevant six-month period. "Abandonment implies conduct on the part of the parent which manifests a willful determination to forego all parental duties and relinquish all parental claims to the child." *In re Young*, 346 N.C. 244, 251 (1997) (quoting *In re Adoption of Searle*, 82 N.C. App. 273, 275 (1986)). "To find that a parent has willfully abandoned his or her child, the trial court must 'find evidence that the parent deliberately eschewed his or her parental responsibilities in their entirety.' " *In re A.L.L.*, 376 N.C. 99, 110 (2020) (quoting *In re E.B.*, 375 N.C. 310, 318 (2020)).[3] "[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 (2019) (quoting *In re D.E.M.*, 257 N.C. App. 618, 619 (2018)).

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3. The dissent relies principally on *In re Lunsford*, 359 N.C. 382, 388 (2005), for the proposition that infrequent visits do not foreclose a finding of willful abandonment. But *Lunsford* involved an entirely different statute governing when a parent can inherit from a deceased intestate child, where the trial court made findings of fact that the parent had "sporadic contacts with his daughter *over a seventeen-year period*." *Id.* (emphasis added). In the context of this case, our Court has made clear that willful abandonment requires findings of fact demonstrating the "purposeful, deliberative and manifest willful determination" to abandon all parental responsibilities. *In re A.G.D.*, 374 N.C. 317, 319 (2020).

¶ 14 The petition to terminate respondent's parental rights in Billy was filed on 11 July 2019. Thus, the determinative six-month period is 11 January 2019 to 11 July 2019. In arguing that the trial court erred by concluding that her parental rights in Billy were subject to termination based on willful abandonment, respondent contends that the evidence and findings of fact demonstrate she exercised her legal rights during the six-month determinative period in several ways, including by taking multiple proactive steps to maintain her relationship with Billy. Therefore, she maintains that her actions were "simply inconsistent with the determination that she had a 'purposeful, deliberative and manifest willful determination' to relinquish her parental claims to Billy[.]"

¶ 15 Respondent further challenges as not supported by the evidence finding of fact 77, which states that "[t]he dates and times set forth herein [in the termination order], regarding the mother contacting Petitioners to set up a visit or requesting a picture of the child, are the only dates and times since June 9, 2017 that the mother has contacted Petitioners to set up visits or contacted Petitioners." Respondent asserts Mrs. H. herself testified that respondent asked for a visit on 8 May 2019, a date which is not reflected in the trial court's findings. We agree.

¶ 16 Mrs. H. testified at the hearing that on 8 May 2019, respondent contacted her and asked if Billy could spend the night at respondent's mother's house. Mrs. H. testified that, in response, she told respondent that all visits must be supervised by petitioners. In finding of fact 66, the trial court found only that on 8 May 2019, "Petitioner informed [respondent] that any visits with the child will be supervised by Petitioners pursuant to the amended disposition order and the mother will have to give Petitioners prior notice in order to schedule visits around their work and other responsibilities." The trial court's finding makes no mention of respondent's initial contact with petitioners that prompted Mrs. H. to inform respondent that only petitioners could supervise visits. Thus, the trial court's finding that the dates and times set forth in the termination order are the only dates on which respondent contacted petitioners requesting a visit is not supported by the evidence. Therefore, we disregard finding of fact 77. *See In re J.M.*, 373 N.C. 352, 358 (2020).

¶ 17 The unchallenged findings demonstrate that respondent was incarcerated for over half of the determinative six-month period and was released on 25 March 2019. Following her release, respondent requested visits with Billy on 27 March, 8 May, and 6 June 2019, all during the relevant six-month period. The findings also show that respondent visited with Billy on 20 June 2019. Both Mrs. H. and respondent also testified that respondent visited with Billy in May 2019 at a museum with the

maternal grandmother.[4] Additionally, respondent filed a pro se motion for review to increase her visitation with Billy one month before the termination petition was filed. The motion was calendared for hearing in July 2019 but continued on petitioners' motion to the date of the termination hearing and never heard. Respondent's filing seeking to obtain increased visitation with Billy prior to the filing of the petition for termination of her parental rights further demonstrates that she did not intend to forego all parental duties and relinquish all parental claims to Billy during the relevant period and undermines the trial court's finding and conclusion that she willfully abandoned Billy.

¶ 18 Respondent's actions do not rise to the level of willful abandonment, considering her two visits, her attempts to schedule additional visits, and her filing of a motion to increase her visitation,[5] all of which occurred during the relevant time period before the petition for termination was filed. *See, e.g.*, *In re D.T.L.*, 219 N.C. App. 219, 222 (2012) (stating that the respondent-father's filing of a civil custody action "cannot support a conclusion that he had a willful determination to forego all parental duties and relinquish all parental claims to the juveniles"); *see also Bost v. Van Nortwic*k, 117 N.C. App. 1, 19 (1994) (finding no willful abandonment where the parent visited the children at Christmas, attended three soccer games, and indicated that he wanted to arrange support payments for the children and regular visitation), *appeal*

4. The dissent's argument that this Court acts improperly when it reviews evidence in the record is misplaced. In conducting the requisite analysis on appeal to determine whether a trial court's findings of fact are supported by clear, cogent, and convincing evidence, we necessarily examine the evidence in the record produced in the underlying proceedings. *See, e.g.*, *In re D.W.P.*, 373 N.C. 327, 328 (2020) (affirming order terminating respondent's parental rights "[a]fter careful consideration of . . . the record evidence[.]"); *In re M.S.E.*, 2021-NCSC-76, ¶ 13 (affirming order terminating respondent's parental rights "[a]fter careful review of the record[.]"); *In re A.M.L.*, 2021-NCSC-21, ¶ 18 (affirming trial court finding because "[t]he record supports this determination."). Further, while we agree with the dissent generally that "[f]indings of fact supported by competent evidence are binding on appeal even if evidence has been presented contradicting those findings," *In re N.B.*, 195 N.C. App. 113, 116 (2009), we are not bound to defer to factual findings that are unsupported by the record. *See, e.g.*, *In re S.M.*, 375 N.C. 673, 684 (2020) (disregarding findings of fact that are unsupported by clear, cogent, and convincing evidence).

5. We do not suggest that filing a motion to increase visitation, standing alone, necessarily defeats the assertion that a parent has willfully abandoned his or her child within the meaning of N.C.G.S. § 7B-1111(a)(7). We do hold that it is evidence to be considered in the willful abandonment analysis, especially given that a parent's failure to file such a motion is routinely found to be evidence supporting a finding that the willful abandonment ground has been proven. *See, e.g.*, *In re E.H.P.*, 372 N.C. 388, 394 (2019) (holding that father's failure to seek to modify temporary custody judgment is evidence of willful abandonment)*; In re A.L.S.*, 374 N.C. 515, 522 (2020) (holding that mother's failure to seek to modify a custody order is evidence of willful abandonment).

dismissed, 340 N.C. 109 (1995). Accordingly, we hold that the trial court's findings of fact do not support its conclusion that respondent's parental rights were subject to termination based on willful abandonment.

III. Neglect

¶ 19 **[2]** Respondent next argues that the trial court erred in concluding grounds existed to terminate her parental rights based on neglect. Respondent contends the trial court failed to make a finding regarding the likelihood of future neglect and that the evidence would not support such a finding had one been made.

¶ 20 A trial court may terminate parental rights when it concludes that the parent has neglected the juvenile within the meaning of N.C.G.S. § 7B-101. N.C.G.S. § 7B-1111(a)(1). A neglected juvenile is one "whose parent, guardian, custodian, or caretaker does not provide proper care, supervision, or discipline; or who has been abandoned; or who is not provided necessary medical care; or who is not provided necessary remedial care; or who lives in an environment injurious to the juvenile's welfare[.]" N.C.G.S. § 7B-101(15) (2019). In some 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, 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, in other instances, 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. at 80. 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).

¶ 21 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. In doing so, the trial court must consider evidence of changed circumstances that

may have occurred between the period of prior neglect and the time of the termination hearing. *In re Z.V.A.*, 373 N.C. 207, 212 (2019) (citing *Ballard*, 311 N.C. at 715).

¶ 22 In this case, respondent does not dispute that there was a finding of prior neglect. She contends, however, that the trial court order does not establish that it "recognized its duty to assess the likelihood of 'future neglect.' " Respondent argues that the trial court failed to make any determination of future neglect and that the court found and concluded only that respondent "ha[s] neglected the child[.]"

¶ 23 We agree that the trial court's adjudication order is devoid of any determination of a likelihood of future neglect should Billy be returned to respondent's care. Indeed, the trial court made very few findings of fact directly related to respondent's ability to care for Billy at the time of the termination hearing or regarding any change in respondent's circumstances since the initial neglect adjudication. The only factual finding that directly addresses respondent's current circumstances and her ability to care for Billy is finding of fact 88, in which the court found that respondent was not physically disabled but was unemployed, did not have a driver's license, did not have a vehicle, and did not have stable housing. Although the trial court found that Billy was previously adjudicated neglected, the court did not make any finding regarding the likelihood that Billy would be neglected if he was returned to respondent's care, a finding which was necessary to sustain the conclusion that respondent's parental rights were subject to termination based on neglect. *See In re K.C.T.*, 375 N.C. at 599 (stating that "the trial court's order lacks any findings whatsoever that address the possibility of repetition of neglect").

¶ 24 Thus, we hold that the trial court's findings are insufficient to support the termination of respondent's parental rights on the ground of neglect.[6] *See In re C.L.H.*, 2021-NCSC-1, ¶10 (holding that the trial court erred in concluding the neglect ground existed where the trial court did not find that there would be a likelihood of future neglect and the findings of fact did not support such a conclusion). However, there may be evidence in the record from which the trial court could have made additional findings of fact that might have been sufficient to support a finding of a likelihood of future neglect. We therefore reverse the trial court's order but

6. For the same reasons discussed above that grounds did not exist to terminate parental rights based on willful abandonment, the findings do not support a conclusion of neglect by abandonment.

remand the matter allowing for further factual findings on this ground. *See In re K.N.*, 373 N.C. 274, 284 (2020); *In re N.D.A.*, 373 N.C. at 84.

IV. Conclusion

¶ 25 In summary, we reverse the trial court's order terminating parental rights but remand the case for further proceedings not inconsistent with this opinion, including, if appropriate, the entry of a new order containing proper findings of fact and conclusions of law addressing whether grounds exist pursuant to N.C.G.S. § 7B-1111(a)(1) to support the termination of respondent's parental rights in Billy. The trial court may, in the exercise of its discretion, receive additional evidence on remand if it elects to do so.

REVERSED AND REMANDED.

Justice BERGER dissenting.

¶ 26 The trial court's order does not contain findings related to the likelihood of future neglect, and I concur in the result reached by the majority as to that ground. However, "a finding of only one ground is necessary to support [ ] termination of parental rights." *In re A.R.A.*, 373 N.C. 190, 194, 835 S.E.2d 417, 421 (2019). Because the trial court's findings of fact and conclusions of law support termination of respondent's parental rights on the basis of willful abandonment pursuant to N.C.G.S. § 7B-1111(a)(7), I respectfully dissent.

¶ 27 The question before this Court is not what findings of fact could have been included in the trial court's order terminating respondent's parental rights. Rather, the appropriate question is whether the findings of fact set forth in the trial court's order support its conclusions of law. Here, they most certainly do.

¶ 28 A trial court may terminate parental rights when "[t]he parent has willfully abandoned the juvenile for at least six consecutive months immediately preceding the filing of the petition or motion[.]" 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). This Court has held that a "parent relinquishes all parental claims and abandons the child" when that parent "withholds his presence, his love, his care, the opportunity to display filial affection, and wil[l]fully neglects to lend support and maintenance." *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).

¶ 29 The majority concedes that the question of willful intent "is a factual one for the trial court to decide based on the evidence presented" and that "a trial court's factual determination is owed deference[.]" Indeed, the weighing of evidence and the determination of what facts to find are based upon the unique insight of the trial court and should be given deference upon review. As this Court has stated, a trial court's "observation[s] of [] parties and [] witnesses provide[s] him with an opportunity to evaluate the situation that cannot be revealed on printed page." *In re Montgomery*, 311 N.C. 101, 112 (1984).

¶ 30 It is rudimentary that this Court is limited to determining whether a trial court's "*findings* support the conclusion of law." *In re G.B.*, 377 N.C. 106, 2021-NCSC-34, ¶ 11 (emphasis added). The majority here inappropriately "goes beyond this task and supplements the trial court's order with new factual findings." *Id.*, ¶ 37 (Earls, J., dissenting). In doing so, the majority here usurps this duty from the trial court and operates as its own fact finder.

¶ 31 The trial court heard testimony and assigned weight to the evidence. The trial judge then made detailed findings of fact related to the evidence presented. The majority's focus on the difference between two and three visitation requests by respondent ignores the reality that willful abandonment still exists here given the remaining findings of fact and conclusions of law set forth in the trial court's order.

¶ 32 The majority correctly notes that the relevant six-month period here is January 11, 2019, to July 11, 2019. However, the majority focuses solely on the latter portion of this period in its analysis. Despite the trial court finding as fact that respondent was incarcerated between January 2019 and March 2019, the majority fails to discuss respondent's actions, or lack thereof, during this time. The trial court determined from the evidence that respondent made no attempt to communicate with Billy while she was incarcerated, nor did she inquire about Billy's well-being. Instead, respondent's only effort to be a parent to Billy while she was incarcerated was prior to the determinative period when she sent Billy a book two weeks after his birthday in November 2018.

¶ 33 Our precedent is clear that respondent's incarceration does not absolve her of the parental duty she owed to Billy. *See In re L.M.M.*, 375 N.C. 346, 351, 847 S.E.2d 770, 775 (2020) (a "parent will not be excused from showing interest in [the] child's welfare by whatever means avail-

able," even if their "options for showing affection while incarcerated are greatly limited.") (emphasis omitted). The majority nonetheless overlooks respondent's failure to pursue any parental involvement with Billy during that time without explanation.

¶ 34 Moreover, respondent repeatedly failed to communicate with petitioners regarding visitations. Indeed, the trial court found that respondent only visited Billy once during the determinative period, and that was after she attempted to cancel that particular visitation. Respondent's absence from the juvenile's life was such that petitioner testified that Billy "[did not] know who [respondent was]."

¶ 35 Sporadic visitation requests and less frequent visits should not foreclose a finding of willful abandonment. Discussion on this point is noticeably absent from the majority opinion. This Court has held that neither continuous absence nor complete disregard for the child is required for willful abandonment. *In re Lunsford*, 359 N.C. 382, 390–91, 610 S.E.2d 366, 372 (2005) (affirming trial courts finding that only sporadic contacts between a parent and minor child over the child's life was sufficient to constitute willful abandonment.). Indeed, because "a child's physical and emotional needs are constant," a parent's responsibilities "cannot be discharged on an ad hoc, intermittent basis." *Id.*; *see also Pratt*, 257 N.C. at 503 (rejecting the respondent-father's contention that one visit during the determinative six-month period refuted a finding of willful abandonment.).

¶ 36 The majority concludes that "respondent's actions do not rise to the level of willful abandonment, considering her two visits, her attempts to schedule additional visits, and her filing of a motion to increase her visitation, all of which occurred during the relevant time period before the petition termination was filed." In support, the majority cites *In re D.T.L.* for the proposition that filing a civil custody action "cannot support a conclusion [of] a willful determination to forego all parental duties and relinquish all parental claims."[1] *In re D.T.L.*, 219 N.C. App. 219, 222, 722 S.E.2d 516, 518 (2012). However, the respondent-father in *D.T.L.* was prohibited by court order from seeing the minor children, markedly different than the situation before us. *Id.* The trial court's findings here indicate that no court order prevented respondent from participating more fully in her son's life; respondent alone did that. *See Lunsford*, 359

1. The majority also offers for support on this point *In re E.H.P.*, 372 N.C. 388, 394 (2019) and *In re A.L.S.*, 374 N.C. 515, 522 (2020). Similarly, these cases involve respondent-parents who were prohibited from visitation by court orders and are distinguishable from the situation before us.

N.C. at 388, 610 S.E.2d at 370 (finding that the "major factors" preventing respondent-father from involvement in child's life were respondent's own "alcoholism and immaturity.").

¶ 37 No prior holdings of our appellate courts establish that the filing of a motion will negate a finding of willful abandonment. Yet the majority's mischaracterization of *D.T.L.* here may open that issue up to argument. Language in our precedent certainly does not support the position that an abandoning parent can avoid termination simply by taking the administrative step of filing a motion with our courts. *See Pratt*, 257 N.C. at 502, 126 S.E.2d at 609 (finding that abandonment is not merely 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.").

¶ 38 Additionally, and again without mention or discussion by the majority, Billy had significant medical issues. Respondent neither attended, nor attempted to attend, any of Billy's medical appointments. Moreover, she failed to provide financial support for care-related costs over the course of almost two years. In fact, respondent failed to pay any child support at all. One is hard-pressed to imagine a more obvious example of a parent's refusal to "lend support and maintenance." *Pratt*, 257 N.C. at 501, 126 S.E.2d at 608 (1962). Despite the parties each dedicating four pages of their briefs to this topic, the majority does not offer a single sentence on this point.

¶ 39 In this case, the trial court heard the evidence presented at the hearing to terminate respondent's parental rights. The trial court made findings of fact based upon that evidence, and those findings of fact support the conclusion that termination of respondent's parental rights was appropriate. I would affirm the termination of respondent's parental rights on the basis of willful abandonment pursuant to N.C.G.S. § 7B-1111(a)(7).

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

IN RE O.E.M.

[379 N.C. 27, 2021-NCSC-120]

IN THE MATTER OF O.E.M.

No. 471A20

Filed 29 October 2021

Termination of Parental Rights—motion in the cause—verification requirement—N.C.G.S. § 7B-1104—subject matter jurisdiction

The trial court lacked subject matter jurisdiction to terminate a father's parental rights to his son based on an unverified motion in the cause, which was filed pursuant to N.C.G.S. § 7B-1102 after the child was adjudicated dependent and neglected, because the requirement in N.C.G.S. § 7B-1104 that a petition or motion to terminate parental rights "shall be verified" was jurisdictional in nature—a result compelled by *In re T.R.P.*, 360 N.C. 588 (2006), which interpreted the same language in N.C.G.S. § 7B-403(a) to be jurisdictional. Nothing in section 7B-1104 distinguished between a petition and a motion in the cause, the statutory requirements served important constitutional interests, and a trial court could not derive its jurisdiction in a termination matter from a prior abuse, neglect, or dependency proceeding.

Justice BARRINGER dissenting.

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

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from an order terminating respondent-father's parental rights entered on 21 August 2020 by Judge Kimberly Gasperson-Justice in District Court, Transylvania County. Heard in the Supreme Court on 30 August 2021.

No brief filed for petitioner-appellee Transylvania County Department of Social Services.

Womble Bond Dickinson (US) LLP, by Rebecca C. Fleishman and Beth Tyner Jones, for appellee Guardian ad Litem.

Richard Croutharmel for respondent-appellant father.

EARLS, Justice.

¶ 1 In this case, we decide whether the trial court had jurisdiction to enter an order terminating respondent-father's parental rights in his child, O.E.M. (Oscar).[1] The party seeking termination, the Transylvania County Department of Social Services (DSS), failed to verify its motion in the cause for termination as required under N.C.G.S. § 7B-1104 (2019). Nevertheless, after conducting a hearing, the trial court terminated respondent-father's parental rights.

¶ 2 The precise question before us is whether DSS' failure to verify its motion deprived the trial court of subject matter jurisdiction to conduct termination proceedings. In *In re T.R.P.*, this Court held that a party's failure to verify a petition alleging that a juvenile was neglected was a fatal jurisdictional defect. 360 N.C. 588, 588 (2006). Although *In re T.R.P.* addressed a party's failure to verify a juvenile petition, we hold today that the requirement contained in subsection 7B-1104 is also jurisdictional as applied to a motion in the cause for termination. Accordingly, we conclude that DSS' failure to verify its motion in the cause deprived the trial court of subject matter jurisdiction, and we vacate the order terminating respondent-father's parental rights in Oscar.

I. Analysis

¶ 3 DSS filed a properly verified juvenile petition alleging that Oscar was a neglected and dependent juvenile on 27 November 2018. The petition alleged that Oscar's mother[2] lacked "knowledge of normal child development" and had exhibited "delusional" behavior at the hospital after giving birth, and that respondent-father lacked "essential items for the juvenile" in his residence and had a pending criminal charge for assault on a female. Both parents admitted to frequent marijuana usage. The trial court entered an order granting DSS nonsecure custody of Oscar and, after a hearing, an order adjudicating Oscar to be a dependent and neglected juvenile. Both parents entered into case plans with DSS. Respondent-father complied with some elements of his case plan and did participate in occasional visits with Oscar, but he continued to use marijuana and engaged in further acts of domestic violence.

¶ 4 On 25 March 2020, DSS filed a motion in the cause seeking termination of both parents' parental rights on the grounds of neglect pursuant

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1. Oscar is a pseudonym which is used for ease of reading and to protect the identity of the juvenile.

2. Oscar's mother, who was ultimately deemed incompetent and provided with an appointed guardian ad litem to represent her at the termination hearing, did not appeal the order terminating her parental rights.

to N.C.G.S. § 7B-1111(a)(1), willful failure to make reasonable progress in correcting the conditions leading to Oscar's removal pursuant to N.C.G.S. § 7B-1111(a)(2), and incapability pursuant to N.C.G.S. § 7B-1111(a)(6). DSS failed to verify this motion.[3] On 3 June 2020, the trial court conducted a termination hearing. On 21 June 2020, the trial court entered an order concluding that DSS had proven all three grounds and terminating both parents' rights in Oscar.

¶ 5 On appeal, respondent-father does not challenge the findings of fact or conclusions of law contained in the termination order. Rather, the sole basis for respondent-father's appeal is DSS' failure to verify its motion for termination. It is undisputed that DSS did not verify its motion as required under N.C.G.S. § 7B-1104. The parties disagree as to what consequences arise from this omission. Because the parties' dispute centers on their competing interpretations of our holding in *In re T.R.P.*, we begin with a brief examination of our decision in that case.

A. In *In re T.R.P.*, this Court established that a statutory mandate to verify a juvenile petition before filing creates a jurisdictional requirement.

¶ 6 To initiate the process for terminating a parent's parental rights in a juvenile, the party seeking termination must file a petition or may, if the child is already the subject of a pending abuse, neglect, or dependency proceeding, file a motion in the cause for termination. N.C.G.S. § 7B-1104 (2019). Subsection 7B-1104 provides that "[t]he petition [for termination], or motion pursuant to [N.C.G.S. §] 7B-1102, *shall be verified* by the petitioner or movant." *Id.* (emphasis added). The significance of the phrase "shall be verified" is the sole issue before us in this case.

¶ 7 In *In re T.R.P.*, we examined an analogous statutory provision requiring that a petition alleging a juvenile to be abused, neglected, or dependent "shall be . . . verified before an official authorized to administer oaths." 360 N.C. at 591 (quoting N.C.G.S. § 7B-403(a) (2005)). In that case, the Wilkes County Department of Social Services (WCDSS) filed a

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3. We acknowledge that the motion was filed at the start of the COVID-19 pandemic and shortly after emergency orders establishing modified court procedures were entered. *See e.g.*, Order of the Chief Justice Emergency Directives 1 to 2 (13 March 2020), https://www.nccourts.gov/covid-19 (encouraging judges to grant additional accommodations to parties, witnesses, attorneys, and others with business before the courts who are at a high risk of severe illness from COVID-19."); *see also* Order of the Chief Justice Extending Court System Deadlines (19 March 2020), https://www.nccourts.gov/covid-19. However, there is nothing in the record to suggest that DSS' failure to verify its motion in the cause was in any way related to difficulties caused by the pandemic or any related accommodations, and counsel has made no argument or representation to that effect before this Court.

juvenile petition alleging that a juvenile was neglected, but the petition "was neither signed nor verified by the Director of WCDSS or any authorized representative thereof." *Id.* at 589. After the trial court entered an order granting legal custody of the juvenile to WCDSS and physical custody to the juvenile's father, the respondent-mother appealed, contending that "the trial court lacked jurisdiction to enter the challenged review order because the juvenile petition was not verified as required by law." *Id.* The Court of Appeals agreed with respondent-mother and vacated the custody order for lack of subject matter jurisdiction. *In re T.R.P.*, 173 N.C. App. 541 (2005). In a 4-3 decision, this Court affirmed the decision of the Court of Appeals.

¶ 8 The majority began by describing the General Assembly's expansive authority to "within constitutional limitations, [ ] fix and circumscribe the jurisdiction of the courts of this State." *In re T.R.P.*, 360 N.C. at 590 (quoting *Bullington v. Angel*, 220 N.C. 18, 20 (1941)). According to the majority, when the legislature requires a party "follow a certain procedure" to invoke the trial court's subject matter jurisdiction, a trial court lacks authority to act if the party fails to follow that procedure. *Id.* (quoting *Eudy v. Eudy*, 288 N.C. 71, 75 (1975)). Thus, the majority recognized the general rule that "for certain causes of action created by statute, the requirement that pleadings be signed and verified 'is not a matter of form, but substance, and a defect therein is jurisdictional.' " *Id.* (quoting *Martin v. Martin*, 130 N.C. 27, 28 (1902)). The majority found ample reason to extend this general rule to causes of action created by North Carolina's juvenile code.

¶ 9 According to the majority, "verification of a juvenile petition is no mere ministerial or procedural act." *Id.* at 591. Instead, the majority reasoned that in a proceeding which "frequently results in DSS' immediate interference with a respondent's constitutionally-protected right to parent his or her children," *id.* at 591–92, the verification requirement serves as a "vital link in the chain of proceedings carefully designed to protect children at risk on one hand while avoiding undue interference with family rights on the other," *id.* at 591. The majority emphasized "[t]he gravity of a decision to proceed and the potential consequences of filing a petition" alleging that a juvenile is abused, neglected, or dependent. *Id.* at 592. In light of

> the magnitude of the interests at stake in juvenile cases and the potentially devastating consequences of any errors, the General Assembly's requirement of a verified petition is a reasonable method of assuring that our courts exercise their power only when an

> identifiable government actor "vouches" for the validity of the allegations in such a freighted action.

Id. In addition, the majority noted that "for more than twenty years our Court of Appeals has consistently held that subject matter jurisdiction over juvenile actions is contingent upon verification of the petition," and that the General Assembly had never amended the relevant provisions of the juvenile code to modify or abrogate this holding. *Id.* at 594.

B. The verification requirement is jurisdictional with regard to both petitions and motions in the cause filed pursuant to N.C.G.S. § 7B-1102.

¶ 10 Although *In re T.R.P.* did not directly address the statute or circumstances at issue in this case, both parties agree *In re T.R.P.* is relevant. According to respondent-father, the exact same reasons which compelled this Court to hold that the verification requirement contained in N.C.G.S. § 7B-403(a) was jurisdictional should compel us to hold that the verification requirement contained in N.C.G.S. § 7B-1104—which mirrors subsection 7B-403(a) in providing that a petition or motion "shall be verified"—is also jurisdictional. The appellee, Oscar's guardian ad litem (GAL), acknowledges that under *In re T.R.P.*, the verification requirement contained in N.C.G.S. § 7B-1102 is jurisdictional with regards to a *petition* for termination of parental rights. Nonetheless, the GAL contends that *In re T.R.P.* does not control when, as in this case, the party seeking termination initiates termination proceedings with the filing of a *motion in the cause*. In this circumstance, the GAL argues, and the dissent agrees, that the verification requirement should be treated as a merely "procedural" requirement and that DSS' failure to verify its motion does not dispossess the trial court of the jurisdiction it obtained when DSS filed a properly verified petition to have Oscar adjudicated neglected and dependent. We reject this argument for three reasons.

1. The statutory text of N.C.G.S. § 7B-1104 does not support drawing any distinction between petitions and motions in the cause regarding application of the verification requirement.

¶ 11 The first problem with the GAL's argument is that it is entirely inconsistent with the text of N.C.G.S. § 7B-1104. "The goal of statutory interpretation is to determine the meaning that the legislature intended upon the statute's enactment." *State v. Rankin*, 371 N.C. 885, 889 (2018). "When the meaning is clear from the statute's plain language, we 'give effect to the plain meaning of the statute, and judicial construction of legislative intent is not required.' " *In re J.E.B.*, 376 N.C. 629, 2021-NCSC-2, ¶ 11

(quoting *Winkler v. N.C. State Bd. of Plumbing*, 374 N.C. 726, 730 (2020)). Because "[t]he intent of the General Assembly may be found first from the plain language of the statute," *Lenox, Inc. v. Tolson*, 353 N.C. 659, 664 (2001), we typically "begin[ ] with an examination of the plain words of the statute," *Correll v. Div. of Soc. Servs.*, 332 N.C. 141, 144 (1992).

¶ 12 In *In re T.R.P.*, we concluded that the phrase "shall be verified" supplied "unambiguous statutory language [which] mandates our holding" that the General Assembly intended the verification requirement to be jurisdictional. 360 N.C. at 594. The GAL does not ask us to overrule *In re T.R.P.*, and we see no cause to disturb a well-reasoned opinion which itself reaffirmed a longstanding legal principle. Thus, we are "bound by prior precedent[under] the doctrine of stare decisis." *Bacon v. Lee*, 353 N.C. 696, 712 (2001). Under *In re T.R.P.*, the phrase "shall be verified" as used in the various provisions of our juvenile code imposes a jurisdictional requirement. Therefore, the argument that the verification requirement is jurisdictional when applied to a "petition" but procedural when applied to a "motion pursuant to [N.C.G.S. §] 7B-1102" is irreconcilable with the text of N.C.G.S. § 7B-1104, unless *In re T.R.P.* is to be overruled.

¶ 13 The plain words of N.C.G.S. § 7B-1104 make clear that the General Assembly did not intend for the verification requirement to operate differently for a petition for termination as compared to a motion in the cause. The qualifier "shall be verified" modifies both "[t]he petition" and "motion pursuant to [N.C.G.S. §] 7B-1102" in the same way without drawing any distinction between the two. The phrase "shall be verified" does not mean one thing when it modifies "[t]he petition" and another when it modifies "motion." The General Assembly knows how to attach distinct legal consequences to different acts or omissions described in a single statute. *See, e.g.*, N.C.G.S. § 1A-1, Rule 41 (2019) (providing for different consequences when a claim is dismissed without prejudice by stipulation, dismissed without prejudice by the court, or dismissed involuntarily upon motion of the defendant). In this case, the General Assembly chose not to make any distinction.

¶ 14 The dissent advances various policy arguments in support of its contention that it is inappropriate to treat the words "shall be verified" as jurisdictional in this context. Notwithstanding the substance of those arguments, the dissent makes no effort to reconcile them with the text and structure of N.C.G.S. § 7B-1104 and the binding precedent we established in *In re T.R.P.* Absent any indication that the legislature intended the phrase "shall be verified" to have one meaning in one place

and an entirely different meaning in another place—and as long as *In re T.R.P.* remains good law—we are bound to give effect to the words the legislature chose to deploy. This Court is not at liberty to treat the verification requirement as jurisdictional in one context and procedural in another. Doing so would require us to "read into a statute language that simply is not there." *N.C. Farm Bureau Mut. Ins. Co., Inc. v. Lunsford*, 2021-NCSC-83, ¶ 22 (cleaned up).

2. Treating the verification requirement as jurisdictional in the context of a motion in the cause serves important constitutional interests.

¶ 15 The second problem with the GAL's argument is that it ignores the concerns which underpinned our holding in *In re T.R.P.* and which are no less present when a party initiates a termination proceeding via a motion in the cause. According to the GAL, it is appropriate to treat the verification requirement as jurisdictional when a termination petition is filed because, in that circumstance, the verification requirement "assur[es] that our courts exercise their power only when an identifiable government actor 'vouches' for the validity of the allegations in such a freighted action." However, the GAL contends that treating the verification requirement as jurisdictional is redundant when a motion for termination is filed regarding a child already subject to an abuse, neglect, or dependency proceeding because in this circumstance the movant "ha[s] already vouched for the validity of the allegations underlying the TPR motion."

¶ 16 As we recognized in *In re T.R.P.*, the legislature's choice to require a party to verify its filing before beginning a juvenile proceeding "is a minimally burdensome limitation on government action, designed to ensure that a [DSS] intervention that has the potential to disrupt family bonds is based upon valid and substantive allegations before the court's jurisdiction is invoked." 360 N.C. at 598. The same holds true for a termination proceeding regardless of the manner in which the proceeding begins.[4]

¶ 17 The allegations underlying a juvenile abuse, neglect, or dependency petition may overlap with, but are necessarily not the same as, the allegations underlying a motion for termination regarding the same juvenile.

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4. The dissent acknowledges that *In re T.R.P.* establishes that a failure to verify "pleadings and petitions *commencing* an action and their amendments thereto" is a jurisdictional defect, but suggests that a motion in the cause does something different. Yet, in this context, a motion in the cause for termination serves the exact same function as a petition for termination: It is what a party files in order to "commenc[e]" a termination proceeding, which is separate and distinct from an underlying juvenile proceeding.

A trial court's decision to terminate a parent's parental rights depends upon evidence of the parent's conduct subsequent to an initial adjudication of the juvenile as abused, neglected, or dependent. *See In re Ballard*, 311 N.C. 708, 716 (1984) ("The petitioner seeking termination bears the burden of showing by clear, cogent and convincing evidence that such neglect exists *at the time of the termination proceeding*.") (emphasis added); *see also In re B.O.A.*, 372 N.C. 372, 385 (2019) ("[T]he extent to which a parent has *reasonably complied with [a] 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.") (emphasis added).

¶ 18 For example, in this case, DSS' motion to terminate respondent-father's parental rights included new allegations that he had "made minimal efforts to complete his case plan," "failed to demonstrate benefit from services directed toward remediating the issues that led to the child being placed out of [his] home," "fail[ed] . . . to make regular inquiry with regard to the minor child and aggressively work toward reunification," and failed to "show[ ] the ability to refrain from the use of controlled substances and he is unlikely to quit the use of said substances even with substance abuse treatment and medications." None of this was known at the time the original juvenile petition was verified. The trial court could not have determined that grounds existed to terminate respondent-father's parental rights without entering findings of fact addressing these allegations. It is in no way redundant to require DSS to verify a new motion containing new allegations regarding a parent's conduct which could not possibly have been included in an initial abuse, neglect, or dependency petition.

¶ 19 Further, the stakes for a parent are considerably higher in a termination proceeding than in an abuse, neglect, or dependency proceeding. Although the latter carries with it "the potential to disrupt family bonds," *In re T.R.P.*, 360 N.C. at 598, the former may result in the permanent severance of the parent-child relationship and the extinguishment of an individual's constitutional status as a parent. Of course, the "paramount importance of the child's best interest and the need to place children in safe, permanent homes within a reasonable time" weigh heavily throughout every phase of a juvenile proceeding. *Id.* at 601 (quoting *In re R.T.W.*, 359 N.C. 539, 549–50 (2005)). Yet our juvenile code also incorporates the protections afforded to all parents under the Due Process Clause of the Fourteenth Amendment. *See, e.g.*, *In re E.B.*, 375 N.C. 310, 316 (2020).[5]

5. N.C.G.S. § 7B-1100(2) provides that one purpose of Article 11 is "to protect all juveniles from *the unnecessary severance of a relationship with biological or legal*

The General Assembly chose to mandate that DSS verify the allegations underpinning an action seeking to interfere with the parent-child relationship. This choice helps ensure that the State appropriately balances its interest in expeditiously achieving permanency for at-risk juveniles with its interest in not improperly abrogating North Carolinians' constitutionally guaranteed parental rights and not subjecting juveniles to the disruption occasioned by a termination proceeding except when necessary. These concerns are present regardless of whether DSS has filed a petition for termination or a motion in the cause.

3. A trial court's jurisdiction to conduct an abuse, neglect, or dependency proceeding does not automatically extend to a termination proceeding.

¶ 20 Finally, we reject the GAL's argument that DSS' filing of a properly verified petition alleging Oscar was neglected and dependent vests the trial court with jurisdiction to terminate respondent-father's parental rights. According to the GAL, we need not treat the verification requirement as jurisdictional when DSS files a motion for termination after previously filing a properly verified juvenile petition, because the trial court need not "re-establish" the jurisdiction it possessed over the underlying juvenile proceedings. This argument is inconsistent with our precedents and with the jurisdictional provisions of the juvenile code.

¶ 21 A petitioner or movant must satisfy distinct requirements to vest a trial court with jurisdiction to conduct a juvenile proceeding on the one hand and a termination proceeding on the other. *Compare* N.C.G.S. § 7B-200(b) (listing certain jurisdictional requirements for abuse, neglect, and dependency proceedings) *with* N.C.G.S. § 7B-1101 (listing certain jurisdictional requirements for termination proceedings).[6] A trial court's authority to adjudicate a child abused, neglected, or dependent does not confer upon the court the authority to terminate that child's parents' parental rights. *See In re A.L.L.*, 376 N.C. 99, 105 (2020) ("[A]

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parents." (Emphasis added.) The General Assembly did not intend for—and the constitution does not allow—courts to disregard the procedural protections afforded to biological and legal parents, which protect both the parents' constitutional parental rights and juveniles from "unnecessary severance" of the parent-child relationship.

6. In addition, there is a difference between the requirements for establishing the jurisdiction of a court to act as a general matter and the requirements for establishing that a court may exercise its jurisdiction in a particular case. Thus, as *In re T.R.P.* recognized, even if a trial court is generally a proper forum for adjudicating the status of a child because the requirements of N.C.G.S. § 7B-200(b) or N.C.G.S. § 7B-1101 have been met, a particular court may lack jurisdiction over a particular child because other jurisdictional prerequisites have not yet been satisfied.

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."). If a petitioner or movant fails to meet all of the requirements for establishing the court's jurisdiction over a termination proceeding, then the court lacks jurisdiction to conduct a termination proceeding, regardless of whether the trial court previously exercised jurisdiction over the child for other purposes.

¶ 22 The GAL's reliance on a recent decision from this Court in support of its argument on this issue is misplaced. In its brief, the GAL points to language from our decision in *In re K.S.D-F.*, where we stated that "[j]urisdiction arises upon the filing of 'a properly verified juvenile petition' and extends 'through all subsequent stages of the action.' " 375 N.C. 626, 633 (2020) (quoting *In re T.R.P.*, 360 N.C. at 593). The GAL contends that *In re K.S.D-F.* means that once a trial court obtains jurisdiction over a juvenile through the filing of a properly verified juvenile petition, the trial court's jurisdiction continues up through and including a termination proceeding. However, the GAL's interpretation of this language misconstrues both *In re K.S.D-F.* and the provisions of the juvenile code we addressed in that case.

¶ 23 In *In re K.S.D-F.*, the respondent-mother asserted that the trial court lacked jurisdiction to terminate her parental rights because DSS did not lawfully have custody of the children at the time it filed its motion for termination. *Id.* at 632. If the respondent-mother's assertion was correct, DSS would have lacked standing to file a termination motion under N.C.G.S. § 7B-1103(a)(3) (2019), and the trial court would have lacked jurisdiction to conduct termination proceedings. *Id.* According to the respondent-mother, when the trial court had, in an earlier proceeding, "determined that a permanent plan for custody and guardianship with [foster parents] was in the children's best interests and awarded custody and guardianship to the [foster parents]," the trial court's jurisdiction over the children ceased. *Id.* at 633. Thus, the respondent-mother claimed that the trial court lacked the legal authority to enter a subsequent order placing the children back in DSS custody and by extension that DSS lacked standing to file a termination motion.

¶ 24 We rejected the respondent-mother's argument, noting that when the trial court entered an order placing the children with foster parents, "[t]he trial court specifically retained jurisdiction and provided that further hearings could be brought upon a motion by any party." *Id.* Therefore, when DSS subsequently filed a motion to reopen proceed-

ings, the trial court did possess the authority to place the children in DSS custody. *Id.* at 633–34. Because the trial court did have jurisdiction to enter the nonsecure custody order, DSS legally had custody of the juveniles, such that DSS "had standing to file the motion to terminate respondents' parental rights" which vested "the trial court [with] jurisdiction over the termination action." *Id.* at 635.

¶ 25 Nothing in *In re K.S.D-F.* suggested that the trial court's jurisdiction over an underlying abuse, neglect, or dependency proceeding was sufficient, standing alone, to establish the court's jurisdiction over a subsequent termination proceeding. Indeed, our reasoning in *In re K.S.D-F.* is predicated on the assumption that jurisdiction does not continue from the underlying juvenile proceeding to a subsequent termination proceeding. If the GAL's theory is correct, there would have been no reason for this Court to reach the question of whether DSS had standing to file a motion to terminate the respondent-mother's parental rights in *In re K.S.D-F.* because the trial court indisputably had jurisdiction to conduct the underlying juvenile proceedings after DSS filed a properly verified petition alleging the juvenile was neglected. We would have had no reason to decide whether there existed an independent basis for the trial court's authority to enter an order terminating the respondent-mother's parental rights.

¶ 26 There is nothing anomalous about requiring a party to establish that the trial court possessed jurisdiction to conduct a termination proceeding even when the court previously had jurisdiction to conduct a juvenile proceeding—it is simply what our juvenile code requires. *See, e.g.*, *In re J.M.*, 797 S.E.2d 305, 307 (N.C. Ct. App. 2016) (holding that the Durham County District Court "lacked jurisdiction to hear the termination of parental rights petition" even though the court previously exercised jurisdiction in an underlying juvenile proceeding, because "none of the[independent jurisdictional] requirements were met"). Accordingly, we reject the GAL's argument that the trial court in this case possessed subject matter jurisdiction to terminate respondent-father's parental rights in Oscar notwithstanding DSS' failure to verify its motion for termination.

II. Conclusion

¶ 27 In all significant respects, this case is indistinguishable from our decision in *In re T.R.P.* As in *In re T.R.P.*, the party which sought a judicial order addressing the status of a juvenile failed to comply with a requirement that the filing be verified contained in a provision of North Carolina's juvenile code. As in *In re T.R.P.*, the trial court entered an

order notwithstanding this deficiency. The only salient difference is that in this case, DSS filed a motion rather than a petition. However, this difference is not legally significant. Subsection 7B-1104 draws no distinction between the verification requirement as it applies to petitions and motions in the cause filed pursuant to N.C.G.S. § 7B-1102. The interests the verification requirement serve do not vary with the manner in which a termination proceeding is initiated. A trial court's jurisdiction to conduct an underlying abuse, neglect, or dependency proceeding does not automatically provide the court with jurisdiction to conduct a termination proceeding.

¶ 28 Accordingly, the verification requirement contained in N.C.G.S. § 7B-1104 is jurisdictional as applied to both a petition for termination and a motion for termination. Because DSS failed to verify its motion for termination of respondent's parental rights, "the trial court ha[d] no power to act." *In re T.R.P.*, 360 N.C. at 598. Therefore, we vacate the trial court order terminating respondent's parental rights in Oscar and remand for further proceedings not inconsistent with this opinion.

VACATED.

Justice BARRINGER, dissenting.

¶ 29

> Ending a parent-child relationship is a decision the court must weigh carefully, mindful of constitutional protections and statutory safeguards. Those safeguards, however, are to be applied practically so that the best interests of the child—the polar star in controversies over child neglect and custody—are the paramount concern.

In re L.M.T., 367 N.C. 165, 173 (2013); *see also In re Montgomery*, 311 N.C. 101, 109 (1984).

¶ 30 Here, not only does the majority's result disregard this paramount concern, but the majority does so by ignoring the legislature's stated policy goals with respect to termination of parental rights, the plain language of the relevant statutes, and the statutory scheme of the Juvenile Code. Accordingly, I respectfully dissent.

¶ 31 In this matter, the Transylvania County Department of Social Services (DSS) filed a verified juvenile petition alleging the neglect and dependency of Oscar on 27 November 2017. Subsequently, the trial court adjudicated Oscar a neglected and dependent juvenile. Then, in

the same cause, DSS filed a motion for termination of parental rights on 25 March 2020 pursuant to N.C.G.S. § 7B-1102(a). However, the motion was not verified. After a hearing on the termination-of-parental-rights motion, the trial court terminated respondent's parental rights by order entered on 21 August 2020.

¶ 32 No one complained of the lack of verification at any time before the trial court. Respondent's sole basis for his appeal of the termination-of-parental-rights order is that "[t]he trial court lacked subject matter jurisdiction to terminate [respondent's] parental rights because [DSS] failed to verify its termination[-]of[-]parental[-]rights motion in the cause as required by N.C.[G.S.] § 7B-1104."

¶ 33 The legislature has expressly "declare[d] as a matter of legislative policy with respect to termination of parental rights" four purposes of Article 11 of the Juvenile Code in N.C.G.S. § 7B-1100. N.C.G.S. § 7B-1100 (2019). As relevant to this matter, the legislature established that the "general purpose of [Article 11] is to provide judicial procedures for terminating the legal relationship between a juvenile and the juvenile's biological or legal parents when the parents have demonstrated that they will not provide the degree of care which promotes the healthy and orderly physical and emotional well-being of the juvenile," N.C.G.S. § 7B-1100(1), and "the further purpose of [Article 11 is] to recognize the necessity for any juvenile to have a permanent plan of care at the earliest possible age, while at the same time recognizing the need to protect all juveniles from the unnecessary severance of a relationship with biological or legal parents," N.C.G.S. § 7B-1100(2).

¶ 34 Therefore, the clear statutory language instructs us to interpret the statutes as setting forth judicial procedures—not subject matter jurisdictional requirements. To comply with this statutory mandate, we must construe statutes in Article 11 to set forth judicial procedures unless the plain language of the statute indicates it is a jurisdictional requirement.

¶ 35 Additionally, in almost all situations, making a judicial procedure a requirement for the trial court's subject matter jurisdiction directly contradicts the text of Article 11: that juveniles should receive a permanent plan of care at the earliest possible age. *See* N.C.G.S. § 7B-1100(2). Challenges to jurisdiction, unlike judicial procedures, can be raised for the first time on appeal and, if successful, render the underlying proceeding void ab initio. *In re T.R.P.*, 360 N.C. 588, 590, 595 (2006).

¶ 36 In matters arising under the Juvenile Code, the legislature by enacting statutes has established the trial court's subject matter jurisdiction. *In re K.J.L.*, 363 N.C. 343, 345 (2009). It is the legislature—not the

courts—that "can, within the bounds of the Constitution, set whatever limits it wishes on the possession or exercise of that jurisdiction." *In re J.M.*, 377 N.C. 298, 2021-NCSC-48, ¶ 15 (quoting *In re M.I.W.*, 365 N.C. 374, 377 (2012)). As enacted by the legislature, the trial court "has exclusive, original jurisdiction over any case involving a juvenile who is alleged to be abused, neglected, or dependent," N.C.G.S. § 7B-200(a) (2019), and once obtained, "jurisdiction shall continue until terminated by order of the [trial] court or until the juvenile reaches the age of [eighteen] years or is otherwise emancipated, whichever occurs first," N.C.G.S. § 7B-201(a) (2019). Thus, "[w]hen the district court is exercising jurisdiction over a juvenile and the juvenile's parent in an abuse, neglect, or dependency proceeding, a person or agency specified in [N.C.]G.S. [§] 7B-1103(a) may file in that proceeding a motion for termination of the parent's rights in relation to the juvenile." N.C.G.S. § 7B-1102(a) (2019).

¶ 37 As recognized by this Court in *In re T.R.P.*, "the provisions in Chapter 7B establish one continuous juvenile case with several interrelated stages, not a series of discrete proceedings." 360 N.C. at 593. Therefore, as it relates to verification, "[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*." *Id.* (emphasis added); *see also In re K.S.D.-F.*, 375 N.C. 626, 633 (2020) ("Jurisdiction arises upon the filing of a properly verified juvenile petition and extends through all subsequent stages of the action." (cleaned up)).

¶ 38 Further, the legislature has limited the trial court's jurisdiction as to termination of parental rights by enacting N.C.G.S. § 7B-1101, which states as follows:

> § 7B-1101 Jurisdiction
>
> The court shall have exclusive original jurisdiction to hear and determine any petition or motion relating to termination of parental rights to any juvenile who resides in, is found in, or is in the legal or actual custody of a county department of social services or licensed child-placing agency in the district at the time of filing of the petition or motion. The court shall have jurisdiction to terminate the parental rights of any parent irrespective of the age of the parent. Provided, that before exercising jurisdiction under this Article, the court shall find that it has jurisdiction to make a child-custody determination under the provisions of G.S. 50A-201, 50A-203, or 50A-204. The

> court shall have jurisdiction to terminate the parental rights of any parent irrespective of the state of residence of the parent. Provided, that before exercising jurisdiction under this Article regarding the parental rights of a nonresident parent, the court shall find that it has jurisdiction to make a child-custody determination under the provisions of G.S. 50A-201 or G.S. 50A-203, without regard to G.S. 50A-204 and that process was served on the nonresident parent pursuant to G.S. 7B-1106. Provided, further, that the clerk of superior court shall have jurisdiction for adoptions under Chapter 48 of the General Statutes.

N.C.G.S. § 7B-1101 (2019); *see also In re A.L.L.*, 376 N.C. 99, 105 (2020) ("[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.").

¶ 39 Thus, the Juvenile Code, its articles, and statutes, as previously recognized by this Court, all establish that jurisdiction in this matter is vested with the trial court upon the filing of the juvenile *petition* and continues uninterrupted until the juvenile's majority, emancipation, or a trial court's order even for termination of parental rights if the legislature's enactment regarding jurisdiction, N.C.G.S. § 7B-1100, is satisfied.

¶ 40 Here, DSS failed to verify a motion for termination of parental rights that it filed in a pending juvenile abuse, neglect, and dependency proceeding. But DSS had already verified the juvenile *petition* underlying the action, and there is no contention that the trial court lacked jurisdiction under N.C.G.S. § 7B-1101. While this Court has held that the verification requirement for a juvenile *petition* alleging abuse, neglect, or dependency pursuant to N.C.G.S § 7B-403(a) was jurisdictional in *In re T.R.P.*, 360 N.C. at 588, this appeal involves an unverified *motion* filed pursuant to N.C.G.S. § 7B-1102(a) in the abuse, neglect, or dependency cause. Thus, to the extent, our prior caselaw has held that pleadings and petitions commencing an action and their amendments thereto are jurisdictional defects "for certain causes of action created by statute," *id.* (citing *Martin v. Martin*, 130 N.C. 19, 20 (1902)[1] (discussing an unverified amendment to a complaint in a divorce action)), they do not resolve the issue before this Court now.

1. Notably, as the dissent in *In re T.R.P.* observed, *Martin* was addressed by this Court prior to the adoption of notice pleading. *In re T.R.P.*, 360 N.C. 588, 606 (2006) (Newby, J., dissenting).

¶ 41 Further, nothing about the statutory language or statutory scheme supports the view that verification of a motion for termination of parental rights in a pending juvenile case is required for the trial court's subject matter jurisdiction. "In construing statutory language, 'it is our duty to give effect to the words actually used in a statute and not to delete words used or to insert words not used.' " *In re B.O.A.*, 372 N.C. 372, 380 (2019) (quoting *Lunsford v. Mills*, 367 N.C. 618, 623 (2014)). Here, N.C.G.S. § 7B-1104 is entitled "Petition or motion" and makes no reference to jurisdiction. N.C.G.S. § 7B-1104 (2019). Section 7B-1101, previously quoted herein and entitled "Jurisdiction," which addresses jurisdiction for termination-of-parental-rights motions, also contains no cross-reference to N.C.G.S. § 7B-1104 or reference to a verification requirement. N.C.G.S. § 7B-1101. This Court has previously recognized that in these circumstances—when the legislature neither mentions jurisdiction in the statute at issue nor references it in the statute entitled "jurisdiction"—the legislature did not intend such statute's requirements "to function as prerequisites for [trial] court jurisdiction." *In re D.S.*, 364 N.C. 184, 193–94 (2010).[2]

¶ 42 Finally, deeming verification of a motion in the cause a jurisdictional requirement in an abuse, neglect, or dependency proceeding cannot be justified. This Court addressed in *In re T.R.P.* the verification requirement for initiating "[a] juvenile abuse, neglect, or dependency action under Chapter 7B [that] may be based on an anonymous report." 360 N.C. at 591. Unlike a juvenile petition, the filing of a termination-of-parental-rights motion in a juvenile abuse, neglect, or dependency proceeding is frequently based on the underlying verified juvenile abuse, neglect, or dependency petition and subsequent conduct and course of dealings between the parents, DSS, the juvenile, and the guardian ad litem, much of which the trial court is privy to from hearings. Section 7B-906.1(a) states as follows:

> The [trial] court shall conduct a review hearing within 90 days from the date of the initial dispositional

2. While the majority acknowledges that *In re T.R.P.* did not address the statute and issue before this Court in this matter, it nevertheless relies solely on that opinion, deeming itself bound, while ignoring this Court's other precedent like *In re D.S.* and other precedent on statutory construction. Such precedent cannot be reconciled with a reading that this Court's construction in *In re T.R.P.* of N.C.G.S. § 7B-403(a) (2005) ("[T]he petition shall be drawn by the [DSS] director, verified before an official authorized to administer oaths, and filed by the clerk, recording the date of filing.") mandates that anytime something "shall be verified," it is a jurisdictional requirement. *In re T.R.P.*, 360 N.C. at 591. In fact, *In re T.R.P.* acknowledges the contrary: "[F]or *certain* causes of action created by statute, the requirement that pleadings be signed and verified is not a matter of form, but substance, and a defect therein is jurisdictional." *Id.* (cleaned up) (emphasis added).

> hearing held pursuant to [N.C.]G.S. [§] 7B-901. Review hearings shall be held at least every six months thereafter. Within [twelve] months of the date of the initial order removing custody, there shall be a review hearing designated as a permanency planning hearing. Review hearings after the initial permanency planning hearing shall be designated as permanency planning hearings. Permanency planning hearings shall be held at least every six months thereafter or earlier as set by the court to review the progress made in finalizing the permanent plan for the juvenile, or if necessary, to make a new permanent plan for the juvenile.

N.C.G.S. § 7B-906.1(a) (2019).

¶ 43 Further, there is no change in the status, physically or legally, between the parent and the juvenile upon the filing of a motion in the cause to terminate parental rights. In other words, it does not "result[ ] in DSS'[s] immediate interference with a respondent's constitutionally-protected right to parent his or her children." *In re T.R.P.*, 360 N.C. at 591–92. Instead, the relationship between the parent and the juvenile does not change until an adjudicatory hearing—where the movant has the burden of proof; the rules of evidence for civil actions apply; and the trial court must take evidence, find facts based on clear, cogent, and convincing evidence, adjudicate the existence of grounds for termination pursuant to N.C.G.S. § 7B-1111, and reduce to writing its findings and conclusions—and a dispositional hearing to determine "whether terminating the parent's rights is in the juvenile's best interest." N.C.G.S. § 7B-1110(a) (2019); *see* N.C.G.S. §§ 7B-1109 to -1110. Thus, while the gravity of filing a termination-of-parental-rights motion is undeniable, there are no identifiable material consequences to the parent or the juvenile from the lack of verification of a motion for termination of parental rights in an abuse, neglect, or dependency proceeding over which the trial court is exercising jurisdiction over both a juvenile and the juvenile's parent pursuant to a verified petition. Thus, unlike this Court in *In re T.R.P.*, the majority reads into a legislative enactment, devoid of reference to jurisdiction, an intent to make a jurisdictional requirement without substantiating reasons. *See In re T.R.P.*, 360 N.C. at 591.

¶ 44 In conclusion, the verification requirement set forth in N.C.G.S. § 7B-1104 for a motion for termination of parental rights filed in an abuse, neglect, or dependency proceeding where the trial court has

subject matter jurisdiction pursuant to a verified abuse, neglect, or dependency juvenile petition cannot and should not be deemed jurisdictional by this Court. Instead, it is a procedural requirement.

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

IN THE MATTER OF Z.M.T.

No. 416A20

Filed 29 October 2021

Termination of Parental Rights—ineffective assistance of counsel—failure to show prejudice

On appeal from an order terminating a mother's parental rights, the mother's ineffective assistance of counsel claim lacked merit because, even assuming her counsel's performance was deficient (where counsel may have failed to ensure the mother received notice of the date and time of the termination hearing, and where counsel did not cross-examine the department of social services' witnesses, offer any witnesses on the mother's behalf, or offer a closing argument at the termination hearing), the mother failed to demonstrate that she was prejudiced as a result. The mother neither challenged the trial court's findings and conclusions of law in the termination order nor argued on appeal that, but for counsel's deficient performance, there was a reasonable probability of a different result.

Justice EARLS dissenting.

On writ of certiorari pursuant to N.C.G.S. § 7A-32(b) to review orders entered on 11 June 2020 by Judge Keith B. Mason in District Court, Beaufort County. This matter was calendared and heard before the Supreme Court on 30 August 2021.

Miller & Audino, LLP, by Jay Anthony Audino, for petitioner-appellee Beaufort County Department of Social Services.

Thomas N. Griffin, III, for appellee Guardian ad Litem.

Mary McCullers Reece for respondent-appellant mother.

BERGER, Justice.

¶ 1 Respondent-mother appeals from an order terminating her parental rights.[1] We affirm.

I. Factual and Procedural History

¶ 2 On May 31, 2019, the Beaufort County Department of Social Services (DSS) received a report alleging that respondent-mother was using heroin and cocaine in the presence of her two children. Respondent-mother was eight months pregnant at the time. On June 7, 2019, respondent-mother gave birth to a minor child, Zoe,[2] who tested positive for heroin and cocaine. DSS received additional child protective services reports on June 8 and 9, 2019.

¶ 3 Respondent-mother received education on appropriate care for a newborn child, but she appeared agitated when the issue of improper handling of Zoe arose. These instances caused concern amongst hospital staff regarding the ability of respondent-mother and Zoe's father to provide appropriate care for the child. After an argument with Zoe's father and against the advice of her doctor, respondent-mother checked herself out of the hospital, leaving Zoe alone in the hospital without a parent on the premises. As a result, Zoe was sent to the Special Care Unit. While there, she was prescribed morphine to help curtail her withdrawal symptoms.

¶ 4 On June 20, 2019, DSS filed a petition alleging that Zoe and her two siblings were neglected juveniles. The petition recited the above facts, and an adjudication hearing was held on July 24, 2019. Respondent-mother consented to entry of an order in which Zoe was adjudicated a neglected juvenile. On August 7, 2019, the trial court entered a dispositional order which set the permanent plan as reunification with a concurrent plan of adoption. Respondent-mother was ordered to complete a psychological evaluation, individual therapy, parenting classes, obtain and maintain stable housing and employment, and engage in substance abuse treatment and recovery therapy.

¶ 5 On November 13, 2019, respondent-mother tested positive for morphine, cocaine, benzoylecgonine, and opiates. Respondent-mother refused to submit to subsequent drug screens on January 2, January 7, January 29, and February 18, 2020.

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1. The biological father's parental rights were terminated in the same order; however, he did not appeal.

2. A pseudonym is used to protect the minor child's identity and for ease of reading.

¶ 6 On January 22, 2020, a permanency planning hearing was conducted. The trial court determined that barriers to reunification existed due to respondent-mother's substance abuse, inconsistent parenting, mental health issues, and decision-making. Additionally, the trial court's permanency planning order detailed respondent-mother's attempts to comply with the dispositional order. The court found that after completing her psychological evaluation, respondent-mother was diagnosed with "Opioid Use Disorder and Other Specified Depressive Disorder." Further, the court found that respondent-mother was not honest with the examiner and that she had failed to seek therapy and related medication. The court also found that respondent-mother was still in need of meaningful substance abuse treatment and employment. Ultimately, the trial court concluded that respondent-mother had failed to make sufficient progress within a reasonable period of time under her case plan and that additional progress was required.

¶ 7 Based on the above findings, the trial court ordered respondent-mother to comply with recommended treatment, attend therapy, obtain and maintain stable housing and employment, attend parenting classes, and submit to random drug testing. The order specifically found that "[respondent-mother] was given an opportunity to discuss this order with her attorney . . . prior to its entry. [Respondent-mother] understands the requirements that this order places upon her; she consents to the decretal portion of this order." Notably, the last entry in the decretal portion of the order stated "[t]his matter shall be scheduled for a permanency planning hearing on **June 10, 2020**."

¶ 8 On March 27, 2020, before the scheduled permanency planning hearing, DSS filed a motion to terminate respondent-mother's parental rights based on neglect and dependency pursuant to N.C.G.S. § 7B-1102. Respondent-mother did not file a responsive pleading or otherwise address the allegations in the motion to terminate parental rights. Notice of the motion was sent to respondent-mother's counsel, who had represented her at the adjudication hearing in July 2019, the dispositional hearing in August 2019, and the first permanency planning hearing in January 2020.

¶ 9 Prior to filing of the motion to terminate parental rights, respondent-mother was arrested and charged with three counts of manufacturing, selling or delivering a controlled substance[3] within 1000 feet of a school, one count of maintaining a dwelling or place for

3. On February 25, 2020, respondent-mother was found with Zoe's father and 2.5 grams of cocaine, 1.5 grams of heroin, and 20 grams of marijuana.

controlled substances, one count of possession of drug paraphernalia, one count of robbery with a deadly weapon, and one count of assault with a deadly weapon inflicting serious injury.[4] Between March and June 2020, respondent-mother did not make any effort to visit with Zoe.

¶ 10 Hearing on the motion to terminate parental rights was scheduled for June 10, 2020, the same day as the previously scheduled second permanency planning hearing. Respondent-mother did not appear in court. Respondent-mother's counsel moved to continue the case and stated in open court that she sent notice of the hearing to respondent-mother, who was "generally present in court for such hearing[s]." The trial court denied the motion and the hearing proceeded without further inquiry.

¶ 11 DSS called one witness during the grounds phase of the hearing and a different witness during the best interests phase. Respondent-mother's counsel did not cross-examine either witness, did not offer any witnesses on respondent-mother's behalf, and declined to offer a closing argument. On June 11, 2020, the trial court terminated respondent-mother's parental rights, concluding that grounds existed pursuant to N.C.G.S. § 7B-1111(a)(1) and (6), and that termination was in Zoe's best interests.

¶ 12 The trial court determined that respondent-mother had not taken advantage of the multiple opportunities she was provided to work towards regaining custody of Zoe. Instead, respondent-mother failed to complete therapy, refused to take drug tests, was charged with both drug and violent offenses, stopped visiting with Zoe, and admitted to increased heroin use. The trial court further found that respondent-mother's lack of stable housing and instability contributed to her inability to care for Zoe and that respondent-mother's actions "present[ed] the risk of severe harm to the child, including a real risk of serious bodily harm or injury to the child." Based on these findings, the trial court concluded that "grounds exist to terminate the parental rights of [respondent-mother] . . . under N.C.G.S. Sections 7B-1111(a)(1)&(6)."

¶ 13 During the trial court's best interest determination, it incorporated the above findings and further found there was a "high likelihood that [Zoe] will be adopted by her current foster parents" because of the strong bond Zoe had developed with them. Such a bond, the trial court found, did not exist in the "attenuated relationship" between Zoe and respondent-mother. Moreover, the trial court found that it was "evident that further reunification efforts with [respondent-mother were]

4. On January 15, 2020, respondent-mother was arrested for assault with a deadly weapon inflicting serious injury and robbery with a dangerous weapon after she took the victim's car and wallet following an altercation.

inconsistent with the juvenile's health, safety, and welfare." As a result, the trial court concluded it to be in Zoe's best interest for respondent-mother's parental rights to be terminated.

¶ 14 Respondent-mother appeals, arguing that the trial court failed to ensure that respondent-mother received effective assistance of counsel.

II. Analysis

¶ 15 A parent in a termination of parental rights proceeding has a statutory right to counsel pursuant to N.C.G.S. § 7B-1101.1, which inherently requires effective assistance from that counsel. *See In re T.N.C.*, 375 N.C. 849, 854, 851 S.E.2d 29, 32 (2020) ("Counsel necessarily must provide effective assistance, as the alternative would render any statutory right to counsel potentially meaningless.").

¶ 16 To succeed in a claim for ineffective assistance of counsel, respondent must satisfy a two-prong test, demonstrating that (1) counsel's performance was deficient; *and* (2) such deficient performance by counsel was so severe as to deprive respondent of a fair hearing. *State v. Braswell*, 312 N.C. 553, 562, 324 S.E.2d 241, 248 (1985). "To make the latter showing, the respondent must prove that 'there is a reasonable probability that, but for counsel's errors, there would have been a different result in the proceedings.' " *In re T.N.C.*, 375 N.C. 849, 854, 851 S.E.2d 29, 33 (2020) (quoting *Braswell*, 312 N.C. at 563, 324 S.E.2d at 248).

¶ 17 Assuming without deciding that counsel's performance was deficient, respondent-mother cannot prevail on her ineffective assistance of counsel claim because she has failed to demonstrate that she was prejudiced by any alleged deficiency in performance by counsel. Respondent-mother does not argue, and therefore cannot show, that there was a reasonable probability of a different result. Respondent-mother has not challenged on appeal the trial court's findings of fact or conclusions of law that the grounds for termination pursuant to N.C.G.S. § 7B-1111(a)(1) and (6) exist or that the termination was in Zoe's best interest. We therefore affirm the trial court's order terminating respondent-mother's parental rights.

III. Conclusion

¶ 18 Respondent-mother has failed to demonstrate that, but for such the alleged deficiency by counsel, there was a reasonable probability of a different result. The trial court's order terminating respondent-mother's parental rights is affirmed.

AFFIRMED.

Justice EARLS dissenting.

¶ 19 "When the State moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures." *Santosky v. Kramer*, 455 U.S. 745, 753–54 (1982). A vital aspect of a fundamentally fair termination proceeding is a parent's "right to counsel, and to appointed counsel in cases of indigency." N.C.G.S. § 7B-1101.1(a) (2019). This statutory right to counsel necessarily includes a right to effective counsel. *In re T.N.C.*, 375 N.C. 849, 854 (2020). Otherwise, a parent's right to counsel would be rendered meaningless. *See State v. Sneed*, 284 N.C. 606, 612 (1974) (stating that the right to counsel "is not intended to be an empty formality but is intended to guarantee effective assistance of counsel."); *see also In re Bishop*, 92 N.C. App. 662, 664 (1989) ("By providing a statutory right to counsel in termination proceedings, our legislature has recognized that this interest must be safeguarded by adequate legal representation.").

¶ 20 In this case, respondent-mother's counsel's allegedly deficient performance appears to have deprived her of the opportunity to develop a record which could support her contention that she received ineffective assistance of counsel (IAC). Rather than examine her IAC claim, the majority assumes without deciding that counsel's performance was deficient, before summarily concluding that she could not have received IAC because she could not have been prejudiced. But this reasoning places respondent-mother in an impossible bind. If it is correct that her counsel's performance was so deficient that it deprived her of the opportunity to develop a record which would support her claim of prejudice, then denying her claim without further factfinding means she could never prove prejudice, even if she did indeed receive IAC.

¶ 21 The majority's decision gives short shrift to an important guarantor of the fairness of our juvenile system. In my view, the record plausibly supports respondent-mother's claim that her counsel's performance during the termination proceedings was deficient. Further, counsel's performance appears to have deprived respondent-mother of a record which allows this Court to meaningfully assess whether or not counsel's performance was actually deficient and whether she was prejudiced thereby. Under these circumstances, I believe the proper course is to remand to the trial court for further factfinding in order to ensure that a decision implicating her fundamental rights as a parent is based upon an adequately developed record. Therefore, I respectfully dissent.

I. The ineffective assistance of counsel standard in termination proceedings

¶ 22 The standard for assessing a parent's claim to have received IAC in a termination proceeding mirrors the standard utilized for assessing a criminal defendant's claim to have received IAC at trial. "To prevail on a claim of ineffective assistance of counsel, respondent must show that counsel's performance was deficient and the deficiency was so serious as to deprive her of a fair hearing." *In re T.N.C.*, 375 N.C. at 854. "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.' " *Id.* (quoting *State v. Braswell*, 312 N.C. 553, 562 (1985)). Thus, as when a criminal defendant raises an IAC claim on appeal, a respondent-parent who raises an IAC claim on appeal of an order terminating his or her parental rights must prove that counsel's performance was deficient and that he or she was prejudiced thereby.

¶ 23 However, there is an important procedural difference which is relevant when an appellate court addresses an IAC claim raised on appeal by a criminal defendant as opposed to one raised by a respondent-parent. If a criminal defendant does not prevail on appeal, the defendant can still challenge certain errors allegedly committed by the trial court by filing a motion for appropriate relief (MAR). N.C.G.S. § 15A-1420 (2019). When a criminal defendant raises an IAC claim on appeal, but the record is insufficient to knowledgably determine the merits of the defendant's claim, an appellate court may dismiss the claim without prejudice to be considered on defendant's subsequent MAR. This is the proper course whenever "[t]he record developed at trial d[oes] not contain any information affirmatively tending to show" an evidentiary basis for deciding whether an IAC claim has been proven. *State v. Hyman*, 371 N.C. 363, 384 (2018).

¶ 24 By contrast, after a termination proceeding has concluded, a respondent-parent lacks an avenue to challenge the fairness of the proceedings except on direct appeal. There is no procedural vehicle for bringing a post-judgment MAR. This creates a significant hurdle for respondent-parents who allege they received IAC during a termination proceeding. As we have noted in the criminal context, "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 (2001). The same can be true in the termination of parental rights context also.

¶ 25 A respondent-parent who alleges IAC does not have the same opportunity to develop a factual record in support of his or her claim on

post-conviction review as a criminal defendant. In part, this is by design. In the juvenile context, the interests of the juvenile in obtaining a secure, permanent placement weigh against allowing proceedings to continue after a termination order has been entered. Nevertheless, the importance of the parent's interest at stake in a termination proceeding, and the need to assure that every parent receives the fundamental procedural protections to which he or she is constitutionally entitled, require that an appellate court carefully scrutinize every credible IAC claim raised on direct appeal from a termination proceeding. In a case where the record is insufficient to allow a reasoned disposition of the parent's IAC claim—and especially in a case where the insufficiency appears to result from counsel's performance—an appellate court should reverse the order terminating the respondent-parent's parental rights and remand for an evidentiary hearing. *Cf. In re B.L.H.*, 239 N.C. App. 52, 62–63 (2015). I believe precisely this action is warranted in the present case.

II. Respondent-mother has plausibly alleged that her counsel was deficient by failing to provide adequate notice and failing to advocate on her behalf at her termination hearing

¶ 26 The majority "assum[es] without deciding that counsel's performance was deficient." It is of course generally appropriate for an appellate court to dispose of a case on the narrowest grounds possible without resolving any unnecessary issues. Nonetheless, in my view, the better course in this case would have been to closely examine respondent-mother's claim on both prongs, given that respondent-mother claims her counsel's deficient performance deprived her of a record adequate to prove prejudice.

¶ 27 In this case, respondent-mother argues counsel was deficient in two ways. First, she contends that her attorney rendered deficient performance when the attorney failed to ensure that respondent-mother received notice of the date and time of the termination hearing. Second, she contends that her attorney rendered deficient performance when the attorney failed to advocate on her behalf at the termination proceeding conducted in respondent-mother's absence. Although respondent-mother has raised plausible allegations which could meet her burden on the first prong of the IAC analysis, I believe the record does not contain critical information necessary to ascertaining whether counsel's performance was deficient at the termination proceeding due to these two alleged failures.

¶ 28 The transcript of the termination hearing reflects that when the proceeding began, respondent-mother was not present. Respondent-

mother's counsel joined respondent-father's counsel's motion to continue the hearing, representing that he had "sent notice of this hearing to my client" and that she "was generally present in court for such hearing[s]." The trial court denied the motion to continue. However, the record in this case reveals significant factual discrepancies regarding respondent-mother's living situation which call into question whether her attorney's efforts to provide notice of the termination hearing were adequate. Respondent-mother maintained multiple physical addresses up until the time of the termination hearing and moved to a new residence at least once during the pendency of the termination proceedings. She appeared for every prior substantive hearing during the termination proceeding.

¶ 29 An attorney may render deficient performance in a termination proceeding by failing to adequately communicate with a respondent-parent. *Cf. In re B.L.H.*, 239 N.C. App. at 63 (concluding that respondent-parent received IAC where "counsel did not make sufficient efforts to communicate with Respondent in order to provide him with effective representation and [ ] this failure deprived Respondent of a fair hearing"). Thus, in my view, the record raises meaningful questions regarding whether or not counsel's efforts to communicate with respondent-mother and notify her of the hearing, which cannot be answered without further factual development.

¶ 30 At the termination hearing, DSS called one witness during the adjudicatory stage and another witness during the dispositional stage. Respondent-mother's counsel remained present in the courtroom while the hearing was conducted. However, counsel did not cross-examine either of DSS' witnesses or raise any objections during their testimony. Counsel also chose not to present any evidence or offer any rebuttal witnesses on respondent-mother's behalf. Counsel declined to offer any closing argument.

¶ 31 "It is well established that attorneys have a responsibility to advocate on behalf of their clients." *In re S.N.W.*, 204 N.C. App. 556, 560 (2010) (citing *State v. Staley*, 292 N.C. 160 (1977)). It is possible there may be circumstances under which counsel's choice to remain silent during a proceeding is strategic. Nonetheless, an appellate court is "is not at liberty to invent for counsel a strategic justification which counsel does not offer and which the record does not disclose." *State v. Allen*, 2021-NCSC-88, ¶ 32. On the record as currently comprised, this Court cannot determine whether or not counsel's failure to advocate on respondent-mother's behalf at the termination hearing resulted from a strategic choice made after consultation, resulted from respondent-mother's failure to provide

counsel with the information she needed to represent her, or resulted from counsel's own decisions or omissions. Accordingly, I would conclude that these questions must be resolved in an evidentiary hearing before conclusively determining whether respondent-mother's counsel rendered deficient performance at her termination hearing.

III. Even if counsel rendered deficient performance, the record is inadequate to determine whether respondent-mother was prejudiced

¶ 32 To prove her IAC claim, respondent-mother must prove prejudice. To prove prejudice, she must show "a reasonable probability that, but for counsel's errors, there would have been a different result in the proceedings," that is, that the court would not have entered an order terminating respondent-mother's parental rights. *In re T.N.C.*, 375 N.C. at 854.[1] In general, a parent meets this burden by identifying factual evidence which rebuts the trial court's factual findings or legal arguments which undercut the trial court's legal conclusion that grounds existed to terminate a respondent-parent's parental rights and that doing so was in the best interests of the juvenile. In certain circumstances, this evidence and these arguments might be found in the record and transcript produced at trial.

¶ 33 In this case, the record and transcript do not and cannot support respondent-mother's claim precisely because of her counsel's failure to advance arguments on her behalf or advocate for her interests at the termination hearing. Again, it is not necessarily the case that counsel's failure to file an answer, advocate at the hearing, cross examine any witnesses, or introduce evidence constituted deficient performance. However, if counsel's actions were in fact so egregious as to constitute deficient performance, then it is profoundly unfair to reject respondent-mother's claim on the grounds that the record produced by that counsel's actions does not indicate that respondent-mother was

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1. Although I acknowledge that our precedents equate the two ways of defining prejudice, arguably proof that an attorney's deficient performance was "so serious as to deprive [a parent] of a fair hearing," *In re T.N.C.*, 375 N.C. 849, 854 (2020) (quoting *In re Bishop*, 92 N.C. App. 662, 669 (1989)), is not necessarily the same as evidence that "but for counsel's errors, there would have been a different result in the proceedings," *id.* (quoting *State v. Braswell*, 312 N.C. 553, 563 (1985)). It is certainly possible that a proceeding that was fundamentally unfair could still have arrived at the same outcome that would have resulted from a fair proceeding. Regardless, I note that United States Supreme Court in *Strickland* emphasized that "the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged," which suggests something other than a purely outcome-determinative test for assessing prejudice. *Strickland v. Washington*, 466 U.S. 668, 696 (1984).

prejudiced. *Cf. Strickland v. Washington*, 466 U.S. 668, 710 (1984) ("The difficulties of estimating prejudice after the fact are exacerbated by the possibility that evidence of injury to the defendant may be missing from the record precisely because of the incompetence of defense counsel.") (Marshall, J., dissenting). Again, the record does not allow us to determine one way or the other (1) whether counsel's performance was deficient, (2) if so, whether counsel's deficient performance resulted in the record being inadequate to assess prejudice, and (3) whether a fully developed record would support the conclusion that counsel rendered IAC. Thus, we do not have a sufficient record to determine the merits of respondent-mother's IAC claim.

IV. Conclusion

¶ 34 Proceedings which may result in the termination of a parent's rights to the care, custody, and control of their child must be fair. It is inconsistent with this fairness requirement to hold that in order to prevail on an IAC claim, a respondent-parent must prove counterfactually that the outcome of the proceeding would have been different but for counsel's deficient performance, solely relying on a record developed by an attorney whose allegedly deficient performance gives rise to the claim. In this case, respondent-mother has plausibly alleged that her counsel rendered deficient performance at her termination hearing. Further, counsel's actions appear to have deprived respondent-mother of a record which can support her IAC claim, and deprived this Court of the record necessary to resolve it. Accordingly, I respectfully dissent from the majority's affirmance of the order terminating respondent-mother's parental rights. Instead, I would reverse the order and remand for an evidentiary hearing to determine whether respondent-mother's counsel's representation was deficient and if so, whether respondent-mother was prejudiced thereby.

PLANTATION BUILDING OF WILMINGTON, INC.
v.
TOWN OF LELAND

No. 515A20

Filed 29 October 2021

Pretrial Proceedings—objection to class certification—after summary judgment granted—waived

In an action filed against a town (defendant), where defendant consented to and joined in plaintiff's motion for continuance, which indicated that the parties had agreed to file cross-motions for summary judgment first and then address class certification if the matter was not resolved during the summary judgment stage, defendant waived any objection it may have had to the trial court granting plaintiff's motion for class certification after it had granted plaintiff's summary judgment motion.

Appeal pursuant to N.C.G.S. § 7A-27(a) from orders entered on 19 August 2020 by Judge Jason C. Disbrow in Superior Court, Brunswick County. Heard in the Supreme Court on 30 August 2021.

Mark R. Sigmon, *Daniel K. Bryson*, *Martha A. Geer*, *Scott C. Harris*, *J. Hunter Bryson*, *and Christopher M. Theriault for plaintiff-appellee.*

Stephen V. Carey, *Charles C. Meeker*, *Corri A. Hopkins*, *Dan M. Hartzog Jr.*, *Katherine Barber-Jones*, *and Brian E. Edes for defendant-appellant.*

Ellis & Winters LLP, by Thomas H. Segars, *Joseph D. Hammond*, *and Scottie Forbes Lee*, *for North Carolina Association of Defense Attorneys*, *amicus curiae.*

BARRINGER, Justice.

¶ 1 In this matter, we must address whether the trial court erred when it granted a motion for class certification filed after a summary judgment motion had been granted in plaintiff Plantation Building of Wilmington, Inc.'s favor. On the record before us, we conclude no reversible error occurred as defendant, Town of Leland, waived any objection that it may have had to the purported error.

¶ 2 In this matter and as relevant to the issue before us, defendant consented to and joined in a motion for continuance filed by plaintiff, which indicated that the parties had agreed to file cross-motions for summary judgment and address class certification if the matter was not resolved during the summary judgment stage. The trial court granted the motion for continuance. Thereafter, plaintiff and defendant filed motions for summary judgment on 27 February 2020 and 4 March 2020 respectively. The trial court heard arguments from both parties on their respective motions for summary judgment at a hearing on 9 March 2020. On 12 March 2020, the trial court granted plaintiff's motion for summary judgment, resolving the issue of liability but not the issue of damages and effectively denying defendant's motion for summary judgment. Thereafter, plaintiff filed a motion for class certification. Defendant then filed a motion to dismiss pursuant to Rule 12(b)(1) of the North Carolina Rules of Civil Procedure, objecting for the first time to the trial court addressing a motion for class certification after resolving the motions for summary judgment, as well as two other motions. On 19 August 2020, after a hearing on the motions, the trial court granted plaintiff's motion for class certification and denied defendant's motion to dismiss pursuant to Rule 12(b)(1) of the North Carolina Rules of Civil Procedure and the two other motions filed by defendant. Defendant then appealed to this Court.

¶ 3 Since the motion for continuance identifies that the issue of class certification would be resolved after addressing the cross-motions for summary judgment and expressly states that "[b]oth parties to this action join in and consent to this Motion" and since the parties did follow this sequence, we conclude that defendant waived any objection that it may have had to the trial court granting plaintiff's motion for class certification after granting plaintiff's summary judgment motion. *See Whitacre P'ship v. Biosignia, Inc.*, 358 N.C. 1, 26 (2004) ("[A] party to a suit should not be allowed to change his position with respect to a material matter in the course of litigation." (quoting *Roberts v. Grogan*, 222 N.C. 30, 33 (1942))); *Frugard v. Pritchard*, 338 N.C. 508, 512 (1994) ("A party may not complain of action which he induced."); *Klein v. Avemco Ins. Co.*, 289 N.C. 63, 68 (1975) ("Waiver sometimes has the characteristics of estoppel and sometimes of contract, but it is always based upon an express or implied agreement. There must always be an intention to relinquish a right, advantage, or benefit. The intention to waive may be expressed or implied from acts or conduct that naturally lead the other party to believe that the right has been intentionally given up."); *Clement v. Clement*, 230 N.C. 636, 639 (1949) ("A person *sui juris* may waive practically any right he has unless forbidden by law or public policy. The

term, therefore, covers every conceivable right—those relating to procedure and remedy as well as those connected with the substantial subject of contracts."). Accordingly, no reversible error occurred, and we need not address defendant's remaining arguments.

AFFIRMED.

STATE OF NORTH CAROLINA
v.
JAMES EDWARD LEAKS

No. 149PA20

Filed 29 October 2021

Homicide—jury instructions—self defense—request for modification—prejudice analysis

Even assuming the trial court erred by declining to give defendant's requested modified self-defense instruction in his trial for murder—that defendant must have believed it necessary "to use deadly force" against the victim, rather than "to kill" the victim—defendant failed to show that the alleged error was prejudicial. Under either instruction, the jury would have needed to find that defendant's belief was reasonable and that he did not use excessive force when he stabbed the victim, and uncontradicted evidence strongly suggested that defendant's use of deadly force was excessive and not reasonable.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 270 N.C. App. 317 (2020), finding no error after appeal from a judgment entered on 8 August 2018 by Judge Carla Archie in Superior Court, Mecklenburg County. Heard in the Supreme Court on 1 September 2021.

Joshua H. Stein, Attorney General, by Mary Carla Babb, Special Deputy Attorney General, for the State-appellee.

William D. Spence for defendant-appellant.

BARRINGER, Justice.

¶ 1 In this case, we review the Court of Appeals' holding that the trial court committed no error by declining to give defendant's requested modified self-defense instruction at trial. *State v. Leaks*, 270 N.C. App. 317, 324 (2020). Regardless of whether an error occurred, a party challenging jury instructions as erroneous must demonstrate on appeal that the error was prejudicial. Since defendant cannot meet this burden, we modify and affirm the decision of the Court of Appeals.

I. Factual and Procedural Background

¶ 2 On 16 August 2016, Darrell Cureton was helping his girlfriend, Sylvia Moore, with yardwork at her house. Ms. Moore's brother, Eric Moore, was also outside with them. As they were working, defendant and his friend, Calvin Mackin, walked down a side street adjoining the house. Witness testimony differed on what happened next.

¶ 3 According to Mr. Moore, defendant and Mr. Mackin were walking across the street from Ms. Moore's home when they asked Mr. Moore for a cigarette. Defendant and Mr. Mackin crossed the street and entered Ms. Moore's yard, Mr. Moore gave them a cigarette, and then they walked back across the street. Hearing the men talking, Mr. Cureton walked over toward Mr. Moore. Defendant, who at that point was back across the street, started staring at Mr. Cureton and patting the knife he carried on his hip. Defendant was around six feet tall and weighed about two hundred pounds. Mr. Cureton was around five-foot-five and weighed approximately 150 to 160 pounds.

¶ 4 Mr. Cureton walked over to his pickup truck, which was parked on the street in front of Ms. Moore's home, and picked up a two-by-four board from the truck bed. Mr. Cureton then said, "[Defendant], go on, I don't want no trouble" and started walking away from defendant, back toward Ms. Moore's house. According to Mr. Moore, Mr. Cureton held the two-by-four straight across in front of himself, with one hand on either end. Mr. Cureton never held the two-by-four like a baseball bat and never swung it at defendant. When Mr. Cureton backed away, defendant sprinted across the street toward Mr. Cureton, holding the knife and exclaiming, "[T]hat will give me an excuse to kill [you]."

¶ 5 Mr. Moore further testified that as defendant drew close, Mr. Cureton dropped the two-by-four and tried to run away, but he ran into the wall of the house and fell. Defendant caught up to Mr. Cureton and stabbed him in the chest. After stabbing Mr. Cureton, defendant rejoined Mr. Mackin, and the two men slowly walked away.

¶ 6 Ms. Moore also testified at trial. According to Ms. Moore, Mr. Cureton was standing in the yard when defendant sprinted through the

bushes in her yard and bumped Mr. Cureton. As defendant moved away, Ms. Moore saw that defendant was holding a knife and Mr. Cureton was clutching his hands to his chest while blood started to appear. Ms. Moore further testified that before dating Mr. Cureton, she had dated defendant for five years.

¶ 7 Next, Veronique Streeter, a social worker with no relationship to any of the individuals directly involved in this case, testified. At the time of the incident, Ms. Streeter was leaving a building that was a block over from Ms. Moore's house. Ms. Streeter testified that upon hearing a commotion, she looked over and saw Mr. Cureton with his back to the house holding up a piece of wood, with a hand on each end, to protect himself from being hit. Ms. Streeter never saw Mr. Cureton swing the piece of wood at defendant or take offensive action. Instead, as Ms. Streeter watched, she saw defendant come toward Mr. Cureton, jabbing at him. After making the jabbing motions, defendant walked away, and Ms. Streeter saw a red patch start to appear on the front of Mr. Cureton's white shirt.

¶ 8 Accompanying Ms. Streeter that day was Theresa McCormick-Dunlap, who also had no relation to any of the individuals directly involved in this case. Ms. McCormick-Dunlap testified that when she looked towards Ms. Moore's house, she saw Mr. Cureton retreating as defendant pursued him. Mr. Cureton was holding a long piece of wood defensively in front of himself like a shield and blocking defendant's swings. Ms. McCormick-Dunlap never saw Mr. Cureton use the two-by-four like a club, swing it offensively, or even move towards defendant. However, Ms. McCormick-Dunlap did observe defendant making jabbing motions while he chased Mr. Cureton. Ms. McCormick-Dunlap testified that defendant was "pretty determined to get at [Mr. Cureton]," while Mr. Cureton, in contrast, was retreating and not even trying to fight back. Eventually, Ms. McCormick-Dunlap saw defendant land a good blow and then "swagger[ ] off" looking satisfied. When she approached Mr. Cureton, Ms. McCormick-Dunlap saw blood on his shirt.

¶ 9 Defendant testified to an alternative version of events. According to defendant, he and Mr. Mackin were walking down the sidewalk across the street from Ms. Moore's house when they saw Mr. Moore. Mr. Mackin asked Mr. Moore for a cigarette. While Mr. Mackin walked over to retrieve the cigarette, defendant stayed across the street on the sidewalk. Mr. Cureton then walked to the edge of the lawn and told him to, "[G]o ahead on" and, "[K]eep it moving." In the meantime, Mr. Mackin had obtained a cigarette and started back across the street to defendant. Mr. Mackin then said, "[L]ook out," and defendant heard some

"pitter-patter." When he turned around, defendant saw Mr. Cureton swinging at him with a two-by-four held like a baseball bat.

¶ 10 Defendant further testified that Mr. Cureton struck defendant on his back and then continued hitting defendant with the two-by-four. Defendant tried to block the blows with his hands and grab the two-by-four but was unsuccessful. According to defendant, he started to fear for his life because he could not get to his knife—a large Gerber the size of a machete. Mr. Cureton kept landing blows, striking defendant on his head, neck, forearms, knee, and shoulder. Defendant began to feel dizzy and see stars. After a couple more hits, defendant fell down, unstrapped his knife, and stabbed Mr. Cureton in the chest one time. Mr. Cureton stopped hitting defendant and ran back to the house. Defendant asserted that his only intent when he stabbed Mr. Cureton was to try to stop Mr. Cureton from beating him.

¶ 11 Mr. Mackin also testified during defendant's case-in-chief. Mr. Mackin testified that he and defendant were so close that they called each other cousins. According to Mr. Mackin, he and defendant were walking by Ms. Moore's house when Mr. Mackin heard some "hollering." Mr. Cureton then walked quickly toward defendant, holding a stick in the air like he was going to hit defendant on the head. Mr. Cureton swung the stick at defendant, but defendant dodged it. However, Mr. Mackin testified that he did not see anything that happened afterwards between defendant and Mr. Cureton.

¶ 12 Shortly after being stabbed by defendant, Mr. Cureton died. Dr. Jonathan David Privette, who examined Mr. Cureton's body, testified that he had suffered from two knife wounds. First, Mr. Cureton had sustained a laceration to his left shoulder. Second, Mr. Cureton had been stabbed in his left chest by a knife that was thrust in, partially removed, and then thrust in again one to two more times. The stab to the chest was severe enough to fracture a rib, perforate Mr. Cureton's lung at three separate locations, and pierce his heart, causing Mr. Cureton's death.

¶ 13 Additionally, two police officers and a medical professional who responded to the incident testified about defendant's appearance shortly after the stabbing occurred. According to the officers, the only injuries they observed were on defendant's arms, and they were minor. Additionally, the officers stated that defendant had no difficulties standing or walking. As for the medic who attended to defendant, she testified that though defendant complained of head pain, the medic could not find any injury to his head. The only injuries the medic observed were the minor injuries to defendant's arms and a swollen knee.

¶ 14 After both parties rested their case at trial, defendant requested the trial court give a modified version of North Carolina Pattern Jury Instruction 206.10, which outlines the elements of self-defense. The first element of Pattern Jury Instruction 206.10 states that a defendant must believe it necessary "to kill" the victim. N.C.P.I.–Crim 206.10. Defendant requested that the trial court modify the instruction to instead state that a defendant must believe it necessary "to use deadly force against the victim."[1] The State opposed defendant's proposed modification. After listening to both sides' arguments, the trial court denied defendant's request and instructed the jury using Pattern Jury Instruction 206.10 without modification. Immediately after the trial court finished instructing the jury, defendant renewed his objection to the unmodified self-defense instruction. On 8 August 2018, the jury returned a verdict of guilty of second-degree murder. Defendant appealed.

¶ 15 Before the Court of Appeals, defendant argued that the trial court (1) abused its discretion in denying defendant's motion for jury view, (2) erred by instructing the jury that defendant needed to have believed it was necessary "to kill" the victim in order to have acted in self-defense, and (3) erred in determining that defendant had a prior record level of IV. *Leaks*, 270 N.C. App. at 320–21. In a unanimous decision, the Court of Appeals found no error by the trial court. *Id.* at 321, 324, 326.

¶ 16 Defendant requested review by this Court pursuant to N.C.G.S. § 7A-31 to address the Court of Appeals' decision that the trial court did not err in giving Pattern Jury Instruction 206.10 without defendant's requested modification. We allowed defendant's petition.

II. Standard of Review

¶ 17 In criminal cases, appellate courts review challenges to jury instructions differently depending on whether the challenge was properly preserved at trial. When a party properly preserves an objection to a jury instruction, appellate courts review the instruction for harmless error pursuant to N.C.G.S. § 15A-1443(a). *State v. Lawrence*, 365 N.C. 506, 512 (2012). Unpreserved objections, on the other hand, are reviewed only for plain error. *Id.* To properly preserve an objection to a jury instruction, the appellate rules require that a party object before the jury retires to consider its verdict and state "distinctly that to which objection is

1. We note that defendant's request that the trial court substitute the words "to use deadly force" for the words "to kill" was based on footnote four in Pattern Jury Instruction 206.10. Given the confusion that this footnote caused during trial in this case, it is recommended that the North Carolina Pattern Jury Instruction Committee review N.C.P.I.–Crim 206.10.

made and the grounds of the objection." N.C. R. App. P. 10(a)(2). Here, defendant properly preserved his objection. Thus, we review for harmless error under N.C.G.S. § 15A-1443(a). *Lawrence*, 365 N.C. at 512.

¶ 18 " 'The harmless-error doctrine recognizes the principle that the central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence' and 'promote[ ] public respect for the criminal process by focusing on the underlying fairness of the trial rather than on the virtually inevitable presence of immaterial error.' " *State v. Malachi*, 371 N.C. 719, 734 (2018) (quoting *Rose v. Clark*, 478 U.S. 570, 577 (1986)). Accordingly, harmless-error review requires a defendant show that "there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises," unless the error relates to a constitutional right. N.C.G.S. § 15A-1443(a) (2019). At no point in this case has defendant alleged that the unmodified jury instruction violated a constitutional right. Therefore, the burden of showing prejudice is upon defendant. *Lawrence*, 365 N.C. at 513.

III. Analysis

¶ 19 Defendant has not shown a reasonable possibility that had the modified self-defense instruction been given, a different result would have been reached at trial. While the trial court instructed the jury that to have acted in self-defense defendant needed to believe it necessary to kill the victim, the trial court further instructed the jury that this belief must be reasonable given "the fierceness of the assault, if any, upon [defendant]" as perceived by "a person of ordinary firmness." Defendant did not object to the reasonableness portion of the instruction at trial and does not challenge it on appeal. Accordingly, even if the trial court had instructed the jury that defendant needed to believe only that deadly force was necessary, as opposed to believing he needed to kill the victim, the jury would still need to have found that this belief was reasonable. Further, the trial court instructed the jury that, as a separate requirement of self-defense, defendant must not have used "excessive force," meaning, "more force than reasonably appeared to the [d]efendant to be necessary at the time of the killing."

¶ 20 At trial, the medical testimony revealed that, at most, defendant had suffered minor arm injuries and a swollen knee that were treated with a bandage and ice pack. In contrast, defendant admitted that he stabbed Mr. Cureton in the chest with his Gerber knife—a knife so large that it looked like a machete. As testified to by the doctor who examined Mr. Cureton's body, this one stab wound to Mr. Cureton's chest was a highly

lethal wound. The wound reflected that the knife was thrust in, partially removed, and then thrust in again one to two more times, causing a fractured rib, a perforated lung at three separate locations, a pierced heart, and ultimately Mr. Cureton's death. Defendant tendered no medical evidence to contradict this testimony.

¶ 21 Accordingly, defendant has not shown a reasonable possibility that even if the trial court had modified the self-defense instruction as requested, the jury would have found that defendant acted in self-defense. The uncontradicted medical evidence strongly suggests that defendant's use of deadly force was not reasonable under the circumstances but rather that it was excessive. Defendant's requested self-defense instruction, if given, would not have changed the trial court's charge to the jury that defendant's use of force must be reasonable and not excessive. As a result, defendant cannot show a reasonable possibility that a different result would have occurred at trial.

IV. Conclusion

¶ 22 Since defendant has not shown a reasonable possibility that a different result would have occurred at trial if the alleged error had not occurred, he cannot meet his burden of showing prejudice under harmless-error review. Therefore, we modify and affirm the decision of the Court of Appeals.

MODIFIED AND AFFIRMED.

STATE v. DEW

[379 N.C. 64, 2021-NCSC-124]

STATE OF NORTH CAROLINA
v.
JEREMY WADE DEW

No. 284PA20

Filed 29 October 2021

Assault—multiple charges—distinct interruption—beating

The State presented sufficient evidence that defendant committed two assaults where defendant beat his girlfriend in a trailer and then beat her in her car. The distinct interruption between the assault in the trailer and the assault in the car—when defendant ordered the victim to clean the bloody bed and help pack the car—allowed the reasonable conclusion that there were two distinct assaults. However, one of defendant's three assault convictions was vacated because there was insufficient evidence of two distinct assaults occurring in the trailer, where the beating in the trailer was one continuous assault, and different injuries or different methods of attack alone are insufficient evidence of multiple assaults.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 270 N.C. App. 458, 462 (2020), finding no error after appeal from judgments entered on 7 February 2018 by Judge John E. Nobles Jr. in Superior Court, Carteret County. Heard in the Supreme Court on 24 March 2021.

Joshua H. Stein, *Attorney General*, *by Wes Saunders*, *Assistant Attorney General*, *for the State-appellee.*

Glenn Gerding, *Appellate Defender*, *by Daniel Shatz*, *Assistant Appellate Defender*, *for the defendant-appellant.*

HUDSON, Justice.

¶ 1 Here we must determine whether there is sufficient evidence, in the light most favorable to the State, that defendant committed multiple assaults against his girlfriend when the testimony tended to show that he beat her in her family's trailer and also in her car as they traveled home. Because we conclude that there was sufficient evidence of multiple assaults to submit the issue to the jury, we hold that the trial court did not err by denying defendant's motion to dismiss all but one assault charge.

I. Factual and Procedural Background

¶ 2 In 2016, Mindy Ray Davis and defendant Jeremy Wade Dew were in a relationship and living together in Sims, North Carolina. On 29 July 2016, Davis and defendant drove to Atlantic Beach with defendant's four-year-old daughter to spend the weekend with Davis's parents who owned a trailer there. Both Davis and defendant testified at trial, but gave different accounts of the events that occurred between 29 July and 31 July 2016.

¶ 3 The following is a summary of Davis's account: On 30 July 2016, defendant, Davis, and defendant's daughter spent the evening outside socializing with neighbors. Davis testified that around 9:00 p.m., she took defendant's daughter back inside the trailer to put her to bed. The trailer had three bedrooms. The bedroom at the front of the trailer where defendant and Davis stayed was separated from the other two bedrooms by the communal living spaces. Davis stayed with defendant's daughter until she fell asleep on the couch in the living room around 9:30 p.m. or 9:45 p.m.

¶ 4 When Davis went back outside, she and defendant went a few trailers over to hang out with her cousin from Virginia. According to her testimony, Davis danced with her cousin and defendant's "whole demeanor changed." Defendant left the trailer and got in the car, drove down the street of the trailer park, drove back, and ultimately went inside the trailer he was staying in with Davis and locked Davis out. After Davis called defendant's phone several times and knocked on the window of the trailer, defendant let her into the trailer.

¶ 5 Once inside, Davis walked to the bedroom at the front of the trailer to change into clothing to sleep in. Davis testified that defendant "just hauled off and hit [her] upside the head." She testified that defendant hit her "over and over,"—a continuous, nonstop beating—for at least two hours. Specifically, defendant hit her "upside the head and ear, on each side," "kicked [her] in the chest," bit her nose and her ear, "punched [her] in the nose," "head-butted [her] twice," and "strangled [her] until vomiting." She recounted that during the attack defendant called her a "slut" and told her that she embarrassed him and that she was making him do this.

¶ 6 Davis testified that she did not fight him back because she was too scared and had never been through anything like that before. Defendant also threatened to throw her in the Buckhorn Reservoir if Davis said anything to defendant's ex-wife and told Davis he could be the next "Tick Bailey," a reference to a man who killed his ex-wife. Davis testified

that defendant told her if she made any noise, he would kill everyone in the trailer.

¶ 7 When the beating was over, defendant said "[w]e're leaving and we're going home." He made Davis take the sheets off the bed, which were stained with her blood, and clean the mattress cover. Davis wiped down the mattress cover and took the sheets off the bed and put them on the dresser. Davis grabbed their bags and took them out to the car. At that point, defendant went to get his daughter off the couch and made Davis get into the driver's seat of the car. He then changed his mind and made Davis get into the passenger's seat. Defendant put his daughter in the backseat of the car.

¶ 8 Davis testified that during the entire car ride back to Sims defendant hit her on the side of her head where she ultimately ended up with a ruptured eardrum. Defendant pulled off the road several times, reached over and was "jacking [her] up to the ceiling of the car, strangling [her]." Davis estimated that three times defendant made her take off her seat belt and open the door, and told her that he was going to push her out. Defendant also threw Davis's phone out of the window of the car.

¶ 9 They arrived in Sims approximately two hours after they left Atlantic Beach. When they arrived, defendant told Davis that if she called the police or went to stay with her sister, he would cut himself with a knife and say that she did it so that she would have to go to jail. Davis testified that she believed defendant because she thought he was "crazy enough to do something like that." The next morning, Davis's sister came to the house and called 911.

¶ 10 The parties stipulated that Davis suffered a concussion, a ruptured eardrum, and a nondisplaced nose fracture. She underwent two surgeries to save her hearing due to the ruptured eardrum.

¶ 11 Defendant also testified at trial. According to defendant, sometime after dinner on 30 July 2016, he and Davis went to a party a few trailers down from Davis's parents' trailer. They were at the party for about an hour and a half, and defendant went back to the trailer to check on his daughter every once in a while.

¶ 12 One time after checking on his daughter, defendant returned to find Davis "with another man." Defendant testified that he felt "disgusted," "angry," "[h]urt," and "[e]mbarrassed." He went back to the trailer and debated calling his parents to pick him and his daughter up, but decided not to. Defendant did not remember locking the trailer door, but he received a text from Davis that said she was locked out, so defendant unlocked the door for her, and she came inside. According to defendant,

Davis tried to frantically explain the situation while defendant began packing up his things to leave.

¶ 13 Defendant testified that when he bent over to get his cell phone charger, Davis came up behind him, bit him on his left shoulder, wrapped her nails around him, and hit him. In response, defendant bucked his head back "pretty hard" into her head "[t]o get her off" of him three or four times. Defendant and Davis fell face first on the floor, and there was a tussle to get up. Defendant testified that the whole episode lasted about two minutes. Afterwards, he said they both calmed down and went out onto the porch to smoke a cigarette together. Defendant denied biting Davis on the nose or the ear but acknowledged that his head hit her in the nose. He denied beating Davis for two hours in the trailer and for two hours on the ride home. He also testified that he did not know what happened to her phone.

¶ 14 Defendant testified that it was Davis's idea to go home that night. Defendant got his daughter and put her in the car seat in the back seat of the car while Davis was in the driver's seat warming up the car. According to defendant, Davis drove the whole way home and they just listened to the radio. When they arrived at the house in Sims, defendant put his daughter in bed and defendant and Davis went to sleep in the same bed. Defendant testified that the next morning Davis's sister came over and was "screaming and hollering." Defendant put his daughter in his car and drove to his parents' house.

¶ 15 On 1 August 2016, defendant was arrested. The defendant went to trial on the following five bills of information in which he was charged with the following seven offenses:

16CRS53232	First-degree kidnapping
16CRS53233	1 – Assault by strangulation 2 – Assault with a deadly weapon inflicting serious injury through fists and hands resulting in a ruptured eardrum
16CRS53234	Assault on a female through a kick to the head
16CRS53235	Assault on a female through a headbutt to the forehead
16CRS53236	1 – Assault with a deadly weapon inflicting serious injury through fists, hands, and teeth resulting in a fractured nose 2 – Communicating threats

The trial began 5 February 2018, and the jury convicted defendant on all charges except two: the assault by strangulation, and assault on a female by kick to the chest. The trial court entered a consolidated judgment in sentencing defendant to a minimum of 75 months and a maximum of 102 months in prison. Defendant appealed to the Court of Appeals.

¶ 16 The Court of Appeals found no error. Defendant filed a petition for discretionary review, which we allowed on 12 August 2020.

II. Issues Presented for Review

¶ 17 On discretionary review, defendant raises two issues: (1) whether there was insufficient evidence of multiple assaults such that the trial court erred by denying defendant's motion to dismiss all but one assault charge; and (2) whether there was sufficient evidence to establish that defendant used his hands, feet, or teeth as deadly weapons. As to the second issue, the members of the Court are equally divided. Accordingly, the decision of the Court of Appeals as to this issue stands as law of this case without precedential value and we spend the remainder of this opinion discussing only the first issue presented. *See*, *e.g.*, *Piro v. McKeever*, 369 N.C. 291, 291 (2016) (per curiam) (affirming a Court of Appeals opinion without precedential value by an equally divided vote); *CommScope Credit Union v. Butler & Burke, LLP*, 369 N.C. 48, 56 (2016) (same).

III. Preservation

¶ 18 Defendant moved to dismiss the deadly weapon element of his assault charges at the close of the State's evidence arguing that insufficient evidence was presented to show that his hands could be considered deadly weapons. He renewed his motion at the close of all of the evidence, mentioning that the bills of information did not include the correct dates of the offense. The Court of Appeals held that defendant's failure to argue before the trial court that the evidence established only one assault resulted in a failure to preserve this argument for appellate review. *State v. Dew*, 270 N.C. App. 458, 462 (2020). We disagree.

¶ 19 We recently held in *State v. Golder*, 374 N.C. 238 (2020), that "merely moving to dismiss at the proper time under Rule 10(a)(3) preserves *all* issues related to the sufficiency of the evidence for appellate review." *Id.* at 249. Additionally, in his petition for discretionary review, defendant requested review of the following issue: "[w]hether the Court of Appeals erred by affirming multiple counts of assault where the defendant struck multiple blows, causing multiple injuries, in a single episode." Defendant's motion to dismiss for insufficient evidence preserved all sufficiency issues, and we allowed defendant's petition for

discretionary review. Accordingly, the issue of whether the trial court erred by failing to dismiss all but one count of assault is properly before us for consideration.

IV. Standard of Review

¶ 20 It is well established that

> [w]hen ruling on a motion to dismiss, the trial court must determine whether the prosecution has presented substantial evidence of each essential element of the crime. Substantial evidence is that amount of relevant evidence that a reasonable mind might accept as adequate to support a conclusion. In making its decision, the trial court must view the evidence in the light most favorable to the State.

State v. Bell, 359 N.C. 1, 25 (2004) (cleaned up) (first quoting *State v. Call*, 349 N.C. 382, 417 (1998); then quoting *State v. Williams*, 355 N.C. 501, 579 (2002), *cert. denied*, 537 U.S. 1125 (2003); and then quoting *State v. Hyatt*, 355 N.C. 642, 666 (2002), *cert. denied*, 537 U.S. 1133 (2003)).

V. Analysis

¶ 21 Here, defendant was charged with seven offenses, including five assault charges, and the jury found him guilty of three assault charges, to wit: AWDWISI (No. 53233) with hands/fists resulting in a ruptured eardrum, assault on a female (No. 53233) headbutt to forehead, and AWDWISI (No. 53236) with hands/fists resulting in a fractured nose. The three assault charges for which defendant was found guilty were assault with a deadly weapon inflicting serious injury resulting in the ruptured eardrum, assault on a female in connection with the headbutt to the forehead, and assault with a deadly weapon inflicting serious injury resulting in the fractured nose. Accordingly, we must now examine whether, in the light most favorable to the State, there was substantial evidence of each essential element of each of these instances of assault on a female or assault inflicting serious injury.[1]

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1. As noted above, the members of this Court are equally divided as to whether there was substantial evidence that defendant's hands, feet, and teeth were used as deadly weapons. Accordingly, we affirm without precedential value the holding of the Court of Appeals that the trial court did not err by denying defendant's motion to dismiss the deadly weapon element of these two counts of assault because the State had presented sufficient evidence that defendant's hands, feet, and teeth were used as deadly weapons. Our analysis of the assault with a deadly weapon inflicting serious injury charges would also be applicable to an analysis of the lesser included offense of assault inflicting serious injury. Therefore, this opinion should not be construed to say conclusively one way or the other whether hands, feet, and teeth are deadly weapons.

¶ 22 One of the essential elements of both assault on a female and assault with a deadly weapon inflicting serious injury is "an assault." *See* N.C.G.S. § 14-33(c)(2) (2019); N.C.G.S. § 14-32(b) (2019).[2] Here we are asked to determine what exactly constitutes an assault and how a court may determine whether there is substantial evidence of multiple assaults or only a single assault.

¶ 23 "Although our statutes criminalize the act of assault, '[t]here is no statutory definition of assault in North Carolina, and the crime of assault is governed by common law rules.' " *State v. Floyd*, 369 N.C. 329, 335 (2016) (alteration in original) (citation omitted) (quoting *State v. Roberts*, 270 N.C. 655, 658 (1967)). "This Court generally defines the common law offense of assault as 'an overt act or an attempt, or the unequivocal appearance of an attempt, with force and violence, to do some immediate physical injury to the person of another, which show of force or menace of violence must be sufficient to put a person of reasonable firmness in fear of immediate bodily harm.' " *Roberts*, 270 N.C. at 658 (quoting 1 Strong's North Carolina Index, *Assault and Battery* § 4 (1957)). Black's Law Dictionary defines "assault" as "[t]he threat or use of force on another that causes that person to have a reasonable apprehension of imminent harmful or offensive contact" and "[p]opularly, any attack." *Assault*, Black's Law Dictionary (11th ed. 2019). From these definitions, we gather that assault is a broad concept that can include more than one contact with another person. For example, an "attack" or "show of force" may refer to a single punch but could also refer to a deluge of punches in a single fight and still be called a single assault. We have not found, and the parties have not presented, any evidence or indication that the General Assembly intended for the State to be able to charge someone with a separate assault for every punch thrown in a fight. Indeed, the State made clear in its argument that it did not think it would be appropriate to charge someone for every punch in a fight. Thus, we must look beyond the number of physical contacts with the victim to determine whether

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2. We note that the bills of information indicate that defendant was charged under N.C.G.S. § 14-32(a), which provides that "[a]ny person who assaults another person with a deadly weapon with intent to kill and inflicts serious injury shall be punished as a Class C felon." However, the bills of information classify the offense as a Class E felony and do not include the language of intent to kill. Therefore, it may be that defendant was actually charged under N.C.G.S. § 14-32(b), which provides that "[a]ny person who assaults another person with a deadly weapon and inflicts serious injury shall be punished as a Class E felon."

Because our focus is on the first element of the offense, "assault" it makes no difference to our analysis whether defendant was charged under N.C.G.S. § 14-32(a) or N.C.G.S. § 14-32(b). Furthermore, neither party raised this potential discrepancy as an issue at any stage of the litigation.

more than one assault has occurred such that the State can appropriately charge a defendant with multiple assaults.

¶ 24 The question of how to delineate between assaults—to know where one assault ends and another begins—in order to determine whether the State may charge a defendant with multiple assaults, is an issue of first impression in our Court. The Court of Appeals has analyzed this issue several times. *See*, *e.g.*, *State v. Brooks*, 138 N.C. App. 185, 190–91 (2000) (holding that the defendant could only be charged with a single count of assault with a deadly weapon inflicting serious injury where there was no evidence of a distinct interruption between three gunshots); *State v. Littlejohn*, 158 N.C. App. 628, 636 (2003) (holding that the defendant could be charged with two counts of assault where the evidence tended to establish that the assaults were distinct in time and inflicted wounds in different parts of the victim's body); *State v. McCoy*, 174 N.C. App. 105 (2005) (holding that the defendant could be charged with two counts of assault where the evidence showed the assaults took place on two different days, but could not be charged with multiple counts of assault arising from a single continuous transaction on one of those days). In brief, the Court of Appeals has required that "[i]n order for a criminal defendant to be charged and convicted of two separate counts of assault stemming from one transaction, the evidence must establish 'a distinct interruption in the original assault followed by a second assault[,]' so that the subsequent assault may be deemed separate and distinct from the first." *Littlejohn*, 158 N.C. App. at 635 (second alteration in original) (quoting *Brooks*, 138 N.C. App. at 189). But it is not always easy to determine when a "distinct interruption" has occurred.

¶ 25 In some cases, the Court of Appeals has chosen to apply our decision in *State v. Rambert*, 341 N.C. 173 (1995). In *Rambert*, the defendant was charged and convicted of three counts of discharging a firearm into occupied property. *Id.* at 174. The defendant argued on appeal that evidence that he fired three shots into occupied property within a short period of time supported only a single conviction and sentence, not three, for discharging a firearm into occupied property. *Id.* We concluded that "the evidence clearly show[ed] that [the] defendant was not charged three times with the same offense for the same act but was charged for three separate and distinct acts." *Id.* at 176. We noted that (1) the defendant employed his thought processes each time he fired the weapon, (2) each act was distinct in time, and (3) each bullet hit the vehicle in a different place. *Id.* at 177. Accordingly, we determined that each time the defendant discharged his firearm could be charged as a separate offense. *Id.*

¶ 26 Here, the Court of Appeals applied the three factors from *Rambert* to determine whether there was a distinct interruption between assaults. *Dew*, 270 N.C. App. at 462–63. The State argues that we should likewise apply the *Rambert* factors and conclude that multiple assaults occurred on the night in question. Although we appreciate that *Rambert* may be the most closely analogous case from our Court to date, we decline to extend *Rambert* to assault cases generally. *Rambert* resolved an issue involving the discharge of a firearm, an act which differs from the physical assaults here in important ways. Discharging a firearm means firing a shot; each distinctly fired shot is a separate discharge of a firearm. The same is not true of assault which, as explained above, might refer to a single harmful contact or several harmful contacts within a single incident. Multiple contacts can still be considered a single assault, even though each punch or kick would require a different thought process, would not occur simultaneously, and would land in different places on the victim's body. These two distinct crimes require two distinct analyses. Accordingly, we conclude that the *Rambert* factors are not the ideal analogy for an assault analysis.

¶ 27 We agree with the Court of Appeals that the State may charge a defendant with multiple counts of assault only when there is substantial evidence that a distinct interruption occurred between assaults. Building on the Court of Appeals' jurisprudence, we now take the opportunity to provide examples but not an exclusive list to further explain what can qualify as a distinct interruption: a distinct interruption may take the form of an intervening event, a lapse of time in which a reasonable person could calm down, an interruption in the momentum of the attack, a change in location, or some other clear break delineating the end of one assault and the beginning of another.

¶ 28 Based on the facts here, we think it is important to further explain what does *not* constitute a distinct interruption. The State's charges here seem to be based on the victim's injuries. But the fact that a victim has multiple, distinct injuries alone is not sufficient evidence of a distinct interruption such that a defendant can be charged with multiple counts of assault. The magnitude of the harm done to the victim can be taken into account during sentencing but does not automatically permit the State to stack charges against a defendant without evidence of a distinct interruption.

¶ 29 Evidence that a defendant used different methods of attack can show a distinct interruption depending on the totality of the circumstances. Here the State has argued that defendant punched and headbutted the victim and that because there was no evidence that these different

methods of attack occurred at the exact same time, each method constituted a separate assault. We disagree. As we explained above, the concept of an assault can be broader than each individual harmful contact, but allowing for a separate charge for each non-simultaneous contact would erase any limiting principle and allow the State to charge a defendant for every punch in a fight. Requiring the State's case to include evidence of a "distinct interruption" in an otherwise continuous assault addresses this concern.

¶ 30 The State has tried to justify its analysis by noting that neither defendant in this case nor any of the defendants in cases cited by the parties in their briefs were charged for every blow during their assaults. However, this argument would put the limiting principle fully within the discretion of the State. Regardless of the fact that the State did not charge a defendant for each blow, the State's argument would leave open the door such that the State *could* charge for each blow. We decline to leave such ambiguity in the law such that the State could, but may choose not to, charge a defendant for every punch thrown in a fight when the legislature has shown no intention to criminalize the conduct at that level of granularity. To do so would be to abdicate our responsibility to interpret the laws passed by the legislature in accordance with their plain meaning and intention. Furthermore, it would abolish any limiting principle and would leave a trial court powerless to determine whether there was sufficient evidence of multiple assaults since evidence of each punch could constitute a separate assault under the State's proposed legal schema.

¶ 31 We now turn to the facts of this case to determine whether there was substantial evidence of more than one assault. In the light most favorable to the State, we conclude that there could be sufficient evidence of a distinct interruption between assault(s) in the trailer and the assault(s) in the car to submit the issue to the jury.

¶ 32 Davis testified to being beaten for approximately four hours total. She testified that in the trailer defendant hit her "over and over" during a continuous, non-stop beating for at least two hours until she vomited. She also testified that she was beaten during the two-hour car ride home to Sims when defendant hit her on the side of her head and pulled off the road several times to strangle her. But Davis also indicated that there was a distinct interruption between the attack in the trailer and the attack in the car.

¶ 33 After the beating in the trailer, but before defendant began beating Davis in the car, Davis testified that she wiped down the mattress cover and took the sheets off of the bed, that she took their luggage out to the

car, and that defendant got his daughter off of the couch and put her in a car seat in the back seat of the car. This is substantial evidence of a distinct interruption between occurrences in the trailer and those in the car. The process of cleaning up and packing up was an intervening event interrupting the momentum of the attack. In addition, the beating in the trailer was distinct in time and location from the beating in the car. The jury could have found that there was a distinct interruption between when the first assault concluded with Davis vomiting on the bed and when defendant resumed his attacks in the car during the drive home.

¶ 34 Defendant draws inferences from Davis's testimony that the entirety of the assault took place in the trailer. But in the light most favorable to the State, the following testimony is substantial evidence that defendant also assaulted Davis in the car:

> We continued on, and as we were on the way home, the whole time he is still hitting me upside this side of my head where I had the ruptured eardrum. He—I remember him pulling off the road, jacking me up to the ceiling of the car, strangling me. There were several times—his arms are long, so he could reach over in my car—he would make me take my seat belt off, open the door and tell me he was going to push me out.
>
> He pulled off the road several times and continued to do that. I think it was about three times with the seat belt and he's going to push me out of the car.

Accordingly, we conclude that the jury could find that the beating in the trailer and the beating in the car were distinct assaults.

¶ 35 The State charged defendant with at least two assaults for his conduct in the trailer: assault on a female involving the headbutt to the forehead and assault with a deadly weapon inflicting serious injury resulting in the fractured nose. As noted above, different injuries or different methods of attack standing alone are insufficient evidence of a distinct interruption. The State presented no evidence indicating that a distinct interruption occurred in the trailer. Even in the light most favorable to the State, all of the evidence indicated that it was an ongoing, continuous attack. Accordingly, there is substantial evidence of only one assault in the trailer. On remand, the trial court should vacate the judgment for the assault on a female (No. 16CR55325, involving the headbutt to the forehead), and enter a new sentence for the remaining consolidated offenses.

VI. Conclusion

¶ 36 The trial court did not err by denying defendant's motion to dismiss all but one of the assault charges because, in the light most favorable to the State, there was sufficient evidence of two assaults—one in the trailer and one in the car—to go to the jury. The evidence was not sufficient to show two assaults in the trailer as there was no showing of a distinct interruption in what was described as a non-stop, several hour attack in the trailer. Accordingly, we modify and affirm the decision of the Court of Appeals.

MODIFIED AND AFFIRMED; REMANDED FOR RESENTENCING.

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

STATE OF NORTH CAROLINA
v.
JOHN D. GRAHAM

No. 155PA20

Filed 29 October 2021

Sentencing—prior record level calculation—parallel offense from another state—comparison of elements—substantially similar

For purposes of calculating defendant's prior record level calculation (after he was convicted of sexual offense with a child by an adult), defendant's conviction of statutory rape in Georgia was properly deemed to be equivalent to a North Carolina Class B1 felony where the statutory rape statutes in both states were substantially similar, despite variations in the age of the victim and the age differential between the perpetrator and victim. In applying the "comparison of the elements" test to determine whether an out-of-state criminal statute is substantially similar to a North Carolina criminal statute (pursuant to N.C.G.S. § 15A-1340.14(e)), there is no requirement that the statutes use identical language or that all conduct prohibited by one statute must also be prohibited by the other.

Justice EARLS dissenting.

Justice ERVIN joins in this dissenting opinion.

Discretionary review allowed pursuant to N.C.G.S. § 7A-31 concerning the opinion of a divided panel of the Court of Appeals, 270 N.C. App. 478 (2020), finding no error in part and vacating and remanding in part an order entered on 13 December 2016 by Judge Eric Levinson in Superior Court, Clay County[1] and an order entered on 13 May 2019 by Judge Athena F. Brooks in Superior Court, Clay County. Heard in the Supreme Court on 26 April 2021.

Joshua H. Stein, Attorney General, by Benjamin O. Zellinger, Special Deputy Attorney General, for the State-appellee.

Glenn Gerding, Appellate Defender, by Daniel Shatz, Assistant Appellate Defender, for defendant-appellant.

MORGAN, Justice.

¶ 1 This Court has limited its allowance of defendant's petition for discretionary review to a single issue addressed by the Court of Appeals which defendant contends that the lower appellate court decided in error. Pertinent to our election to review this case is defendant's argument that the Court of Appeals either improperly applied or disregarded the appropriate test for determining whether a defendant's out-of-state conviction may be counted as an elevated felony classification for purposes of sentencing in North Carolina trial courts as announced in *State v. Sanders*, 367 N.C. 716 (2014). Because we believe that the Court of Appeals majority, with which the lower appellate court's dissenting opinion agreed, properly applied the comparative elements test in affirming the trial court's consideration of defendant's conviction in the state of Georgia for statutory rape as equivalent to a North Carolina Class B1 felony for the purpose of the calculation of prior record level points in criminal sentencing, we affirm the Court of Appeals determination and find no error.

I. Factual and Procedural Background

¶ 2 Defendant was indicted on four counts each of sexual offense with a child by an adult and taking indecent liberties with a child by a Clay

1. The Court of Appeals judge who rendered an opinion "concurring in part and dissenting in part" did not disagree with the lower appellate court's majority opinion concerning the subject of our opinion here. *See State v. Graham*, 270 N.C. App. 478, 502 (2020) (Bryant, J., concurring in part and dissenting in part). As a result, this Court afforded discretionary review to the issue addressed herein so as to be able to consider it.

County grand jury on 11 September 2012. Defendant's trial began on 5 December 2016. The victim in the case, A.M.D.,[2] testified that on multiple occasions when she was seven to eight years old, defendant inappropriately touched her private areas and digitally penetrated her vagina. At the close of the State's evidence, the State voluntarily dismissed all four counts of taking indecent liberties with a child, and the trial court submitted the remaining four counts of sexual offense with a child by an adult to the jury after both parties had ended their respective presentations. On 9 December 2016, the jury returned a verdict of guilty on one count of sexual offense with a child by an adult, and found defendant not guilty as to the three remaining charges. The trial court continued sentencing until the following week.

¶ 3 At the sentencing hearing on 13 December 2016, the State tendered to the trial court defendant's conviction on 21 March 2001 for statutory rape in Georgia,[3] as well as defendant's more recent conviction on 9 April 2015 for escaping a local jail in Clay County, for consideration by the trial court in its calculation of defendant's prior record level. In compliance with the regular procedure for trial courts in North Carolina, the trial court in this case utilized a standardized AOC-CR-600B form to determine, under a structured sentencing statutory framework, the manner in which defendant's prior convictions would affect the length of active time that defendant would serve for his single Class B1 felony conviction in violation of North Carolina law for the commission of sexual offense with a child by an adult. The trial court treated defendant's Georgia statutory rape conviction as a Class B1 felony—which garnered defendant nine prior record points for sentencing purposes—because the trial court regarded the Georgia statute under which defendant was convicted as similar to North Carolina's own statutory rape statute. In the event that the trial court had classified defendant's Georgia conviction in the lower felony class level of Class I, which was an option available to the trial court, then defendant would have been assigned only two prior record points for the Georgia conviction as the trial court determined defendant's sentence for his perpetration of the North Carolina criminal offense of sexual offense with a child by an adult. Combined with

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2. The juvenile victim's initials are used to obscure her identity in an effort to protect the victim's privacy.

3. The record reflects that the victim in defendant's 2001 conviction for statutory rape in Georgia was the mother of A.M.D. It appears that after defendant was released from the active term that he was serving for the Georgia conviction, defendant absconded probation with the assistance of A.M.D.'s mother, and was invited by A.M.D.'s mother to reside with her and A.M.D.

one point assigned for defendant's previous escape conviction, defendant was assigned a total of ten prior record level points for sentencing purposes, which automatically categorized him as a Level IV offender for sentencing determinations. On the other hand, if the trial court had declined to find substantial similarity between the Georgia and North Carolina statutes at issue, then defendant would have received a total of only three prior record level points which would have classified him as a prior record Level II offender under North Carolina's structured sentencing guidelines. In sentencing defendant within the parameters of prior record Level IV, the trial court entered a judgment of 335 to 462 months of active time of incarceration for defendant. Defendant appealed, and the Court of Appeals panel held that the trial court did not err as to finding substantial similarity between the Georgia and North Carolina statutes.

II. Analysis

¶ 4 On 21 March 2001, defendant was found guilty of the offense of statutory rape in the state of Georgia. He was determined to have violated section 16-6-3 of the Official Code of Georgia Annotated, which read as follows at the time of defendant's conviction under the Georgia statute:

> (a) A person commits the offense of statutory rape when he or she engages in sexual intercourse with any person under the age of 16 years and not his or her spouse, provided that no conviction shall be had for this offense on the unsupported testimony of the victim.
>
> (b) A person convicted of the offense of statutory rape shall be punished by imprisonment for not less than one nor more than 20 years; provided, however, that if the person so convicted is 21 years of age or older, such person shall be punished by imprisonment for not less than ten nor more than 20 years; provided, further, that if the victim is 14 or 15 years of age and the person so convicted is no more than three years older than the victim, such person shall be guilty of a misdemeanor.

Ga. Code Ann. § 16-6-3 (2001). Expanded into its component parts, the Georgia statute results in a felony conviction if a defendant (1) engages in sexual intercourse (2) with any person (3) under sixteen years of age (4) who is not the defendant's spouse, (5) unless the victim is fourteen or fifteen years of age and the defendant is no more than three years

older than the victim.[4] Ga. Code Ann. § 16-6-3. If the victim is fourteen or fifteen years old and the defendant is within three years in age of the victim, then the defendant is guilty of a misdemeanor. *Id.*

¶ 5 Comparably, section 14-27.25 of the General Statutes of North Carolina stated the following at the time that the trial court in defendant's matter at issue conducted the sentencing hearing in the present case on 13 December 2016:

> (a) A defendant is guilty of a Class B1 felony if the defendant engages in vaginal intercourse with another person who is 15 years of age or younger and the defendant is at least 12 years old and at least six years older than the person, except when the defendant is lawfully married to the person.
>
> (b) Unless the conduct is covered under some other provision of law providing greater punishment, a defendant is guilty of a Class C felony if the defendant engages in vaginal intercourse with another person who is 15 years of age or younger and the defendant is at least 12 years old and more than four but less than six years older than the person, except when the defendant is lawfully married to the person.

N.C.G.S. § 14-27.25 (2015). The elements of the North Carolina statute require the State to prove that a defendant (1) engaged in vaginal intercourse (2) with another person (3) fifteen years of age or younger (4) who is not the defendant's spouse, (5) provided that the defendant is at least twelve years of age at the time of the offense and (6) at least six years older than the victim to constitute a Class B1 violation of N.C.G.S. § 14-27.25(a), and less than six years older but more than four years older than the victim to constitute a Class C violation of N.C.G.S. § 14-27.25(b). N.C.G.S. § 14-27.25.

¶ 6 In calculating a defendant's prior record level, a trial court must determine whether the statute under which a defendant was convicted in another state is substantially similar to a statute of a particular felony in North Carolina, which the State must show by a preponderance of the evidence. Subsection 15A-1340.14(e) states in pertinent part:

> Except as otherwise provided in this subsection, a conviction occurring in a jurisdiction other than

4. In the case at bar, defendant's Georgia conviction was a felony offense.

> North Carolina is classified as a Class I felony if the jurisdiction in which the offense occurred classifies the offense as a felony . . . . *If the State proves by the preponderance of the evidence that an offense classified as . . . a felony in the other jurisdiction is substantially similar to an offense in North Carolina that is classified as a Class I felony or higher, the conviction is treated as that class of felony for assigning prior record level points.*

N.C.G.S. § 15A-1340.14(e) (2019) (emphasis added).

¶ 7 We adopt the correctness of determinations made by the Court of Appeals that "whether an out-of-state offense is substantially similar to a North Carolina offense is a question of law," *State v. Hanton*, 175 N.C. App. 250, 254 (2006), and "the requirement set forth in N.C. Gen. Stat. § 15A-1340.14(e) is not that the statutory wording precisely match, but rather that the offense be 'substantially similar,' " *State v. Sapp*, 190 N.C. App. 698, 713 (2008). "We review questions of law de novo." *State v. Khan*, 366 N.C. 448, 453 (2013).

¶ 8 In the instant case, the trial court evaluated defendant's conviction of statutory rape in the state of Georgia to be commensurate with a Class B1 felony in North Carolina for sentencing purposes in the present case and hence, in assigning points for prior convictions, accorded nine points to the Georgia conviction. We agree with the determination of the lower appellate court, to which defendant appealed the trial court outcomes, "that the trial court did not err in finding the two offenses substantially similar" as Ga. Code Ann. § 16-6-3 outlaws statutory rape of a person who is under the age of sixteen and N.C.G.S. § 14-27.25 prohibits statutory rape of a person who is fifteen years of age or younger.[5] *State v. Graham*, 270 N.C. App. 478, 496 (2020).

¶ 9 Each of the statutes includes an express reference to the act of physical intercourse between the perpetrator of the offense and the victim; Georgia utilizes the phrase "engages in sexual intercourse" and North

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5. While the Court of Appeals recognized that "the State failed to meet its burden of proof" due to the State's failure to introduce a copy of the Georgia statute into evidence despite the provision of the foreign enactment to the trial court for review, nonetheless the lower appellate court determined that this omission constituted harmless error because "the record contains enough information for us to review the trial court's determination that the Georgia and North Carolina offenses were substantially similar." *Graham*, 270 N.C. App. at 491–92. Defendant does not challenge this determination by the Court of Appeals in the current appeal to us.

Carolina employs the terminology "engages in vaginal intercourse." Both statutes employ nearly identical language that the act of physical intercourse is conducted by the perpetrator with another person and that the other person is not the offender's spouse by virtue of a lawful marriage. The variations between the two statutes arise in the areas of the age of the statutory rape victim—Georgia, "under the age of 16 years," and North Carolina, "15 years of age or younger"—and the age difference between the two participants which impacts the perpetrator's degree of punishment—Georgia, "[a] person convicted of the offense of statutory rape shall be punished by imprisonment for not less than one nor more than 20 years; provided, however, that if the person so convicted is 21 years of age or older, such person shall be punished by imprisonment for not less than ten nor more than 20 years; provided, further, that if the victim is 14 or 15 years of age and the person so convicted is no more than three years older than the victim, such person shall be guilty of a misdemeanor," Ga. Code Ann. § 16-6-3, and North Carolina, "[a] defendant is guilty of a Class B1 felony if the defendant engages in vaginal intercourse with another person who is 15 years of age or younger and the defendant is at least 12 years old and at least six years older than the person . . . [and] a defendant is guilty of a Class C felony if the defendant engages in vaginal intercourse with another person who is 15 years of age or younger and the defendant is at least 12 years older and more than four but less than six years older than the person," N.C.G.S. § 14-27.25.

¶ 10 Defendant argues that the Georgia statutory rape statute and the North Carolina statutory rape statute are not substantially similar in addressing the criminal offenses which they respectively prohibit in that there is no age difference element in the Georgia law, because unlike the North Carolina law which identifies specific age differences in its felony classifications, defendant notes that "the Georgia statute applies equally to all persons under the age of 16 years." He expounds upon this "lack of an age difference element in the Georgia statutory rape statute" by offering hypothetical examples of sexual intercourse which he posits would constitute the offense of statutory rape in Georgia but would not constitute the offense of statutory rape in North Carolina. Defendant submits that in a comparison of a North Carolina statute with another state's statute in order to determine substantial similarity between the two, if the difference between the two statutes renders the other state's law narrower or broader, "or if there are differences that work in both directions, so that each statute includes conduct not covered by the other, then the two statutes will not be substantially similar for purposes of the statute." Additionally, defendant asserts that the Georgia law under

examination here is not substantially similar to the North Carolina enactment to which it is being paralleled because the Georgia law can be violated "by conduct that is only a Class C felony . . . in North Carolina." Defendant's arguments are unpersuasive.

¶ 11 Defendant's position conflates the requirement that statutes subject to comparison be substantially similar to one another with his erroneous perception that the two statutes must have identicalness to each other. As we previously noted in our recognition of *Sapp*, 190 N.C. App. at 713, the statutory wording of the Georgia provision and the North Carolina provision do not need to precisely match in order to be deemed to be substantially similar. Likewise, defendant's stance that the Georgia statute and the North Carolina statute cannot be considered to be substantially similar because not every violation of the Georgia law would be tantamount to the commission of a Class B1 felony under the comparative North Carolina law is unfounded. In applying N.C.G.S. § 15A-1340.14(e) to the case sub judice, since the Georgia offense of statutory rape "is substantially similar to an offense in North Carolina that is classified as a Class I felony or higher"—here, a Class B1 felony under N.C.G.S. § 14-27.25(a)—then defendant's conviction of statutory rape in the state of Georgia is treated as a Class B1 felony conviction for the assignment of the appropriate number of prior record level points. Accordingly, the trial court in the instant case correctly ascertained the figure of nine points for felony sentencing purposes for defendant's commission of the Georgia offense of statutory rape for which defendant was convicted on 21 March 2001.

¶ 12 The dissent's view suffers from the same foundational flaw that is exhibited by defendant's stance on the pivotal resolution of the question as to whether the statutes at issue are substantially similar to one another. Although our learned colleagues who would reach a different outcome in this case join defendant in confusing the legal concept of "substantially similar" with the aspect of identicalness, the dissenters further compound their unfortunate jumble of the two different measures by expanding the scope of "substantially similar" toward a requirement of exactitude. Standing alone, neither word—"substantially" or "similar"—connotes literalness; therefore, when these words are combined to create the legal term of art "substantially similar," this chosen phraseology reinforces the lack of a requirement for the statutory language in one enactment to be the same as the statutory language in another enactment in order for the two laws to be treated as "substantially similar." Yet, the dissent here—despite the obvious essential pertinent parallels between the Georgia statute and the North Carolina statute—

would withhold a recognition that the two statutes are substantially similar because *all* of the same provisions are not common to each of them. In this respect, although the dissent professes that it understands the difference between "substantially similar" and identicalness, nonetheless it appears that the dissent is so ensnared and engulfed by a need to see a mirrored reflection mutually cast between the two statutes that the dissent is compelled to promote this erroneously expansive approach.

¶ 13 With our agreement with the view of the Court of Appeals that the trial court did not err in finding that the two offenses which the Georgia statute and the North Carolina statute respectively proscribed were substantially similar, this outcome comports with our decision in *Sanders*, 367 N.C. 716. In *Sanders*, this Court reviewed the criminal offense of the state of Tennessee known as "domestic assault" and the North Carolina offense of assault on a female. The *Sanders* defendant was found by a jury to be guilty of robbery with a dangerous weapon, and the trial court examined the defendant's prior convictions during the trial's sentencing phase for the purpose of establishing the defendant's sentencing points. His prior convictions included the Tennessee offense of domestic assault.

¶ 14 We noted in *Sanders* that the Court previously "ha[d] not addressed the comparison of out-of-state offenses with North Carolina offenses for purposes of determining substantial similarity under N.C.G.S. § 15A-1340.14(e)." 367 N.C. at 718. In this case of first impression, this Court held that "[d]etermination of whether the out-of-state conviction is substantially similar to a North Carolina offense is a question of law involving comparison of the elements of the out-of-state offense to those of the North Carolina offense." *Id.* at 720 (alteration in original) (quoting *State v. Fortney*, 201 N.C. App. 662, 671 (2010)). In devising a "comparison of the elements" test, this Court expressly rejected the State's argument in *Sanders* "to look beyond the elements of the offenses and consider (1) the underlying facts of defendant's out-of-state conviction, and (2) whether, considering the legislative purpose of the respective statutes defining the offenses, the North Carolina offense is 'suitably equivalent' to the out-of-state offense." *Id.* at 719. The Court's implementation of its announced "comparison of the elements" test compelled us to determine that the Tennessee offense of domestic assault and the North Carolina offense of assault on a female were not substantially similar, in that the disparity in the elements of the two offenses regarding the genders of the parties involved and the status of their relationships rendered the Tennessee and North Carolina offenses legally incomparable to one another for purposes of the determination of prior record level points. *Id.* at 721.

¶ 15 In attempting to equate the statutes at issue in *Sanders* with the statutes being evaluated in the present case, the dissent demonstrates its misunderstanding of the application of *Sanders* and its misinterpretation of the term "substantially similar." The dissent sees no meaningful difference, for purposes of the determination of "substantially similar" statutes, between 1) a one-year difference in the age of early teenagers who are victims and 2) specified age difference delineations between victims and offenders in the instant case, and 1) a total elimination of one gender from the ability to offend and 2) the relationship status of victims and offenders in *Sanders*. In fixating on the exactness of the terminology of the respective statutes being compared in each of the two cases and corresponding potential outcomes which might be yielded in specific fact pattern scenarios which could arise in each state, the dissent promotes a widened view of "substantially similar" which would wrongly extend this Court's holding in *Sanders* to require identicalness between compared statutes from different states and mandate identical outcomes between cases which originate both in North Carolina and in the foreign state. Such requirements would be inconsistent with our analysis in *Sanders*, the cited principles which we utilize from the Court of Appeals cases of *Hanton* and *Sapp*, and the proper construction and application of the concept of "substantially similar."

¶ 16 Despite the dissent's concerns, we understand that it is unwise to endeavor to articulate a "bright-line rule" to govern a determination of whether a North Carolina statute is "substantially similar" to a statute from another state. While the dissent would establish such a standard with a test of identicalness, this guide is erroneous as well as incompatible with the concept of the identification of whether enactments of law are "substantially similar." There are so many iterations of so many similar laws written in so many different ways, in North Carolina and in the forty-nine other states in America, that the courts of this state must necessarily possess the ability to operate with the flexibility that the phrase "substantially similar" inherently signifies in determining whether statutes which are being compared share the operative elements in the evaluation. While such an exercise is predictably challenging, we are confident that the courts of this state have sufficient guidance and flexibility to properly conduct the prescribed analysis of the statutes' respective elements.

¶ 17 In applying the "comparison of the elements" test articulated in *Sanders* to the present case, the harmonious determinations of the trial court and the Court of Appeals here are consistent with our view that the Georgia statutory rape offense prohibited by Ga. Code Ann. § 16-6-3

and the North Carolina statutory rape offense forbidden by N.C.G.S. § 14-27.25(a) are substantially similar. Just as the State in *Sanders* was unsuccessful in its assertion that a court's determination of whether two statutes are "substantially similar" should be premised on considerations other than the statute's elements, defendant is unsuccessful here in his argument that is contrary to the cited statutory and case law, while being incongruous with the "comparison of the elements" test which supports the conclusion that the Georgia and North Carolina offenses at issue are substantially similar for purposes of the computation of defendant's prior record level points for sentencing.

III. Conclusion

¶ 18 The Georgia statutory rape statute under which defendant was previously convicted was substantially similar to North Carolina's statutory rape statute so as to authorize the trial court to regard defendant's conviction of the offense of statutory rape in the state of Georgia as a Class B1 felony offense for purposes of determining defendant's prior record level points for sentencing purposes. The trial court did not err in this determination, and the Court of Appeals was correct in its subsequent determination to affirm the trial court on this sole issue which we have addressed upon discretionary review.

AFFIRMED.

Justice EARLS dissenting.

¶ 19 An out-of-state statute is not "substantially similar" to a North Carolina statute within the meaning of N.C.G.S. § 15A-1340.14(e) if conduct that is proscribed by the out-of-state statute is lawful under the North Carolina statute. That was the substance of the elements-based approach to comparing criminal statutes we articulated in *State v. Sanders*, 367 N.C. 716 (2014). Despite its protestations to the contrary, the majority does not adhere to *Sanders*. The resulting decision fails to "giv[e] fair and clear warning" to the public of the consequences of engaging in criminal conduct, *United States v. Lanier*, 520 U.S. 259, 271 (1997), and construes N.C.G.S. § 15A-1340.14(e) in a way that likely "fail[s] to meet constitutional standards for definiteness and clarity," *Kolender v. Lawson*, 461 U.S. 352, 361 (1983). Because the majority's analysis will not yield an "evenhanded, predictable, or consistent" application of N.C.G.S. § 15A-1340.14(e), *Johnson v. United States*, 576 U.S. 591, 606 (2015), I respectfully dissent.

I. The majority's decision is in tension with *Sanders*

¶ 20 In this case, the Georgia statute that the defendant, John D. Graham, violated is not "substantially similar" to any Class B1 felony provided by North Carolina law. This conclusion necessarily follows from any fair reading of *Sanders*.

¶ 21 In *Sanders*, this Court considered whether a Tennessee statute prohibiting individuals from assaulting any "domestic abuse victim," Tenn. Code Ann. § 39-13-111(b) (2009), was "substantially similar" to the North Carolina statutory offense of assaulting a female, N.C.G.S. § 14-33(c)(2) (2013). We held that it was not. Our reasoning was straightforward. Under the Tennessee statute, an individual was guilty of the specified offense if the person assaulted someone who fell within one of six defined categories of "domestic abuse victims." None of these categories contained the requirement found in N.C.G.S. § 14-33(c)(2) that "the victim . . . be female [and] the assailant . . . be male and of a certain age." *Sanders*, 367 N.C. at 720. Thus,

> a woman assaulting her child or her husband could be convicted of "domestic assault" in Tennessee, but could not be convicted of "assault on a female" in North Carolina. A male stranger who assaults a woman on the street could be convicted of "assault on a female" in North Carolina, but could not be convicted of "domestic assault" in Tennessee.

Id. at 721. This Court unanimously agreed that because the defendant could have been convicted under the Tennessee statute for conduct that would not have been criminal under the North Carolina statute, the two statutes were not "substantially similar." *Id.*

¶ 22 *Sanders* yielded two principles which should dictate the outcome of this case. The first principle is that "[d]etermination of whether the out-of-state conviction is substantially similar to a North Carolina offense is a question of law involving comparison of the elements of the out-of-state offense to those of the North Carolina offense." *Id.* at 720 (alteration in original) (quoting *State v. Fortney*, 201 N.C. App. 662, 671 (2010)). Accordingly, when ascertaining whether two statutes are substantially similar, we look only to the statutory elements of the offense, not to the factual underpinnings of the defendant's convictions.

¶ 23 The second principle is that an out-of-state criminal statute is not substantially similar to a North Carolina criminal statute if a defendant could be convicted under the out-of-state statute for acts which would

not be criminal (or not criminal at the same offense level) if committed in North Carolina. Adherence to this principle is necessary to faithfully implement the elements-based approach. When all of the conduct targeted by an out-of-state statute is encompassed within the North Carolina statute it is being compared to, there is no doubt that the defendant has committed an offense which would garner the same number of prior record level points had the defendant engaged in the proscribed conduct in North Carolina. A defendant who previously committed an act giving rise to an out-of-state criminal conviction will never be sentenced more harshly than a similarly situated defendant who previously committed the exact same act in North Carolina. Further, the facts underlying the defendant's out-of-state conviction are made irrelevant—whatever the defendant did to earn his or her out-of-state conviction, his or her conduct would necessarily violate the North Carolina statute it is being compared to.

¶ 24 The elements-based approach adopted in *Sanders* is not difficult to apply. That is, or was, its primary virtue. In this case, applying *Sanders'* correct interpretation of N.C.G.S. § 15A-1340.14(e) dictates that Graham's prior conviction in Georgia should be treated as a Class I felony for purposes of sentencing. The Georgia statute Graham was convicted under, Ga. Code Ann. § 16-6-3 (2001), indisputably encompasses conduct which is not a Class B1 felony in North Carolina. If an eighteen-year-old individual has sexual intercourse with a fourteen-year-old in Georgia, that person has violated Ga. Code Ann. § 16-6-3. If an eighteen-year-old individual has sexual intercourse with a fourteen-year-old in North Carolina, that person has not violated any statute creating a Class B1 felony offense in this state that existed at the time Mr. Graham was convicted of his offense in Georgia. *See* N.C.G.S. § 14-27.7A(a) (2001) (making it a Class B1 felony "if . . . defendant engages in vaginal intercourse or a sexual act with another person who is 13, 14, or 15 years old and . . . defendant is at least six years older than the person"); N.C.G.S. § 14-27.2A(a) (2001) (making it a Class B1 felony "if the [defendant] is at least 18 years of age and engages in vaginal intercourse with a victim who is a child under the age of 13 years"); N.C.G.S. § 14-27.2(a) (2001) (making it a Class B1 felony "if the person engages in vaginal intercourse . . . [w]ith a victim who is a child under the age of 13 years and the defendant is at least 12 years old and is at least four years older than the victim"). Under *Sanders*, we should stop there.

¶ 25 Whatever the majority says it is doing in extending beyond this point, it is not applying *Sanders*. The point of the elements-based approach is not to engage in a subjective, qualitative assessment of the substance of

two criminal offenses. The point is to enable a court to convert an out-of-state offense into an in-state offense for sentencing purposes, without needing to resort to an independent inquiry into the factual circumstances of a defendant's prior out-of-state conviction, and without creating the risk that a defendant who previously engaged in criminal conduct in another state will be sentenced differently than a similarly situated defendant who engaged in the same conduct in North Carolina.

¶ 26 The fact that Ga. Code Ann. § 16-6-3 generally targets the same kind of conduct as some North Carolina Class B1 felony offenses does not make the statute "substantially similar" under N.C.G.S. § 15A-1340.14(e). It is improper to sentence a defendant based upon our own intuition that most of the conduct prohibited by an out-of-state statute would also be prohibited by an analogous North Carolina statute. *Cf. United States v. Davis*, 139 S. Ct. 2319, 2326 (2019) ("[T]he imposition of criminal punishment can't be made to depend on a judge's estimation of the degree of risk posed by a crime's imagined 'ordinary case.' "). Squinting at two statutes and saying "close enough" is not, in this context, good enough. The majority's freewheeling approach is an invitation to unchecked judicial discretion. As a result, some defendants will inevitably be sentenced as if they had previously committed more serious offenses than they actually committed.

¶ 27 The majority is also wrong to suggest that faithful application of the elements-based approach reflects an "erroneous perception that the two statutes must have identicalness to each other." No one disputes that "substantially similar" does not mean "identical." However, the rule articulated in *Sanders* in no way requires the State to prove that an out-of-state statute is a carbon copy of the North Carolina statute it is being compared to.

¶ 28 Two criminal statutes may contain the same elements yet utilize different statutory language or be structured in different ways. For example, a hypothetical out-of-state statute which makes it a crime to intentionally use physical force to harm or threaten a female person, provided that the perpetrator is a male above the age of majority, would be substantially similar to N.C.G.S. § 14-33(c)(2), which makes it a crime for a "male person at least 18 years of age" to "[a]ssault[ ] a female." The statutes would not be identically worded, but they would be substantially similar because both would require the State to prove the same elements in order to convict a defendant.

¶ 29 Similarly, two criminal statutes may contain different elements but still be substantially similar if all of the conduct proscribed by the

out-of-state statute is proscribed by the North Carolina statute it is being compared to. A hypothetical out-of-state statute which makes it a crime to intentionally use physical force to harm or threaten a female person under the age of 12, provided that the perpetrator is a male at least twenty years old, would be substantially similar to N.C.G.S. § 14-33(c)(2), even though the statutes would not contain exactly the same elements, because anyone convicted under the out-of-state statute would necessarily have engaged in conduct proscribed by N.C.G.S. § 14-33(c)(2). *Sanders* gave full effect to every word the legislature chose to include in N.C.G.S. § 15A-1340.14(e). We should in turn give full effect to a unanimous decision interpreting the statute, rather than depart from its well-reasoned principles.

II. The majority's reasoning creates substantial uncertainty for lower courts and criminal defendants

¶ 30 The majority eschews the elements-based approach we established in *Sanders*, but it is not entirely clear what has been offered as a replacement. As the majority acknowledges, the Georgia and North Carolina statutes at issue in this case vary "in the areas of the age of the statutory rape victim" and in "the age difference between the two participants which impacts the perpetrator's degree of punishment." Further, the majority does not dispute that an individual could engage in conduct which "would constitute the offense of statutory rape in Georgia but would not constitute the offense of statutory rape in North Carolina." Nevertheless, the majority cursorily dismisses Graham's position that the statutes are not substantially similar as "unfounded." According to the majority, the State should prevail here because "[e]ach of the statutes includes an express reference to the act of physical intercourse between the perpetrator of the offense and the victim," and the two statutes "employ nearly identical language that the act of physical intercourse is conducted by the perpetrator with another person and that the other person is not the offender's spouse by virtue of a lawful marriage."

¶ 31 Of course, nearly the same could be said for the statutes at issue in *Sanders*. Both of those statutes criminalized the same kind of violent conduct directed against statutorily defined category of victims. In *Sanders*, we held that two statutes were *not* substantially similar because each targeted conduct directed towards distinct classes of persons—"domestic abuse victims" under the Tennessee statute, "females" under the North Carolina statute. Here, the majority holds that the two statutes *are* substantially similar even though they target conduct directed towards distinct classes of persons—anyone under the age of sixteen who is not the perpetrator's spouse under the Georgia statute,

anyone under the age of fifteen who is not the perpetrator's spouse and who is at least six years younger than the perpetrator under the North Carolina statute. The majority leaves lower courts, criminal defendants, and the public guessing as to why the distinctions we found dispositive in *Sanders* are irrelevant here.

¶ 32 The majority's unwillingness to articulate a clear legal rule, or even a squishier but still bounded multifactor test, is not only in tension with *Sanders*. It also creates a significant risk of rendering N.C.G.S. § 15A-1340.14(e) unconstitutionally vague. Under the majority's interpretation of N.C.G.S. § 15A-1340.14(e), an individual with a prior out-of-state conviction has no real way of knowing how they will be sentenced if they violate a North Carolina statute.[1] If the elements of the out-of-state criminal statute are in any way different than the elements of the North Carolina criminal statute it is being compared to, an individual will be tasked with speculating as to whether the elements are different enough to make the statutes not substantially similar, without any meaningful guidance from this Court. The United States Supreme Court has long held that precisely this kind of uncertainty is inconsistent with due process rights. *See, e.g.*, *United States v. Batchelder*, 442 U.S. 114, 123 (1979) ("[V]ague sentencing provisions may pose constitutional questions if they do not state with sufficient clarity the consequences of violating a given criminal statute.").

¶ 33 As a practical matter, the majority's amorphous reasoning will confer upon trial courts increased discretion to determine whether two statutes are or are not substantially similar based solely upon their own judgment. There are some matters which should be left entirely to the discretion of a trial court, but determining how many prior record level points should be assessed for an out-of-state conviction is not one of them. The majority's "grant of wholly standardless discretion to determine the severity of punishment appears inconsistent with due process." *Bankers Life & Cas. Co. v. Crenshaw*, 486 U.S. 71, 88 (1988); *see also Johnson*, 576 U.S. at 602 ("Invoking so shapeless a provision to condemn

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1. The majority claims that holding the two statutes at issue in this case to be not substantially similar would ignore "the obvious essential pertinent parallels" between them. I acknowledge that the two statutes at issue here share some similarities, but the majority's reasoning does not yield any principled way of discerning whether two statutes which share some similarities are or are not substantially similar within the meaning of N.C.G.S. § 15A-1340.14(e). The majority does not explain which elements are "essential" and "pertinent" and which are not, nor does the majority explain how closely the elements must "parallel" each other for two statutes to be substantially similar. Even if the outcome the majority reaches could be justified under N.C.G.S. § 15A-1340.14(e), the reasoning the majority deploys fails to provide necessary guidance to lower courts and future litigants.

someone to prison . . . does not comport with the Constitution's guarantee of due process."). *Sanders* circumscribed this discretion by requiring trial courts to conduct an objective analysis which yielded predictable results. The majority's new approach places N.C.G.S. § 15A-1340.14(e) on much shakier constitutional ground.

¶ 34 What does remain clear after today is that a court is never permitted to engage in an examination of the factual underpinnings of a defendant's out-of-state conviction. As the United States Supreme Court cautioned when it adopted something akin to the elements-based approach in the context of interpreting the Armed Career Criminal Act, 18 U.S.C. § 924, "the practical difficulties and potential unfairness of a factual approach are daunting." *Taylor v. United States*, 495 U.S. 575, 601 (1990). Practically, it is unclear what sources a court would be permitted to draw from when attempting to determine whether the facts giving rise to the defendant's out-of-state conviction would have constituted an in-state criminal offense at the same level. In at least some cases—especially those resolved by plea bargain—the factual basis for the defendant's out-of-state conviction might be impossible to surmise. Legally, because the court's inquiry into the factual basis for an out-of-state conviction could lead to enhanced criminal punishment, a defendant's Sixth Amendment rights would necessarily be implicated. *See*, *e.g.*, *Blakely v. Washington*, 542 U.S. 296, 303 (2004) (explaining that a defendant's Sixth Amendment rights are violated if the court imposes an increased sentence based upon "facts supporting [a] finding [that] were neither admitted by [the defendant] nor found by a jury"). Accordingly, although the majority departs from the approach we endorsed in *Sanders* in critical ways, nothing in today's decision gives license to trial courts to sentence criminal defendants based upon ad hoc inquiries into the circumstances of their out-of-state convictions, a practice which would be akin to constitutionally dubious "collateral trials." *Shepard v. United States*, 544 U.S. 13, 23 (2005).

III. The majority's interpretation of the phrase "substantially similar" is in tension with the structure and purpose of N.C.G.S. § 15A-1340.14(e)

¶ 35 At its core, this case involves a question of statutory interpretation: What did the General Assembly intend when it chose the phrase "substantially similar" in N.C.G.S. § 15A-1340.14(e)? The majority contends that the legislature did not intend for courts to treat statutes as substantially similar only when "the statutory wording precisely match[es]." True, but the structure of the provision at issue makes clear that finding two statutes to be "substantially similar" is an exception to the baseline rule,

rather than the expected outcome every time a criminal defendant has a prior out-of-state conviction. Subsection § 15A-1340.14(e) provides that "[*e*]*xcept as otherwise provided in this subsection*, a conviction occurring in a jurisdiction other than North Carolina is classified as a Class I felony if the jurisdiction in which the offense occurred classifies the offense as a felony." (Emphasis added.) The majority's reasoning threatens to make a finding of substantial similarity the default, in contrast to clear legislative intent. *See, e.g.*, *State v. Hogan*, 234 N.C. App. 218, 228 (2014) ("[I]f the State establishes that the defendant has an out-of-state felony conviction, *it is by default considered a Class I felony* . . . .").

¶ 36 Moreover, it is worth noting that the majority's reasoning cuts both ways: It is often a defendant who has been convicted of an offense categorized as a felony in another state who invokes N.C.G.S. § 15A-1340.14(e) in an effort to prove that the out-of-state felony offense is actually "substantially similar" to a North Carolina misdemeanor. N.C.G.S. § 15A-1340.14(e) ("*If the offender proves by the preponderance of the evidence* that an offense classified as a felony in the other jurisdiction is substantially similar to an offense that is a misdemeanor in North Carolina, the conviction is treated as that class of misdemeanor for assigning prior record level points." (emphasis added)); *see also Hogan*, 234 N.C. App. at 229 (treating a New Jersey conviction as a Class I felony because the "defendant failed to show that [felony] third degree theft in New Jersey is substantially similar to a North Carolina misdemeanor"). Thus, by removing any reliable and clear standard for a movant to prove that two statutes are substantially similar, the majority's reasoning guarantees both that individuals whose conduct would not be felonious under North Carolina law will more haphazardly be sentenced as if they had committed a felony and that individuals whose conduct would have been felonious under North Carolina law will more haphazardly be sentenced as if they had committed misdemeanors. This outcome stands in stark contrast to the design of a statute plainly intended to ensure that criminal defendants in North Carolina with prior out-of-state convictions are sentenced at parity with criminal defendants in North Carolina with prior in-state convictions.

IV. Conclusion

¶ 37 Our Court does not seek to fashion clear legal rules (solely) because we are lawyers who, by nature and by training, tend to be persnickety. First and foremost, we strive for clarity because the force and legitimacy of law depends in no small part on its comprehensibility and predictability. Ambiguous laws are susceptible to unequal application under

the guise of judicial discretion. The need for certainty is especially pronounced when interpreting statutes imposing criminal sanctions. *See*, *e.g.*, *Clark's Charlotte*, *Inc. v. Hunter*, 261 N.C. 222, 233 (1964) (explaining that a statute may be unconstitutionally vague if it fails to "warn people of the criminal consequences of certain conduct"); *Johnson*, 576 U.S. at 597 (holding a provision of 18 U.S.C. § 924 unconstitutional because it "leaves grave uncertainty about how to estimate the risk posed by a crime"). The majority's decision to trade *Sanders*' clear legal rule for a Delphic muddle disserves these constitutional interests and produces an interpretation of a statute at odds with legislative intent. Therefore, I respectfully dissent.

Justice ERVIN joins in this dissenting opinion.

STATE OF NORTH CAROLINA
v.
MICHAEL EUGENE WRIGHT

No. 408A20

Filed 29 October 2021

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. 188, 848 S.E.2d 252 (2020), affirming a judgment entered on 26 April 2019 by Judge Carla Archie in Superior Court, Cleveland County. Heard in the Supreme Court on 31 August 2021.

Joshua H. Stein, *Attorney General*, *by John R. Green Jr.*, *Special Deputy Attorney General*, *for the State-appellee.*

Mary McCullers Reece for defendant-appellant.

PER CURIAM.

AFFIRMED.

STATE v. STRUDWICK

[379 N.C. 94, 2021-NCSC-127]

STATE OF NORTH CAROLINA
v.
TENEDRICK STRUDWICK

No. 334PA19-2

Filed 29 October 2021

1. Satellite-Based Monitoring—lifetime—reasonableness—imposition after lengthy term of imprisonment—current factors—safeguards

The imposition of lifetime satellite-based monitoring (SBM) on defendant after he pled guilty to kidnapping, robbery with a dangerous weapon, and rape, for which defendant received an active sentence of thirty to forty-three years, was constitutionally permissible despite the lengthy passage of time before SBM could be effectuated, because the reasonableness determination was appropriately based on factors as they existed at the time of the SBM hearing. If at some point in the future the imposition of lifetime SBM were to become unreasonable, statutory avenues of relief provided sufficient safeguards of defendant's constitutional right to be free from unreasonable searches.

2. Satellite-Based Monitoring—lifetime—reasonableness—imposition after lengthy term of imprisonment—aggravated offenders

The imposition of lifetime satellite-based monitoring (SBM) on defendant upon the completion of his sentence for kidnapping, robbery with a dangerous weapon, and rape (for which he received an active sentence of thirty to forty-three years) did not violate defendant's constitutional right to be free from unreasonable searches, where the legitimate and compelling governmental interest in preventing and prosecuting future crimes of sex offenders outweighed the narrowly tailored intrusion into defendant's expectation of privacy.

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, *State v. Strudwick*, 273 N.C. App. 676 (2020), reversing two orders entered on 8 December 2017 and

19 December 2017 by Judge Yvonne Mims Evans in Mecklenburg County Superior Court. Heard in the Supreme Court on 17 May 2021.

Joshua H. Stein, *Attorney General*, *by Sonya Calloway-Durham*, *Special Deputy Attorney General*, *for the State-appellant.*

Glenn Gerding, *Appellate Defender*, *by Nicholas C. Woomer-Deters*, *Assistant Appellate Defender*, *for defendant-appellee.*

MORGAN, Justice.

¶ 1 The State appeals on the basis of a dissent filed in the Court of Appeals' consideration of defendant's challenge to a trial court order imposing lifetime satellite-based monitoring (SBM) following this Court's remand of the case to the lower appellate court for reconsideration of defendant's claims in light of our decision in *State v. Grady*, 372 N.C. 509 (2019) (*Grady III*). Because the intrusion of lifetime SBM into the privacy interests of defendant is outweighed by lifetime SBM's promotion of a compelling governmental interest, the trial court was without error in entering an order requiring defendant to participate in SBM for the remainder of his natural life.

I. Factual and Procedural Background

¶ 2 On 22 March 2016, the victim in this case, a 64-year-old resident of Charlotte, was walking her dog along a greenway near her home when she noticed defendant was approaching her from the rear. The victim stopped to allow defendant to pass her, but once defendant had done so, defendant came back and began speaking with the victim while petting her dog. Shortly thereafter, defendant said to the victim "I'm sorry about this," grabbed the victim by her arm, and began to drag the victim into a wooded area along the greenway. The victim produced a small taser and managed to discharge the device in an effort to protect herself, but with little effect upon defendant. Defendant then pulled out a sock filled with concrete and began to beat the victim over the head, knocking the taser from her grasp. The victim fell to the ground, and defendant dragged her into the woods and across a creek. Once past the creek, defendant wrapped a sweatshirt around the victim's head and threw her face down on the ground. Defendant proceeded to rape the victim and to commit multiple forms of sexual assault upon her body. Defendant threatened to kill the victim with a gun if she did not do what he said and ordered the victim to remain in place for at least one minute while defendant made his escape after defendant had concluded his assault.

Defendant rummaged through the victim's purse, took her cellular telephone, and then ran out of the woods past a group of bystanders who had gathered around the victim's dog in an attempt to locate its owner. The victim exited the woods a short time later and sought assistance from the bystanders, who contacted the police on her behalf. Utilizing the description of defendant and his last known direction of travel as provided by the victim and the bystanders, law enforcement officers located defendant walking along a busy thoroughfare near the crime scene. A search of defendant's person revealed the victim's cellular telephone and a small amount of marijuana. DNA testing ultimately confirmed that defendant was the perpetrator of the attack upon the victim.

¶ 3 On 28 March 2016, a Mecklenburg County grand jury indicted defendant for, among other charges, the offenses of first-degree kidnapping, robbery with a dangerous weapon, and first-degree forcible rape. Defendant appeared with counsel in Superior Court, Mecklenburg County on 2 August 2017, where he pleaded guilty to the above-referenced offenses and allowed the State to present an uncontested factual basis for a plea agreement which described defendant's attack upon the victim. In consideration of defendant's guilty plea to the three felony offenses, the State agreed to dismiss four counts of first-degree sex offense and the misdemeanor charge of possession of marijuana. The trial court accepted defendant's guilty plea and sentenced defendant, pursuant to the plea arrangement, to an active term of incarceration of 360 to 516 months. Defendant was also ordered by the trial court to register as a sex offender for life. The prosecution apprised the trial court of the State's intention to seek the imposition of lifetime SBM and to bring defendant back at a later date for a hearing on the State's request.

¶ 4 The State filed a petition to impose lifetime SBM on defendant upon his release from his active sentence. In response, defendant filed a motion to dismiss the State's petition in which he asserted both facial and as-applied challenges under the Fourth Amendment of the United States Constitution and article I, section 20 of the North Carolina Constitution to North Carolina's SBM statutory structure. The matter came on for hearing on 8 December 2017. At the hearing, the State called Probation Officer Shakira Jones as a witness who, while employed as a probation officer for thirteen years with the North Carolina Department of Public Safety (DPS), had spent most of the previous three years specifically supervising sex offenders who were on probation or post-release supervision following the completion of active sentences for sex crimes. In that capacity, Officer Jones also worked as an instructor who provided initial and refresher training sessions to other probation officers who utilized the state's SBM

program to monitor sex offenders. Officer Jones explained that when an offender is ordered to complete a term of SBM, a 2.5-by-1.5-inch device weighing 8.5 ounces called an "ET-1" is attached to the offender's body using fiber optic straps, usually around the offender's ankle. The ET-1 apparatus is charged using a 10-foot cord that allows the offender to move about while the device is charging. Two hours of charging provides 100 hours of ET-1 operation, and Officer Jones testified that even one of her homeless supervisees had no issues with keeping the unit charged. According to Officer Jones, the ET-1 does not restrict travel, work activities, or participation in regular sports. It can be concealed by wearing long pants.

¶ 5 Officer Jones further testified during the State's presentation that the State's monitoring of sex offenders in the SBM program manifests itself in distinct ways. She related that offenders on probation or post-release supervision typically interact with their supervising officers on a regular basis through visits at the offender's home and at the probation office, where the equipment is checked for functionality. However, individuals placed on unsupervised probation are not actively supervised by an officer, but instead are overseen by a central monitoring office in Raleigh. These unsupervised offenders receive a new ET-1 once a year. Other than these compulsory interactions for supervised offenders and yearly check-ins for unsupervised offenders, a person subject to lifetime SBM would have little interaction with the State, unless something goes amiss. For example, Officer Jones explained that in the event that the ET-1 is low on power or if the device loses its signal, an offender's supervising officer or the Raleigh monitoring office can send a message to the ET-1 which will play for the offender until the offender presses a small button on the unit to acknowledge receipt of the message. If an offender fails to respond to a low battery or lost signal alert, or if an ET-1 remains dormant for six hours, an officer or other state agent will attempt to call the offender to address the issue. In the most extreme cases, such as when an offender attempts to tamper with the ET-1 device, when a sex offender goes to a location where the offender is prohibited from going, or when the offender is unable to independently correct a battery or signal issue, an officer attempts to locate the offender in person and to address any noncompliant or criminal behavior.

¶ 6 Officer Jones elaborated in her testimony for the State on the purpose and operation of the SBM program itself. Officer Jones explained that the purpose of SBM is "to monitor [offenders'] movement and to work closely with other law enforcement agencies so that we can prevent future victims." The SBM program can be used to determine

whether an offender was present at a location where a new sexual assault or crime has occurred, to generate potential suspects for a crime based on its location, or to corroborate a victim's allegations against a particular offender. Conversely, an offender in the SBM program would benefit from being eliminated as a suspect if the offender's tracking device established the offender's location to be a place other than the site at issue. Officer Jones related at the hearing that the State also utilizes the SBM program to ensure that registered sex offenders like defendant are actually remaining at their registered homes at night and are staying away from "exclusion zones"—areas where offenders are not allowed to go—such as schools and daycare facilities. To these ends, the SBM tracker allows the State to access an offender's physical location either in real time or through subsequent review of an offender's movements. The ET-1 only indicates an offender's physical location through the use of cell towers and the Global Positioning System (GPS) and provides no information about an offender's activity at a particular location. Law enforcement officers access an offender's location by interacting with a system operated by the state's SBM vendor BI Incorporated, which displays an offender's location on a map using GPS. Officer Jones testified that offenders on probation and post-release supervision have their locations and data checked at least three times a week by their respective supervising officers according to DPS policy, but could not testify concerning the practices of the Raleigh center in monitoring individuals who had completed their terms of judicially ordered state supervision. Only BI Incorporated and DPS personnel have access to an offender's location information in simultaneous time. While law enforcement officers may contact DPS to obtain historic information about an offender's location in the performance of their duties, all other parties must obtain a court order to be able to access information stored in BI Incorporated's system.

¶ 7 Officer Jones also administered a Static-99 test to defendant, which is an evaluative tool utilized to assess certain information about an offender and the offender's criminal activity in order to determine the offender's risk of committing another sex offense. The Static-99 accounts for, *inter alia*, whether an offender has ever lived with a romantic partner for more than two years, whether the offender knew or was related to the offender's victim, and at what age a particular offender will be released from prison—all of which are factors deemed relevant to a person's propensity to reoffend. While defendant would have scored a total of four points on the Static-99 if the assessment had failed to take into account the age of defendant upon defendant's release from incarceration—an amount which indicates an above-average risk for reoffending—Officer Jones subtracted one point from the Static-99 composite

score since defendant's age would fall within the 40-to-59.9-years-old range upon his release after serving his sentence. The Static-99 therefore reflected a consideration of the lengthy duration of defendant's prison sentence and the corresponding advanced age at which defendant would be released in tallying a total of three points for defendant on the Static-99, ultimately concluding that defendant would have an average risk of reoffending through the commission of another sex offense upon his release from prison in 30 to 43 years.

¶ 8 After Officer Jones concluded her testimony, defendant lodged an oral motion to dismiss. Counsel for the State and for defendant presented arguments as to the reasonableness of lifetime SBM. The trial court denied defendant's motion to dismiss and entertained closing arguments from the parties. Defendant reiterated his argument that "the North Carolina satellite-based monitoring program is facially unconstitutional under the Fourth Amendment to the United States Constitution and Article I, Section 20 of the North Carolina Constitution" in opposing the State's petition to impose lifetime SBM. The trial court found the imposition of lifetime SBM upon defendant to be reasonable and constitutional under both the federal and state constitutions, explaining:

> THE COURT: . . . the Court finds that it is constitutional, and I find also that such a requirement is reasonable, and so I am going to abide by the statute and require that it be satellite-based monitoring for his lifetime.
>
> Now, having said that, the law changes all the time, and at some point in the next 30 years, it may change again, and he may [sic] eligible to approach the Court and request a different outcome.

The trial court also declined to dismiss the State's petition based upon grounds of double jeopardy, due process, and cruel and unusual punishment.

¶ 9 The trial court filed a form order imposing lifetime SBM on 8 December 2017 pursuant to N.C.G.S. § 14-208.40A(c) (2017) based upon its determination of the existence of the statutory factor as defined in N.C.G.S. § 14-208.6(1a) (2017) that defendant committed an aggravated offense. On 19 December 2017, the trial court filed a more detailed order containing 27 findings of fact and 11 conclusions of law. The trial court made the following findings of fact relevant to this appeal:

> 7. . . . The monitor consists of a middle unit with two adjustable straps. The middle unit is smaller than the

palm of Officer Jones' hand. The monitor as worn by participants, with straps and battery, weighs 8.5 ounces. Participants typically wear the monitor on their ankle, but some choose to wear it on their wrist. If worn on the ankle, the device cannot be seen when the participant is wearing long pants. The State introduced photographs of the monitor being worn on a participant's ankle. The photographs illustrate that the monitor is a small, relatively unobtrusive device.

8. The SBM system used by the State continuously monitors a participant's location using GPS. If a participant is traveling in a vehicle, the system monitors his speed of travel. The system does not collect any additional information, and it does not collect any information about what a participant is doing at a particular location.

9. The information collected by the system is stored on servers of the State's vendor, BI. The information is not publicly available. Probation officers who supervise SBM participants have access to and monitor the information online.

10. Probation officers who supervise SBM participants are required to review the information three times per week. Some choose to review it daily. They review the information to ensure the participant spends nights at his registered address.

11. Probation officers also monitor the information when they receive alerts from the system. Alerts are generated when a participant tampers with his monitor or enters an exclusion zone. Exclusion zones can include the victim's home, the victim's workplace, schools, and daycare facilities. These alerts require an immediate response from the officer for safety purposes.

12. Alerts are also generated when the monitor's battery is low, or when the monitor has a mechanical problem. These alerts are sent to the participant as well. This type of alert does not require immediate response from the officer. If the participant does not begin charging the monitor after receiving a low battery alert, the probation officer can send him a

message asking him to do so. Following a mechanical alert, the officer contacts the participant to schedule an appointment to correct the problem. These appointments can take place at the probation office or the participant's home.

13. Participants who are not on supervised probation are monitored by an officer for the Department of Public Safety in Raleigh. If this officer receives an alert that requires immediate response, they contact local probation officers to respond.

14. Probation officers physically check the monitors only during alert responses, regular probation appointments, and an annual appointment in which they provide participants with a new monitor. This annual appointment may occur at the probation office or the participant's home.

15. The monitor has 100 hours of battery life if charged for two hours. Participants charge the monitor by connecting the battery to a wall outlet by a charging cord. The charging cord is ten feet long, and participants are able to move around while charging the monitor.

16. Officer Jones supervises a homeless participant who does not have trouble keeping his monitor charged.

17. Officer Jones supervises two participants who work in construction. Neither of them experiences difficulty working because of the monitor.

18. The monitor is waterproof up to 10 feet.

19. The only participant Officer Jones has ever supervised who experienced issues with sport activities participated in extreme sports that caused physical damage to the monitor itself.

20. The monitor does not restrict working activities, ability to travel, or sports activities other than extreme sports.

21. Probationers who are participants must receive permission to travel out of state, but this permission is routinely granted.

> 22. Officer Jones supervises a participant who travels out of state for work on a weekly basis.
>
> 23. The purpose of SBM is to assist law enforcement in protecting communities and [sic] prevent future sexual assault victims by monitoring the movement of sex offenders.
>
> 24. 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.
>
> 25. Static-99 is an assessment tool that takes into account multiple factors about the defendant's history in order to determine his risk level.
>
> 26. Officer Jones administered a Static-99 to defendant.
>
> 27. Defendant scored a 3 on the Static-99 assessment, which indicates average risk. . . .

The trial court also made several conclusions of law pertinent to this appeal:

> 3. Participation in the State's SBM program constitutes a search for purposes of the Fourth Amendment to the United States Constitution. *Grady v. North Carolina*, 135 S. Ct. 1368, 1371 (2017).
>
> 4. Registered sex offenders have a slightly diminished expectation of privacy, as they are subject to the regular conditions imposed by the registry. See N.C.G.S. 14 § [sic], Article 27A.
>
> 5. Although imposing lifetime SBM results in an intrusion of privacy; [sic] when considering the totality of the circumstances, including the nature and purpose of the search and the extent to which the search intrudes upon reasonable expectations of privacy, lifetime enrollment in the State's SBM program is reasonable in this case.
>
> 6. An order directing defendant to enroll in satellite-based monitoring does not constitute a general

> warrant in violation of Article I, § 20 of the North Carolina Constitution[,] . . .
>
> 7. . . . is not a criminal punishment, and does not violate defendant's right to be free from double jeopardy[,] . . .
>
> 8. . . . does not violate defendant's right to be free from cruel and unusual punishment[,] . . .
>
> 9. . . . does not increase the maximum penalty for a participant's conviction based upon facts not charged in the indictment and not proven beyond a reasonable doubt[,] . . .
>
> 10. . . . [and] does not violate the defendant's substantive due process rights[.]
>
> [11.] Notwithstanding the arguments made by counsel for the defendant both in court and in his written motion, the satellite-based monitoring statute is constitutional on its face and as applied to defendant under both the United States Constitution and the North Carolina Constitution.

¶ 10 Defendant perfected an appeal of the trial court's order imposing lifetime SBM to the Court of Appeals, which reversed the trial court's order in a unanimous, unpublished opinion filed on 6 August 2019. *State v. Strudwick* (*Strudwick I*), COA18-794, 2019 WL 3562352 (N.C. Ct. App. Aug. 6, 2019) (unpublished). The lower appellate court cited several of its own opinions in which it had reversed similar trial court orders "for the same reasons as argued by [d]efendant" in the wake of the Supreme Court of the United States' decision in *Grady v. North Carolina*, 575 U.S. 306 (2015). *Id.* at *1. On 4 September 2019, the State filed a petition for discretionary review in this Court, seeking an opportunity to argue against the "continued and significant expansion" of the State's burden in cases to prove the reasonableness of the imposition of lifetime SBM under the totality of the circumstances. A few weeks earlier, however, this Court had announced its decision in *Grady III*, which was itself issued in response to the Supreme Court of the United States' mandate to this Court that we reconsider the *Grady* defendant's case in light of the Supreme Court of the United States' conclusion that North Carolina's SBM program constituted a warrantless search which required a reasonableness analysis under the Fourth Amendment. Having received the State's petition for discretionary review in such close temporal proxim-

ity to our pronouncement in *Grady III*, this Court allowed the State's petition for discretionary review "for the limited purpose of remanding this case to the Court of Appeals for further consideration in light of this Court's decision in [*Grady III*]."

¶ 11 Upon remand, the Court of Appeals issued a second opinion in this matter. The published decision was rendered by a divided lower appellate court on 6 October 2020, with the Court of Appeals again reversing the trial court's SBM order in this case. *State v. Strudwick* (*Strudwick II*), 273 N.C. App. 676 (2020). Relying primarily on *State v. Gordon* (*Gordon II*), 270 N.C. App. 468 (2020), another case in which the Court of Appeals reversed a trial court's order imposing lifetime SBM, the majority lamented the "impossible burden" placed upon the State in the State's efforts to establish the reasonableness of lifetime SBM in cases where such determinations are required to be made years and sometimes decades before the search will be effected, due to N.C.G.S. § 14-208.40A's requirement that the State seek the imposition of lifetime SBM at the time that a defendant is sentenced. *Strudwick II*, 273 N.C. App. at 681 (quoting *State v. Gordon* (*Gordon I*), 261 N.C. App. 247, 261 (2018)). According to the Court of Appeals majority's invocation of the *Gordon* lineage of cases, establishing the reasonableness of lifetime SBM when an offender had decades left to serve in prison would require the State to prove that the search would remain reasonable despite the inability to know, with any certifiable degree of certainty, the circumstances impacting a defendant's appropriateness for lifetime SBM between defendant's time of sentencing and defendant's time of release from incarceration. *Id.* The majority concluded that "until we receive further guidance from our Supreme Court or new options for addressing the SBM procedure from the General Assembly, under existing law, we are required by law to reverse defendant's SBM order." *Id.* The dissent disagreed with the majority's assignment of dispositive force to the length of time between the moment when the reasonableness determination is made and the moment when the search would be effected, observing that the Court of Appeals

> cannot anticipate nor predict what may or may not occur well into the future, and a prediction or hunch alone is not a legitimate basis to overturn the trial court's statutorily required and lawful imposition of SBM over a defendant still in custody or under state supervision on constitutional grounds.

Id. at 684 (Tyson, J, dissenting). The State filed a notice of appeal from the Court of Appeals decision pursuant to N.C.G.S. § 7A-30(2), based

upon the dissenting opinion.[1] Hence, this Court has been presented with an opportunity to provide the "further guidance" beckoned by the lower appellate court regarding the salient considerations which should constitute and resolve the timing of the reasonableness determination.

II. Analysis

¶ 12 Our standard of review is derived from defendant's claim that the imposition of lifetime SBM under the General Assembly's duly enacted statutory scheme which governs the program is unconstitutional. "Whether a statute is constitutional is a question of law that this Court reviews de novo. In exercising de novo review, we presume that laws enacted by the General Assembly are constitutional, and we will not declare a law invalid unless we determine that it is unconstitutional beyond a reasonable doubt." *Grady III*, 372 N.C. at 521–22 (quoting first from *State v. Romano*, 369 N.C. 678, 685 (2017), then second from *Cooper v. Berger*, 370 N.C. 392, 413 (2018)) (extraneity omitted). It is the burden of the proponent of a finding of facial unconstitutionality to prove beyond a reasonable doubt that an act of the General Assembly is unconstitutional in every sense. *State v. Bryant*, 359 N.C. 554, 564 (2005).

A. Timing of Reasonableness Determination

¶ 13 **[1]** As an initial matter, the Court of Appeals determined in this case that the State had failed to meet its burden of showing that lifetime SBM constituted a reasonable search in defendant's case because such a demonstration of reasonableness in light of defendant's incarceration over the course of at least thirty years required that

> the State must divine all the possible future events that might occur over the ten or twenty years that the

1. We recognize that, during the time period between the State's perfection of its appeal and the issuance of this opinion, the General Assembly enacted a major revision of the state's SBM program as it relates to sex offenders by the passage of Session Law 2021-138, § 18. Act of Sep. 2, 2021, S.L. 2021-138, § 18, https://www.ncleg.gov/EnactedLegislation/SessionLaws/PDF/2021-2022/SL2021-138.pdf. However, this new legislation does not take effect until 1 December 2021. *Id.* at § 18(p). Nevertheless, although brief in its ongoing applicability, the SBM program as it existed at the time of defendant's SBM determination by the trial court still provides governing authority for the trial court's orders under review in the case sub judice, and the General Assembly remains empowered to further amend the SBM program up to or after the effective date of the new legislation. This Court is also aware that this case presents us with an issue that remains unaltered under the new enactment: the lawfulness of the gapped time sequence between the point at which the prosecution seeks, and the trial court potentially orders, the imposition of the continuing warrantless search that SBM presents and the point at which the search is actually imposed upon defendant. Thus, "the version of the SBM program in effect on [8 December 2017], the date of defendant's SBM determination, governs the present case." *State v. Hilton*, 2021-NCSC-115, ¶ 3, n. 1.

> offender sits in prison and then prove that satellite-based monitoring will be reasonable in every one of those alternate future realities. That is an impossible burden and one that the State will never satisfy.

Strudwick II, 273 N.C. App. at 681. In employing this premise as a guidepost in its examination of the State's ability to show the reasonableness of the implementation of SBM in a case such as the present one in which a defendant is subject to the State's oversight for a substantial period prior to the imposition of SBM, the lower appellate court expands its perception that the State cannot possibly satisfy the reasonableness standard under such circumstances to a conclusion that the entirety of the lifetime SBM statutory structure is facially unconstitutional. However, this approach overlooks, undervalues, or otherwise misidentifies the aspect here that the State is *not* tasked with the responsibility to demonstrate the reasonableness of a search at its effectuation in the future for which the State is bound to apply in the present; rather, the State *is* tasked under a legislative enactment presumed to be constitutional with the responsibility to demonstrate the reasonableness of a search at its evaluation in the present for which the State is bound to apply for the future effectuation of a search.

¶ 14 Just as "[f]airness and common sense dictate that an accused must be tried and sentenced under the state of the law as it exists" at the time of his crime, *State v. Stockton*, 1979 WL 208803, *3 (Ohio Ct. App. April 4, 1979) (citing *Dobbert v. Florida*, 432 U.S. 282, 301 (1977)), identical guidance should apply in the circumstance at issue wherein the current state of the law mandates that the prosecution must request a trial court's imposition of lifetime SBM on a duly convicted sex offender at the offender's sentencing hearing if SBM is being sought. Under this Court's enduring principles, the General Assembly's requirement that the determination of the imposition of lifetime SBM is to be conducted "during the sentencing phase," N.C.G.S. § 14-208.40A (2019), is presumptively constitutional. *Hart v. State*, 368 N.C. 122, 126 (2015). While the State properly faces a challenging hurdle when attempting to overcome the Fourth Amendment's protections against unreasonable searches when the State requests at a defendant's sentencing hearing that a trial court order the imposition of lifetime SBM, nonetheless the challenge is not intensified or heightened concerning the State's necessity to establish the reasonableness of lifetime SBM merely because the State's compliance with the General Assembly's procedural requirements at a defendant's sentencing hearing includes the State's request for the lifetime SBM at the end of the State's oversight of a defendant, which does not happen to

end until decades later. In light of these considerations, defendant in the instant case has failed to satisfy his burden to show, as the proponent of a facial constitutional challenge, that the legislative enactment governing lifetime SBM is unconstitutional beyond a reasonable doubt. *Id.*

¶ 15 Defendant's dispute about the timing of the reasonableness determination in light of the timing of the actual effectuation of the SBM search, decades later, as reflected in the dispositive discussion of the issue by the lower appellate court, is largely allayed by the civil nature of the penalty imposed upon him. Our decision here applies to defendant as he is currently assessed, to the law as it is currently applied, and to the search as it is currently adapted. In the event that defendant is subsequently assessed more favorably such that the search becomes unreasonable because defendant is deemed to no longer constitute the threat to public safety that he has been determined to pose at the present time,[2] then he may petition the Post-Release Supervision and Parole Commission for release from the SBM program upon the passage of one year from his release from prison if defendant can show that he has "not received any additional reportable convictions during the period of satellite-based monitoring and [he] has substantially complied with the provisions of" the SBM program, and that he is "not likely to pose a threat to the safety of others." N.C.G.S. § 14-208.43 (2019). However, this statutory relief from the continued imposition of SBM upon defendant, which is readily available to him, is not the sole vehicle through which defendant could be released from the obligation of SBM upon the trial court's determination that the search has become unreasonable.

¶ 16 Rule 60 of the North Carolina Rules of Civil Procedure also affords potential relief to defendant from prospective application of lifetime SBM or other relief from the SBM order, while maintaining deference to the constitutionality of any search effected during the relevant time period. Rule 60 provides, in pertinent part:

> On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:

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2. In his brief, defendant provides examples of such developments which may, if they come to fruition, reduce his threat to the public: "positive clinical assessments after years of cognitive and psychological counseling; educational achievement; skill development; an improved prognosis due to advancements in psychiatric medication; as well as any physical disabilities [defendant] may develop far in the future."

> (5) . . . it is no longer equitable that the judgment should have prospective application; or
>
> (6) Any other reason justifying relief from the operation of the judgment.
>
> The motion shall be made within a reasonable time. . . .

N.C. R. Civ. P. 60(b) (2019). A Rule 60(b) motion "may not be used as a substitute for appeal," and the appellate process, not Rule 60(b), is the proper apparatus for the correction of errors of law committed by a trial court. *Davis v. Davis*, 360 N.C. 518, 523 (2006). Nonetheless, a trial court that has ordered the imposition of a continuing, warrantless search at a time when such a search was reasonable has not committed an error of law if the continuing, warrantless search becomes unreasonable through changes in circumstances pertaining to the nature, character, and subject of the search. While an otherwise reasonable, warrantless Fourth Amendment search may become unreasonable "by virtue of its intolerable intensity and scope," *Terry v. Ohio*, 392 U.S. 1, 18 (1968), or "as a result of its duration or for other reasons," *Segura v. United States*, 468 U.S. 796, 812 (1984), such circumstances do not render impossible, as the Court of Appeals perceived, the ability of the State to show, and the properness of a trial court to find, the present reasonableness of a search to be conducted in the future. This is particularly true in the event that each of the reasonableness factors which are currently germane to the present case remain materially unchanged in the interim. After all, it has been long established by this Court that "[a]n individual challenging the facial constitutionality of a legislative act must establish that *no* set of circumstances exists under which the act would be valid." *State v. Thompson*, 349 N.C. 483, 491 (1998) (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987)) (emphasis added) (extraneity omitted). It is likewise noteworthy that the only circumstance preventing the immediate imposition of lifetime SBM upon defendant is his superseding term of lengthy incarceration which delays the identified efficacy of SBM.

¶ 17 The availability of the application of Rule 60's provisions to a case such as the current one effectively preserves the rights of individuals like defendant who are subject to the imposition of lifetime SBM only after a significant duration of time has passed, while protecting the sanctity of the constitutionality of the statutory structure of the SBM program which has been legislatively created. Over the course of time, in the event that the circumstances of defendant change in such a manner that the intrusion of lifetime SBM upon defendant's privacy is no

longer reasonable to promote a legitimate governmental interest, then defendant may petition the trial court to consider, as to the civil order of SBM, that "it is no longer equitable that the judgment should have prospective application," and defendant may move the trial court to have the judgment set aside. N.C. R. Civ. P. 60(b)(5). And ironically, while the lower appellate court opined that the State's inherent inability to "divine all the possible events that might occur over the ten or twenty years that the offender sits in prison" negatively impacted the State's ability to establish reasonableness, on the other hand such an inability to predict all eventualities with certainty inures to the benefit of defendant, who is not curtailed in his opportunity to show "*any* other reason justifying relief from the operation of the judgment" which may occur or develop during the time period under scrutiny. N.C. R. Civ. P. 60(b)(6) (emphasis added). The trial courts of this state are endowed with "ample power to vacate judgments whenever such action is appropriate to accomplish justice" through the operation of Rule 60(b)(6) and are invited to wield that power in a judicious manner. *Brady v. Town of Chapel Hill*, 277 N.C. 720, 723 (1971) (extraneity omitted).

¶ 18 In sum, we conclude that the combination of the available resources for defendant's potential relief from the continued imposition of lifetime SBM, in the criminal administrative review form of the Post-Release Supervision and Parole Commission and the civil judicial review form of Rule 60 of the North Carolina Rules of Civil Procedure,[3] are sufficient substantive and procedural safeguards to protect defendant's constitutional rights against unreasonable searches, while preserving the constitutionality of the General Assembly's SBM statutory structure which requires the establishment of reasonableness at the mandated time of a defendant's sentencing hearing when the State's request for SBM monitoring must be made for a trial court's consideration.

B. Reasonableness of Lifetime SBM

¶ 19 **[2]** Having addressed the concerns of the Court of Appeals regarding the timing of the entry of the lifetime SBM determination upon defendant, we next consider the implication of Fourth Amendment jurisprudence, and particularly the application of *Grady III*, to the specific facts of defendant's case. In *Grady v. North Carolina*, the Supreme Court of the

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3. While cautiously refraining from the inappropriate rendition of an advisory opinion, we further note that the passage of S.L. 2021-138, § 18(i) presents a potential additional avenue of relief to defendant as "[a]n offender who is enrolled in a satellite-based monitoring [sic] for life." Act of Sep. 2, 2021, S.L. 2021-138, § 18, https://www.ncleg.gov/EnactedLegislation/SessionLaws/PDF/2021-2022/SL2021-138.pdf.

United States held that, because the state's SBM program operates "by physically intruding on a subject's body, it effects a Fourth Amendment search." 575 U.S. 306, 310 (2015). Due to the lifetime SBM program's coverage by the Fourth Amendment, the high court vacated our dismissal of defendant's appeal in the *Grady* case and remanded the matter to this Court for an analysis of whether "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" resulted in the conclusion that the ongoing, warrantless search imposed by the SBM program was reasonable. *Id.* at 310. We fulfilled this directive from our nation's highest tribunal through the issuance of our opinion in *Grady III*, in which we affirmed as modified a Court of Appeals decision reversing a trial court's order which imposed lifetime SBM on the *Grady* defendant based solely upon his status as a recidivist. *Grady III*, 372 N.C. at 545, 550–51. This Court first addressed the intrusion upon reasonable privacy expectations which is created by the imposition of lifetime SBM. Our approach ultimately employed a three-pronged inquiry into (1) the nature of the *Grady* defendant's privacy interest itself, *id.* at 527, (2) the character of the intrusion effected by the lifetime SBM program, *id.* at 527, 534 (citing *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646, 652–53, 658 (1995)), and (3) the "nature and purpose of the search" where we "consider[ed] the nature and immediacy of the governmental concern at issue here, and the efficacy of this means for meeting it." *Id.* at 538 (quoting *Vernonia*, 515 U.S. at 652–53) (extraneity omitted).

¶ 20 This Court in *Grady III*, "mindful of our duty . . . to not undertake to pass upon the validity of the statute as it may be applied to factual situations materially different from that before it," *id.* at 549, expressly limited our as-applied determination of unconstitutionality to defendants who fit squarely within the *Grady* defendant's exact status: (1) a criminal defendant (2) not currently under any supervisory relationship with the State (3) who is ordered to submit to lifetime SBM based solely on the fact that the defendant is a recidivist as defined by statute, and (4) who also is not "classified as a sexually violent predator, convicted of an aggravated offense, or . . . convicted of statutory rape or statutory sex offense with a victim under the age of thirteen." *Id.* at 550. As defendant in the case sub judice was ordered to submit to lifetime SBM based upon his conviction for an aggravated offense, the holding of *Grady III* concerning the unconstitutionality of North Carolina's lifetime SBM scheme as it applies to recidivists, including *Grady III*'s discussion concerning the State's burden of proof as to the effect of lifetime SBM on reducing recidivism, is wholly inapplicable to the instant case. *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 329 (2006) ("It is axiom-

atic that a statute may be invalid as applied to one state of facts and yet valid as applied to another." (extraneity omitted)). Instead, we are bound to apply the instructions which we enunciated in *Grady III*—and further developed in *Hilton*—in order to determine the reasonableness of the trial court's imposition of lifetime SBM in defendant's case. *See Hilton*, 2021-NCSC-115, ¶ 18 (recognizing that *Grady III*'s as-applied holding was limited to the facts of that case, while employing the Fourth Amendment reasonableness analysis utilized in *Grady III* as drawn from the Supreme Court's guidance in *Grady I*).

¶ 21 Starting with the nature of defendant's privacy interest, the State surely gains pervasive access to defendant's person, home, vehicle, and location through the imposition of lifetime SBM that the State would not acquire otherwise if defendant were not subject to lifetime SBM monitoring. In *Grady III*, we noted that the search impinges upon defendant's "right to be secure in his person [and] his expectation of privacy in the whole of his physical movements." 372 N.C. at 531 (extraneity omitted). This conclusion in *Grady III* regarding the nature of defendant's privacy interest once he is subject to lifetime SBM remains intact and must be considered in the case at bar. However, defendant's expectation of privacy is duly diminished by virtue of his status as a convicted felon generally and as a convicted sex offender specifically. *Hilton*, 2021-NCSC-115, ¶ 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.").

¶ 22 Secondly, while we noted in *Grady III* that our decision in *State v. Bowditch* "did not address the defendants' expectations of privacy with respect to the physical search of their person or their expectations of privacy in their location and movements," we did sufficiently incorporate in *Bowditch* the invasion of a defendant's home—another bastion zealously guarded under the Fourth Amendment—for purposes of maintaining SBM equipment. *Grady III*, 372 N.C. at 532 (discussing *State v. Bowditch*, 364 N.C. 335 (2010)). In *Bowditch*, this Court recognized that "it 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. The *Bowditch* Court cited a plethora of cases which illustrate the principle that the Fourth Amendment expectation of privacy of persons convicted of felonious sex offenses is routinely subject to encroachment by civil regulations and acts of criminal procedure. *Id.* at 350 (citing *Velasquez v. Woods*, 329 F.3d 420 (5th Cir. 2003) (per curiam) for the constitutional, forced

collection of blood samples from felons; citing *Russell v. Gregoire*, 124 F.3d 1079 (9th Cir. 1997), *cert. denied*, 523 U.S. 1007 (1998) for its discussion of sex offender registries; citing *Jones v. Murray*, 962 F.2d 302, 306 (4th Cir. 1992), *cert. denied*, 506 U.S. 977 (1992) for its holding that probationers lose their Fourth Amendment protections against warrantless searches of their home pursuant to established supervision programs; citing *Standley v. Town of Woodfin*, 362 N.C. 328, 329–30 (2008) for its holding that municipalities may constitutionally ban sex offenders from public parks; citing *State v. Bryant*, 359 N.C. 554, 557–70 (2005) for its conclusion that no due process violation occurs when a sex offender is required to register in North Carolina upon moving to the state despite only being informed of his duty to register in his original state). While we further noted in *Grady III* that the cases relied upon by *Bowditch* "either deal exclusively with prisoners and probationers, do not hold that a conviction creates a diminished expectation of privacy, or do not address privacy rights at all," 372 N.C. at 532, it is clear that *Bowditch* establishes that it is constitutionally permissible for the State to treat a sex offender differently than a member of the general population as a result of the offender's felony conviction for a sex offense. *Hilton*, 2021-NCSC-115, ¶ 30. Concomitantly, a sex offender such as defendant possesses a constitutionally permissible reduction in the offender's expectation of privacy in matters such as the imposition of lifetime SBM.

¶ 23 Lastly, regarding the character of the intrusion which defendant challenges, we recognized in *Grady III* that this factor requires us to "contemplate[ ] the degree of and manner in which the search intrudes upon legitimate expectations of privacy." *Grady III*, 372 N.C. at 534 (extraneity omitted). During the sentencing phase of defendant's trial, the uncontroverted evidence presented by the State showed that the search occasioned by SBM reveals only defendant's physical location, and nothing "about what a participant is doing at a particular location." Testimony also indicated that the State is not allowed to utilize the data which it collects through the SBM program for any unauthorized purpose without running afoul of the Fourth Amendment. This Court in *Grady III* expressed our awareness of the "intimate window into an individual's privacies of life" that the state's SBM program provides. *Grady III*, 372 N.C. at 538 (extraneity omitted). The purposes of the SBM program—to assist the State in both preventing and solving crime—are universally recognized as legitimate and compelling. *Maryland v. King*, 569 U.S. 435, 453 (2013) ("The government's interest in preventing crime by arrestees is both legitimate and compelling." (quoting *United States v. Salerno*, 481 U.S. 739, 749 (1987))). In directing our attention to, and in placing such dispositive weight on, this clearly legitimate goal of the

SBM program, the State has compellingly highlighted the safeguards which effectively narrow the State's utilization of SBM to a singular permissible scope of the search effected: to track the location of convicted sex offenders in order to promote the prevention and prosecution of future crimes by those individuals. Any extension of this use of the compiled data would present an impermissible extension of the scope of the authorized search. *Terry*, 392 U.S. at 19 ("The scope of the search must be strictly tied to and justified by the circumstances which rendered its initiation permissible.") (extraneity omitted). The State's burden of establishing the reasonableness of a warrantless search therefore is ongoing because "in determining whether the seizure and search were 'unreasonable' our inquiry is a dual one—whether the officer's action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place." *Id.* at 19–20.

¶ 24 The trial court found that the ET-1 is a "relatively small, unobtrusive device" that cannot "be seen when the participant is wearing long pants." As defendant has failed to challenge any of the trial court's findings of fact, and as "unchallenged findings of fact are binding on appeal," *Brackett v. Thomas*, 371 N.C. 121, 127 (2018), we are constrained to this description of the instrument. And while we rued in *Grady III* "[t]he lack of judicial discretion in ordering the imposition of SBM on any particular individual and the absence of judicial review of the continued need for SBM," *Grady III*, 372 N.C. at 535, the present case allows us to assuage these lamentations through a combination of the promulgation of *Grady III* itself—which now requires trial courts to determine the reasonableness of the search imposed on a particular defendant upon that defendant's challenge to the State's efforts to impose SBM—and our previous discussion of Rule 60 which illuminates the availability of post hoc judicial review of the reasonableness of the search in the event that a change in circumstances warrants such a review. The utility of these methods of judicial review, in conjunction with the access to subsequent, periodic review by the Post-Release Supervision and Parole Commission afforded defendant by N.C.G.S. § 14-208.43, is reflected in the General Assembly's aforementioned codification of similar procedures in its reconstruction of the state's SBM scheme after our opinion in *Grady III*. Act of Sep. 2, 2021, S.L. 2021-138, § 18, https://www.ncleg.gov/EnactedLegislation/SessionLaws/PDF/2021-2022/SL2021-138.pdf. The law-making branch of North Carolina has deemed it appropriate to legislatively memorialize the protections afforded by the overlapping substantive, procedural, administrative, and judicial routes discussed herein, which remain available to defendant and others similarly

situated—namely, those sex offenders ordered to submit to lifetime SBM—up to the designated effective date of 1 December 2021 for Session Law 2021-138, § 18, when the provisions of the recent legislative enactment are slated to supplant the outgoing SBM program which presently prevails.

¶ 25 Therefore, as we consider the inconvenience to defendant in wearing a small, unobtrusive device pursuant to SBM protocols that only provides the State with his physical location which the State may use solely for its legitimate governmental interest in preventing and prosecuting future crimes committed by defendant, in conjunction with the added protection of judicial review as to the reasonableness of the search both at its imposition and at such times as circumstances may render the search unreasonable, we conclude that the imposition of lifetime SBM on defendant constitutes a pervasive but tempered intrusion upon his Fourth Amendment interests. *Hilton*, 2021-NCSC-115, ¶ 35 ("SBM's collection of information regarding physical location and movements effects only an incremental intrusion into an aggravated offender's diminished expectation of privacy.").

¶ 26 The governmental interest which the State advances as the purpose served by the imposition of lifetime SBM upon a sex offender is well documented as being both legitimate and compelling. *King*, 569 U.S. at 453. This governmental interest serves to assist law enforcement in preventing and prosecuting future crimes committed by sex offenders. *See Bowditch*, 364 N.C. at 342–43 ("The purpose of this Article is to assist law enforcement agencies' efforts to protect communities. Understandably, section 14–208.5 explicitly refers to registration, but the SBM program is consistent with that section's express goals of compiling and fostering the 'exchange of relevant information' concerning sex offenders.") (extraneity omitted); *see also Grady III*, 372 N.C. at 539 ("Sexual offenses are among the most disturbing and damaging of all crimes, and certainly the public supports the General Assembly's efforts to ensure that victims, both past and potential, are protected from such harm.") (quoting *Bowditch*, 364 N.C. at 353 (Hudson, J., dissenting)). As we recognized in both *Grady III* and *Hilton*, "the State's interest in solving crimes and facilitating apprehension of suspects so as to protect the public from sex offenders" is both legitimate and supported by the public through acts promulgated by the General Assembly. *Grady III*, 372 N.C. at 538–39; *accord Hilton*, 2021-NCSC-115, ¶¶ 19–23. More broadly, the maintenance of public safety is "a legitimate nonpunitive purpose" of civil regulatory schemes so long as the legislative enactments which provide operative force to the civil regulations bear some potency in addressing the societal ill of crime. *Smith v. Doe*, 538 U.S. 84, 102–03 (2003).

¶ 27 In her testimony before the trial court and unlike the testimony provided by the State's witness in *Grady III*, Officer Jones testified concerning situations in which lifetime SBM would be obviously effective in assisting law enforcement with achieving the constitutionally endorsed purpose of preventing and solving future crimes by sex offenders. As reflected in the trial court's findings of fact, which we are bound to accept as supported by competent evidence in light of their uncontested nature, *Brackett*, 371 N.C. at 127, "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." Law enforcement may also use the fact that a sex offender is subject to lifetime SBM to ensure that the offender is actually residing at the residence that he is statutorily required to report to the local sheriff, the violation of which is a Class F felony. N.C.G.S. § 14-208.11 (2019). These observations further buttress the reasonableness of lifetime SBM in appropriate cases, including the instant one.

¶ 28 The state's lifetime SBM program promotes a legitimate and compelling governmental interest. When utilized for the stated purpose, the lifetime SBM program is constitutional due to its promotion of the legitimate and compelling governmental interest which outweighs its narrow, tailored intrusion into defendant's expectation of privacy in his person, home, vehicle, and location. Therefore, the search authorized by the trial court's orders in this case is reasonable and permissible under the Fourth Amendment.

III. Conclusion

¶ 29 Based upon the foregoing factual background, procedural background, and legal analysis, this Court concludes that the implementation of lifetime satellite-based monitoring is constitutionally permissible and is applicable to defendant under the Fourth Amendment as a reasonable, continuing, and warrantless search based upon the specific facts of defendant's case. The conclusion of this analysis renders the trial court's order in this case, which imposed continuous GPS tracking using a small, unobtrusive ankle monitor on defendant for life based upon the specific facts of his case, constitutionally permissible under the Fourth Amendment as a reasonable, continuing, warrantless search. Therefore, the opinion of the Court of Appeals is reversed, and the trial court's 8 December 2017 and 19 December 2017 orders remain in full force and effect.

REVERSED.

Justice EARLS dissenting.

¶ 30 The Fourth Amendment only functions if courts are willing to enforce it. Unfortunately, today, this Court has once again proven unwilling to give meaning to the protections the Fourth Amendment provides to the people of North Carolina. As it did in *State v. Hilton*, the majority here resuscitates numerous arguments previously rejected by this Court and bends over backwards to save the State from a constitutional problem of its own making. This time, the majority does so in the service of its remarkable conclusion that a court today can assess the reasonableness of a search that will be initiated when (and if) Mr. Strudwick is released from prison decades in the future, a search will be carried out for as long as Mr. Strudwick lives beyond his release. Fortunately, as the majority now recognizes, its decision is of limited practical importance, given that the General Assembly has just "enacted a major revision of the state's SBM program as it relates to sex offenders" which effectively eliminates lifetime SBM in this state. Regardless, I cannot join the majority in its cavalier disregard for the protections afforded to all North Carolinians under the state and federal constitutions.

¶ 31 To justify flouting the precedent we established in *Grady III*, the majority again reaches for the canard that when a defendant is ordered to enroll in lifetime SBM "based upon his conviction for an aggravated offense, the holding of *Grady III* . . . is wholly inapplicable[.]" Once again, I note that the Fourth Amendment we interpreted in *Grady III* is the same Fourth Amendment we interpreted in *Hilton*, which is the same Fourth Amendment we are called upon to interpret in this case. We articulated legal principles regarding the proper interpretation of the scope of protections afforded by the Fourth Amendment in *Grady III*. We reserved judgment as to how those principles should be applied in a different case on different facts. But it is sophistry to, once again, treat *Grady III* as if it had nothing to say about the constitutionality of ordering a sex offender to enroll in lifetime SBM. The majority's circumlocutions are window dressing for what is, at its core, a declaration that precedents which this majority does not like will not be respected simply because the majority does not like them.

¶ 32 The majority's labored efforts to reconcile *Hilton* with *Grady III* are unconvincing. Invoking *Grady III* and then adopting legal principles we expressly rejected in that case is not respecting precedent.

¶ 33 To pick just one example, the majority duly notes that *Grady III*'s conclusion "regarding the nature of defendant's privacy once he is subject to lifetime SBM remains intact and must be considered in the case

at bar." In *Grady III* we stated that "[w]e cannot agree" with the proposition that the "physical restrictions" associated with enrolling in SBM "which require defendant to be tethered to a wall for what amounts to one month out of every year, are 'more inconvenient than intrusive.' " *State v. Grady*, 372 N.C. 509, 536 (2019) (*Grady III*). We held that "being required to wear an ankle appendage, which emits repeating voice commands when the signal is lost or when the battery is low, and which requires the individual to remain plugged into a wall every day for two hours," and which constantly tracks an individual's real-time location data in perpetuity, is a significant intrusion on the individual's privacy interests and is "distinct in its nature from that attendant upon sex offender registration." *Id.* at 537; *see also id.* at 529 ("SBM does not, as the trial court concluded, 'merely monitor[ ] [defendant's] location'; instead, it 'gives police access to a category of information otherwise unknowable,' by 'provid[ing] an all-encompassing record of the holder's whereabouts,' and 'an intimate window into [defendant's] life, revealing not only his particular movements, but through them his 'familial, political, professional, religious, and sexual associations.' " (quoting *Carpenter v. United States*, 138 S. Ct. 2206, 2217–2218 (2018))). Yet the majority decides it is not bound by this reasoning and instead minimizes "the inconvenience to defendant in wearing a small, unobtrusive device pursuant to SBM protocols that only provides the State with his physical location," an intrusion the majority then justifies by emphasizing that a defendant's "expectation of privacy is duly diminished by virtue of his status as a convicted felon generally and as a convicted sex offender specifically."

¶ 34 The myriad ways in which this majority has turned *Grady III* on its head are comprehensively addressed in dissenting opinions in *Hilton* and *Ricks*. *See generally State v. Hilton*, 2021-NCSC-115, ¶ 43–83 (Earls, J., dissenting); *State v. Ricks*, 2021-NCSC-116, ¶ 12–21 (Hudson, J., dissenting). I will not rehash every instance here. I will only suggest that, once again, the majority refuses to own up to the jurisprudential havoc it wreaks on its way to reaching its desired outcome.

¶ 35 However, I am compelled to address two additional arguments the majority endorses in this case which further compound the errors it committed in *Hilton*. First, the majority transforms the longstanding but always rebuttable presumption that legislation enacted by the General Assembly respects constitutional bounds into an impenetrable fortress shielding this version of the SBM statutes from judicial review. The majority appears to suggest that the State's actions are constitutional because they were undertaken in accordance with "a legislative enactment

presumed to be constitutional[.]" But the question before this Court is precisely whether or not the "legislative enactment" the State is acting in accordance with is or is not constitutional. The fact that the SBM statute, like all statutes, is "presumptively constitutional" does not mean that the statute is *actually* constitutional. *See Moore v. Knightdale Bd. of Elections*, 331 N.C. 1, 4 (1992) ("The presumption of constitutionality is not, however, and should not be, conclusive.").

¶ 36 The presumption of constitutionality is, essentially, a substantive canon of interpretation which reminds courts to "not lightly assume that an act of the legislature," the "agent of the people for enacting laws," "violates the will of the people of North Carolina as expressed by them in their Constitution." *State ex rel. Martin v. Preston*, 325 N.C. 438, 448 (1989). It counsels deference towards legislative enactments, not an abdication of our "duty . . . in proper cases, to declare an act of the Legislature unconstitutional, [an] obligation imposed upon the courts to declare what the law is." *State v. Knight*, 169 N.C. 333, 351–52 (1915). The majority tries to prove the constitutionality of the SBM statute by reference to the fact that the General Assembly chose to enact it, but that ship sailed "nearly sixteen years before *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 2 L.Ed. 60 (1803)," when this Court recognized "that it is the duty of the judicial branch to interpret the law, including the North Carolina Constitution. *See Bayard v. Singleton*, 1 N.C. (Mart.) 5 (1787)." *Comm. to Elect Dan Forest v. Emps. Pol. Action Comm.*, 2021-NCSC-6, ¶ 14. In its application of the presumption of constitutionality, the majority deals the General Assembly a trump card it can play any time the constitutionality of a legislative enactment is challenged.

¶ 37 The majority's unwillingness to enforce constitutional limitations on the General Assembly's authority is especially inappropriate in this case given the nature of the legislation at issue and the category of individuals the legislation targets. Mandatory lifetime enrollment in the SBM program necessarily implicates an individual's "fundamental right to privacy . . . [in] his home," *State v. Elder*, 368 N.C. 70, 74 (2015), "which is protected by the highest constitutional threshold and thus may only be breached in specific, narrow circumstances." *State v. Grice*, 367 N.C. 753, 760 (2015). When the State asserts for itself the authority to cross that threshold, and in the process puts in jeopardy a fundamental right that the people of North Carolina have reserved for themselves in their state and federal constitutions, we have an obligation to rigorously scrutinize the challenged enactment. Our obligation cannot be discharged by outsourcing our work to the General Assembly, particularly when the legislation imposes debilities upon a class of individuals who are subject to widespread public opprobrium. *Cf. Texfi Indus., Inc. v. City*

of Fayetteville, 301 N.C. 1, 11 (1980) ("[W]here legislation or governmental action affects discrete and insular minorities, the presumption of constitutionality fades because the traditional political processes may have broken down."). The majority's "casual dismissal of Fourth Amendment rights runs contrary to one of this nation's most cherished ideals: the notion of the right to privacy in our own homes and protection against intrusion by the State into our personal effects and property." *State v. Bowditch*, 364 N.C. 335, 365 (2010) (Hudson, J., dissenting).

¶ 38 Second, the majority improperly excuses the State from its burden of proving the reasonableness of the search it seeks to conduct. Under the Fourth Amendment, the burden is on the State to demonstrate that a search is reasonable. *See*, *e.g.*, *Grady III*, 372 N.C. at 543 ("[T]he State bears the burden of proving the reasonableness of a warrantless search."). When an individual is ordered to enroll in SBM, the State continues to effectuate a search of that individual within the meaning of the Fourth Amendment unless and until that individual's requirement to enroll in SBM is terminated. Thus, to prove that SBM is constitutional, the State must provide evidence to support its assertion that it is reasonable to initiate the search when the search will be initiated and to carry out the search for as long as the search will be carried out.

¶ 39 Rather than determine whether the State has proven that a search it will not initiate for decades is reasonable—or whether the State has proven that it will be reasonable to continue this search in perpetuity—the majority wishes away the problem. According to the majority, to hold the State to its burden to prove reasonableness under the Fourth Amendment under the current SBM statute is to impose an "impossible burden." In my view, the majority is correct that it is impossible for the State to prove it is reasonable to order Mr. Strudwick to submit to SBM decades from now and remain enrolled for the remainder of his life, after he has completed the terms of a 360 to 516 month period of incarceration ostensibly imposed at least in part to rehabilitate him, and given the likely evolutions in technology that very well could change both the nature and the intrusiveness of the search. Yet that is reason to hold the statute unconstitutional under circumstances in which it requires the State to do the impossible, not to absolve the State of its obligation to meet constitutional requirements.

¶ 40 The crux of the majority's position appears to be that because "the State *is* tasked under a legislative enactment presumed to be constitutional with the responsibility to demonstrate the reasonableness of a search," the State *must* be able to demonstrate that a search is reasonable in all of the circumstances contemplated by the statute. Put another way, the majority appears to be saying that because N.C.G.S.

§ 14-208.40A (2019) is "presumptively constitutional," and because the State is acting in accordance with this provision when it "requests at a defendant's sentencing hearing that a trial court order the imposition of lifetime SBM," then the State's actions undertaken in accordance with subsection § 14-208.40A are *ipso facto* constitutional. Again, the fact that the State is acting pursuant to a legislative enactment presumed to be constitutional does not immunize that enactment from constitutional challenge. Under the procedure set forth in N.C.G.S. § 14-208.40A, it is impossible for the State to demonstrate that ordering an individual to enroll in lifetime SBM to begin after a period of incarceration that will last decades, because the State "is hampered by a lack of knowledge concerning the unknown future circumstances relevant to that analysis." *State v. Strudwick*, 273 N.C. App. 676, 680 (2020) (quoting *State v. Gordon*, 270 N.C. App. 468, 475 (2020), *review allowed*, *writ allowed*, 853 S.E.2d 148 (N.C. 2021)). Our obligation under these circumstances is to enforce the Fourth Amendment. Any remedy lies with the legislature, who possesses the indisputable authority to amend a statute to bring it into compliance with the constitutions of North Carolina and the United States. *See id.* at 681 ("Our General Assembly could remedy this 'impossible burden' imposed upon the State by amending the relevant statutes . . . ."). Moreover, that is precisely what the legislature has attempted in enacting Session Law 2021-138, § 18. The Court of Appeals recognized that it lacked the authority to suspend the constitution to salvage a statute which compelled the State to violate an individual's fundamental constitutional rights. We should not shirk our obligation to do the same.

¶ 41 The majority's other attempts to rescue the order requiring Mr. Strudwick to enroll in lifetime SBM are similarly unavailing. Once again ignoring a legal principle we established in *Grady III* that it now finds inconvenient, the majority asserts that lifetime SBM is not really lifetime SBM because "Rule 60 of the North Carolina Rules of Civil Procedure also affords potential relief to defendant from prospective application of lifetime SBM or other relief from the SBM order, while maintaining deference to the constitutionality of any search effected during the relevant time period." If it is the duration of the search contemplated that renders an SBM order unconstitutional, then the solution is to limit the duration of the search, which the legislature did when it functionally ended lifetime SBM. *See* Session Law 2021-138, § 18.(d) (providing 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 maximum period of ten years). The solution is not to endorse an open-ended search on the promise that someday, some other court might step in to relieve an individual of an unconstitutional order.

¶ 42 Mr. Strudwick pleaded guilty to committing an egregious crime. He will spend 360 to 516 months in prison as a consequence. No one disputes that the State can take reasonable measures to mitigate the risk that Mr. Strudwick will commit another crime when and if he is released from prison. Where I diverge from the majority is in its willingness to condone the State's failure to adhere to constitutional limits. In its rush to ensure that the State can claim the constitutional authority to order Mr. Strudwick to enroll in SBM after he completes the terms of his sentence, for the rest of his life, regardless of how Mr. Strudwick or monitoring technologies change over the next thirty to forty-three years, and notwithstanding a recent revision to the SBM statute which will reduce his period of enrollment to ten years and provides him with significantly enhanced procedural protections, the majority once again treats the Fourth Amendment as a dead letter. Therefore, I respectfully dissent.

Justices HUDSON and ERVIN join in this dissenting opinion.

JUSTIN WAYNE WARD
v.
JESSICA MARIE HALPRIN

No. 2A21

Filed 29 October 2021

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 274 N.C. App. 494, 853 S.E.2d 7 (2020), affirming orders entered on 24 October 2018 and 2 May 2019 by Judge Aretha V. Blake in District Court, Mecklenburg County. Heard in the Supreme Court on 5 October 2021.

Wofford Burt, PLLC, by J. Huntington Wofford and Rebecca B. Wofford, for plaintiff-appellant.

Fox Rothschild LLP, by Michelle D. Connell and Kip D. Nelson, and Tom Bush Law Group, by Tom Bush and Rachel Rogers Hamrick, for defendant-appellee.

PER CURIAM.

AFFIRMED.

ALDEN v. OSBORNE

[379 N.C. 122 (2021)]

CHRISTINE ALDEN	)	
	)	
v.	)	Alleghany County
	)	
LISA OSBORNE	)	

No. 326P21

ORDER

Pursuant to this Court's Order issued 31 August 2021 allowing Respondent's Motion for a Temporary Stay of the 27 August 2021 Order of the Court of Appeals in this matter, and pursuant to Rule 21(a)(2) of the North Carolina Rules of Appellate Procedure, the Court, upon its own initiative, sets the following schedule in order to expedite further proceedings in this Court: Any petition by any party seeking further review by this Court of the Court of Appeals 27 August 2021 Order must be filed by Monday, 13 September 2021 addressing the legal question of whether North Carolina courts have subject matter jurisdiction under the provisions of the Uniform Child-Custody Jurisdiction and Enforcement Act (UCCJEA), N.C.G.S. § 50A-101. Any response or responses to such petition or petitions must be filed by Monday, 20 September 2021.

By order of the Court in Conference, this the 3rd day of September, 2021.

s/Berger, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 3rd day of September, 2021.

AMY FUNDERBURK
Clerk of the Supreme Court

s/Amy Funderburk
~~Assistant~~ Clerk, Supreme Court of North Carolina

ALDEN v. OSBORNE

[379 N.C. 123 (2021)]

ALDEN	)	
	)	
v.	)	Alleghany County
	)	
OSBORNE	)	

No. 326P21

ORDER

The Alleghany County Department of Social Services' petition for discretionary review and motion to amend or supplement its petition for discretionary review are allowed. The order of the Court of Appeals entered on 27 August 2021 allowing respondent-mother's petition deemed a petition for writ of certiorari is vacated. The matter is remanded to the District Court, Alleghany County for further proceedings.

By order of the Court in Conference, this the 24th day of September, 2021.

s/Berger, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 24th day of September, 2021.

AMY FUNDERBURK
Clerk of the Supreme Court

s/Amy Funderburk
~~Assistant~~ Clerk

JONATHAN H. BYNUM	)	
	)	
v.	)	LINCOLN COUNTY
	)	
DISTRICT ATTORNEY OF LINCOLN COUNTY, REGISTER OF DEEDS DANNY HESTER, FIFTH THIRD BANK, LINCOLNTON, NC 28092, REGISTER OF DEEDS PENNY SHERILL, REGISTER OF DEEDS AMANDA VINSON	)	

No. 43P18-2

ORDER

Defendant's motions for relief filed on 10 August 2021 are dismissed.

By order of this Court in Conference, this 27th day of October, 2021.

s/Berger, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 29th day of October, 2021.

AMY L. FUNDERBURK
Clerk of the Supreme Court

s/Amy Funderburk

COMMUNITY SUCCESS INITIATIVE; JUSTICE SERVED NC, INC; WASH AWAY UNEMPLOYMENT; NORTH CAROLINA STATE CONFERENCE OF THE NAACP; TIMOTHY LOCKLEAR; DRAKARUS JONES; SUSAN MARION; HENRY HARRISON; ASHLEY CAHOON; AND SHAKITA NORMAN	)	
v.	)	WAKE COUNTY
TIMOTHY K. MOORE, IN HIS OFFICIAL CAPACITY AS SPEAKER OF THE NORTH CAROLINA HOUSE OF REPRESENTATIVES; PHILIP E. BERGER, IN HIS OFFICIAL CAPACITY AS PRESIDENT PRO TEMPORE OF THE NORTH CAROLINA SENATE; THE NORTH CAROLINA STATE BOARD OF ELECTIONS; DAMON CIRCOSTA, IN HIS FFICIAL CAPACITY AS CHAIRMAN OF THE NORTH CAROLINA STATE BOARD OF ELECTIONS; STELLA ANDERSON, IN HER OFFICIAL CAPACITY AS SECRETARY OF THE NORTH CAROLINA STATE BOARD OF ELECTIONS; KENNETH RAYMOND, IN HIS OFFICIAL CAPACITY AS MEMBER OF THE NORTH CAROLINA STATE BOARD OF ELECTIONS; JEFF CARMON IN HIS OFFICIAL CAPACITY AS MEMBER OF THE NORTH CAROLINA STATE BOARD OF ELECTIONS; AND DAVID C. BLACK, IN HIS OFFICIAL CAPACITY AS MEMBER OF THE NORTH CAROLINA STATE BOARD OF ELECTIONS	)	

No. 331P21-1

ORDER

On Plaintiffs' Petition for a Writ of Supersedeas and Emergency Motion for a Temporary Stay, this Court orders that the status quo be preserved pending defendant's appeal of the expanded preliminary injunction issued initially by the trial court on 23 August 2021 in open court by maintaining in effect the original preliminary injunction issued on 4 September 2020 as it was understood at the time and implemented for the November 2020 elections. Further, the Court orders that the Court of Appeals stay issued 3 September 2021 be implemented prospectively

only, meaning that any person who registered to vote at a time when it was legal for that person to register under then-valid court orders as they were interpreted at the time, shall remain legally registered voters. The North Carolina Board of Elections shall not remove from the voter registration database any person legally registered under the expanded preliminary injunction between 23 August 2021 and 3 September 2021, and those persons are legally registered voters until further Order.

In all other respects, Plaintiffs' Petition for a Writ of Supersedeas and Emergency Motion for a Temporary Stay is denied without prejudice.

By order of the Court in conference, this the 10th day of September 2021.

s/Barringer, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 10th day of September 2021.

s/Amy L. Funderburk

AMY L. FUNDERBURK
Clerk of the Supreme Court

FARMER v. TROY UNIV.

[379 N.C. 127 (2021)]

SHARELL FARMER	)	
	)	
v.	)	Cumberland County
	)	
TROY UNIVERSITY, PAMELA GAINEY, AND KAREN TILLERY	)	

No. 457P19-2

ORDER

Plaintiff's petition for discretionary review is decided as follows: Allowed as to Issue Nos. 1 and 2; denied as to Issue Nos. 3 and 4.

By order of the Court in conference, this the 27th day of October 2021.

s/Berger, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 3rd day of November, 2021.

AMY FUNDERBURK
Clerk, Supreme Court of
North Carolina

s/Amy Funderburk

~~M.C. Hackney~~
~~Assistant~~ Clerk, Supreme Court of
North Carolina

IN RE S.C.L.R.

[379 N.C. 128 (2021)]

IN RE	)	
	)	Cleveland County
S.C.L.R.	)	

No. 371A20

ORDER

The Court, acting on its own motion, amends the record on appeal that was filed in this case by including the Complaint, dated 15 May 2017; Acceptance of Service by Jessica Lynn Maloney, dated 15 May 2017; Acceptance of Service by Christopher Lee Reeves, dated 15 May 2017; Order, dated 15 May 2017; and Custody Order, dated 27 June 2019, from Cleveland County File No. 17-CVD-814, pursuant to Rule 9(b)(5)(b) of the North Carolina Rules of Appellate Procedure. These documents are needed in order for the Court to make an informed decision in this matter.

By order of the Court in Conference, this 25th 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 27th day of August 2021.

s/Amy L. Funderburk

AMY L. FUNDERBURK
Clerk of the Supreme Court

I. BEVERLY LAKE, JOHN B. LEWIS, JR., EVERETTE M. LATTA, PORTER L. McATEER, ELIZABETH S. McATEER, ROBERT C. HANES, BLAIR J. CARPENTER, MARILYN L. FUTRELLE, FRANKLIN E. DAVIS, JAMES D. WILSON, BENJAMINE E. FOUNTAIN, JR., FAYE IRIS Y. FISHER, STEVE FRED BLANTON, HERBERT W. COOPER, ROBERT C. HAYES, JR., STEPHEN B. JONES, MARCELLUS BUCHANAN, DAVID B. BARNES, BARBARA J. CURRIE, CONNIE SAVELL, ROBERT B. KAISER, JOAN ATWELL, ALICE P. NOBLES, BRUCE B. JARVIS, ROXANNA J. EVANS, JEAN C. NARRON, AND ALL OTHERS SIMILARLY SITUATED	)	
v.	)	Gaston County
STATE HEALTH PLAN FOR TEACHERS AND STATE EMPLOYEES, A CORPORATION, FORMERLY KNOWN AS THE NORTH CAROLINA TEACHERS AND STATE EMPLOYEES' COMPREHENSIVE MAJOR MEDICAL PLAN, TEACHERS AND STATE EMPLOYEES' RETIREMENT SYSTEM OF NORTH CAROLINA, A CORPORATION, BOARD OF TRUSTEES OF THE TEACHERS AND STATE EMPLOYEES' RETIREMENT SYSTEM OF NORTH CAROLINA, A BODY POLITIC AND CORPORATE, JANET COWELL, IN HER OFFICIAL CAPACITY AS TREASURER OF THE STATE OF NORTH CAROLINA, AND THE STATE OF NORTH CAROLINA	)	

No. 436PA13-4

ORDER

In light of the quorum requirement contained in N.C.G.S. § 7A-10(a) and the fact that a majority of the members of the Court are potentially disqualified from participating in the hearing and decision of this case pursuant to Canon 3(C)(1)(c) of the Code of Judicial Conduct on the grounds that one or more persons within the third degree of kinship by either blood or marriage not residing in their households could be a member of the plaintiff class, the Court hereby exercises its discretion to invoke the Rule of Necessity and will proceed to set this case for argument and decision. This decision rests upon the following

considerations: (1) the significance of this case to the citizens of North Carolina arising from the large number of potential class members, (2) the potential impact of any decision that the Court might make in this case upon the public fisc, (3) the likelihood that the Court's decision will provide further guidance concerning the extent of the General Assembly's authority to modify the terms and conditions of State employment, and (4) the importance of fulfilling the Court's duty under Article IV of the Constitution of North Carolina to resolve a matter properly presented for its consideration, *see United States v. Will*, 449 U.S. 200, 214 (1980) (stating that "[i]t is well established that actual disqualification of a member of a court of last resort will not excuse such member from performing his official duty if failure to do so would result in a denial of a litigant's constitutional right to have a question, properly presented to such court, adjudicated"); *see also Boyce & Isley, PLLC v. Cooper*, 357 N.C. 655, 656–57 (2003) (invoking the Rule of Necessity in order to permit the making of a decision to grant or deny a petition for discretionary review in an important case by more than a bare quorum of the Court); *Bacon v. Lee*, 353 N.C. 696, 717–18 (2001) (holding that the Governor of North Carolina was permitted to consider death row clemency petitions despite the Governor's prior tenure as Attorney General); *Long v. Watts*, 183 N.C. 99, 102, 110 S.E. 765, 767 (1922) (determining that the Court must hear a case challenging the application of a statewide income tax to judicial salaries despite the potential impact of that case upon the members of the Court).

The Court further determines that the invocation of the Rule of Necessity will not violate the due process rights of any party to this proceeding. This order is subject to the right of each individual member of the Court to recuse himself or herself from further participation in this matter on his or own initiative pursuant to Canon 3D of the North Carolina Code of Judicial Conduct if additional facts warrant the exercise of such discretion.

By order of the Court in conference, this the 18th day of August 2021.

s/Berger, J.
For the Court

Chief Justice Newby did not participate in the consideration or decision of this matter.

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 18th 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

N.C. NAACP v. MOORE

[379 N.C. 132 (2021)]

NORTH CAROLINA STATE CONFERENCE OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE	)	
v.	)	Wake County
TIM MOORE, IN HIS OFFICIAL CAPACITY, PHILIP BERGER, IN HIS OFFICIAL CAPACITY	)	

No. 261A18-3

ORDER

The Court, on its own motion, authorizes the parties to file simultaneous supplemental briefs and reply briefs addressing the question of the procedure that the Court should implement in considering a recusal motion, including some or all the following issues and any additional procedure-related issues that any party deems appropriate:

1. What historical and current recusal practices are utilized by state and federal courts of last resort in the United States? To the extent that another state's court of last resort has rules allowing the involuntary recusal of a justice who does not believe that his or her self-recusal would be appropriate, upon what authority were those rules predicated and what process was used to adopt them? Does the recusal process differ between state and federal courts of last resort and, if so, why?

2. Does this Court have the authority to require the involuntary recusal of a justice who does not believe that self-recusal is appropriate? If so, upon what legal principles does that authority rest? What role, if any, do N.C.G.S. § 7A-10 and N.C.G.S. § 7A-10.1 play in determining whether this Court has such authority? What role do the provisions of the Code of Judicial Conduct play in the making of any such recusal decision? And what enforcement mechanisms exist to ensure compliance with any such involuntary recusal decision?

3. What has been the method for making recusal decisions by this Court? What should be the procedures employed in making recusal decisions for members of this Court?

4. Are there any differences in the principles to be utilized in determining whether a justice of a court of last resort

should be recused and those governing the recusal of a judicial official serving as a member of a trial court or lower appellate court?

5. What, if any, effect should the filing of a motion that a particular justice be recused have upon the process followed in making the recusal decision? Should any distinction be made in the handling of recusal motions predicated upon constitutional and non-constitutional grounds? Should the justice who is the subject of the recusal motion participate in the determination of that motion by the full court and, if so, on what authority?

6. What effect should any "duty to sit" have in the process of deciding whether a justice of a court of last resort should be recused? Does the fact that a justice of a state court of last resort is elected, rather than appointed, have any bearing upon the recusal analysis? Does an elected justice have an individual constitutional right to participate in deciding every case that comes before the Court and, if so, what is the source and extent of any such right? Does the involuntary recusal of a justice have any impact upon the constitutional or statutory rights of any party to the underlying case?

7. Should written rules be adopted to govern the recusal of a member of this Court who elects to refrain from recusing himself or herself? If so, what entity should adopt any such rules? And what should be the content of those rules?

8. Should any such rules incorporate a process for the making of findings of fact? If so, what person or entity should make those findings and what procedures should be employed in order to facilitate the making of any such findings? What should be the standard of proof utilized in making those findings of fact? And what burden of proof, if any, is applicable to the fact-finding process and who bears it?

Each party's initial brief should be filed no later than 30 days from the date of the entry of this order. Any response brief that a party wishes to submit should be filed no later than 20 days after the deadline for the filing of initial briefs. After both initial and response briefs have been filed, the Court will decide the extent, if any, to which additional procedural steps need to be taken prior to the resolution of the recusal motions that are currently pending before this Court.

By order of the Court in conference, this the 28th day of September 2021.

s/Ervin, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 28th day of September 2021.

AMY FUNDERBURK
Clerk, Supreme Court of
North Carolina

s/M.C. Hackney

M.C. Hackney
Assistant Clerk, Supreme Court of
North Carolina

RADIATOR SPECIALTY CO. v. ARROWOOD INDEM. CO.

[379 N.C. 135 (2021)]

RADIATOR SPECIALTY COMPANY	)	
	)	
v.	)	Mecklenburg County
	)	
ARROWOOD INDEMNITY COMPANY, ET AL.	)	

No. 20PA21

ORDER

The parties' joint motion to file appellant, appellee, and reply briefs under seal is allowed as follows: The parties are ordered to file briefs under seal in compliance with all applicable deadlines, and, in addition, to file unsealed briefs within seven (7) days of the filing of the sealed briefs. In the unsealed briefs, the parties are only permitted to redact information contained within or descriptive of information contained within privileged attorney-client communications between RSC and its defense counsel in underlying personal injury cases in which certain of the Insurers have a duty to defend RSC under the insurance policies at issue. Pursuant to Rule 42(a) of the North Carolina Rules of Appellate Procedure, items sealed in the trial court in this matter remain under seal in this Court.

By order of the Court in Conference, this the 1st day of October, 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 1st day of October 2021.

AMY L. FUNDERBURK
Clerk of the Supreme Court

s/M.C. Hackney
Assistant Clerk

STATE OF NORTH CAROLINA	)	
	)	
v.	)	Wayne County
	)	
PAUL ANTHONY BROWN	)	

No. 145A02-3

ORDER

Defendant's Unopposed Motion to Unseal is decided as follows: In light of the fact that the Court has not, after a diligent search of its records, been able to locate a copy of the *ex parte* motion that defendant seeks to have unsealed, defendant's motion is dismissed without prejudice.

By order of the Court in conference, this the 12th day of October 2021.

s/Ervin, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 13th day of October 2021.

AMY FUNDERBURK
Clerk, Supreme Court of
North Carolina

s/Amy Funderburk

~~M.C. Hackney~~
~~Assistan~~t Clerk, Supreme Court of
North Carolina

STATE v. DIAZ-TOMAS

[379 N.C. 137 (2021)]

STATE OF NORTH CAROLINA	)	
	)	
v.	)	WAKE COUNTY
	)	
ROGELIO ALBINO DIAZ-TOMAS	)	
	)	
and	)	
	)	
STATE OF NORTH CAROLINA	)	
	)	
v.	)	
	)	
EDGARDO G. NUNEZ	)	

No. 54A19-3 (consolidated with No. 255PA20)

AMENDED ORDER

The above-captioned two cases were consolidated by order of the Court on 30 June 2020. Defendant Nunez now moves this Court to unconsolidate these cases for oral argument or, in the alternative, to extend time for oral argument. Defendant's alternative motion to extend time is allowed as follows: the time for oral argument will be extended both for the defendant-appellants collectively, and for the State, to forty-five minutes for each side pursuant to North Carolina Rule of Appellate Procedure 30(b). The defendant-appellants' collective total of forty-five minutes for oral argument, including main argument and rebuttal, shall be divided equally between the two defendant-appellants unless they agree otherwise. Defendant's motion is otherwise denied.

Justice BERGER is not participating in the consideration or decision of this case.

By order of this Court in Conference, this 4th day of October, 2021.

s/Barringer, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 4th day of October 2021.

AMY L. FUNDERBURK
Clerk of the Supreme Court

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

STATE OF NORTH CAROLINA	)	
	)	
v.	)	Wake County
	)	
ROBERT LEE HODGE	)	

No. 134A20

ORDER

In light of the additional findings of fact which were filed on 4 August 2021 by the Superior Court, Wake County in the above-captioned case in timely response to the questions tendered to the trial court in an order of this Court issued on 5 May 2021, wherein the trial court determined that:

1) Yes, there was a true bill for habitual felon indictment dated 7 November 2017;

2) Yes, pursuant to N.C.G.S. § 15A-628(c), the true bill was returned by the foreman of the grand jury to the presiding judge in open court;

3) Yes, pursuant to N.C.G.S. § 15A-628(d), the clerk did keep a permanent record of the true bill along with all matters returned by the grand jury to the judge; and

4) Yes, defendant was properly served with the true bill,

the Court concludes that the record in this case has been duly supplemented by these additional findings of fact, and therefore remands this case to the Court of Appeals for the limited purpose of reevaluating the opinion of the Court of Appeals in this case in light of the additional findings of fact which were not available for consideration by the Court of Appeals at the time of the issuance of its opinion. Consequently, it is further ordered that defendant-appellant's Motion for Supplemental Briefing filed in this Court on 11 August 2021 is deemed to be moot.

By order of the Court in Conference, this the 27th 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 31st day of August, 2021.

AMY L. FUNDERBURK
Clerk, Supreme Court of
North Carolina

s/Amy L. Funderburk
~~Assistant~~ Clerk, Supreme Court of
North Carolina

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

29 OCTOBER 2021

12P21	State v. John Anton Parulski	Def's PDR Under N.C.G.S. § 7A-31 (COA19-673)	Denied
13P21	State v. Wallace Bradsher	1. Def's Motion for Temporary Stay (COA19-365) 2. Def's Petition for Writ of Supersedeas 3. Def's PDR Under N.C.G.S. § 7A-31 4. State's Petition for Writ of Supersedeas 5. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **01/11/2021** Dissolved **10/27/2021** 2. Denied 3. Denied 4. Allowed 5. Allowed **Berger, J., recused**
20PA21	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	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' (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 4. 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 5. Plt's Conditional PDR Under N.C.G.S. § 7A-31 6. Plt and Defs' Joint Motion to Set Briefing Schedule 7. Def's (Landmark American Insurance Company) Motion to Admit Stephen M. Green Pro Hac Vice 8. Def's (Landmark American Insurance Company) Motion to Admit David A. Tartaglio Pro Hac Vice 9. Def's (Landmark American Insurance Company) Motion to Admit Steven T. Adams Pro Hac Vice 10. Def's (National Union Fire Insurance Company of Pittsburgh, PA) Motion to Admit Mark J. Sobczak Pro Hac Vice	1. Allowed **08/10/2021** 2. Allowed **08/10/2021** 3. Allowed **08/10/2021** 4. Allowed **08/10/2021** 5. Allowed **08/10/2021** 6. Allowed **09/01/2021** 7. Allowed **09/17/2021** 8. Allowed **09/17/2021** 9. Allowed **09/17/2021** 10. Allowed **09/30/2021**

	(as Successor to Imperial Casualty and Indemnity Company); United National Insurance Company; Westchester Fire Insurance Company; Zurich American Insurance Company of Illinois	11. Def's (National Union Fire Insurance Company of Pittsburgh, PA) Motion to Admit Matthew J. Fink Pro Hac Vice	11. Allowed **09/30/2021**
		12. Parties' Joint Motion to File Briefs Under Seal	12. Special Order **10/01/2021**
		13. Amicus Curiae (Complex Insurance Claims Litigation Association and American Property Casualty Insurance Association) Motion to Admit Laura A. Foggan Pro Hac Vice	13. Allowed **10/01/2021**
		14. Complex Insurance Claims Litigation Association and American Property Casualty Insurance Association's Motion for Leave to File Amicus Brief	14. Allowed **10/04/2021**
		15. Plt's Motion to Admit Catherine J. Del Prete Pro Hac Vice	15. Allowed **10/06/2021**
		16. Plt's Motion for Brief to be Deemed Timely	16. Allowed **10/06/2021**
		17. Def's (National Union Fire Insurance Company of Pittsburgh, PA) Motion to File Amended/Corrected Brief and Deem it Timely Filed	17. Allowed **10/07/2021**
		18. Plt's and Defendant's (Zurich American Insurance Company of Illinois) Joint Motion to Dismiss Party	18. Allowed **10/15/2021** **Berger, J., recused**
22A21	Mace, et al. v. Utley, et al.	Def's Consent Motion to Withdraw Appeal (COA19-726)	Allowed **09/27/2021**
23A21	State v. Darrell Tristan Anderson	Def's Motion to Share Argument Time with Amicus Curiae	Allowed **10/12/2021**
42P04-12	State v. Larry McLeod Pulley	1. Def's Pro Se Motion for Relief	1. Dismissed
		2. Def's Pro Se Motion for Writ of Coram Nobis	2. Dismissed
		3. Def's Pro Se Motion to Amend	3. Dismissed as moot
		4. Def's Pro Se Motion to Consider Newly Found Evidence	4. Dismissed

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43P18-2	Jonathan H. Bynum v. District Attorney of Lincoln County, Register of Deeds Danny Hester, Fifth Third Bank, Lincolnton, NC 28092, Register of Deeds Penny Sherill, Register of Deeds Amanda Vinson	1. Plt's Pro Se Motion for Class Action	1. Special Order
		2. Plt's Pro Se Motion to Counterclaim	2. Special Order
		3. Plt's Pro Se Motion to Dismiss	3. Special Order
		4. Plt's Pro Se Motion for Conversion	4. Special Order
		5. Plt's Pro Se Amended Motion for Defamation Torts	5. Special Order
		6. Plt's Pro Se Motion for Agent or Attorney Fees	6. Special Order
		7. Plt's Pro Se Motion to Proceed as a Veteran	7. Special Order
		8. Plt's Pro Se Motion for Class Action	8. Special Order
		9. Plt's Pro Se Motion for Conversion	9. Special Order
		10. Plt's Pro Se Motion to Counterclaim	10. Special Order
		11. Plt's Pro Se Motion for Defamation	11. Special Order
		12. Plt's Pro Se Motion for Agent or Attorney Fees	12. Special Order
		13. Plt's Pro Se Motion to Proceed as a Veteran	13. Special Order
		14. Plt's Pro Se Motion for Class Action	14. Special Order
		15. Plt's Pro Se Motion for Discrimination	15. Special Order
		16. Plt's Pro Se Motion for Defamation	16. Special Order
		17. Plt's Pro Se Motion for Civil Rights Violation	17. Special Order
		18. Plt's Pro Se Motion for Agent or Attorney Fees	18. Special Order
		19. Plt's Pro Se Motion to Proceed as a Veteran	19. Special Order
		20. Plt's Pro Se Motion for Amended Class Action	20. Special Order
		21. Plt's Pro Se Motion to File a Complaint	21. Special Order

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		22. Plt's Pro Se Motion for Violation Rerecord in Satisfaction Security Instrument	22. Special Order
		23. Plt's Pro Se Motion for Conversion	23. Special Order
		24. Plt's Pro Se Motion for Agent or Attorney Fees	24. Special Order
		25. Plt's Pro Se Motion to Proceed as a Veteran	25. Special Order
		26. Plt's Pro Se Motion for Amended Class Action	26. Special Order
		27. Plt's Pro Se Motion to File Complaint Conduct Unbecoming	27. Special Order
		28. Plt's Pro Se Motion for Conversion	28. Special Order
		29. Plt's Pro Se Motion to Proceed as a Veteran	29. Special Order
44P21-4	Reginald Anthony Falice v. State of North Carolina	Petitioner's Pro Se Motion for Immediate Hearing	Dismissed
54A19-3	State v. Rogelio Albino Diaz-Tomas	1. Def's Motion for Temporary Stay (COA19-777 P19-490)	1. Allowed **04/21/2020**
		2. Def's Petition for Writ of Supersedeas	2. Allowed **06/03/2020**
		3. Def's Notice of Appeal Based Upon a Dissent	3. ---
		4. Def's PDR as to Additional Issues	4. Special Order **12/15/2020**
		5. Def's Conditional Petition for Writ of Certiorari to Review Order of the COA	5. Allowed **12/15/2020**
		6. Def's Conditional Petition for Writ of Certiorari to Review Order of District Court, Wake County	6. Allowed **12/15/2020**
		7. Def's Conditional Petition for Writ of Mandamus	7.
		8. Def's Motion to Expedite the Consideration of Defendant's Matters	8. Dismissed as moot **12/15/2020**
		9. Def's Motion to Proceed *In Forma Pauperis*	9. Allowed **12/15/2020**
		10. Def's Motion to Take Judicial Notice	10. Dismissed as moot **12/15/2020**

		11. Def's Motion for Leave to Amend Notice of Appeal	11. Allowed **12/15/2020**
		12. Def's Motion for Summary Reversal	12. Dismissed **12/15/2020**
		13. Def's Motion to Supplement Record on Appeal	13. Allowed **12/15/2020**
		14. Def's Motion to Consolidate Diaz-Tomas and Nunez Matters	14. Allowed **06/30/2020**
		15. Def's Motion to Clarify the Extent of Supersedeas Order	15. Dismissed **12/15/2020**
		16. Def's Motion in the Alternative to Hold Certiorari and Mandamus Petitions in Abeyance	16. Allowed **12/15/2020**
		17. Def's Motion to File Memorandum of Additional Authority	17. Dismissed **07/08/2020**
		18. Def's Motion for Petition for Writ of Procedendo	18. Dismissed **12/15/2020**
		19. Def's Motion for Printing and Mailing of PDR on Additional Issues	19. Dismissed **12/15/2020**
		20. Def's Motion for the Production of Discovery Under Seal	20. Denied **12/15/2020**
		21. Def's Motion to Amend Certificate of Service	21. Allowed **12/15/2020**
		22. Def's Motion to Amend Motion for Petition for Writ of Procedendo	22. Dismissed as moot **12/15/2020**
		23. Def's Motion to Unconsolidate Cases for Oral Argument	23. Special Order **10/04/2021**
		24. The North Carolina Advocates for Justice's Motion for Leave to File Amicus Brief	24. Allowed **03/02/2021** **Berger, J., recused**
66P21	Pia Townes v. Portfolio Recovery Associates, LLC	1. Def's PDR Under N.C.G.S. § 7A-31 (COA20-78)	1. Allowed
		2. North Carolina Creditors Bar Association's Motion for Leave to File Amicus Brief in Support of Petition for Discretionary Review	2. Dismissed as moot
		3. North Carolina Creditors Bar Association's Conditional Motion for Leave to File Amicus Brief	3. Allowed
		4. Plt's Conditional PDR Under N.C.G.S. § 7A-31	4. Allowed **Ervin, J., recused**

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72P21	Guy Ferrante v. Judge W. David McFadyen	1. Petitioner's Pro Se Motion for Notice of Appeal (COAP20-612) 2. Petitioner's Pro Se Motion for PDR	1. Dismissed *ex mero motu* 2. Denied
86P21	Thomas M. Anderson, Perry Polsinelli, Dori Danielson, William Hannah, Deborah Hannah, Richard F. Hunter, Andrew Juby, Thomas T. Schreiber, Fred R. Yates and wife, Karon K. Yates, individually and on behalf of Mystic Lands Property Owners Association, a North Carolina Non-profit Corporation v. Mystic Lands, Inc., a Florida Corporation and Ami Shinitzky	1. Defs' Motion for Temporary Stay (COA19-801) 2. Defs' Petition for Writ of Supersedeas 3. Defs' PDR Under N.C.G.S. § 7A-31 4. Defs' Motion to Amend PDR 5. Defs' Motion to Strike Portions of Plaintiffs' Response	1. Allowed **02/26/2021** Dissolved **10/27/2021** 2. Denied 3. Denied 4. Allowed **02/26/2021** 5. Dismissed as moot **Berger, J., recused**
87P21	Thomas M. Anderson, Perry Polsinelli, Dori Danielson, William Hannah, Deborah Hannah, Richard F. Hunter, Andrew Juby, Thomas T. Schreiber, Fred R. Yates and wife, Karon K. Yates, individually and on behalf of Mystic Lands Property Owners Association, a North Carolina Non-profit Corporation v. Mystic Lands, Inc., a Florida Corporation and Ami Shinitzky	1. Defs' PDR Under N.C.G.S. § 7A-31 (COA19-802) 2. Defs' Motion to Strike Portions of Plaintiffs' Response	1. Denied 2. Dismissed as moot **Berger, J., recused**
92A21	State v. Abdul Haneef Abdullah	Def's Pro Se Notice of Appeal Based Upon a Constitutional Question (COA19-867)	Dismissed *ex mero motu*
94P20-2	State v. Carlton Lashawn White	Def's Pro Se Petition for Writ of Habeas Corpus	Denied **10/08/2021**
94P20-3	State v. Carlton Lashawn White	Def's Pro Se Motion for Notice of Denial of Writ of Habeas Corpus	Dismissed **10/26/2021**

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104P21	Molly Schwarz v. Thomas J. Weber, Jr., D.O.	Plt's PDR Under N.C.G.S. § 7A-31 (COA19-1164)	Denied
105P20-3	State v. Matthew Joseph Taylor	Def's Pro Se Motion to Strike a Prior Conviction (COA19-593)	Dismissed
119P21	State v. Maderkis Deyawn Rollinson	1. Def's PDR Under N.C.G.S. § 7A-31 (COA20-42) 2. Def's Motion to Deem PDR Timely Filed 3. Def's Motion in the Alternative to Review as a Petition for Writ of Certiorari 4. Def's Motion for Temporary Stay 5. Def's Petition for Writ of Supersedeas	1. Allowed 2. Allowed 3. Dismissed as moot 4. Allowed **04/08/2021** 5. Allowed
128P21-2	State v. Richard L. Hefner	1. Def's Pro Se Motion for PDR 2. Def's Petition for Writ of Habeas Corpus	1. Denied **09/20/2021** 2. Denied **09/20/2021**
129A96-3	State v. Carlton Eugene Anderson	Def's Pro Se Petition for Writ of Certiorari to Review Order of Superior Court, Jackson County	Denied **09/22/2021**
131P01-18	State v. Anthony Dove	1. Def's Pro Se Motion to Proceed *In Forma Pauperis* 2. Def's Pro Se Petition for Writ of Mandamus	1. Allowed 2. Denied **Ervin, J., recused**
131P16-21	State v. Somchai Noonsab	1. Def's Pro Se Motion for Lawsuit (COAP16-103) 2. Def's Pro Se Motion for Jurisdiction and to Take Judicial Notice 3. Def's Pro Se Motion for Jurisdiction of Same Elements	1. Dismissed 2. Dismissed 3. Dismissed

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132PA21	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 **08/10/2021** 3. Allowed **08/10/2021** 4. Allowed **08/10/2021** 5. Allowed **08/10/2021**
133PA21	State v. Matthew Benner	State's Motion for Oral Argument to be Heard via Webex and Not in Person (COA19-879)	Denied **10/19/2021**
134A20	State v. Robert Lee Hodge	Def's Motion for Supplemental Briefing (COA19-443)	Special Order **08/27/2021**
145A02-3	State v. Paul Anthony Brown	Def's Motion to Unseal	Special Order **10/12/2021**
151PA18-2	State v. Ramar Dion Benjamin Crump	Def's Pro Se Petition for Writ of Habeas Corpus	Denied **09/07/2021**
153P21	In the Matter of S.M., Jr	1. State's Motion for Temporary Stay (COA20-871) 2. State's Petition for Writ of Supersedeas 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **05/07/2021** Dissolved **10/27/2021** 2. Denied 3. Denied
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	1. Dismissed as moot 2. Dismissed as moot 3. Allowed 4. Dismissed as moot 5. Allowed **06/15/2021**

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156A17-4	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. Def's Motion to Dismiss Appeal 2. Plt's Plaintiffs' Motion for Extension of Time to File Response 3. Plt's Motion to Admit Adam Gitlin, Brendan P. Glackin, Miriam E. Marks, Daniel E. Seltz, and Benjamin E. Shiftan Pro Hac Vice 4. Def's Joint Motion to Extend Time and Set Briefing Schedule	1. Dismissed as moot 2. Allowed **08/20/2021** 3. Allowed **09/22/2021** 4. Allowed **09/17/2021**
157P21	State v. Christopher Baldwin	Def's PDR Under N.C.G.S. § 7A-31 (COA20-17)	Denied
158P16-3	State v. Larry Brandon Moore	1. Def's Pro Se Petition for Writ of Certiorari 2. Def's Pro Se Motion to Proceed *In Forma Pauperis*	1. Dismissed 2. Allowed
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. Plt's Motion to Dismiss Appeal 2. Defs' (ACE American Insurance Company) Motion for Extension of Time to File Reply Brief 3. Def's (Old Republic Insurance Company) Motion for Extension of Time to File Reply Brief 4. Defs' (Old Republic Insurance Company and ACE American Insurance Company) Motion for Extension of Time to File Response to Motion to Dismiss 5. Def's (Old Republic Insurance Company) Motion to Dismiss Appeal as Settled	1. Allowed 2. Allowed **09/03/2021** 3. Allowed **09/07/2021** 4. Allowed **09/07/202** 5. Allowed **10/06/2021**
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	Amicus Curiae's Motion to Withdraw and Substitute Counsel	Allowed **10/01/2021**

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166A21	In the Matter of J.C. and D.C.	1. Petitioner's Motion for Leave to File a Motion to Correct the March 29, 2021 Order in the District Court 2. Petitioner's Motion to Stay Briefing in this Matter Until the Court's Order of March 29, 2021 can be Corrected and the Record on Appeal Supplemented with a Corrected Copy of the Order	1. 2. Denied **09/29/2021**
178P21	Lisa Howze as Administratrix of the Estate of Palestine Howze v. Treyburn Rehabilitation Center, LLC d/b/a Treyburn Rehabilitation Center; Southern Healthcare Management, LLC; 2059, LLC; Sovereign Healthcare Holdings, LLC	Plt's PDR Prior to a Determination by the COA (COA21-272)	Denied
183P21	State v. Brian Thad Carver	Def's PDR Under N.C.G.S. § 7A-31 (COA19-555)	Denied
185P21	State v. Ricardo Solis Garcia	Def's PDR Under N.C.G.S. § 7A-31 (COA20-380)	Denied
191A21	In the Matter of K.Q.	1. Guardian ad Litem's Motion to Dismiss Appeal 2. Respondent-Mother's Motion to Supplement the Record on Appeal	1. Allowed **09/14/2021** 2. Dismissed as moot **10/21/2021**
192P21	Alejandro Asbun v. North Carolina Department of Health and Human Services	1. Petitioner's Pro Se Notice of Appeal Based Upon a Constitutional Question (COA20-346) 2. Petitioner's Pro Se Petition in the Alternative for Discretionary Review Under N.C.G.S. § 7A-31 3. Respondent's Motion to Dismiss Appeal	1. --- 2. Denied 3. Allowed
194P21	State v. Jeffery Lee Sechrest	1. Def's PDR Under N.C.G.S. § 7A-31 (COA20-256) 2. State's Motion to Deem Response Timely Filed	1. Denied 2. Allowed

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197PA20-2	State v. Jeremy Johnson	1. Def's Motion for Temporary Stay (COA19-529-2) 2. Def's Petition for Writ of Supersedeas 3. Def's PDR Under N.C.G.S. § 7A-31	1. Allowed **01/20/2021** 2. Allowed 3. Allowed **Berger, J., recused**
207A21	In the Matter of E.D.H.	Guardian ad Litem's Motion to File Amended Brief	Allowed **09/01/2021**
212P21-2	State v. Milton E. Lancaster	Def's Pro Se Motion for Review	Dismissed
216A21	In the Matter of L.Z.S.	1. Respondent-Father's Petition for Writ of Certiorari to Review Order of District Court, Chowan County 2. Guardian ad Litem's Motion to Dismiss Appeal 3. Petitioner's Motion to Dismiss Appeal 4. Petitioner and Guardian ad Litem's Motion to Temporarily Stay the Filing of the Briefs	1. Allowed **09/13/2021** 2. 3. 4. Allowed **09/13/2021**
226P06-3	State v. De'Norris L. Sanders	Def's Petition for Writ of Habeas Corpus	Denied **09/28/2021**
229P21-2	State v. Anthony Moses Arnold	Def's Pro Se Motion to Dismiss Charges and Drop POV	Dismissed
240P21	In the Matter of the Foreclosure of a Lien by Executive Office Park of Durham Association, Inc. v. Martin E. Rock a/k/a Martin A. Rock Lien Dated: October 23, 2018 Lien Recorded 18 M 1195 In the Clerk's Office, Durham County Courthouse	1. Petitioner's PDR Under N.C.G.S. § 7A-31 (COA20-405) 2. Respondent's Motion to Dismiss PDR 3. Petitioner's Motion for Temporary Stay 4. Petitioner's Petition for Writ of Supersedeas 5. Respondent's Motion that Petitioner be Taxed Costs or Fines 6. Respondent's Petition for Writ of Mandamus 7. Respondent's Motion in the Alternative for Order Directing the Durham County Clerk of Superior Court to Set a Hearing as to the Release of Appeal Bond	1. 2. 3. Allowed **09/01/2021** 4. 5. 6. Denied **10/06/2021** 7. Denied **10/06/2021**
242P21	State v. Danny William Young	Def's Pro Se Motion for Appropriate Relief	Dismissed

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246PA21	State v. James Gregory Medlin	1. Def's Petition for Writ of Supersedeas (COA20-563) 2. Def's Notice of Appeal Based Upon a Dissent 3. Def's Motion to Deem Notice of Appeal Timely Served 4. Def's Petition for Writ of Certiorari to Review Decision of the COA 5. Def's Motion to Maintain the Stay	1. Allowed **09/01/2021** 2. Dismissed as moot **09/01/2021** 3. Dismissed as moot **09/01/2021** 4. Allowed **09/01/2021** 5. Dismissed as moot **09/01/2021**
253P19-3	State v. Justin Michael Tyson	1. Def's Pro Se Motion to Dismiss the Indictment (COAP18-739) 2. Def's Pro Se Motion to Quash the Indictment, Dismiss Charges, and Reverse the Decision of the COA 3. Def's Pro Se Motion for Relief from Judgment or Order	1. Dismissed 2. Dismissed 3. Dismissed
254P18-6	State v. Jimmy A. Sevilla-Briones	Def's Pro Se Motion for Petition for Direct Review (COAP17-645)	Denied
255PA20	State v. Edgardo Gandarillo Nunez	Def's Motion to Un-Consolidate Cases for Oral Argument (COA20-202)	Special Order **08/31/2021** **Berger, J., recused**
257P21	State v. Maribel Gonzalez	1. Def's Motion for Temporary Stay (COA20-390) 2. Def's Petition for Writ of Supersedeas 3. Def's PDR Under N.C.G.S. § 7A-31	1. Allowed **07/21/2021** Dissolved **10/27/2021** 2. Denied 3. Denied
258P21	Richard P. Meabon v. Michael K. Elliott; Elliott Law Firm, PC	Plt's PDR Under N.C.G.S. § 7A-31 (COA20-559)	Denied
260A20	State v. Marc Peterson Oldroyd	1. Notice of Appeal Based Upon a Dissent (COA19-595) 2. State's Motion to Withdraw Appearance of Heyward Earnhardt	1. --- 2. Allowed **09/16/2021**

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261A18-3	North Carolina State Conference of the National Association for the Advancement of Colored People v. Tim Moore, in his official capacity, Philip Berger, in his official capacity	1. Plt's Motion to Disqualify Justice Barringer and Justice Berger 2. Def's Motion for Extension of Time to File Briefs	1. 2. Allowed **10/25/2021**
262P21	In re Joseph Gibson, III	1. Petitioner's Pro Se Petition for Writ of Certiorari (COAP21-223) 2. Petitioner's Pro Se Motion to Proceed *In Forma Pauperis*	1. Denied 2. Allowed
270A18-2	State v. Thomas Earl Griffin	Def's Motion for Leave to File Supplemental New Brief	Denied **10/26/2021**
272A14	State v. Jonathan Douglas Richardson	1. Def's Motion to Bypass Court of Appeals 2. Def's Motion for Order Amending Record on Appeal	1. Allowed **02/24/2021** 2. Allowed
272P21	State v. Paul Kevin Flint	Def's Pro Se Motion for Phone Records	Dismissed
273A21	In the Matter of V.D.M. and A.D.M.	1. Respondent-Mother's Motion to Dismiss Appeal 2. Respondent-Mother's Motion to Waive Costs	1. Allowed **09/14/2021** 2. Allowed **09/14/2021**
276A21	State v. Michael Steven Elder	1. State's Motion for Temporary Stay (COA20-215) 2. State's Petition for Writ of Supersedeas 3. State's Notice of Appeal Based Upon a Dissent 4. Def's Motion to Hold Appeal in Abeyance	1. Allowed **08/05/2021** 2. Allowed **08/24/2021** 3. --- 4. Allowed **09/28/2021**
279A20-2	State v. Demon Hamer	Def's Pro Se Motion to Reconsider	Denied
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 3. Respondent and State's Joint Motion to Hold Appeal in Abeyance	1. Allowed **08/06/2021** 2. Allowed **08/24/2021** 3. Allowed **09/21/2021**

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280P21	Travis Wayne Baxter v. Roy Cooper, USA Attorney, Leo Act	1. Plt's Pro Se Motion for New Complaint *In Forma Pauperis* 2. Plt's Pro Se Motion to Order the Paying of $33,000 3. Plt's Pro Se Motion for Petition Payment Demand 4. Plt's Pro Se Motion for Petition Payment Demand	1. Dismissed 2. Dismissed 3. Dismissed 4. Dismissed
281P21	Robert M. Pedlow v. Timothy Kornegay	Def's PDR Under N.C.G.S. § 7A-31 (COA20-747)	Denied
282P21	State v. Timothy Leon Moore	Def's PDR Under N.C.G.S. § 7A-31 (COA20-53)	Denied
283P21-1	American Transportation Group Insurance Risk Retention Group v. MVT Insurance Services, Inc., Amrit Singh, Eleazar Rojas, and Shamsher Singh	1. Def's (Amrit Singh) Pro Se Motion for Notice of Appeal 2. Plt's Motion to Dismiss Appeal 3. Plt's Motion for Reconsideration 4. Plt's Motion to Strike	1. Dismissed **09/09/2021** 2. Dismissed as moot **09/09/2021** 3. Dismissed as moot **09/09/2021** 4. Dismissed as moot **09/09/2021**
283P21-2	American Transportation Group Insurance Risk Retention Group v. MVT Insurance Services, Inc., et al.	Def's (Amrit Singh) Motion to Stay Proceedings	Dismissed **09/28/2021**
283P21-3	American Transportation Group Insurance Risk Retention Group v. MVT Insurance Services, Inc., et al.	1. Def's (Amrit Singh) Pro se Motion to Dismiss Case 2. Def's (Amrit Singh) Pro se Motion to Supreme Court for the Investigation	1. Denied **10/04/2021** 2. Denied **10/04/2021**
283P21-4	American Transportation Group Insurance Risk Retention Group v. MVT Insurance Services, Inc., et al.	Def's (Amrit Singh) Pro Se Motion for Appointment of Counsel	Dismissed as moot **10/07/2021**

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283P21-5	American Transportation Group Insurance Risk Retention Group v. MVT Insurance Services, Inc., et al.	1. Def's (Amrit Singh) Pro Se Motion to Immediately Vacate the Case in the Lower Tribunal Superior Court	1. Dismissed **10/20/2021**
		2. Def's (Amrit Singh) Pro Se Motion to Restrain ATGI from Removing her from the Board of Directors of ATGI	2. Dismissed **10/20/2021**
		3. Def's (Amrit Singh) Pro Se Motion to Restrain ATGI from Using Any Shareholder Proxies Obtained Since March 2020	3. Dismissed **10/20/2021**
		4. Def's (Amrit Singh) Pro Se Motion to Restrain ATGI from Scheduling Any Shareholder Meetings for the Purposes of Removing Defendants from the ATGI Board of Directors During the Pendency of this Litigation	4. Dismissed **10/20/2021**
		5. Def's (Amrit Singh) Pro Se Motion for Reconsideration and to Reopen Discovery	5. Dismissed **10/20/2021**
		6. Def's (Amrit Singh) Pro Se Motion for Request to the Supreme Court and Honorable Judge with Respect and Loyalty	6. Dismissed **10/20/2021**
284P21	Wells Fargo Bank, N.A., as Trustee of the Jane Richardson McElhanney Revocable Trust, Wells Fargo Bank, N.A., as Trustee of the Samuel Clinton McElhaney Revocable Trust, and Wells Fargo Bank, N.A., as Executor of the Estate of Jane Richardson McElhaney v. Orsbon & Fenninger, LLP, and R. Anthony Orsbon	1. Defs' PDR Under N.C.G.S. § 7A-31 (COA20-560)	1.
		2. Defs' Petition for Writ of Certiorari to Review Order of Superior Court, Mecklenburg County	2.
		3. Defs' Motion to Withdraw PDR	3. Allowed **08/20/2021**
		4. Defs' Motion to Withdraw Petition for Writ of Certiorari	4. Allowed **08/20/2021**

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285P21	Jacob Samuel McElhaney and Julia Elizabeth McElhaney, as beneficiaries of the Jane Richardson McElhaney Revocable Trust and the Samuel Clinton McElhaney Revocable Trust v. Orsbon & Fenninger, LLP, and R. Anthony Orsbon	1. Defs' PDR Under N.C.G.S. § 7A-31 (COA20-561) 2. Defs' Petition for Writ of Certiorari to Review Order of Superior Court, Mecklenburg County 3. Defs' Motion to Withdraw PDR 4. Defs' Motion to Withdraw Petition for Writ of Certiorari	1. 2. 3. Allowed **08/20/2021** 4. Allowed **08/20/2021**
286A21	In the Matter of H.P., I.S., J.S.	1. Guardian ad Litem's Notice of Appeal Based Upon a Dissent (COA20-876) 2. Guardian ad Litem's Motion for Temporary Stay 3. Guardian ad Litem's Petition for Writ of Supersedeas 4. Respondent-Mother's Motion to Dissolve Temporary Stay and Petition for Writ of Supersedeas 5. Respondent-Mother's Motion to Dismiss Appeal	1. --- 2. Allowed **08/11/2021** 3. Allowed **08/11/2021** 4. Allowed **10/22/2021** 5. Allowed **10/22/2021**
289P21	State v. Brian Lorenzo Curlee	1. Def's Pro Se Motion for Notice of Appeal (COAP21-205) 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	1. Dismissed 2. Dismissed 3. Dismissed
292P21	Amanda C. Solomon, as Executrix of the Estate of Kent Anderson Cundiff v. Dawn Lorraine Cundiff	Plt's PDR Under N.C.G.S. § 7A-31 (COA20-489)	Denied
294A21	State v. Harold Eugene Swindell	1. State's Motion for Temporary Stay (COA20-263) 2. State's Petition for Writ of Supersedeas 3. State's Notice of Appeal Based Upon a Dissent 4. Def's PDR Under N.C.G.S. § 7A-31	1. Allowed **08/20/2021** 2. Allowed **09/08/2021** 3. --- 4.

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295P21	State v. D'Monte Lamont O'Kelly	1. State's Motion for Temporary Stay (COA20-693) 2. State's Petition for Writ of Supersedeas	1. Allowed **08/20/2021** 2.
296P21	In the Matter of Z.M.	Respondent-Mother's Pro Se Motion for Appeal	Dismissed
298A21	State v. David Myron Dover	1. State's Motion for Temporary Stay (COA20-362) 2. State's Petition for Writ of Supersedeas 3. State's Notice of Appeal Based Upon a Dissent 4. State's Motion to Deem Brief Timely Filed	1. Allowed **08/24/2021** 2. Allowed **09/14/2021** 3. --- 4. Allowed **10/06/2021**
301P12-2	State v. Mark Bradley Carver	1. State's Motion for Temporary Stay (COA11-1382) 2. State's Petition for Writ of Supersedeas 3. State's PDR Under N.C.G.S. § 7A-31 4. Def's Motion for Sanctions	1. Allowed **05/11/2021** Dissolved **10/27/2021** 2. Denied 3. Denied 4. Denied
302A21	In the Matter of K.M.S.	Respondent-Father's Motion to Deem Brief Timely Filed	Allowed **10/06/2021**
304P20-4	Clyde Junior Meris v. Guilford County Sheriffs	1. Plt's Pro Se Petition for Writ of Certiorari 2. Plt's Pro Se Motion to Proceed *In Forma Pauperis*	1. Dismissed 2. Allowed
305P97-10	State of North Carolina v. Egbert Francis, Jr.	Def's Pro Se Motion for Reconsideration of M.A.R.	Dismissed
308A21	In the Matter of C.G.	1. Respondent's Notice of Appeal Based Upon a Dissent (COA20-520) 2. Respondent's PDR as to Additional Issues	1. --- 2. Allowed
309A21	In the Matter of Q.J.	Respondent and State's Joint Motion to Hold Appeal in Abeyance	Allowed **09/21/2021**
312A21	In the Matter of C.G.F.	Respondent and State's Joint Motion to Hold Appeal in Abeyance	Allowed **09/21/2021**

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312PA18-2	State v. Aaron Lee Gordon	Def's Motion for Leave to File Supplemental New Brief	Denied **10/26/2021**
313A21	In the Matter of J.R.	Respondent and State's Joint Motion to Hold Appeal in Abeyance	Allowed **09/21/2021**
314P21	Paul Steven Wynn v. Rex Frederick, in his official capacity as a Magistrate, and Great American Insurance Company	Def's Motion to Withdraw Appearance of Heyward Earnhardt (COA20-472)	Allowed **09/16/2021**
315P21	Vanuzia de Moraes v. Simon Mayo Alemman	Plt's Pro Se Motion for Notice of Appeal	Dismissed
317A21	In the Matter of R.S.H.	1. Respondent's Notice of Appeal Based Upon a Dissent (COA20-777) 2. Respondent's PDR as to Additional Issues	1. --- 2. Allowed
322P21	State v. Adam McRee a/k/a Kevin Vaughn	Def's Pro Se Petition for Writ of Habeas Corpus (COAP21-329)	Denied **09/01/2021**
323P21	State v. Malik Jones	Def's Pro Se Motion for a Change of Venue	Dismissed **10/22/2021**
326P21	Christine Alden v. Lisa Osborne	1. Respondent's Motion for Temporary Stay (COAP21-200) 2. Respondent's Petition for Writ of Supersedeas 3. Respondent's PDR Under N.C.G.S. § 7A-31 4. Respondent's Motion to Amend or Supplement PDR	1. Allowed **08/31/2021** 2. Special Order **09/24/2021** 3. Special Order **09/24/2021** 4. Special Order **09/24/2021**
326P21-2	Christine Alden v. Lisa Osborne	1. Respondent's Motion for Temporary Stay (COAP21-200) 2. Respondent's Petition for Writ of Supersedeas 3. Respondent's PDR 4. Petitioner's Pro Se Motion to Dismiss PDR, Petition for Writ of Supersedeas, and Motion for Temporary Stay for Lack of Standing	1. Allowed **10/05/2021** 2. Allowed 3. Allowed 4. Denied

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327P21	Joy Natasha Faucette Balom (formerly Burgess) v. Chaplain Dr. Ned Burgess, Jr.	1. Def's Pro Se Motion for Notice of Appeal 2. Def's Pro Se Motion for Appointment of Counsel	1. Dismissed **09/20/2021** 2. Dismissed **09/20/2021**
328A21	In the Matter of B.E.V.B.	Respondent-Father's Petition for Writ of Certiorari to Review Order of District Court, Brunswick County	Allowed **10/13/2021**
329P21	State v. Robert Louis Staton	Def's Pro Se Petition for Writ of Certiorari to Review Decision of the COA (COA20-676)	Denied
330P21	State v. Cordero Deon Newborn	1. State's Motion for Temporary Stay (COA20-411) 2. State's Petition for Writ of Supersedeas 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **09/03/2021** 2. 3.
331PA20	Connette v. The Charlotte-Mecklenburg Hospital Authority, et al.	Plt's Motion to Allow Remote Oral Argument (COA19-354)	Allowed **10/14/2021** **Ervin, J., recused** **Berger, J., recused**
331P21	Community Success Initiative et al. v. Moore, et al.	1. Plts' Emergency Motion for Temporary Stay (COAP21-340) 2. Plts' Petition for Writ of Supersedeas 3. Legislative Defs' Motion to Admit David H. Thompson Pro Hac Vice 4. Legislative Defs' Motion to Admit Peter A. Patterson Pro Hac Vice 5. Legislative Defs' Motion to Admit Joseph O. Masterman Pro Hac Vice 6. Legislative Defs' Motion to Admit William V. Bergstrom Pro Hac Vice 7. Plts' Motion for Leave to File Reply 8. Counsel for Plts' Motion to Withdraw as Counsel 9. Plts' Motion for Prompt Disqualification of Justice Berger, Jr.	1. Special Order **09/10/2021** 2. Special Order **09/10/2021** 3. Allowed **09/10/2021** 4. Allowed **09/10/2021** 5. Allowed **09/10/2021** 6. Allowed **09/10/2021** 7. Dismissed as moot **09/10/2021** 8. Allowed **09/10/2021** 9.

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		10. Plts' Plaintiffs' Motion in the Alternative for Deferred Disqualification Following the Court's Resolution of Plaintiffs' Petition for Writ of Supersedeas and Motion for Temporary Stay	10.
332A21	William J. Parra Angarita v. Marguerite Edwards	Def's Pro Se Notice of Appeal Based Upon a Constitutional Question (COA20-846)	Dismissed *ex mero motu*
333A21	In the Matter of J.I.T.	Respondent-Father's Motion to Deem the Record on Appeal Timely Filed	Allowed **09/14/2021**
336P21	State v. Curtis Steven Pryor	Def's PDR Under N.C.G.S. § 7A-31 (COA20-363)	Denied
338P21	Lauri A. Nielson v. Raymond Schmoke	Def's PDR Under N.C.G.S. § 7A-31 (COA20-701)	Denied
339A18-2	The New Hanover County Board of Education v. Josh Stein, in his capacity as Attorney General of the State of North Carolina and North Carolina Coastal Federation and Sound Rivers, Inc., Intervenors	1. Intervenors Notice of Appeal Based Upon a Dissent 2. State's Notice of Appeal Based Upon a Dissent 3. Plt's Petition for Writ of Supersedeas	1. --- 2. --- 3. Denied **09/20/2021** **Berger, J., recused**
343P21	State v. Lee Anthony Brisbon	1. Def's PDR Under N.C.G.S. § 7A-31 (COA20-408) 2. State's Motion to Dismiss Appeal	1. Denied 2. Dismissed as moot
345P21	State v. Gilbert Lee King, Jr.	Def's Pro Se Motion for Violation of Due Process and Rights	Dismissed **09/14/2021**
346A21	In the Matter of N.F., Z.F., D.F., C.F.	Respondent-Father's Motion to Close Docket	Allowed **10/20/2021**
347A21	Public Service Company of North Carolina, Incorporated d/b/a Dominion Energy North Carolina v. Rita R. Thomas a/k/a Rita Rene Franklin	Def's Pro Se Notice of Appeal Based Upon a Constitutional Question (COA21-200)	Dismissed

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350P21	State v. Joseph H. Shaw	1. Def's Pro Se Petition for Writ of Mandamus 2. Def's Pro Se Petition for Writ of Habeas Corpus	1. Denied **09/16/2021** 2. Denied **09/16/2021**
352P20	State v. Johnny Ringo Wallace	Def's PDR Under N.C.G.S. § 7A-31 (COA19-923)	Denied
353P21	State v. Travis Wayne Baxter	1. Def's Pro Se Motion for Notice of Appeal (COAP21-332) 2. State's Motion for Release of Documents Under Seal	1. Dismissed 2. Allowed
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 Notice of Appeal Based Upon a Dissent (COA19-1127) 2. Def's PDR as To Additional Issues) 3. Plt's Motion to Amend Response to Notice of Appeal Based on a Dissent and PDR	1. — 2. Denied **08/10/2021** 3. Allowed **08/19/2021**
359P21	Cheryl A. Groves v. Governor of North Carolina Roy Cooper	Petitioner's Pro Se Petition for Writ of Mandamus	Denied
360P21	State v. Daryl Lynn Sparks	1. Def's Pro Se Motion for PDR (COAP21-336) 2. Def's Pro Se Petition for Writ of Habeas Corpus 3. Def's Pro Se Motion to Appoint Counsel	1. Denied **09/24/2021** 2. Denied **09/24/2021** 3. Dismissed as moot **09/24/2021**
362P21	Epes Logistics Services, Inc. v. Steen Marcuslund, Anthony De Piante, Jillian Caron, Brad Wiedner, Login Logistics, LLC, and Noble Worldwide Logistics, LLC	1. Defs' (Anthony De Piante, Jillian Caron, Brad Wiedner, and Noble Worldwide Logistics, LLC) Motion for Temporary Stay (COA20-338) 2. Defs' (Anthony De Piante, Jillian Caron, Brad Wiedner, and Noble Worldwide Logistics, LLC) Petition for Writ of Supersedeas 3. Defs' (Anthony De Piante, Jillian Caron, Brad Wiedner, and Noble Worldwide Logistics, LLC) PDR	1. Allowed **09/27/2021** 2. 3.

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364P21	Thomasina Gean v. Mecklenburg County Schools, EEOC, Huntingtowne Farms Classroom Teachers Association	Plt's Pro Se Motion for Review and Judgement	Dismissed
371A20	In the Matter of S.C.L.R.	The Court's Motion to Amend the Record on Appeal	Special Order **08/25/2021**
383P20	Derek Hendricks v. N.C. Dept. of Justice, et al.	1. Petitioner's Pro Se Motion for Verified Complaint Jury Trial Demanded 2. Petitioner's Pro Se Motion for Order to Show Cause 3. Petitioner's Pro Se Motion for Judicial Intervention 4. Petitioner's Pro Se Motion for Fee Reduction/Waiver	1. Dismissed 2. Dismissed 3. Dismissed 4. Dismissed as moot
388A10	State v. Andrew Darrin Ramseur	Def's Motion to Withdraw Andrew J. DeSimone as Counsel	Allowed **09/24/2021**
393P20	In the Matter of L.N.H.	1. Petitioner's PDR Under N.C.G.S. § 7A-31 (COA19-1020) 2. Respondent-Mother's Conditional PDR Under N.C.G.S. § 7A-31 3. Petitioner and Guardian ad Litem's Motion for Temporary Stay 4. Petitioner and Guardian ad Litem's Petition for Writ of Supersedeas	1. 2. 3. Allowed **10/14/2020** 4.
420A20	State v. Dmarlo Levonne Faulk Johnson	State's Motion to Withdraw and Substitute Counsel (COA19-191-2)	Allowed **08/06/2021** **Berger, J., recused**
424P20	Unifund CCR Partners v. Fred Hoke	Def's PDR Under N.C.G.S. § 7A-31 (COA20-87)	Denied **Berger, J., recused**

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429A20	Shelley Bandy, Plaintiff and Third-Party Defendant State of North Carolina, Intervenor-Plaintiff v. A Perfect Fit for You, Inc.; Margaret A. Gibson; and Ronald Wayne Gibson, Defendants v. A Perfect Fit for You, Inc., Intervenor-Defendant, and Third-Party Plaintiff v. Margaret A. Gibson; Ronald Wayne Gibson; R. Wayne Gibson, Inc., and RW & MA, LLC, Cross-Claim and Third-Party Defendants	Appellants' Motion to Waive Oral Argument	Allowed **09/13/2021**
436PA13-4	I. Beverly Lake, John B. Lewis, Jr., Everette M. Latta, Porter L. McAteer, Elizabeth S. McAteer, Robert C. Hanes, Blair J. Carpenter, Marilyn L. Futrelle, Franklin E. Davis, James D. Wilson, Benjamin E. Fountain, Jr., Faye Iris Y. Fisher, Steve Fred Blanton, Herbert W. Cooper, Robert C. Hayes, Jr., Stephen B. Jones, Marcellus Buchanan, David B. Barnes, Barbara J. Currie, Connie Savell, Robert B. Kaiser, Joan Atwell, Alice P. Nobles, Bruce B. Jarvis, Roxanna J. Evans, Jean C. Narron, and all others similarly situated v. State Health Plan for Teachers and State Employees, a Corporation, Formerly Known as	Motion to Dismiss Appeal	Special Order **08/18/2021** **Newby, C.J., recused**

	the North Carolina Teachers and State Employees' Comprehensive Major Medical Plan, Teachers and State Employees' Retirement System of North Carolina, a corporation, Board of Trustees of the Teachers and State Employees' Retirement System of North Carolina, a body politic and corporate, Janet Cowell, in her official capacity as Treasurer of the State of North Carolina, and the State of North Carolina		
448P07-3	State v. Jacobie Quonzel Brockett	1. Def's Pro Se Petition for Writ of Mandamus (COAP19-688) 2. Def's Pro Se Petition for Writ of Supersedeas	1. Denied 2. Denied
449P11-26	Charles Everette Hinton v. State of North Carolina, et al.	1. Petitioner's Pro Se Motion for Special Proceeding and Suit at Common-Law Action 2. Petitioner's Pro Se Petition for Writ of Habeas Corpus 3. Petitioner's Pro Se Motion for Writ of Error 4. Petitioner's Pro Se Motion for an Equitable Hearing Ex-Parte In Camera in Private 5. Petitioner's Motion for Full Extinguishment and Accounting 6. Petitioner's Pro Se Motion for Discharge and Release from Imprisonment and to Be Compensated Damages	1. Dismissed 2. Denied **09/07/2021** 3. Denied **09/07/2021** 4. Denied **10/04/2021** 5. Denied **10/04/2021** 6. Denied **10/04/2021** **Ervin, J., recused**

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450P20	State v. Clifton William Batts	1. Def's PDR Under N.C.G.S. § 7A-31(COA19-1100) 2. Def's Motion to Amend PDR 3. Def's Pro Se Motion to Withdraw PDR 4. Def's Pro Se Motion for Review 5. Def's Pro Se Motion to Withdraw 6. Def's Motion to Withdraw Petition for Discretionary Review	1. --- 2. --- 3.--- 4.--- 5.--- 6. Allowed
454P20-3	State v. Nafis Akeem-Alim Abdullah-Malik a/k/a Akeem A. Malik	Def's Pro Se Motion to Stay Time for Filing of Petition for Writ of Certiorari	Denied **09/09/2021**
457P19-2	Sharell Farmer v. Troy University, Pamela Gainey, and Karen Tillery	1. Plt's Notice of Appeal Based Upon a Constitutional Question (COA19-1015) 2. Plt's PDR Under N.C.G.S. § 7A-31	1. Dismissed *ex mero motu* 2. Special Order
459A20	In the Matter of K.N. & K.N.	Respondent's Petition for Rehearing	Denied **09/24/2021**
471A20	In the Matter of O.E.M.	1. Petitioner's Motion to Withdraw and Substitute Counsel 2. Petitioner's Motion for Permission of the Court to Participate in Oral Argument 3. Petitioner's Motion in the Alternative for Permission to be Present During Oral Argument	1. Allowed **08/25/2021** 2. Denied **08/28/2021** 3. Allowed **08/28/2021**
482P20	Iris Pounds, Carlton Miller, Vilayuan Sayaphet-Tyler, and Rhonda Hall, on behalf of themselves and all others similarly situated v. Portfolio Recovery Associates, LLC	1. Def's Motion for Temporary Stay (COA19-925) 2. Def's Petition for Writ of Supersedeas 3. Def's Motion to Consolidate Appeals 4. Def's PDR Under N.C.G.S. § 7A-31 5. Plts' Conditional PDR Under N.C.G.S. § 7A-31	1. Allowed **11/24/2020** Dissolved **10/27/2021** 2. Denied 3. Dismissed as moot 4. Denied 5. Dismissed as moot

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483P20	Shari Spector v. Portfolio Recovery Associates, LLC	1. Def's Motion for Temporary Stay (COA20-13)	1. Allowed **11/24/2020** Dissolved **10/27/2021**
		2. Def's Petition for Writ of Supersedeas	2. Denied
		3. Def's Motion to Consolidate Appeals	3. Dismissed as moot
		4. Def's PDR Under N.C.G.S § 7A-31	4. Denied
		5. Plt's Conditional PDR Under N.C.G.S § 7A-31	5. Dismissed as moot
486P20	State v. Brenda W. Bryant	Def's PDR Under N.C.G.S. § 7A-31 (COA20-14)	Denied
493A20	In the Matter of B.I.H.	1. Petitioners' Motion to Dispense with Oral Argument	1. Dismissed as moot **10/06/2021**
		2. Respondent-Father's Motion to Stay Further Action or Decision in the Appellate Proceedings for 60 Days	2. Allowed **09/24/2021**
		3. Respondent-Father's Motion to Allow Trial Court to Determine Respondent-Father's and DSS's Rule 60(b) Motion for Relief from TPR Order Against Respondent-Father	3. Allowed **09/24/2021**
		4. Respondent-Father's Motion to Withdraw and Dismiss Appeal	4. Allowed **10/01/2021**
511A20	In the Matter of S.C.C.	Respondent-Mother's Motion to Correct Citations	Allowed **08/19/2021**
533A20	State v. Lewie P. Robinson	Def's Motion to Dismiss Appeal (COA19-474)	Denied **09/08/2021** **Berger, J., recused**
535A20	State v. Ciera Yvette Woods	1. Def's Motion for Temporary Stay (COA19-985)	1. Allowed **12/31/2020**
		2. Def's Petition for Writ of Supersedeas	2. Allowed **08/10/2021**
		3. Def's Notice of Appeal Based Upon a Dissent	3. ---
		4. Def's PDR as to Additional Issues	4. Allowed **08/10/2021**
		5. State's Motion to Withdraw and Substitute Counsel	5. Allowed **08/19/2021** **Berger, J., recused**

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563P08-2	State v. Henry Atkins Jennings	Def's Pro Se Motion for Discovery Ipso Facto Laws (COA08-598)	Dismissed
567P04-3	State v. John Darrell Norman, Sr.	Def's Pro Se Motion for Petition for Investigation	Dismissed
580P05-23	In re David Lee Smith	1. Def's Pro Se Emergency Petition for Writ of Mandamus 2. Def's Pro Se Emergency Petition for Writ of Mandamus 3. Def's Pro Se Emergency Motion to Amend Pro Se Petition 4. Def's Pro Se Emergency Petition for Writ of Mandamus 5. Def's Pro Se Emergency Petition for Writ of Mandamus 6. Def's Petition for Writ of Mandamus	1. Denied 2. Denied 3. Dismissed as moot 4. Denied 5. Denied 6. Denied **Ervin, J. recused**

IN RE A.A.M.

[379 N.C. 167, 2021-NCSC-129]

IN THE MATTER OF A.A.M.

No. 91A21

Filed 5 November 2021

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

The trial court properly terminated a father's parental rights to his son on grounds of willful abandonment (N.C.G.S. § 7B-1111(a)(7)) where the court's findings of fact—supported by clear, cogent, and convincing evidence—demonstrated that, during the determinative six-month period, the father (who was serving a criminal sentence) had the ability to contact his son by telephone from prison and had the contact information for the child's foster family but, nevertheless, failed to check in on his son or to provide any child support. Further, the father did not send any gifts or letters to his son from prison, and any gifts that his fiancée sent to the child were not sent at the father's direction.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from an order entered 3 December 2020 by Judge Mark L. Killian in District Court, Burke County. This matter was calendared for argument in the Supreme Court on 30 September 2021 but determined on the record and briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

Amanda C. Perez for petitioner-appellee Burke County Department of Social Services.

Morgan Renee Thomas, Heather Williams Forshey, and Katelyn Bailey Heath, for respondent-appellee Guardian ad Litem.

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

BERGER, Justice.

¶ 1 Respondent appeals from the trial court's order terminating his parental rights in A.A.M. (Aiden)[1] based on dependency and willful abandonment.[2] We affirm.

I. Background

¶ 2 On August 20, 2018, Burke County Department of Social Services (DSS) filed a juvenile petition alleging that Aiden was a neglected and dependent juvenile. The petition alleged that Aiden's mother tested positive for fentanyl and amphetamines at the time of Aiden's birth in August 2018, and Aiden also tested positive for amphetamines and methamphetamines. The trial court entered a nonsecure custody order authorizing DSS to place Aiden in a licensed foster home or a facility operated by DSS. On August 23, 2018, the trial court appointed a guardian ad litem for Aiden.

¶ 3 Aiden was adjudicated a dependent and neglected juvenile in a December 20, 2018 order. The trial court ordered DSS to maintain custody of Aiden and arrange for his placement or foster care. Paternity for Aiden had not been established at the time of the review hearing. The mother had named six potential fathers. By order entered February 4, 2019, the court precluded visitation between the juvenile and any putative father until DNA testing confirmed paternity.

¶ 4 A permanency planning hearing was conducted on March 14, 2019, and the trial court set the primary permanent plan as reunification (with mother) and the secondary plan as adoption.

¶ 5 Subsequent DNA testing established that respondent was Aiden's biological father, and respondent was added as a party to the action. At a May 9, 2019 permanency planning hearing, the court found that respondent had an extensive criminal history and was in custody under an $85,000.00 bond. The court ordered that respondent have no visitation with Aiden until respondent entered into a case plan with DSS and was released from custody. Respondent would be allowed one hour of supervised visitation per month if he met these requirements.

¶ 6 The trial court entered a permanency planning order on August 29, 2019 in which it found that respondent had yet to enter a case plan and was not actively participating with DSS or the guardian ad litem.

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

2. The trial court's order also terminated the parental rights of Aiden's mother, who is not a party to this appeal.

Additionally, respondent was not paying child support. Respondent was still in custody under an $85,000.00 bond at the time, and the trial court found that respondent was "acting in a manner inconsistent with the health and safety of the [juvenile]." The court further determined that adoption may be an appropriate plan if reunification could not occur within six months.

¶ 7 The trial court entered another permanency planning order on December 20, 2019 in which it found respondent had not entered a case plan with DSS; remained incarcerated with an expected release date of June 16, 2021; was not making progress toward reunification within a reasonable period of time; and was not actively participating with a case plan, DSS, or the guardian ad litem. The court changed the primary permanent plan to adoption with a secondary plan of reunification. Respondent was ordered to comply with the following:

> a. Complete a substance abuse assessment and complete all recommendations;
> b. Submit to random urine and hair follicle drug screens as requested by [DSS] no later than 4:00pm on the date requested.
> c. Complete parenting classes and demonstrate the skills he has learned;
> d. Obtain and maintain a legal means of income;
> e. Maintain contact with [DSS];
> f. Sign appropriate releases of information for all service providers so [DSS] can monitor [his] compliance with services;
> g. Obtain and maintain stable housing;
> h. Refrain from engaging in criminal activity.

¶ 8 In another permanency planning order entered on August 14, 2020, the court found that respondent had still not entered a case plan with DSS. Moreover, respondent remained incarcerated, but his expected release date had changed to January 27, 2021. As to potential placements for Aiden, DSS excluded some of the individuals provided by respondent because they were not biological relatives and excluded others based on criminal history, physical inability, and living circumstances. The remaining potential placements either did not respond to communications from DSS, or DSS had not found contact information for the potential placement. The court found that respondent was "minimally" available to the Court, DSS, and the guardian ad litem.

¶ 9 On July 29, 2020, DSS filed a motion to terminate respondent's parental rights.[3] DSS alleged that grounds existed to terminate his parental rights for willfully leaving the juvenile in foster care for more than twelve months, dependency, and willful abandonment.

¶ 10 On August 10, 2020, respondent responded to the motion to terminate his parental rights by contending he did not receive a case plan from DSS until July 2020, despite requesting a plan "since day one." Respondent also noted his unsuccessful efforts in providing a suitable placement for Aiden and stated that his fiancée could act as a guardian to provide stable housing and finances for Aiden.

¶ 11 A hearing on the motion to terminate parental rights began on September 25, 2020. The trial court terminated respondent's parental rights in an order entered December 3, 2020, pursuant to N.C.G.S. § 7B-1111(a)(6) and (7), and concluded that it was in Aiden's best interests that respondent's parental rights be terminated.

¶ 12 The trial court made the following findings of fact related to willful abandonment:

> 128. The foster parents of the juvenile set up a post office box so that the respondent father could send mail to the juvenile. The foster father also gave the respondent father his personal cell phone number so that he could call and keep in touch with the foster parents and the juvenile.
>
> 129. The respondent father did not send cards, gifts or letters for the juvenile in the six months prior to the Department filing the motion for termination of parental rights either to the Department or to the foster parents.
>
> 130. The respondent father did not call to check on the status of the juvenile or inquire about his health, safety, or welfare in the six months in the six months [sic] prior to the Department filing the motion for termination of parental rights either to the Department or the foster parents. The respondent father testified that he has access to a phone in prison and that his

3. The motion to terminate parental rights included the termination of the mother's parental rights in Aiden. Respondent-mother's parental rights were subsequently terminated, and she did not appeal.

access to that phone has not be[en] curtailed by the COVID-19 pandemic.

131. The respondent father has never met or acted as a parent to the juvenile.

132. The respondent father has never made a bond with the juvenile.

133. The respondent father has never provided a safe home for the juvenile.

134. The respondent father has never contributed financially to the juvenile. [Respondent-father] has a job in prison wherein he earns $0.70 per day.

135. The respondent father has withheld his love and affection from the juvenile.

136. The court received evidence in the form of copies of receipts for items that were supposedly purchased by [respondent-father's fiancée] for the juvenile's second birthday.

137. [Respondent-father's fiancée] testified that any efforts she made were voluntary and that [respondent-father] did not ask her to do it.

138. The respondent father is aware that the juvenile is in the custody of the Burke County Department of Social Services.

. . . .

140. The failure of the respondent father to send cards, gifts or letters, financially support the juvenile or maintain a parental bond with the juvenile within six months next preceding the filing of the juvenile motion demonstrates conduct which is wholly inconsistent with a desire to maintain custody of the juvenile.

. . . .

145. Pursuant to N.C.G.S. § 7B-1111(a)(7) the respondent father has willfully abandoned the juvenile for a continuous period of six months preceding the filing of the motion.

¶ 13 Respondent appeals, arguing findings of fact 128, 129, 130, 135, 140, and 145 are not supported by the evidence. Further, respondent contends the trial court erred in concluding that grounds existed to terminate his parental rights based on dependency, pursuant to N.C.G.S. § 7B-1111(a)(6), and willful abandonment, pursuant to N.C.G.S. § 7B-1111(a)(7).

II. Analysis

¶ 14 Our Juvenile Code provides a two-stage process for terminating parental rights: an adjudicatory stage followed by a dispositional stage. *See* N.C.G.S. § 7B-1109, -1110 (2019). During the adjudicatory stage, the burden is on the petitioner to establish the existence of any ground for termination alleged under N.C.G.S. § 7B-1111(a) based on clear, cogent, and convincing evidence. N.C.G.S. § 7B-1109(e)–(f) (2019). "A trial court's finding of fact that is supported by clear, cogent, and convincing evidence is deemed conclusive even if the record contains evidence that would support a contrary finding." *In re B.O.A.*, 372 N.C. 372, 379, 831 S.E.2d 305, 310 (2019) (citing *In re Moore*, 306 N.C. 394, 403–04, 293 S.E.2d 127, 132 (1982)).

¶ 15 "Unchallenged findings are deemed to be supported by the evidence and are 'binding on appeal.' " *In re K.N.K.*, 374 N.C. 50, 53, 839 S.E.2d 735, 738 (2020) (quoting *In re Z.L.W.*, 372 N.C. 432, 437, 831 S.E.2d 62, 65 (2019)). "Moreover, we review only those findings necessary to support the trial court's determination that grounds existed to terminate respondent's parental rights." *In re Z.O.G.-I.*, 375 N.C. 858, 861, 851 S.E.2d 298, 301 (2020) (quoting *In re T.N.H.*, 372 N.C. 403, 407, 831 S.E.2d 54, 58–59 (2019)). "[W]hether a trial court's findings of fact support its conclusions of law is reviewed de novo." *In re J.S.*, 374 N.C. 811, 814–15, 845 S.E.2d 66, 71 (2020) (citing *State v. Nicholson*, 371 N.C. 284, 288, 813 S.E.2d 840, 843 (2018)).

¶ 16 Pursuant to N.C.G.S. § 7B-1111(a)(7), a trial court may terminate parental rights upon a finding 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). "[A]bandonment imports any willful or intentional conduct on the part of the parent which evinces a settled purpose to forego all parental duties and relinquish all parental claims to the child." *Pratt v. Bishop*, 257 N.C. 486, 501, 126 S.E.2d 597, 608 (1962). "Willful intent is an integral part of abandonment and this is a question of fact to be determined from the evidence." *Id.* at 501, 126 S.E.2d at 608.

¶ 17 "If a parent withholds that parent's presence, love, care, the opportunity to display filial affection, and willfully neglects to lend support

and maintenance, such parent relinquishes all parental claims and abandons the child." *In re C.B.C.*, 373 N.C. 16, 19, 832 S.E.2d 692, 695 (2019) (cleaned up) (quoting *Pratt*, 257 N.C. at 501, 126 S.E.2d at 608). To support this ground for termination, "the trial court must make findings of fact that show that the parent had a 'purposeful, deliberative and manifest willful determination to forego all parental duties and relinquish all parental claims to [the child][.]' " *In re A.G.D.*, 374 N.C. 317, 319, 841 S.E.2d 238, 240 (2020) (quoting *In re N.D.A.*, 373 N.C. 71, 79, 833 S.E.2d 768, 774 (2019)).

¶ 18 "[T]he 'determinative' period for adjudicating willful abandonment is the six consecutive months preceding the filing of the petition." *See In re D.M.O.*, 250 N.C. App. 570, 573, 794 S.E.2d 858, 861 (2016) (citing *In re Young*, 346 N.C. 244, 251, 485 S.E.2d 612, 617 (1997)). DSS filed its motion to terminate respondent's parental rights on July 29, 2020. Thus, the determinative six-month period was from January 29, 2020, through July 29, 2020.

A. Finding of Fact 128

¶ 19 The record includes testimony from Aiden's foster parent that the foster parents obtained a post office box to allow respondent to communicate with Aiden by mail and that Aiden's foster father provided his cell phone number to respondent as well. Respondent testified that the foster parents opened a post office box, provided him with the address, and provided him with their contact information. Thus, finding of fact 128 is supported by the record evidence and is conclusive on appeal.

B. Finding of Fact 129

¶ 20 Aiden's foster parent testified that after receiving a Christmas card from respondent in December 2019, the foster family did not receive any additional correspondence or gifts from respondent. Moreover, respondent's fiancée testified that when she bought clothes, shoes, toys, and snacks for Aiden, she did it voluntarily and that respondent had not asked her to. As such, finding of fact 129 is supported by the record evidence and is conclusive on appeal.

C. Finding of Fact 130

¶ 21 Respondent specifically contends that during the adjudicatory hearing, the DSS social worker assigned to Aiden's case changed her testimony related to contact by respondent with DSS during the determinative six-month period. Respondent also asks this Court to compare the statements of Aiden's foster parent summarized in a DSS report against the foster parent's testimony before the trial court.

¶ 22 We note that "[i]f different inferences may be drawn from the evidence, [the trial judge] determines which inferences shall be drawn and which shall be rejected." *See Knutton v. Cofield*, 273 N.C. 355, 359, 160 S.E.2d 29, 33 (1968). Furthermore, a review of the record reveals that the social worker's testimony was not inconsistent or "modified."

¶ 23 The social worker assigned to respondent's case in 2019 testified that prior to the determinative six-month period, respondent called her about Aiden "periodically." Then, from January through April 2020, another social worker handled Aiden's case. The initial social worker testified that DSS records did not reflect contact between respondent and the second social worker during the January through April 2020 period. Moreover, after the initial social worker resumed working on Aiden's case in April 2020, respondent did not contact her prior to July 29, 2020. Thus, the testimony was that prior to the determinative period, respondent had periodic contact with DSS, but that from January through July 29, 2020, respondent had no contact with DSS. Thus, the social worker's testimony was not inconsistent.

¶ 24 Respondent also asks this Court's to compare statements made by a foster parent in April 2020 against testimony the foster parent gave during the termination hearing. Respondent seeks to show that his last communication with the foster family occurred during the determinative six-month period, rather than on January 15, 2020, as testified to by the foster parent at trial. Respondent argues "[i]t is more likely that their earlier testimony is more accurate."

¶ 25 However, this Court has previously noted that

> an important aspect of the trial court's role as finder of fact is assessing the demeanor and credibility of witnesses, often in light of inconsistencies or contradictory evidence. It is in part because the trial court is uniquely situated to make this credibility determination that appellate courts may not reweigh the underlying evidence presented at trial.

In re A.J.T., 374 N.C. 504, 510, 843 S.E.2d 192, 196 (2020) (quoting *In re J.A.M.*, 372 N.C. 1, 11, 822 S.E.2d 693, 700 (2019)). Through the testimony of the social worker and foster parent, the record supports finding of fact 130, even if the trial court may have made a contrary finding. *See In re B.O.A.*, 372 N.C. at 379, 831 S.E.2d at 310. As such, finding of fact 130 is conclusive on appeal.

D. Findings of Fact 135, 140, and 145

¶ 26 Regarding findings of fact 135, 140, and 145—that "respondent father has withheld his love and affection from the juvenile"; his actions demonstrate "conduct which is wholly inconsistent with a desire to maintain custody of the juvenile"; and that respondent has willfully abandoned the juvenile—the trial court addressed mixed questions of law and fact.

¶ 27 Respondent further argues that the evidence before the court showed that he did not abandon Aiden. He contends that while incarcerated his contacts were "limited" but that he began making phone calls to Aiden's foster parents in October 2019 and had an in-person meeting in November 2019 with the foster parents while at a hearing. Respondent testified to having regular access to a telephone every day during the determinative period from 7:00 a.m. to 11:00 p.m. Moreover, respondent's fiancée testified to speaking with respondent every day in the year preceding the trial.

¶ 28 As reflected in the testimony of Aiden's foster parent, the foster family received a letter and a card from respondent in December 2019, and he spoke with the foster parents during four telephone calls prior to January 16, 2020. During a call on January 15, 2020, respondent acknowledged to the foster parents that there was a "very real possibility" that Aiden would be placed for adoption, and he asked to maintain a relationship with Aiden should the foster parents adopt him. When the foster parents indicated they could not guarantee continued contact with Aiden and that the type of contact respondent would be allowed would be based on respondent's post-release actions, respondent "hung up." Respondent did not communicate again with the foster parents via phone or Aiden via card or letter prior to the filing of the motion to terminate his parental rights. While the evidence suggests that respondent called the foster family one time "several weeks" after January 15, 2020, no one was able to answer or return the call as respondent did not leave a message.

¶ 29 Respondent contends that the gifts provided to Aiden by his fiancée are evidence that he did not willfully abandon the juvenile. However, respondent did not ask her to send Aiden cards and gifts, and his fiancée testified she did it of her own volition. The evidence discussed above is contained in the record and supports findings of fact 135, 140, and 145. Thus, such findings are conclusive on appeal.

¶ 30 Respondent also directs our attention to a Certificate of Achievement he received for successful completion of a "Nurturing Father's Program" filed with the Burke County Clerk of Court's Office on July 2, 2020. Yet

respondent fails to direct our attention to any evidence or finding which suggests he applied the skills learned in the Nurturing Father's Program in developing a relationship with Aiden or that such a relationship exists at all.

¶ 31 While the trial court may consider respondent's efforts outside of the determinative six-month period, those actions do not preclude a finding that respondent willfully abandoned the juvenile when he did nothing to maintain or establish a relationship with Aiden during the determinative six-month period. *In re C.B.C.*, 373 N.C. 16, 23, 832 S.E.2d 692, 697 (2019) (citing *In re B.S.O.*, 234 N.C. App. 706, 713 n.4, 760 S.E.2d 59, 65 n.4 (2014)).

¶ 32 As the challenged findings of fact are supported by clear, cogent, and convincing evidence they are conclusive on appeal. Additionally, the remaining unchallenged findings of fact are binding on appeal. *See In re K.N.K.*, 374 N.C. at 53, 839 S.E.2d at 738; *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991) ("Where no exception is taken to a finding of fact by the trial court, the finding is presumed to be supported by competent evidence and is binding on appeal."). We now turn to whether such findings support the trial court's conclusion that respondent abandoned Aiden and the termination of his parental rights was warranted.

¶ 33 The trial court's findings demonstrate that during the determinative six-month period, respondent was aware Aiden was in DSS custody, had the ability to communicate by telephone, and had the contact information for the foster family with whom Aiden was placed. Despite this, respondent failed to check on Aiden's health, safety, welfare, condition, or status, and failed to provide any financial support. Respondent also did not send cards, gifts, or letters, and the gifts given to Aiden by respondent's fiancée were not at the direction of respondent. Thus, respondent never acted as a parent to the juvenile and has never cultivated a bond with him. Therefore, the findings of fact support the trial court's determination that grounds existed to terminate respondent's parental rights in Aiden pursuant to N.C.G.S. § 7B-1111(a)(7).

¶ 34 Because the existence of only one ground under N.C.G.S. § 7B-1111 is required to support a termination of parental rights, *see* N.C.G.S. § 7B-1111(a), we need not address respondent's argument as to N.C.G.S. § 7B-1111(a)(6). Respondent does not challenge the trial court's determination that termination of his parental rights was in Aiden's best interests. *See* N.C.G.S. § 7B-1110(a) (2019). Accordingly, we affirm the court's order terminating respondent's parental rights.

AFFIRMED.

IN RE A.E.

[379 N.C. 177, 2021-NCSC-130]

IN THE MATTER OF A.E., J.V., E.V., A.V.

No. 253A20

Filed 5 November 2021

1. Termination of Parental Rights—findings of fact—challenges—recitation of testimony and reports—independent determination of evidence

A father's numerous challenges to the findings of fact in the trial court's order terminating his parental rights—arguing that the findings were nothing more than recitations of witness testimony, reports, or the trial court's beliefs—were for the most part rejected where the trial court did refer to prior orders and reports from earlier proceedings but heard live testimony and made an independent determination regarding the evidence presented. However, the findings that simply recited witness testimony were disregarded in the appellate court's evaluation of whether grounds existed to terminate the father's parental rights.

2. Termination of Parental Rights—findings of fact—challenges—sufficiency of evidence—stipulation

A father's numerous challenges to the findings of fact in the trial court's order terminating his parental rights—arguing that the findings lacked sufficient evidentiary support or were excessively imprecise—were rejected where portions of the challenged findings were based on the father's own stipulation and portions regarding a psychologist's evaluation and testimony were supported by record evidence.

3. Termination of Parental Rights—findings of fact—challenges—sufficiency of evidence—pattern of neglect

A father's numerous challenges to the findings of fact in the trial court's order terminating his parental rights—arguing that the findings were overbroad or lacked evidentiary support—resulted in some findings being disregarded on appeal because of a lack of evidentiary support, while other findings, including those related to the father's continuation of the pattern of neglect, remained undisturbed because they were sufficiently supported by record evidence.

4. Termination of Parental Rights—grounds for termination—neglect—sufficiency of findings

The trial court did not err by concluding that a father's parental rights were subject to termination on the grounds of neglect

(N.C.G.S. § 7B-1111(a)(1)) where the conclusion was sufficiently supported by the findings of fact, including that both parents had stipulated to the children's neglect at the time the juvenile petitions were filed, the parents exhibited a pattern of neglect and failed to understand the importance of keeping the children and the home clean, and the father denied that the children had special needs despite evidence-based documentation of those needs. Further, the trial court properly considered circumstances up to and including the date of the termination hearing.

5. Termination of Parental Rights—grounds for termination—neglect—sufficiency of findings

Where many of a mother's challenges to the findings of fact in the trial court's order terminating her parental rights overlapped with the father's challenges, her challenges were addressed in the same manner, resulting in some findings being disregarded and others being found to have ample evidentiary support. As with the father, the trial court did not err in determining that the mother's parental rights were subject to termination on the grounds of neglect (N.C.G.S. § 7B-1111(a)(1)).

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from orders entered on 27 February 2020 by Judge Marion M. Boone in District Court, Stokes County. This matter was calendared for argument in the Supreme Court on 30 September 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.

David A. Perez for respondent-appellant mother.

Mercedes O. Chut for respondent-appellant father.

ERVIN, Justice.

¶ 1 Respondent-mother Rosa E. and respondent-father Charles V. appeal from the trial court's orders terminating their parental rights in

their minor children J.V., E.V., and A.V.,[1] and respondent-mother appeals from the trial court's order terminating her parental rights in her minor child A.E.[2] After careful consideration of respondent-mother's and respondent-father's challenges to the trial court's termination orders in light of the record and the applicable law, we conclude that the trial court's termination orders should be affirmed.

I. Factual Background

¶ 2 On 20 February 2018, the Stokes County Department of Social Services received a report alleging that Ellie, Jake, Evette, and Alana lived in a home that was "severe[ly] infest[ed]" with German cockroaches and that Ellie, who was always anxious to eat when she was at school, arrived at school wearing dirty and soiled clothes. The report was accompanied by videos showing the severity of the cockroach infestation that depicted "[a] multitude" of cockroaches in all stages of life crawling up and across all of the surfaces in the home, including the walls, floors, ceilings, counters, cabinets, and kitchen appliances. In the course of investigating the report, the social worker observed that cockroaches were ubiquitous throughout the home and noticed a pile of used diapers by the front door, breakfast cereal scattered around the home, and food-encrusted dishes in the kitchen area. In addition, the social worked observed that two of Alana's front teeth were decaying and that Evette appeared to have an abdominal hernia. On 20 February 2018, DSS filed juvenile petitions alleging that all four children were neglected juveniles who lived in an environment that was injurious to their welfare and were exposed to a substantial risk of physical injury as the result of conditions created by respondent-mother and respondent-father and obtained the entry of orders taking the children into nonsecure custody, a step that resulted in the children's placement in foster care.

¶ 3 After the filing of the original petitions, DSS obtained additional information concerning the children and the conditions in which they lived. Among other things, DSS learned that Ellie had to have her clothes changed on a daily basis following her arrival at school because of their filthy condition and the smell that emanated from them. In addition, the social worker learned that respondent-father allegedly "whopped" Ellie

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1. J.V., E.V., and A.V., respectively, will be referred to throughout the remainder of this opinion as "Jake," "Evette," and "Alana," which are pseudonyms used to protect the identity of the juveniles and for ease of reading.

2. A.E. will be referred to throughout the remainder of this opinion as "Ellie," which is a pseudonym used to protect the juvenile's identity and for ease of reading. Ellie's putative father is not a party to this appeal.

with a "wood[en] board" when she failed to listen to educational personnel. The family had been the subject of five prior DSS reports, having been found in need of services in 2014 in the aftermath of an incident during which Ellie had been left alone in a vehicle for about fourteen minutes while wearing a heavily soiled diaper at a time when the outside temperature was ninety degrees. According to a psychological report, respondent-mother had reduced intellectual functioning and an untreated mood disorder, did not have sound judgment, and lacked "a good sense" of appropriate child development.

¶ 4 Although respondent-mother claimed that Alana had been born with rotten teeth, subsequently obtained medical records disproved that assertion. An examination of Ellie's medical records reflected concerns relating to inadequate nutrition and a history of asthma. In addition, other medical records revealed that both Ellie and Jake had tested positive for the presence of high levels of lead and that Ellie exhibited "risk factors for lead toxicity." Although the available educational records indicated that, when she was two, Ellie exhibited delays in fine motor skills, she had been identified as being "globally delayed" upon entering kindergarten and was receiving special education services on the basis of an Individualized Educational Plan. In light of this additional information, DSS filed amended juvenile petitions on 8 March 2018 for the purpose of adding allegations that the children had not received proper care, supervision, or discipline from respondent-mother and respondent-father.

¶ 5 On 23 February 2018, respondent-mother and respondent-father entered into case plans in which they agreed to cooperate with an exterminator in connection with the elimination of the cockroach infestation, to dispose of trash and other waste products in an appropriate manner, to receive information concerning the maintenance of appropriate hygiene and to demonstrate a proper understanding of that subject by bathing regularly and maintaining a sanitary home, to attend parenting classes, to obtain a psychological and parenting evaluation and follow all resulting recommendations, and to provide appropriate snacks for and engage in appropriate activities with the children during visits. Respondent-mother and respondent-father began work toward satisfying the requirements of their case plans immediately.

¶ 6 In a report that was dated 15 March 2018 and had been prepared for use in connection with the initial adjudication and disposition hearing on 22 March 2018, DSS noted that respondent-mother and respondent-father had been cooperating with the exterminator, had begun a fourteen-week parenting class, and had scheduled appointments for the purpose of obtaining a psychological and parenting evaluation. DSS noted that, while

respondent-mother had displayed adequate parenting skills and had provided appropriate snacks during visitations, respondent-father had done "very little" during his visits with the children.

¶ 7 On 22 March 2018, respondent-mother and respondent-father stipulated that, at the time that the juvenile petitions had been filed, the children had not been receiving proper care, supervision, or discipline. On 11 May 2018, the trial court entered an order finding that all of the children were neglected juveniles based upon the information to which respondent-mother and respondent-father had stipulated. The trial court instructed respondent-mother and respondent-father to continue to comply with their case plans, allowed them to visit with the children for two hours each week, and established a primary permanent plan for the children of reunification and a secondary permanent plan of legal custody with a relative.

¶ 8 Respondent-mother and respondent-father made some progress toward satisfying the requirements of their case plans prior to the initial review hearing, which was held on 14 June 2018. According to a DSS report dated 6 June 2018, both respondent-mother and respondent-father had completed their psychological and parenting evaluations, neither of which found the conditions of the family home to be unsafe or inappropriate for the children. DSS described the improvements in the condition of the family home as "significant." Finally, DSS reported that respondent-mother and respondent-father had visited with the children "faithfully," were appropriately engaged with the children during the visits, and had completed the required parenting classes.

¶ 9 A report prepared by the guardian ad litem on 7 June 2018, noted, on the other hand, that respondent-mother and respondent-father often ended their visits with the children fifteen minutes early and that they had left a three-hour visit in May 2018 at the two hour mark. In addition, the guardian ad litem indicated that respondent-mother and respondent-father continued to struggle with problems relating to personal hygiene and that they found it difficult to bring appropriate snacks for consumption during visits with the children. Similarly, the guardian ad litem stated that respondent-mother and respondent-father had trouble managing the children and that only respondent-mother attempted to engage with all four children during visits. Finally, the guardian ad litem noted the difficulties that respondent-mother and respondent-father had in attempting to understand the problems that arose from the existence of the children's special needs. The trial court did not make any changes to the children's permanent plan or the existing visitation arrangements in an order that was entered on 13 July 2018 following the conclusion of the 14 June 2018 review hearing.

¶ 10 In a report prepared prior to a review hearing that was initially scheduled for 23 August 2018 and held on 13 September 2018, DSS pointed out that both respondent-mother and respondent-father had participated in Ellie's appointments and had expressed a willingness to meet with the specialists responsible for Jake and Evette as well. According to DSS, respondent-father had difficulty controlling his emotions when he was confronted with information that he viewed as adverse, including information relating to the children's placements. Although it believed that respondent-mother and respondent-father were continuing to make progress toward satisfying the requirements of their case plans, DSS pointed out that they "need[ed] to demonstrate their ability to consistently address the developmental, care and well-being needs for the children" and "their commitment to the children's safety and their ability to protect the children." In a report relating to the same period of time, the guardian ad litem identified the existence of similar obstacles to the reunification of respondent-mother and respondent-father with the children. The trial court did not make any changes to the primary permanent plan or the existing visitation arrangements in an order entered on 29 October 2018, but it did change the secondary permanent plan to one of guardianship with a court-approved caretaker.

¶ 11 The progress that respondent-mother and respondent-father were making toward reunification began to stall in 2019. In a report prepared prior to a review hearing that was scheduled for 11 April 2019 and held on 17 May 2019, DSS noted that respondent-mother and respondent-father had failed to attend, or even make inquiry about, appointments and meetings related to the children's health and development. In addition, DSS pointed out that respondent-mother and respondent-father had continued to bring sugary snacks to their visits with the children and allowed the children to eat these snacks off of unhygienic surfaces. DSS stated that respondent-father denied that there was anything wrong with the type of snacks that the children were being provided or the manner in which those snacks were being served and questioned whether any of the children had special needs despite having been provided with information to the contrary. According to DSS, respondent-mother and respondent-father had become less attentive to their own hygiene, with their lack of concern about these subjects being indicative of a failure to demonstrate the ability to use the skills that they had learned during parenting classes and to meet the children's needs and suggesting the appropriateness of a change in the permanent plan for the children from one of reunification to one of adoption. The position espoused by DSS was supported by psychological evaluations of both parents that had been performed in February 2019, with the guardian ad litem's report

relating to the same period of time expressing support for DSS' recommended change to the children's permanent plan. In an order entered on 11 July 2019, the trial court reduced the amount of visitation to which respondent-mother and respondent-father were entitled and changed the permanent plan for the children to a primary plan of adoption and a secondary plan of reunification.

¶ 12 On 12 September 2019, DSS filed motions seeking to have respondent-mother's parental rights in all four children terminated on the basis of neglect, N.C.G.S. § 7B-1111(a)(1), and dependency, N.C.G.S. § 7B-1111(a)(6), and to have respondent-father's parental rights in Jake terminated on the basis of neglect, N.C.G.S. § 7B-1111(a)(1); failure to legitimate, N.C.G.S. § 7B-1111(a)(5); and dependency, N.C.G.G. § 7B-1111(a)(6), and to have his parental rights in Evette and Alana terminated on the basis of neglect, N.C.G.S. § 7B-1111(a)(1), and dependency, N.C.G.S. § 7B-1111(a)(6). After a hearing held on 17 January 2020, which neither respondent-mother nor respondent-father attended, the trial court entered orders on 27 February 2020 terminating respondent-mother's and respondent-father's parental rights in the children on the basis of all of the grounds for termination alleged in the termination motions and a determination that the termination of respondent-mother's and respondent-father's parental rights would be in the children's best interests.[3] Respondent-mother and respondent-father noted appeals to this Court from the trial court's termination orders.[4]

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3. The trial court entered separate adjudication orders and separate dispositional orders for each of the four children, resulting in a total of eight termination-related orders. For the sake of clarity, however, we will refer to the adjudication orders that the trial court entered at the conclusion of the termination proceeding as "termination orders" and reserve the expression "adjudication order" for the order in which the trial court determined that the children were neglected juveniles.

4. In her notice of appeal, respondent-mother states that she is appealing from "the Adjudication and Disposition Orders, entered . . . on January 17, 2020 as same day orders . . . as well as any subsequent formal Adjudication and Disposition Orders." Although the termination hearing was held on 17 January 2020, the trial court's written termination-related orders were entered on 27 February 2020. A notice of appeal is required to "designate the judgment or order from which appeal is taken," N.C. R. App. P. 3(d), with "[c]ompliance with the requirements for entry of notice of appeal [being] jurisdictional[,]" *State v. Oates*, 366 N.C. 264, 266 (2012) (citing *Dogwood Dev. & Mgmt. Co. v. White Oak Transp. Co.*, 362 N.C. 191, 197–98 (2008)). "As such, 'the appellate court obtains jurisdiction only over the rulings specifically designated in the notice of appeal as the ones from which the appeal is being taken.' " *Sellers v. Ochs*, 180 N.C. App. 332, 334, (2006). However, "a mistake in designating the judgment, or in designating the part appealed from if only a part is designated, should not result in loss of the appeal as long as the intent to appeal from a specific judgment can be *fairly inferred* from the notice and the appellee is not misled

II. Analysis

¶ 13 In seeking relief from the trial court's termination orders before this Court, respondent-mother and respondent-father challenge many of the trial court's findings of fact as lacking sufficient evidentiary support or as otherwise legally deficient and the extent to which the trial court's findings of fact and the record evidence support the trial court's determination that their parental rights in the children were subject to termination. In conducting a termination of parental rights proceeding, the trial court begins by determining whether any of the grounds for termination delineated in N.C.G.S. § 7B-1111(a) exist. *See* N.C.G.S. § 7B-1109 (2019). "At the adjudicatory stage, the petitioner bears the burden of proving by 'clear, cogent, and convincing evidence' the existence of one or more grounds for termination under section 7B-1111(a) of the General Statutes." *In re A.U.D.*, 373 N.C. 3, 5–6 (2019) (quoting N.C.G.S. § 7B-1109(f)). "If a trial court finds one or more grounds to terminate parental rights under N.C.G.S. § 7B-1111(a), it then proceeds to the dispositional stage," *id.* at 6, at which it "determine[s] whether terminating the parent's rights is in the juvenile's best interest." N.C.G.S. § 7B-1110(a) (2019).

¶ 14 We review a trial court's adjudicatory decision for the purpose of "determin[ing] whether the findings are supported by clear, cogent and convincing evidence and the findings support the conclusions of law." *In re E.H.P.*, 372 N.C. 388, 392 (2019) (quoting *In re Montgomery*, 311 N.C. 101, 111 (1984)). "A trial court's finding of fact that is supported by clear, cogent, and convincing evidence is deemed conclusive even if the record contains evidence that would support a contrary finding." *In re B.O.A.*, 372 N.C. 372, 379 (2019) (citing *In re Moore*, 306 N.C. 394, 403–04 (1982)). "The trial court's conclusions of law are reviewable de novo on appeal." *In re C.B.C.*, 373 N.C. 16, 19 (2019).

A. Respondent-father's arguments

¶ 15 In his brief, respondent-father challenges the majority of the trial court's findings on the basis that they (1) constitute nothing more than recitations of witness testimony, reports, or the trial court's beliefs, (2) lack sufficient evidentiary support, or (3) are overbroad.

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by the mistake." *Evans v. Evans*, 169 N.C. App. 358, 363 (2005) (quoting *Van Ramm v. Van Ramm*, 99 N.C. App. 153, 156–57 (1990)). In view of the fact that DSS and the guardian ad litem have not moved to dismiss respondent-mother's appeal and have fully participated in the proceedings before this Court, they do not appear to have been misled by respondent-mother's mistake in designating the orders from which she has appealed. As a result, we will address the merits of respondent-mother's appeal.

Respondent-father also challenges the trial court's conclusions that his parental rights in Jake, Evette, and Alana are subject to termination.

1. Challenges to Findings of Fact

a. Recitations of Testimony, the Contents of Documents, or the Trial Court's Beliefs

¶ 16 **[1]** According to respondent-father, Finding of Fact Nos. 15–18 and 21–27 in the termination orders relating to Jake and Evette and Finding of Fact Nos. 15–18 and 21–27 in the termination order relating to Alana constitute mere recitations of witness testimony, reports, or the trial court's beliefs "without an assessment of credibility." As this Court has previously held, "[r]ecitations of the testimony of each witness *do not* constitute *findings of fact* by the trial judge" absent an indication concerning "whether [the trial court] deemed the relevant portion of [the] testimony credible." *In re N.D.A.*, 373 N.C. 71, 75 (2019) (first 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 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,' " with the father having argued on appeal that the finding in question constituted nothing more than a recitation of his own testimony, a contention with which this Court agreed given the trial court's failure to indicate whether the relevant portion of the father's testimony was credible. *Id.* As a result, we disregarded the challenged finding of fact in evaluating the validity of the trial court's termination order. *Id.*

¶ 17 After carefully reviewing the trial court's termination orders, we agree with respondent-father that Finding of Fact Nos. 16–18 and 23 in all three termination orders, Finding of Fact No. 24 in the termination order relating to Alana, and Finding of Fact No. 22 in the termination orders relating to Jake and Evette constitute mere recitations of testimony given that each of the challenged findings of fact simply recite that a particular witness either "testified" or "stated" a particular proposition without any indication that the trial court evaluated the credibility of the relevant witness or resolved any contradictions in his or her testimony. As a result, as in *In re N.D.A.*, we will disregard these findings of fact in evaluating the extent to which the trial court properly found that respondent-father's parental rights in the children were subject to termination.

¶ 18 We note, however, that "[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. 403, 408

(2019) (quoting *In re C.L.C.*, 171 N.C. App. 438, 446 (2005), *aff'd per curiam*, *in part*, *and disc. rev. improvidently allowed*, *in part*, 360 N.C. 475 (2006)), which is what the trial court, in many instances, did in this case. In addition to making findings of fact that recited the testimony of various witnesses, the trial court made findings of fact that resolved a number of material disputes in the record evidence by stating that the children were previously adjudicated neglected juveniles on the basis of a consent order signed by respondent-mother and respondent-father and that respondent-mother and respondent-father had "stipulated the juvenile[s] [were] neglected juvenile[s], in that the juvenile[s] did live in an environment injurious due to the conditions of the home, including a roach infestation, unsanitary conditions of the home and hygiene of the juvenile[s]"; the juveniles did not receive proper care from respondent-mother and respondent-father; that respondent-mother and respondent-father "show[ed] a pattern of neglect and a failure to understand the need to change diapers, keep the home and the juvenile[s] clean, and keep themselves clean"; that respondent-mother and respondent-father did not appear to believe that there were any problems that they needed to address; that, while the level of sanitation in the family home appeared to have improved, there was "no indication of acceptance that there was a problem that needed addressing to begin with"; that respondent-father continued to assert that the children did not have special needs despite being provided with documents indicating that the children's alleged needs were genuine; that the care that respondent-mother provided for the children was insufficient; and that respondent-father had failed to provide the children with consistent care. As a result, these findings of fact are appropriately considered in evaluating the lawfulness of the trial court's termination orders.

¶ 19 In addition, respondent-father argues that Finding of Fact Nos. 15, 21, and 24–27 in the termination orders relating to Jake and Evette and Finding of Fact Nos. 15, 21–22, and 25–28 in the termination order relating to Alana are nothing more than mere recitations of portions of the record. As far as Finding of Fact Nos. 15 and 24 in Jake's and Evette's termination orders and Finding of Fact Nos. 15 and 25 in Alana's termination order are concerned, "the trial court in this case relied partly on evidence from prior proceedings and findings in earlier orders, which . . . is proper and appropriate." *In re T.N.H.*, 372 N.C. at 408.

¶ 20 In *In re T.N.H.*, the mother argued that certain findings "were improper because they merely recite prior allegations, describe what various people not in court, or unidentified, believed about certain events, and do not meet the standard for evidentiary findings sufficient to support conclusions of law." *Id.* In rejecting this argument, we noted that:

> A trial court may take judicial notice of findings of fact made in prior orders, even when those findings are based on a lower evidentiary standard because where a judge sits without a jury, the trial court is presumed to have disregarded any incompetent evidence and relied upon the competent evidence. *Munchak Corp. v. Caldwell*, 301 N.C. 689, 694, 273 S.E.2d 281, 285 (1981). As this Court has stated:
>
> > [E]vidence 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. The 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.
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> *In re Ballard*, 311 N.C. 708, 715, 319 S.E.2d 227, 232 (1984). We agree with the Court of Appeals' precedent holding that the trial court may not rely solely on prior court orders and reports but must receive some oral testimony at the hearing and make an independent determination regarding the evidence presented. *In re A.M., J.M.*, 192 N.C. App. 538, 541–42, 665 S.E.2d 534, 536 (2008), *appeal after remand*, 201 N.C. App. 159, 688 S.E.2d 118 (2009) (unpublished).

Id. (alteration in original). After noting that the trial court had taken judicial notice of certain orders upon which it had relied in making the challenged findings of fact and that "the social worker assigned to the case testified at the hearing regarding" the subject matter of the findings, we held that "[t]he trial court's findings of fact appear to be based, at least in part, on testimony provided at the hearing, sufficient to demonstrate that the trial court made an independent determination regarding the evidence presented." *Id.* The same is true of Finding of Fact No. 15 in the termination orders relating to all three juveniles, to Finding of Fact Nos. 24 and 27 in the termination orders relating to Jake and Evette, and to Finding of Fact Nos. 25 and 28 in the termination order relating to Alana, all of which described what the social worker did, what DSS had determined, and what the trial court had previously found or concluded.

¶ 21 The trial court took judicial notice of the findings of fact and orders in the adjudication orders that were entered relating to all three

children. In Finding of Fact No. 15 in all three adjudication orders, the trial court found that, following the receipt of the child protective services report, a social worker noted that the home had "roaches throughout[,] . . . a pile of dirty diapers at the door[,] . . . [and] trash and food debris scattered around the home." This finding rested upon the findings that had been made in prior orders in the underlying neglect proceeding that were incorporated into reports submitted by DSS and the guardian ad litem. The reports submitted by DSS and the guardian ad litem detailed the conditions found in the home and the investigating social worker described these conditions at the termination hearing, during which she testified that she had personally observed roaches throughout the home, a pile of dirty diapers within reach of the children, food scattered throughout the home in the vicinity of roaches, and plates of food and leftover pans in the kitchen.

¶ 22 Similarly, in Finding of Fact No. 24 in the termination order relating to Jake and Evette and Finding of Fact No. 25 in the termination order relating to Alana, the trial court found that DSS had discovered that the juveniles had significant needs, that there were concerns about the nutrition that the juveniles were receiving, and that the juveniles had tested positive for the presence of high levels of lead. As was the case with the findings discussed in the immediately preceding paragraph, the challenged trial court findings rely upon orders that the trial court entered during the underlying neglect proceeding that, in turn, relied upon the DSS and guardian ad litem reports that detailed the relevant information. In addition, the trial court did not place sole reliance upon these reports given that the social worker testified that her investigation of the medical records led to concerns about the quality of the nutrition provided in the home, which included sugary drinks and limited food choices, and that Jake and Ellie had tested positive for high levels of lead exposure. Similarly, another social worker testified that Jake had been diagnosed with a chromosomal issue that mimicked autism; that Evette had medical and developmental issues, including a hernia and speech difficulties, that needed to be addressed by the parents; that Alana had developed dental problems at four months of age; and that Ellie had experienced global delays in kindergarten, had an extensive IEP, and had failed kindergarten.

¶ 23 Respondent-father also argues that Finding of Fact No. 27 in the termination orders relating to Jake and Evette and Finding of Fact No. 28 in the termination order relating to Alana constituted mere recitations of record information. In the challenged findings, the trial court stated that it previously found in the underlying neglect proceeding, following a hearing held on 17 May 2019, that respondent-father did not

believe that Jake needed the recommended therapies and expressed a need to go to work. Once again, the relevant finding is a reference to a prior order rather than a mere recitation of record evidence. *In re T.N.H.*, at 408. In a permanency planning order dated 11 July 2019, the trial court found that respondent-father participated in an IEP meeting relating to Jake by phone and stated that he did not believe that Jake needed the services that were being recommended and that respondent-father needed to get to work. In addition, a social worker testified that respondent-father had participated in an IEP meeting relating to Jake by phone, respondent-father had previously testified that Jake's speech delays did not pose a problem, and another witness described respondent-father's focus upon his work rather than upon the children's needs.

¶ 24 As a result, the record reflects that, in making each of the challenged findings, the trial court did not rely solely upon prior orders and reports and, instead, also heard live testimony from witnesses at the termination hearing. "The trial court's findings of fact appear to be based, at least in part, on testimony provided at the hearing" and are "sufficient to demonstrate that the trial court made an independent determination regarding the evidence presented." *Id.* at 410. Moreover, the challenged findings of fact, rather than merely reciting portions of the record evidence, simply acknowledge what a social worker observed, what DSS had determined, and what the trial court had previously found or concluded. Thus, we hold that respondent-father's challenge to these findings lacks merit. *See also In re J.M.J.-J*, 374 N.C. 553, 558 (2020).

¶ 25 Finally, respondent-father's argument to the contrary notwithstanding, Finding of Fact Nos. 21, 25 and 26 in the termination orders relating to Jake and Evette and Finding of Fact Nos. 21, 22, 26 and 27 in the termination orders relating to Alana are not mere recitations of the testimony of various witness or other items of evidence admitted at the termination hearing and, instead, constitute findings made by the trial court based upon its consideration of the evidence. *In re Appeal of Harris Teeter, LLC*, 271 N.C. App. 589, 611 (2020) (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))), *aff'd*, 2021-NCSC-80 (2021). As a result, respondent-father's challenge to these findings of fact lacks merit.

b. Evidence Provided by Dr. Bennett

¶ 26 **[2]** In his next challenge to the trial court's termination orders, respondent-father asserts that the majority of the trial court's remaining

findings of fact either lack sufficient evidentiary support or are excessively imprecise. As an initial matter, respondent-father challenges Finding of Fact Nos. 21 and 40 in the termination orders relating to Jake and Evette and Finding of Fact Nos. 21 and 41 in the termination order relating to Alana, which discuss the psychological evaluation given to respondent-mother by Dr. Bennett in 2014. According to respondent-father, the 2014 evaluation was so remote in time as to be irrelevant, with respondent-mother having been under no obligation to comply with any DSS recommendation in 2014. For that reason, respondent-father urges us to exclude the relevant findings from our evaluation of the lawfulness of the trial court's termination orders. However, since the challenged findings of fact relate to respondent-mother rather than to respondent-father, they have no bearing upon the validity of respondent-father's challenge to the trial court's termination orders. As a result, we decline to address the validity of this aspect of respondent-father's challenge to the trial court's termination orders. *See In re T.N.H.*, 372 N.C. at 407 (stating that "we review only those findings necessary to support the trial court's determination that grounds existed to terminate respondent's parental rights").

¶ 27 In addition, respondent-father argues, with respect to his own evaluation by Dr. Bennett in 2018, that any "findings that state or imply [the] report was valid are erroneous" given that Dr. Bennett's "conclusions, answers to questions, and recommendations derive from a gross misunderstanding of the relevant facts." After excluding the portions of the challenged findings that we have already addressed in the earlier portions of this opinion, it appears that this aspect of respondent-father's argument involves two findings of fact. First, he challenges Finding of Fact No. 20 in all three of the relevant termination orders, which provides:

> That the juvenile was adjudicated neglected via a consent order signed by the mother and putative father on March 22nd, 2018. The mother and putative father stipulated that the juvenile was a neglected juvenile, in that the juvenile did live in an environment injurious due to the conditions of the home, including a roach infestation, unsanitary conditions of the home and hygiene of the juvenile. The juvenile did not receive proper care by the parents.

Although respondent-father attacks this finding as resting upon a failure on the part of Dr. Bennett to understand the relevant facts, it makes no mention of Dr. Bennett and is fully supported by the record evidence. The children were adjudicated to be neglected juveniles by means of a stipulation into which respondent-mother and respondent-father entered

on 22 March 2018 and which stated that the juveniles "did not receive proper care, supervision, or discipline from" respondent-mother and respondent-father and that respondent-mother and respondent-father waived the presentation of evidence in support of the stipulation. The trial court took judicial notice of this stipulation, *see In re Ordinance of Annexation No. 1977-4*, 296 N.C. 1, 14 (1978) (stating that "stipulations constitute judicial admissions binding on the parties and dispense with the necessity of proving the stipulated fact" and "continue in force for the duration of the controversy and preclude the later assertion of a position inconsistent therewith"), in the 11 May 2018 adjudication order, in which the trial court stated that:

> [Respondent-mother and respondent-father], through their respective counsel, acknowledge the children are neglected juveniles, as they were in an environment injurious due to the conditions of the home, including a roach infestation, unsanitary conditions of the home and hygiene of the children. The children did not receive proper care by the parents.

See In re Ballard, 311 N.C. 708, 715 (1984) (stating that "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"). In view of the fact that "respondent[-father] did not appeal from the trial court's adjudication order," he "is bound by the doctrine of collateral estoppel from re-litigating these findings of fact." *In re T.N.H.*, 372 N.C. at 409 (citing *King v. Grindstaff*, 284 N.C. 348, 356 (1973) (stating that, in accordance with the doctrine of collateral estoppel, parties "are precluded from retrying fully litigated issues that were decided in any prior determination and were necessary to the prior determination")).

¶ 28 Similarly, respondent-father challenges the trial court's finding in all three termination orders that "[r]ecommendations were also made to the putative father by Dr. Bennett in 2018 through a Psychological Evaluation." According to respondent-father, Dr. Bennett was under the impression that, in April 2018, respondent-father and respondent-mother still lived in filthy conditions and had made no progress toward improving the condition of their home environment. Assuming, without in any way deciding, that respondent-father's factual assertions are valid, they have little bearing upon the issue of whether Dr. Bennett made recommendations relating to respondent-father in a 2018 psychological evaluation. Furthermore, Dr. Bennett testified that he evaluated respondent-father in 2018, with the report that he prepared at the time of this evaluation

having been admitted into evidence. Dr. Bennett's report recommended that respondent-father participate in parenting classes, ensure that the children receive safe and adequate care in his care, and maintain a home that was safe and did not pose a health hazard. As a result, we conclude that the challenged finding has ample evidentiary support.

¶ 29 In contending that the trial court should have refrained from considering Dr. Bennett's report in its entirety, respondent-father points to the presence of a note at the end of Dr. Bennett's report stating that respondent-father was with respondent-mother "when her children were removed in 2014" while arguing that no "removal" had occurred at that time. In the same vein, respondent-father claims that Dr. Bennett was not aware that respondent-father and respondent-mother had kept the home in a cleaner condition from the spring of 2018 until the date of the hearing. Upon being asked whether Ellie had been removed from respondent-mother's and respondent-father's care in 2014 after respondent-mother had left the child in the car for approximately fourteen minutes during ninety degree weather, Dr. Bennett testified that "I don't see that I've made a notation that [DSS] had custody. So, no, I — I don't think I knew that at that time." As a result, given that Dr. Bennett denied any knowledge that Ellie had been removed from the care of respondent-mother and respondent-father in 2014, we do not believe that the inclusion of a single erroneous phrase precluded the trial court from relying upon other portions of Dr. Bennett's report in deciding the issues that were before it in this case.

¶ 30 Similarly, respondent-father notes that he and respondent-mother were just "making progress on removing the roaches and cleaning their home" on 22 March 2018 and had begun to keep their house clean beginning in "the spring of 2018[.]" In view of the fact that the progress that respondent-mother and respondent-father had made in connection with the cleanliness of their home had just begun at the time of Dr. Bennett's report, the record evidence tends to show that Dr. Bennett's report does not reflect a misunderstanding of the issues that needed to be addressed by respondent-mother and respondent-father or the status of the home at the time that he conducted his evaluation. At the hearing, Dr. Bennett was asked multiple questions in which he was requested to assume that respondent-mother and respondent-father had been able to keep their home clean from April 2018 to the date of the termination hearing. In answering these questions, Dr. Bennett stated, that "it ha[d] been almost three years since I'd seen them. So that for me would be — is if that home ha[d] been reasonably clean for those three years, then that would for me say, well, it sounds like they are able to do that," and that, "if

it's been clean for three years, then that would suggest that they had succeeded." Thus, the record reflects that Dr. Bennett fully considered the possibility that respondent-mother's and respondent-father's ability to maintain their home in a clean and sanitary condition had improved and that, even considering this factor, he "still ha[d] concerns about the capacity to parent" and that he "would have real reservations about their ability to" parent the children. As a result, the trial court did not err in considering Dr. Bennett's report and the testimony that he provided at the termination hearing.

c. Other Findings

¶ 31 **[3]** In his remaining challenges to the trial court's findings, respondent-father argues that the record does not support the findings in the termination orders relating to Jake, Evette, and Alana that he "did not complete parenting classes which were recommended by Dr. Bennett and Dr. Holm."[5] In view of the fact that a social worker testified that, despite the absence of any supporting records in the file, she understood that both respondent-mother and respondent-father had completed parenting classes and the fact that the reports that both DSS and the guardian ad litem had prepared for an 11 April 2019 hearing stated that respondent-father had completed parenting classes, we conclude that respondent-father's contention to this effect has merit. As a result, we will disregard this finding in determining whether the trial court erred by determining that respondent-father's parental rights were subject to termination. *See In re N.G.*, 374 N.C. 891, 901 (2020) (disregarding findings of fact not supported by clear, cogent, and convincing evidence).

¶ 32 In addition, respondent-father argues that the trial court erred by finding that he "ha[d] not attended any therapies." Once again, we agree that respondent-father's contention has merit. A social worker testified that, in May 2019, DSS was instructed to give respondent-mother and respondent-father the contact information for each of the children's medical providers and that she attempted to comply with this instruction.

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5. Respondent-father also claims that the findings contained in all three termination orders relating to respondent-mother's failure to complete parenting classes and to attend "any therapies" for the juveniles and the trial court's findings that respondent-mother's caregiving had been insufficient and that she did not feel that there were issues that needed to be addressed lack sufficient evidentiary support. In light of the fact that these findings have no bearing upon the termination of respondent-father's parental rights, we will review them in the course of addressing respondent-mother's appeal. *See In re T.N.H.*, 372 N.C. 408, 407 (2019) (stating that "we review only those findings necessary to support the trial court's determination that grounds existed to terminate respondent's parental rights").

Although the record does not reflect the number of appointments that respondent-father and respondent-mother actually attended, a DSS report prepared in advance of the 12 September 2019 review hearing stated that respondent-father had routinely attended Evette's speech therapy appointments and that respondent-father had attended one of Alana's dental appointments and a swallow test for Evette before stating that respondent-father "has not called or participated with any other appointments or sessions regarding these two or any other children." The permanency planning order entered on 11 October 2019, which incorporated the related DSS report into its findings of fact, found that respondent-father had attended the appointments listed above while having failed to attend numerous other appointments. As a result, since the record evidence does not support the trial court's finding that respondent-father had failed to attend "any" therapies, we will disregard the trial court's findings to that effect in determining whether respondent-father's parental rights in the children were subject to termination. *See id.*

¶ 33 Next, respondent-father challenges the trial court's finding, which appears in all three termination orders, that, when DSS became involved with the family, there were "concerns with the juvenile testing positive for high levels of lead." In respondent-father's view, the record does not contain any evidence tending to show that "all juveniles tested positive for high levels of lead." Although a social worker testified that Jake and Ellie had tested positive for high levels of lead, there is no similar evidence relating to Evette and Alana. As a result, we will disregard any finding that the trial court might have made to the effect that Evette and Alana had tested positive for high levels of lead in determining whether the trial court correctly determined that respondent-father's parental rights in the children were subject to termination. *See id.*

¶ 34 Similarly, respondent-father argues that the trial court erred by making Finding of Fact No 35 in the termination orders relating to Jake and Evette and Finding of Fact No. 36 in the termination order relating to Alana, which state that "there appears to be an improvement in the sanitation of the home as evidenced by the photos submitted into evidence" on the grounds that the challenged findings "misstate[ ] the record" given that "every order entered . . . since the spring of 2018 [found] that the parents had corrected the conditions in the home." Aside from our inability to understand why respondent-father would challenge a finding of fact that indicated that the sanitation in the home had improved, his own characterization of the record supports, rather than undercuts, the challenged findings. A social worker testified that respondent-father and

respondent-mother cooperated with the exterminator and that, when the social worker visited the home in September 2019, she discovered that, while the exterior of the home showed the presence of clutter, the inside was "free from trash and waste products," with the photographs that were admitted into evidence tending to support this assertion. As a result, the challenged findings of fact have sufficient evidentiary support.

¶ 35 Furthermore, respondent-father argues that the trial court's finding that "there is still no indication of acceptance that there was a problem that needed addressing to begin with" is only supported by psychological reports "which are based on erroneous information." As we have already noted, the record reflects that Dr. Bennett, a psychologist who has done parenting capacity evaluations for ten to twenty years, evaluated respondent-father in 2018. After being qualified as an expert in psychology and conducting parenting capacity evaluations, Dr. Bennett testified that respondent-father believed that "there was really no problem[,]" that DSS was picking on him and unfairly interfering in his life, that the situation was being exaggerated, and that everything was fine. Dr. Bennett described respondent-father as "someone who did not seem to recognize the seriousness of the condition that DSS was . . . reporting," who was not focused on the conditions in his home, and who did not think that those conditions were unsafe or unsanitary. Dr. Bennett stated that, while most parents whom he evaluates initially believe that there is no reason for them to be seeing him, at some point they recognize that "they need to make some changes because whatever was happening was harming a child," while, on the other hand, respondent-mother and respondent-father continued to minimize the gravity of the situation that the children faced and had an attitude of "it's not that bad," "our kids are fine[,]" "[w]e're doing fine[,]" "[s]tay out of my life." Finally, Dr. Bennett testified that respondent-father did not believe that either he or respondent-mother had done anything worthy of DSS involvement. In the same vein, a social worker who had interacted with respondent-father and respondent-mother before and after the children's removal from the home testified that neither parent appeared to understand DSS' concerns with the condition of the home, stating that respondent-father "often minimized the conditions of the home and wouldn't take responsibility." As a result, the record evidence fully supports the challenged finding.

¶ 36 Moreover, respondent-father argues that certain of the trial court's findings of fact, "to the extent they describe a condition or belief that has endured over time or existed at the termination hearing," lack sufficient evidentiary support on the theory that the "evidence does not support

the findings to the extent they attempt to describe conditions or views that existed after the spring of 2018." For example, respondent-father challenges the finding contained in all three termination orders that respondent-mother and respondent-father "have shown a pattern of neglect and a failure to understand the need to change diapers, keep the home and the juvenile clean, and keep themselves clean." However, a social worker described the existence of a problem stemming from a failure to change diapers in a timely manner, both in 2014 and in 2018. In addition, the social worker testified that the home occupied by respondent-mother and respondent-father was dirty in both 2014 and 2018. Finally, two social workers and Dr. Bennett described the level of hygiene maintained by respondent-mother and respondent-father during the initial investigation in 2018, at the time of Dr. Bennett's evaluation, and during more recent interactions that began in March of 2019 and continued during visitation sessions and other face-to-face meetings. As a result, the record contains sufficient evidence to support the challenged findings of fact. *See In re J.O.D.*, 374 N.C. 797, 806 (2020) (stating that, "[a]lthough there was record evidence that would have supported a contrary decision, 'this Court lacks the authority to reweigh the evidence that was before the trial court' " (quoting *In re A.U.D.*, 373 N.C. at 12)); *In re T.N.H.*, 372 N.C. at 411 (recognizing 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 from the testimony"); *In re Montgomery*, 311 N.C. at 110–11 (stating that "our appellate courts are bound by the trial courts' findings of fact where there is some evidence to support those findings, even though the evidence might sustain findings to the contrary").

¶ 37 The next challenged finding, which appears in all three termination orders, states that respondent-father "has failed to provide consistent care with respect to the juvenile." Respondent-father contends that this finding lacks sufficient evidentiary support to the extent that it purports to describe conditions that continued beyond the spring of 2018. As we have already noted, however, a social worker described the conditions that existed in the home in 2018 as including the presence of "roaches throughout[,] . . . a pile of dirty diapers at the door[,] . . . [and] trash and food debris scattered around the home." In addition, respondent-mother and respondent-father stipulated that the juveniles "did not receive proper care, supervision, or discipline from" them at the time that the juvenile petitions were filed in the underlying neglect and dependency proceeding. Similarly, Dr. Bennett testified that respondent-father did not believe that any unsafe or unsanitary conditions existed in the family home, that he believed that he and respondent-mother were

being unfairly targeted by DSS, that respondent-father did not recognize the seriousness of the conditions that the family faced and was not focused upon resolving them, that respondent-father was not the primary "or even a real active parent," and that respondent-father left the actual parenting to respondent-mother even though the children were not safe in her care. Furthermore, Dr. Bennett did not believe that respondent-father could create an environment for appropriate child development, that he could care for the children's needs, that the children were safe in his care, or that he understood the health risks of the living environment. After hearing the testimony at the termination hearing, Dr. Bennett opined that he still believed that it was unlikely that respondent-mother and respondent-father could successfully parent the children in light of several of the children's special needs and their limited parenting capabilities.

¶ 38 The concerns that Dr. Bennett expressed were supported by the testimony of other witnesses. At the termination hearing, a social worker testified that respondent-father minimized the conditions in the home and did not take them seriously. Another social worker testified that respondent-mother and respondent-father had not completed all aspects of their care plans, having fallen short in the areas of hygiene, the ability to demonstrate parenting skills, and maintaining consistent communication with DSS. *See In re M.A.*, 2021-NCSC-99, ¶ 32 (stating that "[a] parent's failure to make progress in completing a case plan is indicative of a likelihood of future neglect" (quoting *In re M.A.*, 374 N.C. 865, 870 (2020))). The social worker testified that, even though respondent-mother took the lead during visits, her skills were minimal, she could not handle all four children simultaneously, and she tended to ask the visitation worker what to do or hand a child off to the visitation worker during difficult situations even though respondent-father was present. The social worker also testified that, if a visitation worker made any suggestions to respondent-mother or respondent-father, they would argue with the visitation worker.

¶ 39 According to the social worker, during one visit, respondent-father "got very frustrated with [Jake], and very loudly in a crowded park was like I've had enough of this to the point where in this crowded park everybody's head turned," leading to respondent-mother's intervention. According to the social worker, there had been "a number of issues during the visits[,]" including the fact that respondent-mother and respondent-father could not manage all four children, resulting in a decision to limit future visits to two children; the fact that, when all four children were in attendance, two supervisors needed to be pres-

ent as well; the fact that, invariably, one of the children would be left out during the visits; the fact that respondent-father showed a preference for one child over the others; the fact that respondent-mother and respondent-father spoke about the case during visits; the fact that, when Ellie referred to her foster mother as "mom" or "mommy" during a visit, respondent-mother and respondent-father got upset, with respondent-father having told Ellie that he would "bust [her] butt" if she called the foster mother "mommy" again; that, when the visitation worker addressed his conduct, respondent-father "started yelling at the visitation worker that he didn't care" and that "[h]e was gonna do what he needed to do" and "say what he wanted to say" to Ellie; and that respondent-father would argue with visitation workers and refuse to comply when redirected during visits. The social worker testified that, at the time of the hearing, respondent-mother and respondent-father had not demonstrated the existence of the ability to parent consistently, any interest in learning what it would take to parent the children, the ability to parent the four children at the same time, or a desire to do what needed to be done for the children and to make them a priority. As a result, for all of these reasons, the record evidence amply supports the trial court's findings that respondent-father failed to provide consistent care to Jake, Evette, and Alana and that the pattern of neglect that existed at the time that the children were removed from the family home had continued to the time of the termination hearing, so that this aspect of respondent-father's challenge to the trial court's termination orders has no merit.

¶ 40 In addition, respondent-father argues that the record did not support the trial court's findings that he did not believe that the juveniles had special needs, that he "does not appear to feel that there are any issues that need to be addressed[,]" and that "there is still no indication of acceptance that there was a problem that needed addressing to begin with" "to the extent they describe a condition or belief that has endured over time or existed at the termination hearing." On the contrary, however, respondent-father testified at a permanency planning hearing that Jake's speech was normal rather than delayed, with a social worker having described these comments at the termination hearing. In addition, as we have already noted, the trial court found in a permanency planning order entered on 11 July 2019 that, during an IEP meeting relating to Jake, respondent-father denied that Jake needed the proposed services before indicating that respondent-father needed to get to work. In the same vein, we also reiterate that Dr. Bennett and a social worker testified that respondent-father did not agree that the juveniles had any problems and believed, instead, that DSS was simply harassing the

family. The challenged findings are also supported by the evidence concerning respondent-father's conduct during visits with the children, in which he refused to change his behavior when redirected by visitation workers and, instead, told them that he was going to act as he wished. As a result, the trial court reasonably inferred that respondent-father's failure to recognize the problems that had resulted in DSS intervention continued throughout the course of the underlying neglect and dependency proceeding and the termination of parental rights proceeding. *See In re J.O.D.*, 374 N.C. at 806; *In re T.N.H.*, 372 N.C. at 411; *In re Montgomery*, 311 N.C. at 110–11.

¶ 41 Next, respondent-father challenges the trial court's references to him as the "putative father" in the orders that the trial court entered during the underlying neglect and dependency proceeding and in Finding of Fact No. 43 in the portion of the termination order relating to Jake, which stated that respondent-father had "never legitimated the juvenile" in the manner required by law or submitted to a DNA test. In view of the fact that this argument relates to the trial court's decision that respondent-father's parental rights in Jake were subject to termination based upon a failure to legitimate Jake pursuant to N.C.G.S. § 7B-1111(a)(5) and the fact that we have, for the reasons set forth below, elected to affirm the trial court's determination that respondent-father's parental rights in all of his children were subject to termination on the basis of neglect, N.C.G.S. § 7B-1111(a)(1), we need not address this aspect of respondent-father's challenge to the trial court's termination orders given that "we review only those findings necessary to support the trial court's determination that grounds existed to terminate respondent's parental rights[,]" *In re T.N.H.*, 372 N.C. at 407.

2. Grounds for Termination

¶ 42 **[4]** In his final challenge to the trial court's termination orders, respondent-father argues that the trial court erred by concluding that his parental rights in Evette and Alana were subject to termination on the basis of neglect, N.C.G.S. § 7B-1111(a)(1), and dependency, N.C.G.S. § 7B-1111(a)(6), and that his parental rights in Jake were subject to termination on the basis of neglect, N.C.G.S. § 7B-1111(a)(1); failure to legitimate, N.C.G.S. § 7B-1111(a)(5); and dependency, N.C.G.S. § 7B-1111(a)(6). According to respondent-father, the trial court erred by concluding that his parental rights in all three children were subject to termination on the basis of neglect given the absence of any evidence tending to show that, since the spring of 2018, the children were subject to any condition that placed them in an injurious environment or

created a risk that they would be subject to improper care or supervision. Although respondent-father does not deny that he stipulated that his children were neglected juveniles in March 2018, he claims that the "undesirable conditions existing or arising from the date of removal to the termination hearing do not rise to the level of neglect" and that the trial court erred by concluding that a repetition of the neglect to which the children had been subjected was likely in the event that they were returned to his care. We do not find respondent-father's argument to be persuasive.

¶ 43 A trial court may terminate a parent's parental rights in a child based upon a determination that the parent has neglected that child. N.C.G.S. § 7B-1111(a)(1) (2019). A "neglected juvenile" is 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). Although the trial court is entitled to terminate a parent's parental rights in a child in the event that neglect 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) (stating that "this Court has recognized that the neglect ground can support termination . . . if a parent is presently neglecting their child by abandonment"), 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. at 80 (quoting *In re L.O.K.*, 174 N.C. App. 426, 435 (2005)). In such circumstances, this Court has stated that "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"; however, "[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. at 715. After weighing the relevant evidence, the trial court may conclude that the parent's parental rights in the child are subject to termination on the basis of neglect if it determines that 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)). As a result, a parent's parental rights in a child may be subject to termination pursuant to N.C.G.S. § 7B-1111(a)(1) in the event that the trial court determines that the child has been neglected in the past and that there is a likelihood that the child will be neglected in the future if he or she is returned to the parent's care. *Id.* at 841.

¶ 44 According to respondent-father, the trial court's findings of fact do not support a determination that his parental rights in his children were subject to termination on the basis of neglect given that the problems that led to the initial adjudication of neglect were resolved before the termination hearing, with the trial court having failed to give proper consideration to the changes in his circumstances and the progress that he had made towards reunification following the initial adjudication. As we have demonstrated in considerable detail above, however, the record contains ample evidence tending to show that the children, with the consent of both respondent-mother and respondent-father, were found to be neglected juveniles in May of 2018, and that (1) the children had significant needs; (2) respondent-mother and respondent-father exhibited "a pattern of neglect and a failure to understand the need to change diapers, keep the home and the juvenile[s] clean, and keep themselves clean"; (3) respondent-father continued to deny that the children had special needs even after having been presented with "evidence-based documentation"; (4) respondent-father did not believe that the family had any problems that needed to be addressed; (5) respondent-father failed to accept "that there was a problem that needed addressing to begin with"; (6) respondent-father left most of the parenting responsibilities to respondent-mother and never made any effort to assume responsibility for the performance of any parenting duties; and (7) respondent-father failed to provide consistent care for the juveniles. In our view, these findings fully support the trial court's determination that Jake, Evette, and Alana were neglected juveniles and that the neglect that they had previously experienced was likely to reoccur in the event that they were to be returned to respondent-father's care.

¶ 45 In addition, respondent-father's contention to the contrary notwithstanding, the trial court's findings do not rest upon any misapprehension of the applicable law. For example, having found that "there appears to be an improvement in the sanitation of the home as evidenced by photos submitted into evidence," it is clear that the trial court did, in fact, consider the evidence concerning relevant circumstances up to and including the date of the termination hearing. In addition, we see no indication that the trial court failed to apply the appropriate standard of proof or acted on the basis of an understanding that it could not consider the evidence concerning the efforts at reunification that respondent-mother and respondent-father did make until the time of the termination hearing given that a social worker testified concerning the efforts that respondent-mother and respondent-father made in attempting to satisfy the requirements of their case plans and given that the trial court made a specific finding that the level of sanitation in the

family home had improved. As a result, the trial court did not err by concluding that respondent-father's parental rights were subject to termination on the basis of neglect, N.C.G.S. § 7B-1111(a)(1).

B. Respondent-mother's arguments

¶ 46 **[5]** In her own challenge to the trial court's termination orders, respondent-mother begins by arguing that several of the trial court's findings of fact constitute mere recitations of the testimony of various witnesses or the contents of various reports, with these arguments being directed to Finding of Fact Nos. 15–18 in the termination orders relating to all four children, Finding of Fact No. 22 in the termination order relating to Ellie, Finding of Fact Nos. 22–23 in the termination orders relating to Jake and Evette, and Finding of Fact Nos. 23–24 in the termination order relating to Alana. We have already addressed Finding of Fact Nos. 15–18 in the orders regarding Jake, Evette, and Alana in addressing respondent-father's challenge to the lawfulness of the trial court's termination orders, with the determinations that we made in connection with respondent-father's appeal being equally applicable to the same findings challenged in respondent-mother's appeal. Similarly, and for the same reasons that we gave in connection with our consideration of respondent-father's appeal, we conclude that, while Finding of Fact No. 15 in the order relating to Ellie was not improper, Finding of Fact Nos. 16–18 in the order relating to Ellie should be disregarded in determining whether respondent-mother's parental rights in that child were subject to termination. In the same vein, having determined that Finding of Fact No. 23 in the termination orders relating to Jake, Evette, and Alana; Finding of Fact No. 24 in the order relating to Alana; and Finding of Fact No. 22 in the orders relating to Jake and Evette were improperly made with respect to respondent-father, the same is equally true with respect to respondent-mother. Finally, for the reasons stated above, we also conclude that Finding of Fact No. 22 in the termination order relating to Ellie was improperly made and will disregard it in the course of determining whether respondent-mother's parental rights were subject to termination.

¶ 47 Next, respondent-mother challenges the sufficiency of the evidentiary support for several of the trial court's findings of fact. First, respondent-mother challenges the sufficiency of the evidentiary support for the finding of fact contained in all four termination orders that "[t]he mother and . . . father have shown a pattern of neglect and a failure to understand the need to change diapers, keep the home and the juvenile clean, and keep themselves clean." In addition to the evidence that we relied upon in rejecting respondent-father's challenge

to this finding, we note that the record also contains evidence tending to show that respondent-mother exhibited a pattern of "fail[ing] to understand" the need to address problems relating to the sanitary conditions in the home given that she did not see these conditions as problematic to begin with. In addition, a social worker and Dr. Bennett, who evaluated respondent-mother in 2014 and 2018, both testified that respondent-mother's intellectual limitations resulted in a lack of understanding of the parenting skills that DSS had attempted to teach her.

¶ 48 Dr. Bennett, whose 2014 evaluation of respondent-mother occurred in the aftermath of the incident in which she left Ellie alone in a car for approximately fourteen minutes on a ninety-degree day, testified that respondent-mother denied the existence of any problems in the family, failed to understand the issues that had led to her referral to Dr. Bennett, and thought that DSS was treating her unfairly. Furthermore, Dr. Bennett testified that respondent-mother did not appear to understand child development, that people were attempting to teach her parenting skills that were not being learned, and that respondent-mother's attitude was, " 'Why are you bugging me? I'm doing okay.' There's not really a problem." Dr. Bennett further stated that he did not, in 2014, "see evidence that she exercises the judgment and the understanding of — of child development and of safety to keep the children safe" and that he "was concerned that — that she did not have that." Dr. Bennett found that respondent-mother did not understand the need to proactively address problems arising from dealing with dirty diapers, the problems that could result from isolating a child in a car seat or playpen, and the difficulties that could result from a failure to address a child's developmental delays. In conclusion, Dr. Bennett testified that, "if you don't believe that there's a problem, you're not going to put the effort into it because why."

¶ 49 Dr. Bennett expressed similar concerns following the evaluation that he conducted with respect to respondent-mother in 2018. At that time, Dr. Bennett concluded that respondent-mother did not understand the severity of the conditions that existed in the home and had not learned anything from the experiences that she had had in 2014. Dr. Bennett testified that, as was the case in 2014, respondent-mother lacked the ability to create an appropriate environment for the children, the children were not safe in her exclusive care, and she did not understand the health risks that resulted from the maintenance of an environment like the one that existed in the family home. According to Dr. Bennett, respondent-mother was effectively saying, "I don't understand. You guys are kind of — this is unfair. We're — we're doing okay. You know, stay

out of my life. I just [don't] see that she was even aware that — that the environment was that bad." Based upon this evidence, we hold that the challenged finding of fact has ample evidentiary support with respect to all four children. *See In re J.O.D.*, 374 N.C. at 806; *In re T.N.H.*, 372 N.C. at 411; *In re Montgomery*, 311 N.C. at 110–11.

¶ 50 In addition, respondent-mother challenges the findings of fact that appear in the termination orders relating to all four children that she did not complete parenting classes and has not attended any classes or therapies. A social worker testified that respondent-mother and respondent-father completed parenting classes, and the record evidence establishes that respondent-mother attended some of the children's medical appointments, while missing others. Having concluded in connection with respondent-father's appeal that these findings, at least in part, lacked sufficient evidentiary support, we reach the same result with respect to respondent-mother.

¶ 51 Similarly, respondent-mother, like respondent-father, challenges the sufficiency of the evidentiary support for the findings, which appear in all four termination orders, that respondent-mother "does not appear to feel that there are any issues that need to be addressed" and that there "is still no indication of acceptance that there was a problem that needed addressing to begin with." Having held that these findings had ample evidentiary support in addressing respondent-father's appeal, we reach the same result with respect to respondent-mother, particularly given Dr. Bennett's testimony that respondent-mother failed to comprehend that the family faced significant difficulties that needed to be addressed.

¶ 52 Finally, respondent-mother challenges the finding of fact contained in all four termination orders to the effect that her caregiving skills and efforts had been insufficient. As we have already discussed in our consideration of the similar challenge that respondent-father has directed to these findings of fact, the record, including, but not limited to, the testimony of Dr. Bennett, provides ample support for these findings as well.

¶ 53 The record reflects that respondent-mother left Ellie in a hot car in 2014. A subsequent investigation revealed the existence of problems relating to the cleanliness of and level of sanitation in the family home. However, according to Dr. Bennett, respondent-mother did not acknowledge the existence of the problems that were pointed out to her on that occasion and failed to learn anything from the remedial services that were offered to her at that time. The condition of the family home continued to be very poor in 2018, as was reflected by the existence of a

roach infestation and a collection of unaddressed dirty diapers. Even so, respondent-mother continued to fail to recognize the existence of these problems and felt, instead, that DSS was unfairly interfering in her life. According to Dr. Bennett, respondent-mother had the same parenting deficiencies in 2018 that she had had in 2014, having learned nothing from her prior experience. In addition, respondent-mother failed to take care of herself, suffered from untreated depression, was easily taken advantage of, allowed a sex offender to live in her home, and failed to understand child development or how to create an appropriate home environment for the children.

¶ 54 Finally, a social worker described respondent-mother's failure to satisfy the requirements of her case plan with respect to issues relating to hygiene, parenting skills, and the need for regular communication with DSS and the deficient parenting skills that respondent-mother exhibited during visitation sessions with the children, during which she demonstrated an inability to care for all four children even when respondent-father was present. The social worker further testified that she had not seen any desire on the part of respondent-mother to learn improved parenting skills, with Dr. Bennett having testified that it was unlikely that respondent-mother and respondent-father could develop the ability to parent the children if the children were returned to their care. As a result, these findings have ample evidentiary support as well.

¶ 55 As was the case with respect to respondent-father, respondent-mother acknowledges that the children had previously been found to be neglected juveniles. Instead, she argues that the trial court erred by concluding that the children were likely to experience a repetition of neglect in the event that they were returned to her care. As we have already explained in connection with respondent-father's appeal, however, the trial court's findings fully support its determination that the neglect that the children had experienced would likely be repeated in the event that the children were returned to respondent-mother's care. In its termination orders, the trial court found that (1) the children were previously adjudicated as neglected juveniles with the consent of respondent-mother and respondent-father; (2) the juveniles had significant needs; (3) respondent-mother, like respondent-father, showed "a pattern of neglect and a failure to understand the need to change diapers, keep the home and the juvenile[s] clean, and keep themselves clean"; (4) respondent-mother did not feel that the family had any problems that needed to be addressed; (5) respondent-mother did not accept "that there was a problem that needed addressing to begin with"; (6) respondent-mother did not understand that there had been problems

that needed addressing in 2014 and that, "by the time the 2018 psychological evaluation occurred[,] she still did not seem to understand that any problem needed addressing"; and (7) respondent-mother lacked sufficient caregiving skills. As a result, we hold that the trial court did not err in determining that respondent-mother's parental rights in all four children were subject to termination on the basis of neglect pursuant to N.C.G.S. § 7B-1111(a)(1).

III. Conclusion

¶ 56 Thus, for the reasons set forth above, we hold that the trial court did not err by determining that the parental rights of respondent-mother and respondent-father in Ellie, Jake, Evette, and Alana were subject to termination on the basis of neglect pursuant to N.C.G.S. § 7B-1111(a)(1). In view of the fact that the 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 the challenges that have been advanced by respondent-mother and respondent-father to the other grounds for termination that the trial court found to exist in this case. Finally, since neither respondent-mother nor respondent-father has advanced any challenge to the trial court's dispositional decision before this Court, we affirm the trial court's termination orders.

AFFIRMED.

IN RE C.K.I.

[379 N.C. 207, 2021-NCSC-131]

IN THE MATTER OF C.K.I.

No. 523A20

Filed 5 November 2021

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

The trial court's termination of a father's parental rights to his son based on willful abandonment (N.C.G.S. § 7B-1111(a)(7)) was supported by unchallenged findings of fact that the father had not seen his six-and-a-half-year-old son since he was a baby, he did not contact his son, he did not send money, gifts, cards, or letters, and he did not take any action to follow up on statements to the child's mother that he planned to become more involved with his son. The father's refusal to sign papers to allow the child's mother to change their son's last name was not sufficient to refute the ground of willful abandonment.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from order entered 5 October 2020 by Judge Robert P. Trivette in District Court, Dare County. This matter was calendared in the Supreme Court on 30 September 2021 but determined on the record and briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

No brief filed for petitioner-appellee mother.

No brief filed for appellee Guardian ad Litem.

Edward Eldred for respondent-appellant father.

HUDSON, Justice.

¶ 1 Respondent, the father of the minor child, C.K.I. (Charlie),[1] appeals from the trial court's order terminating his parental rights on the ground of willful abandonment. We affirm.

I. Factual and Procedural Background

¶ 2 Petitioner and respondent were in a relationship that began during the summer of 2013 but never married. The relationship suffered from

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

substance abuse and domestic violence. Charlie was born in February 2014. The couple lived together for a month after Charlie's birth, then separated. Following a domestic incident between petitioner and respondent on 4 March 2014 during which Charlie was present, the Dare County Department of Social Services (DSS) initiated an assessment for child neglect. DSS recommended counseling and informed the parents that the child should have a sober caregiver at all times and should not be exposed to acts of domestic violence. DSS also responded to incidents of domestic violence in April and June 2014.

¶ 3 Following a 5 June 2014 incident, DSS made a safety resource arrangement with Charlie's maternal grandfather and step-grandmother who agreed that the minor child would stay in their home until DSS determined otherwise. DSS referred the parents to mental health and substance abuse counseling. Initially, the parents were not consistent with their counseling, were unable to maintain appropriate housing for an infant, failed to address issues related to domestic violence, and failed to demonstrate an ability to provide food, clothing, and shelter for the minor child. On 18 September 2014, DSS filed a juvenile petition alleging the minor child was a neglected juvenile. By January 2015, petitioner resided with Charlie's maternal grandmother. Respondent resided with his sister. Charlie continued to reside with his maternal grandfather and step-grandmother. Following a 28 January 2015 hearing, the trial court entered a dispositional order on 23 February 2015 in which it adjudicated Charlie a neglected juvenile and granted custody to the maternal grandfather and step-grandmother. The matter was converted to a Chapter 50 action, and DSS was relieved of further responsibility. The court ordered that petitioner and respondent have separate weekly supervised visitation for two hours.

¶ 4 Following the court's 23 February 2015 dispositional order, petitioner "substantially changed her life." She established a safe, stable, and appropriate residence and maintained a steady job which provided the means and ability to provide financially for the minor child. By April 2017, petitioner had provided for the child's basic needs for over a year, and the child had been living with her for more than six months. With the support of maternal grandfather and step-grandmother, petitioner petitioned for custody of the minor child. Respondent was served with notice of the custody hearing but failed to appear or make any communication with the court regarding the matter. By order entered 12 April 2017, the trial court concluded that it was in the best interests of the minor child that petitioner be granted custody, and the court awarded petitioner sole legal and physical custody of the minor child.

¶ 5 On 6 November 2019, petitioner filed a petition for termination of respondent's parental rights. Petitioner alleged that grounds existed to terminate respondent's parental rights on grounds of neglect and abandonment. Petitioner alleged that respondent had not seen the minor child since he was four months old and had not provided medical care or financial support for the child since he was one month old. Moreover, petitioner alleged that respondent has no relationship with the minor child and had not pursued a relationship since March 2014.

¶ 6 Respondent answered the petition to terminate his parental rights denying petitioner's allegations regarding grounds to terminate his parental rights. The court appointed a guardian ad litem for the minor child on 22 January 2020. A hearing on the matter took place on 25 September 2020 during which the court heard testimony from petitioner, the maternal grandfather, the maternal grandmother, Charlie's half-sibling's paternal grandmother, petitioner's boyfriend, respondent, respondent's girlfriend, and the guardian ad litem. On 5 October 2020, the trial court entered its order concluding that grounds existed to terminate respondent's parental rights and that termination was in the best interests of the child. Respondent appeals.

II. Analysis

¶ 7 Our Juvenile Code provides a two-stage process for terminating parental rights. N.C.G.S. §§ 7B-1109, -1110 (2019). At the initial or adjudicatory stage, the burden is on the petitioner to establish the existence of any ground for termination alleged under N.C.G.S. § 7B-1111(a) based on clear, cogent, and convincing evidence. N.C.G.S. § 7B-1109(e)–(f) (2019). "We review a trial court's adjudication under N.C.G.S. § 7B-1109 'to determine whether the findings are supported by clear, cogent and convincing evidence and the findings support the conclusions of law.' " *In re C.B.C.*, 373 N.C. 16, 19 (2019) (quoting *In re Montgomery*, 311 N.C. 101, 111 (1984)). "[F]indings of fact are binding 'where there is some evidence to support those findings, even though the evidence might sustain findings to the contrary.' " *In re R.D.*, 376 N.C. 244, 258 (2020) (quoting *In re Montgomery*, 311 N.C. at 110–11). "Unchallenged findings are deemed to be supported by the evidence and are 'binding on appeal.' " *In re K.N.K.*, 374 N.C. 50, 53 (2020) (quoting *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 J.D.C.H.*, 375 N.C. 335, 337 (2020) (quoting *In re C.B.C.*, 373 N.C. at 19).

¶ 8 Respondent contends that the trial court erred by terminating his parental rights on the grounds of neglect and willful abandonment.

Respondent does not challenge the trial court's findings of fact, rather he argues the evidence presented does not support the trial court's conclusions on either ground. Because a single ground for terminating parental rights is sufficient to support a termination order, this Court can uphold the trial court's order based on one ground without reviewing any remaining ground. *In re J.S.*, 374 N.C. 881, 815 (2020).

¶ 9 A court may terminate parental rights upon a finding 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). "The most frequently approved definition is that abandonment imports any willful or intentional conduct on the part of the parent which evinces a settled purpose to forego all parental duties and relinquish all parental claims to the child." *Pratt v. Bishop*, 257 N.C. 486, 501 (1962); *see also In re N.M.H.*, 375 N.C. 637, 642 (2020). "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 (2020) (quoting *In re Adoption of Searle*, 82 N.C. App. 273, 276 (1986)). "Although the trial court may consider a parent's conduct outside the six-month window in evaluating a parent's credibility and intentions, the 'determinative' period for adjudicating willful abandonment is the six consecutive months preceding the filing of the petition." *In re N.D.A.*, 373 N.C. 71, 77 (2019) (quoting *In re D.E.M.*, 257 N.C. App. 618, 619 (2018)). "If a parent withholds his presence, his love, his care, the opportunity to display filial affection, and willfully neglects to lend support and maintenance, such parent relinquishes all parental claims and abandons the child." *In re J.D.C.H.*, 375 N.C. 335, 338 (2020) (cleaned up).

¶ 10 Here, the determinative six-month period is from 6 May to 6 November 2019. In support of its conclusion that grounds exist to terminate respondent's parental rights based on willful abandonment, the trial court made the following unchallenged findings of fact:

> 13. The parties lived together for periods of time prior to the birth of the juvenile. They lived together for about a month after the birth of the juvenile at the home of Petitioner's mother. There was domestic violence and substance abuse issues in the relationship. [DSS] took non-secure custody of the juvenile and placed the juvenile with Petitioner's father. The juvenile matter was converted to a Chapter 50 Order giving custody to the [minor child's] maternal

grandfather. Petitioner later filed a motion to modify that Chapter 50 Order and was granted custody as previously set forth.

14. Respondent was slightly involved at birth. He attended at least one pre-natal appointment and was present at the birth. He helped to set up the juvenile's nurse[r]y at Petitioner's mother's home. Once [DSS] became involved, Respondent's involvement dwindled off and he was non-compliant with his case plan with the Department.

15. Since the juvenile was one month old, the Respondent has provided no support, either monetary or in-kind and he has not paid for medical care nor attended any medical appointments for the juvenile. The Respondent last saw the juvenile when the child was 4–6 months old. Since the juvenile was one month old, he has purchased or provided no birthday gifts or Christmas gifts and has not acknowledged those holidays in any fashion for the minor child.

16. Testifying on Petitioner's behalf, her father and mother confirmed that Respondent only visited initially when the juvenile was living with Petitioner's mother and that while the juvenile resided with Petitioner's father, the Respondent did not visit. Both also confirmed that Respondent had provided no support, cards, or gifts that they were aware of and Respondent had never contacted either one of them to try to have contact with the juvenile.

. . . .

18. The Respondent admittedly had a terrible addiction to opioids. His criminal record was introduced with[out] objection from Dare and Currituck Counties which showed a variety of criminal convictions involving drugs as well as a misdemeanor conviction for tampering with a motor vehicle and for resisting an officer. He was convicted in Virginia for felony possession

with intent to sell and deliver a Schedule I substance, heroin. Between his local jail time and his prison time in Virginia, he was incarcerated from October 2016 to July 2019. He also was in jail in North Carolina for periods of time prior to that.

19. There was conflicting testimony regarding Respondent's contact with Petitioner while he was incarcerated. . . . [T]he Court finds that Respondent contacted Petitioner one time in December 2018. Petitioner asked Respondent to agree for the juvenile's last name to be changed. Respondent disagreed and indicated he had a prison lawyer who told him all he had to do was file for custody when he was released and that he would get shared custody of the child and that he intended to do that. The parties argued and then hung up.

20. Despite indicating he was aware he could file an action to receive custody, Respondent has never filed an action to receive custody or visitation.

21. Respondent was released from prison in July 2019. Petitioner learned that he was out of prison via Facebook as he did not contact her or try to see the juvenile. Petitioner contacted Respondent's grandmother to determine if he was out of prison and then Respondent contacted Petitioner from the grandmother's phone. Petitioner again asked him to agree to change the child's last name. He refused and indicated his intent to see the juvenile. Yet, he never followed through in any way with this intent prior to the filing of the termination of parental rights action.

22. While Respondent was incarcerated, Petitioner kept in contact with his grandmother. She visited with the juvenile on occasion, and sent gifts and cards signed by her on the juvenile's birthdays and Christmas. On one occasion when she was unable to see the child, she sent a card and a

money card so he could buy a present for himself. She never indicated to Petitioner that the money card, gifts, or cards were from Respondent. Although Respondent asserts that the gifts and money provided by his grandmother were from him, there is no evidence to support such an assertion. Thus, the Court finds those items to be from the grandmother.

23. Respondent had a conduit to send money, cards, letters or gifts to the juvenile from himself. He could have written letters to the child to show his interest and even if Respondent would not have accepted the letters, his grandmother could have saved them to prove his interest. He failed entirely to do anything to support or show interest in the juvenile.

24. Petitioner never filed a child support action but she also never told Respondent or his grandmother that she would not accept support, money, or gifts for the juvenile. Both parties testified that Petitioner accused Respondent of never having supported the juvenile and having told Respondent that if he had gifts for the child, he should send them to him. Respondent failed to send support, money or gifts.

25. Based upon Respondent's lack of involvement throughout the juvenile's life, his apparent lack of interest during his incarceration and his failure to affirmatively do anything to assert his parental rights before the filing of this action, there is a reasonable probability that his lack of involvement would continue.

26. Petitioner did not encourage Respondent to have contact with the juvenile. She told him to forget about the juvenile. Petitioner tried to keep in contact with Respondent's sister but she was rebuffed. Respondent's father died prior to Respondent's incarceration and his mother was never involved with the juvenile. Petitioner did keep in touch with Respondent's grandmother . . . .

27. Between the time the parties spoke in August 2019 and filing of the action in November 2019, Respondent did not attempt to see the juvenile. He provided no support of gifts. He showed no further interest. He did not file an action to establish a relationship with the juvenile. After the termination of parental rights action was filed, Respondent was served and he established his relationship with his court appointed attorney. He began contacting Petitioner in early 2020.

28. The parties set up a meeting in March 2020 because Respondent wanted Petitioner to see for herself that he had changed. . . . Respondent did not show up at the meeting set up between the parties. Thereafter, Petitioner answered few of Respondent's texts and he did not call her. Petitioner eventually blocked Respondent's number on her phone. Petitioner did not encourage Respondent's desire to have contact with the juvenile and did not allow such. (All of this exchange occurred months after the termination action was filed.)

29. The juvenile does not know who the Respondent is. He has not seen his father since he was 4–6 months old. From that time until the Respondent was incarcerated, Respondent did not attempt to contact the juvenile or the Petitioner and showed no interest. There is no bond between the Respondent and the juvenile. The juvenile considers Petitioner's boyfriend to be his father as he has raised him since he was 10 months old.

30. The Petitioner lives . . . at the address listed on the petition for termination of parental rights. Respondent claims to have only learned her address at the hearing but admitted was served with the petition on November 7, 2019 and that he read the petition (which contained Petitioner's address) . . . .

¶ 11 Respondent argues that the findings do not support a conclusion of his abandonment for three reasons. First, while he did not initiate adver-

sarial legal proceedings to force petitioner to allow respondent to see the minor child, respondent took steps toward that goal. As stated in his brief to this Court, respondent called petitioner and said "(1) he wanted to be involved in Charlie's life, (2) he was going to see Charlie, and (3) he was going to be a father to Charlie."

¶ 12 Second, after petitioner refused to allow respondent to see the minor child, she asked respondent to sign papers allowing her to change the minor child's name. However, as respondent contends, petitioner could have petitioned to change the minor child's name without his consent if she believed respondent had abandoned the minor child. By asking respondent's consent to change the minor child's name, respondent contends, petitioner evidenced a belief that respondent did not abandon the minor child.

¶ 13 Third, respondent refused to sign papers allowing petitioner to change the minor child's name. In sum, respondent argues that this is not a case of a parent doing nothing for six months preceding the filing of a termination action, but one of a parent who asserted his intent to be a father to his son without aggressively inserting himself into his son's life immediately after completing three years in prison. We disagree.

¶ 14 "[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*, 257 N.C. at 501; *see also In re Apa*, 59 N.C. App. 322, 324 (1982) (affirming an order terminating parental rights of the father based on abandonment where the court's unchallenged findings provided that "except for an abandoned attempt to negotiate visitation and support, respondent 'made no other significant attempts to establish a relationship with [the minor child] or obtain rights of visitation with [the minor child].' ").

¶ 15 Here, the court's findings demonstrate that respondent had not seen the minor child, born in February 2014, since the minor child was four-to-six months old. Since the child was four-to-six months old but prior to respondent's three-year incarceration, respondent did not contact the minor child. While incarcerated, respondent had a conduit to the minor child through respondent's grandmother but nevertheless failed to send money, gifts, cards, or letters to the minor child. Upon his release from prison and prior to the filing of the termination petition, respondent made no attempt to communicate with the minor child. Despite repeated statements that he intended to petition the courts for custody and visitation, respondent failed to do so. These facts evidence

the lack of care, support, and maintenance that indicate abandonment. Accordingly, we uphold the trial court's conclusion that respondent willfully abandoned the minor child and clear, cogent, and convincing evidence supports the termination of respondent's parental rights. *See* N.C.G.S. § 7B-1111(a)(7).

¶ 16 Respondent does not challenge the trial court's dispositional determination that it was in the minor child's best interests that respondent's parental rights be terminated. Therefore, we affirm the trial court's order terminating respondent's parental rights.

AFFIRMED.

IN THE MATTER OF C.M.F., D.J.H., N.S.E.

No. 209A21

Filed 5 November 2021

Termination of Parental Rights—no-merit brief—multiple grounds—best interests of the children

The termination of a mother's parental rights to three of her children on multiple grounds was affirmed where her counsel filed a no-merit brief, the trial court's findings of fact in the termination order had ample record support, those findings supported the court's conclusion that termination grounds existed, and the trial court did not err in finding that termination was in the children's best interests.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from an order entered 2 March 2021 by Judge Ricky W. Champion in District Court, Alamance County. This matter was calendared for argument in the Supreme Court on 30 September 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.

Jamie L. Hamlett for petitioner-appellee Alamance County Department of Social Services.

Thomas N. Griffin, III, for appellee Guardian ad Litem.

Richard Croutharmel for respondent-appellant-mother.

IN RE C.M.F.

[379 N.C. 216, 2021-NCSC-132]

PER CURIAM.

¶ 1 Respondent-mother Krystle H. appeals from the trial court's order terminating her parental rights in three of her children. Respondent-mother'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-mother's appellate counsel as arguably supporting an award of relief from the trial court's termination order lack merit and affirm the trial court's termination order.

¶ 2 Respondent-mother Krystle H. and the father James E. were married on 15 July 2006, with five children having been born of their marriage, one of whom, N.S.E.,[1] was born on 1 December 2010 in Hattiesburg, Mississippi. Respondent-mother and Mr. E. divorced on or about 21 August 2012. On or about 2 August 2012, respondent-mother married Joe H., with D.J.H.[2] having been born of their marriage in Hattiesburg on 24 September 2013. Respondent-mother and Mr. H. divorced on 28 August 2017. C.M.F.[3] was born to respondent-mother and Joshua R. in Hattiesburg on 4 October 2017. While they were living in Mississippi, the children were the subject of a juvenile court proceeding that involved allegations of sexual abuse during which they were placed in foster care before being returned to respondent-mother's custody.

¶ 3 Respondent-mother and the children had been residing in North Carolina since December 2019, when respondent-mother moved to this State in order to live with a man that she had met through an on-line dating service. On 25 February 2020, the Alamance County Department of Social Services obtained the entry of an order taking the children into nonsecure custody and filed a juvenile petition alleging that Carol, Danny, and Nancy were neglected and dependent juveniles.[4] In its

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1. N.S.E. will be referred to throughout the remainder of this opinion as "Nancy," which is a pseudonym that will be used for ease of reading and to protect the juvenile's privacy.

2. D.J.H. will be referred to throughout the remainder of this opinion as "Danny," which is a pseudonym that will be used for ease of reading and to protect the privacy of the juvenile.

3. C.M.F. will be referred to throughout the remainder of this opinion as "Carol," which is a pseudonym that will be used for ease of reading and to protect the privacy of the juvenile.

4. The underlying neglect and dependency proceeding involved children in addition to Carol, Danny, and Nancy. However, none of these other children were the subject of the termination of parental rights proceeding that is before us in this case. As a result, we will refrain from commenting upon the proceedings relating to the other children in this opinion.

petition, DSS alleged that the children received improper supervision, had insufficient housing, lacked proper hygiene, and had been subjected to improper discipline; that respondent-mother lacked adequate financial resources and parenting skills and had mental health and substance abuse-related problems; and that respondent-mother and her boyfriend had assaulted the children. After the filing of the petition, Judge Kathryn W. Overby communicated with the applicable judicial authorities in Mississippi, with that state having declined to exercise jurisdiction over the children after determining that North Carolina would be a more convenient forum.

¶ 4 On 22 June 2020, Judge Overby entered an adjudication order based upon stipulations by respondent-mother in which Judge Overby found that Carol, Danny, and Nancy were neglected and dependent juveniles, determined that a dispositional hearing would be held at a later time, and ordered that the children remain in the temporary custody of DSS. On 22 July 2020, Judge Overby entered a dispositional order providing that the children would remain in DSS custody; requiring the parents to provide support for the children while they were in DSS custody; and ordering that, in order to reunify with the children, respondent-mother develop a sufficient source of income to provide for herself and the children; provide for a safe, stable, and secure home environment; refrain from allowing her use of unlawful substances to interfere with her ability to parent the children; obtain a substance abuse and mental health assessment and comply with all treatment-related recommendations; participate in parenting education and demonstrate the ability to use the skills that she had learned during her interactions with the children; demonstrate the ability to meet the medical and mental health needs of the children by attending their medical and mental health appointments; and visit with the children.[5]

¶ 5 After a permanency planning and review hearing held on 23 September 2020, Judge Overby entered an order on 9 October 2020 in which she found, among other things, that, while respondent-mother was employed at McDonald's, she had failed to provide sufficient information concerning her earnings, that respondent-mother had failed to secure stable and adequate housing, that respondent-mother's substance abuse assessment had resulted in a diagnosis of tobacco use disorder, that respondent-mother's mental health assessment had resulted in

5. Judge Overby also ordered that the fathers take certain steps in order to be reunified with their children. In view of the fact that there are no issues relating to the fathers before us in this case, we will refrain from describing the provisions of the dispositional order or subsequent orders relating to the fathers in this opinion.

recommendations that respondent-mother participate in individual and group therapy and medication management, that respondent-mother had participated in a single medication management session, and that respondent-mother had failed to take any steps to satisfy her obligation to provide support for her children. As a result, Judge Overby determined that the primary permanent plan for Carol, Danny, and Nancy should be adoption, with a secondary plan of reunification, in light of respondent-mother's failure to make adequate progress toward rectifying the concerns that had led to the children's removal from her home.

¶ 6 On 24 November 2020, DSS filed a motion seeking to terminate respondent-mother's parental rights in Carol, Danny, and Nancy on the grounds that respondent-mother's parental rights in the children were subject to termination on the basis of neglect, N.C.G.S. § 7B-1111(a)(1); failure to pay a reasonable portion of the cost of the care that the children had received while in a placement outside the home, N.C.G.S. § 7B-1111(a)(3); and dependency, N.C.G.S. § 7B-1111(a)(6), and that the termination of respondent-mother's parental rights would be in the children's best interests. On 2 March 2021, the trial court entered an order concluding that respondent-mother's parental rights in Carol, Danny, and Nancy 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-mother's parental rights would be in the children's best interests. Based upon these determinations, the trial court ordered that respondent-mother's parental rights in the children be terminated.[6] Respondent-mother noted an appeal from the trial court's termination order to this Court.

¶ 7 Respondent-mother's appellate counsel has filed a no-merit brief on his client's behalf. In that brief, respondent-mother's appellate counsel identified a number of issues that could potentially provide a basis for challenging the lawfulness of the trial court's termination order, including whether the record evidence and the trial court's findings of fact provided adequate support for its determination that respondent-mother's parental rights in Carol, Danny, and Nancy were subject to termination and whether the trial court had abused its discretion by determining that the termination of respondent-mother's parental rights would be in the children's best interests. Ultimately, however, respondent-mother's appellate counsel concluded that there was no non-frivolous basis

6. The trial court also terminated the parental rights of the fathers in his termination order. In view of the fact that none of the children's fathers have sought review of the trial court's termination order by this Court, we will refrain from discussing the termination-related proceedings concerning the fathers any further in this opinion.

for challenging 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 her failure to pay a reasonable portion of the cost of the children's care while in DSS custody, N.C.G.S. § 7B-1111(a)(3), and that, since the termination order contained findings of fact that were supported by sufficient record evidence relating to the dispositional factors delineated in N.C.G.S. § 7B-1110(a) and since the trial court's findings of fact provided adequate support for its dispositional decision, there was no non-frivolous basis for challenging the lawfulness of the trial court's determination that the termination of respondent-mother's parental rights would be in the children's best interests. Although respondent-mother's appellate counsel communicated with respondent-mother for the purpose of advising her that she had a right to file written arguments for the Court's consideration and provided respondent-mother with the materials necessary to permit her to do so, respondent-mother failed to submit any written arguments for consideration by the Court. Both DSS and the guardian ad litem filed briefs expressing agreement with the conclusion reached by respondent-mother's appellate counsel that the record does not disclose the existence of any arguably meritorious issues in this case.

¶ 8 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-mother's appellate counsel in this case 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 the trial court did not err in the course of determining that respondent-mother's parental rights in the children were subject to termination and that the termination of respondent-mother's parental rights would be in the children's best interests. As a result, we affirm the trial court's order terminating respondent-mother's parental rights in Carol, Danny, and Nancy.

AFFIRMED.

IN RE I.E.M.

[379 N.C. 221, 2021-NCSC-133]

IN THE MATTER OF I.E.M.

No. 85A21

Filed 5 November 2021

Termination of Parental Rights—grounds for termination—failure to make reasonable progress—progress made post-petition—no misapprehension of the law

The trial court did not act under a misapprehension of the law when terminating a mother's parental rights in her daughter for failure to make reasonable progress to correct the conditions leading to the child's removal (N.C.G.S. § 7B-1111(a)(2)). Specifically, the mother failed to show that the court operated on the erroneous belief that evidence of any progress she made after the filing of the termination petition was irrelevant, where the court not only overruled a relevance-based objection to testimony describing events occurring after the petition filing but also admitted a substantial amount of evidence concerning those post-petition events.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from an order entered on 18 November 2020 by Judge William J. Moore in District Court, Robeson County. This matter was calendared for argument in the Supreme Court on 30 September 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.

J. Edward Yeager, Jr., *for petitioner-appellee Robeson County Department of Social Services.*

Lindsey Reedy for appellee Guardian ad Litem.

Garron T. Michael for respondent-appellant mother.

ERVIN, Justice.

¶ 1 Respondent-mother Joanna W. appeals from an order entered by the trial court terminating her parental rights in her daughter, I.E.M.[1] After careful consideration of respondent-mother's challenges to the trial

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

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

¶ 2 The Robeson County Department of Social Services became involved with Iris' family in July 2018 because of concerns arising from respondent-mother's mental health and the manner in which she supervised Iris. On 3 October 2018, DSS received a neglect referral alleging that respondent-mother, who had been living with Iris in a shelter as the result of their displacement following a recent hurricane, had been involuntarily committed and diagnosed as suffering from paranoid schizophrenia.

¶ 3 On 5 October 2018, DSS filed a juvenile petition alleging that Iris was a neglected juvenile and obtained nonsecure custody of the child.[2] In its petition, DSS alleged that a social worker had learned that respondent-mother was hearing voices and had attempted to leap from a relative's moving car after "God told her to free herself." In addition, DSS alleged that respondent-mother had admitted to a social worker that, while she had been hearing voices, she did not know that she had been diagnosed as suffering from a mental health condition. After the social worker and respondent-mother discussed possible safety placements for Iris, DSS placed Iris with a maternal cousin.

¶ 4 After a hearing held on 16 January 2019, Judge Daniels entered an adjudication order finding that Iris was a dependent juvenile and a separate dispositional order finding that respondent-mother had undergone a psychological examination and that the examining psychologist had concluded that respondent-mother would be "unable to parent [Iris] for the indefinite future." As a result, Judge Daniels ordered that Iris remain in DSS custody and approved a primary plan of reunification with respondent-mother and a secondary plan of adoption.

¶ 5 Following a permanency planning hearing held on 20 November 2019, the trial court entered an order on 15 January 2020 finding that respondent-mother had entered into a Family Services Case Plan with DSS and was seeing a "peer support person" at the Stephens Outreach Center for sixteen hours per week. In addition, the trial court found that respondent-mother's therapist believed that respondent-mother remained unable to care for herself or Iris as a result of her severe paranoid schizophrenia and approved a primary permanent plan for Iris of adoption, with a secondary plan of guardianship with a relative.

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2. On 16 January 2019, Judge Judith M. Daniels allowed DSS to assert that Iris was a dependent, as well as a neglected, juvenile.

¶ 6 On 20 December 2019, DSS filed a petition seeking to have respondent-mother's parental rights in Iris terminated on the grounds that she had willfully allowed Iris to remain in a placement outside the home for more than twelve months without making reasonable progress toward correcting the conditions that had led to Iris' removal from her home, N.C.G.S. § 7B-1111(a)(2); willfully failing to pay a reasonable portion of the cost of the care that Iris had received during the six month period immediately preceding the filing of the termination petition, N.C.G.S. § 7B-1111(a)(3); and dependency, N.C.G.S. § 7B-1111(a)(6). The issues raised by the termination petition came on for hearing before the trial court at the 23 September 2020 session of the District Court, Robeson County. On 18 November 2020, the trial court entered an order concluding that respondent-mother's parental rights in Iris were subject to termination on the basis of her willful failure to make reasonable progress toward correcting the conditions that had led to Iris' removal from her home, N.C.G.S. § 7B-1111(a)(2), and dependency, N.C.G.S. § 7B-1111(a)(6), and that the termination of respondent-mother's parental rights in Iris would be in Iris' best interests. Respondent-mother noted an appeal to this Court from the trial court's termination order.

¶ 7 A termination of parental rights proceeding is conducted in two phases. At the adjudicatory phase, the trial court determines whether any of the statutory grounds for terminating a parent's parental rights delineated in N.C.G.S. § 7B-1111 exist, *see* N.C.G.S. § 7B-1109 (2019), with the petitioner being required to prove the existence of any applicable ground for termination by clear, cogent, and convincing evidence. *In re A.U.D.*, 373 N.C. 3, 5–6, (2019). In the event that the trial court determines that the petitioner has established the existence of at least one ground for termination, the case moves to the dispositional phase, at which the trial court must "determine[ ] whether terminating the parent's rights is in the juvenile's best interest." N.C.G.S. § 7B-1110(a) (2019).

¶ 8 In seeking relief from the trial court's termination order, respondent-mother argues that the trial court erred by determining that her parental rights in Iris were subject to termination. In reviewing the trial court's adjudication decision, we are required to determine whether the trial court's findings of fact are supported by clear, cogent, and convincing evidence and whether its findings, in turn, support the trial court's conclusions of law. *In re E.H.P.*, 372 N.C. 388, 392 (2019). According to well-established North Carolina law, 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). On the other hand, the trial court's conclusions of law are subject to de novo review by an appellate court. *In re C.B.C.*, 373 N.C. 16, 19 (2019).

¶ 9 As an initial matter, we will examine whether the trial court erred in determining that respondent-mother's parental rights in Iris were subject to termination on the basis of a willful failure to make reasonable progress to correct the conditions that had led to Iris' removal from respondent-mother's home pursuant to N.C.G.S. § 7B-1111(a)(2). A parent's parental rights in a child are subject to termination pursuant to N.C.G.S. § 7B-1111(a)(2) in the event that 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). The reasonableness of a parent's progress in addressing the conditions that led to the child's removal from the family home "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) (cleaned up).

¶ 10 In challenging the trial court's determination that respondent-mother's parental rights in Iris were subject to termination pursuant to N.C.G.S. § 7B-1111(a)(2), respondent-mother argues that the trial court acted on the basis of a misapprehension of law relating to this ground for termination consisting of an erroneous belief that any evidence concerning progress that respondent-mother had made after the filing of the termination petition was irrelevant. Although this Court has clearly held that, "where it appears that the judge below has ruled upon the matter before him upon a misapprehension of the law, the cause will be remanded to the [trial] court for further hearing in the true legal light[,]" *Capps v. Lynch*, 253 N.C. 18, 22, (1960) (cleaned up), we conclude that respondent-mother has failed to demonstrate that the trial court acted on the basis of any misapprehension of the applicable law in the course of finding that respondent-mother's parental rights in Iris were subject to termination pursuant to N.C.G.S. § 7B-1111(a)(2).

¶ 11 In attempting to persuade us that her challenge to the trial court's termination order has merit, respondent-mother begins by directing our attention to the testimony provided by Kylene Chavis, who served as respondent-mother's peer support specialist at the Stephens Outreach Center and had begun assisting respondent-mother after the filing of the termination petition. When respondent-mother's trial counsel asked Ms. Chavis to describe the manner in which she had provided respondent-mother with support, counsel for DSS stated that, "Judge, if I may object to this. Your Honor, this is actually — what she's testifying to is after the date the petition was filed, so not relating to adjudication,

Your Honor." During the ensuing colloquy between the trial court and counsel, the trial court asked respondent-mother's trial counsel, "How is it — how is what happened after the petition was filed relevant?" After considering the response that respondent-mother's trial counsel made to this inquiry and the other arguments that were made by the parties, the trial court overruled DSS' objection.

¶ 12 Although respondent-mother acknowledges that the trial court overruled the DSS objection, she insists that this aspect of her challenge to the trial court's termination order has merit on the theory that the trial court "never corrected its incorrect statement of the law regarding the relevance of post-petition facts." However, despite the fact that trial counsel for DSS clearly misstated the applicable law, the existence of such a misstatement by counsel for a party coupled with a related inquiry posed by the trial court to counsel for another party cannot be equated to an affirmative "statement of the law" or the adoption of the position espoused by DSS' trial counsel by the trial court, particularly given that the trial court signaled its rejection of the argument advanced by counsel for DSS by overruling that party's objection.

¶ 13 In addition, respondent-mother attempts to buttress her challenge to the trial court's termination order by noting that the trial court did not make any findings of fact predicated upon Ms. Chavis' testimony and suggesting that the trial court's statement in Finding of Fact No. 10 conflicts with Ms. Chavis' assertion that she had not provided respondent-mother with any financial support. The trial court is not, however, "required to make findings of fact on all the evidence presented, nor state every option it considered." *In re E.S.*, 378 N.C. 8, 2021-NCSC-72, ¶22 (citations omitted). For that reason, the absence of any findings of fact that appear to be directly based upon Ms. Chavis' testimony does not establish that the trial court failed to consider what Ms. Chavis had to say. In addition, the statement contained in Finding of Fact 10 with which respondent-mother takes issue is supported by the testimony of a social worker that the peer support provided by the Stephens Outreach Center included a financial component, which the social worker defined as "somebody helping [respondent-mother] manage her money," an interpretation of Finding of Fact No. 10 that appears to be consistent with Ms. Chavis' testimony that she would "consistently contact [respondent-mother] and make sure" she was paying her bills. Thus, the trial court's treatment of Ms. Chavis' testimony does not establish that it acted upon the basis of a misapprehension of law in deciding that respondent-mother's parental rights in Iris were subject to termination pursuant to N.C.G.S. § 7B-1111(a)(2).

¶ 14 On the other hand, an examination of the record developed before the trial court indicates that other witnesses provided testimony concerning events that occurred after the filing of the termination petition. For example, the maternal cousin who served as Iris' caretaker throughout the pendency of the entire proceeding testified about respondent-mother's visits with Iris, including a visit that occurred during the same month as the one in which the termination hearing was held. Similarly, respondent-mother testified concerning her recent visits with Iris, her current living situation, and the attempts that she had made to find a support person. Thus, the trial court did, in fact, hear considerable testimonial evidence relating to the period of time that followed the filing of the termination petition.

¶ 15 Finally, the record developed at the adjudication hearing contains substantial documentary evidence relating to the period of time after the filing of the termination petition. For example, the trial court took judicial notice of the file from the underlying juvenile proceeding, a set of documents that included orders associated with two hearings that occurred after the filing of the termination petition. In addition, DSS introduced, over respondent-mother's objection, a one hundred page exhibit that was titled "Termination of Parental Rights Time Line" and contained 809 numbered paragraphs detailing a considerable amount of relevant information concerning the period of time extending from the filing of the initial juvenile petition until a few weeks prior to the termination hearing. The trial court expressly stated in its termination order that it had taken the timeline into consideration in reaching its decision.

¶ 16 According to respondent-mother, however, the trial court should have refrained from considering the timeline because it was "replete with hearsay statements" and was "based primarily upon third-party reports or out-of-court statement[s] made to [DSS] by a variety of declarants." A general objection of the type that respondent-mother lodged against the timeline is insufficient to show that the trial court committed an error of law, however, given that, "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. 553, 558 (2020) (cleaned up). Respondent-mother has failed to identify any inadmissible hearsay evidence upon which the trial court erroneously relied in the course of making the findings of fact contained in its termination order and has failed, for that reason, to establish that the trial court erred by considering the timeline in deciding that respondent-mother's parental rights in Iris were subject to termination.

¶ 17 Thus, the record clearly reflects that the trial court overruled a relevance-based objection to the admission of testimony relating to events that occurred after the filing of the termination petition and that a substantial amount of evidence concerning such post-petition events was received during the adjudication hearing in both testimonial and documentary form. On the other hand, respondent-mother has failed to offer anything more than mere speculation in attempting to show that the trial court erroneously failed to consider evidence relating to the period of time following the filing of the termination petition. Such a showing is simply insufficient "to overcome the presumption of correctness at trial." *State v. Ali*, 329 N.C. 394, 412 (1991). For that reason, we hold that respondent-mother's contention that the trial court acted on the basis of a misapprehension of law in the course of finding that respondent-mother's parental rights in Iris were subject to termination pursuant to N.C.G.S. § 7B-1111(a)(2) lacks merit and that, since this argument constitutes the only basis upon which respondent-mother has challenged the trial court's determination that respondent-mother's parental rights in Iris were subject to termination pursuant to N.C.G.S. § 7B-1111(a)(2), the trial court did not err by finding the existence of this ground for termination.

¶ 18 Having upheld the trial court's determination that at least one ground for terminating respondent-mother's parental rights in Iris existed, we need not address the validity of respondent-mother's challenge to the trial court's determination that respondent-mother's parental rights in Iris were subject to termination for dependency pursuant to N.C.G.S. § 7B-1111(a)(6). *See In re A.R.A.*, 373 N.C. 190, 194 (2019) (stating that "a finding of only one ground is necessary to support a termination of parental rights"). In view of the fact that the trial court did not err by finding that respondent-mother's parental rights in Iris were subject to termination pursuant to N.C.G.S. § 7B-1111(a)(2) and the fact that respondent-mother has not advanced any challenge to the trial court's determination that the termination of her parental rights would be in Iris' best interest, we affirm the trial court's termination order.

AFFIRMED.

IN RE I.P.

[379 N.C. 228, 2021-NCSC-134]

IN THE MATTER OF I.P.

No. 124A21

Filed 5 November 2021

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

The trial court's order terminating a father's parental rights to his daughter on the grounds of failure to make reasonable progress was affirmed where his counsel filed a no-merit brief and the termination order was supported by clear, cogent, and convincing evidence and based upon proper legal grounds.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from an order entered on 15 February 2021 by Judge J.H. Corpening, II in District Court, New Hanover County. This matter was calendared for argument in the Supreme Court on 30 September 2021 but determined on the record and briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

Garron T. Michael for petitioner-appellee.

No brief filed for Guardian ad Litem.

Richard Croutharmel, for respondent-appellant.

MORGAN, Justice.

¶ 1 Respondent-father appeals from the trial court's order terminating his parental rights to "Ivey,"[1] a minor child born on 27 November 2018. After careful review, we hold that there was no error in the trial court's determination that grounds existed to support the termination of respondent-father's parental rights to Ivey and there was no abuse of discretion in the trial court's conclusion that it would be in Ivey's best interests to terminate respondent-father's parental rights. Accordingly, we affirm the trial court's order terminating respondent-father's parental rights to Ivey.

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

I. Factual and Procedural Background

¶ 2 Prior to Ivey's birth, all of her older siblings had been taken into nonsecure custody by the New Hanover County Department of Social Services (DSS), with Ivey's mother eventually relinquishing her parental rights to each of these children. Ivey tested positive for cocaine at her birth on 27 November 2018 and was taken into custody by DSS. Ivey's mother identified three men as possible fathers of Ivey; one of them was respondent-father. On 11 December 2018, DSS filed a juvenile petition alleging that Ivey was a neglected juvenile. Following a hearing conducted on 31 January 2019 and by order filed on 25 February 2019, the trial court adjudicated Ivey to be neglected. On disposition, the trial court ordered Ivey's mother to comply with a case plan to effect reunification with Ivey and ordered the putative fathers identified by Ivey's mother to submit to DNA testing in order to confirm the identity of Ivey's biological father.

¶ 3 On 30 May 2019, the trial court adjudicated respondent-father as Ivey's biological father. At a hearing held on 3 October 2019 and in an order entered on 13 November 2019, the trial court directed respondent-father to comply with a case plan to effect placement of Ivey with him. The trial court changed Ivey's primary permanent plan to adoption after an 8 July 2020 hearing and the entry of a 22 July 2020 order. Ivey's mother relinquished her parental rights to Ivey on 10 July 2020. On 1 September 2020, DSS filed a petition to terminate respondent-father's parental rights to Ivey. Following a hearing conducted on 26 and 29 October 2020 and by an order filed on 15 February 2021, the trial court terminated respondent-father's parental rights to Ivey. In its termination of parental rights order, the trial court found that three grounds existed to permit the termination of respondent-father's parental rights: neglect under N.C.G.S. § 7B-1111(a)(1), willful failure to make reasonable progress to correct the matters which caused Ivey to be in an out-of-home placement for at least 12 months under N.C.G.S. § 7B-1111(a)(2), and abandonment under N.C.G.S. § 7B-1111(a)(7). Respondent-father appeals.

¶ 4 On 17 June 2021, appellate counsel for respondent-father filed a brief, stating that "[a]fter a conscientious and thorough review of the record and the relevant law and consultation with other experienced appellate attorneys, [appellate counsel for respondent-father was] unable to identify any issues with sufficient merit on which to base an argument for relief on appeal." Pursuant to N.C. R. App. P. 3.1(e), appellate counsel for respondent-father identified two general issues for this Court's review that might potentially support relief on appeal. Appellate counsel for respondent-father also sent to respondent-father copies of counsel's brief, the record on appeal, and the transcript, along with a letter

explaining respondent-father's right to file his own pro se brief and instructions on how to do so. Respondent-father did not submit his own brief or any other filing to the Court.

¶ 5 The brief filed in this Court by appellate counsel on behalf of respondent-father only analyzes the ground for termination of parental rights found under N.C.G.S. § 7B-1111(a)(2)—failure to make reasonable progress—as a sufficient basis for the termination of respondent-father's parental rights. The trial court made the following findings concerning respondent-father's failure to make reasonable progress:

> 129. That the Court finds that Respondent-Father lacks credibility.
>
> 130. That the Court finds that Respondent-Father clearly fabricated his pay stubs and lease. The lease is suspect at best. The Court struggles to believe that this is a lease for that address.
>
> 131. That the Court finds that Respondent-Father's testimony about the quality of his visits with [Ivey] are not credible.
>
> . . . .
>
> 134. That this Court questions anything said by Respondent-Father and any documents provided by Respondent-Father.
>
> 135. That Respondent-Father is unfit to parent and is acting contrary and contradictory to his parental rights.
>
> 136. That this Court has no confidence that things will change any more than they have in the past twenty-three months that the child has been in care.
>
> 137. That Respondent-Father is not in a position to parent [Ivey] almost two years after she came into care and at least eighteen (18) months since he learned that he was her biological father.
>
> . . . .
>
> 146. That Respondent-Father has made periodic progress on his case plan but cannot remain consistent nor has addressed his significant mental health issues. Respondent-Father is partially compliant, at

> best, after two years and instead of focusing on completing the objectives of his case plan spent more time creating a façade of progress.
>
> 147. That the concerns that originally brought [Ivey] into care remain unaddressed by Respondent-Father. He lacks understanding of the detrimental effects of his decision-making and its lasting effects on [Ivey]. Respondent-Father has not complied and has failed to actively engage in most services designed to address the issues of neglect that brought [Ivey] into care and support reunification efforts. Respondent-Father continues to have ongoing and longstanding issues that impact the care and supervision of the child. He disengaged from his child for the first year of her life and then after three visits, disengaged with her again until the plan changed to adoption and the [TPR] Petition was filed.
>
> 148. That Respondent-Father has not made reasonable progress in correcting those conditions which led to the removal of the minor child based on his conduct. . . . Respondent-Father's lack of credibility does not show progress in being able to parent this child safely as Respondent-Father continues to put his needs ahead of hers.
>
> . . . .
>
> 151. That Respondent-Father is not in a position to parent today. Respondent-Father would need significant therapy and verified stable income and housing before he would be in a position to reunite with [Ivey]. Respondent-Father has had the luxury of additional time to complete his case plan with the six-month hiatus of this case due COVID-19 and still has not accomplished the necessary objectives to reunite with [Ivey]. [The social worker and the guardian ad litem] do not see Respondent-Father being in a position to safely parent or complete his recommended treatment in the near future and this Court agrees.

Respondent-father's appellate counsel represents that he cannot refute these findings of fact as they apply to the ground of respondent-father's willful failure to make reasonable progress to reunify with Ivey after she

had been in an out-of-home placement for at least twelve months, specifically in light of evidence in the record that: (1) there was a question as to respondent-father's veracity during the termination hearing; (2) there was some doubt as to whether respondent-father had stable employment, adequate and stable housing, and adequate and stable income; (3) there was a question as to whether respondent-father had another newborn child and romantic relationships with multiple women; (4) respondent-father failed to visit Ivey from June through November 2019 and January through July 2020, with questionable reasons for not visiting; (5) respondent-father's failure to consistently visit Ivey undoubtedly led to his inability to form a stronger bond with her; and (6) respondent-father never developed the parenting skills necessary to assuage Ivey's anxiety in his presence despite multiple parenting classes. It is well settled that "a finding of only one ground is necessary to support a termination of parental rights." *In re A.R.A.*, 373 N.C. 190, 194 (2019).

¶ 6 After a careful review of the record on appeal in this matter, we agree with the candid assessment of respondent-father's appellate counsel and with the determinations of the trial court in this case. As this Court has noted, "[a] respondent's prolonged inability to improve [his] situation, despite some efforts in that direction, will support a finding of willfulness regardless of [his] good intentions, and will support a finding of lack of progress sufficient to warrant termination of parental rights." *In re J.S.*, 374 N.C. 811, 815 (2020) (extraneity omitted). Here, respondent-father has not achieved reasonable progress under his case plan and has not demonstrated an intention and commitment to do so. Based upon the evidence adduced in the trial court and upon the entirety of the record, we affirm the trial court's determination that grounds existed under N.C.G.S. § 7B-1111(a)(2) to support termination of respondent-father's parental rights.

¶ 7 Further, during the disposition phase of the termination of parental rights hearing, the trial court made findings of fact which addressed evidence concerning the specifically enumerated factors contained in the disposition statute, N.C.G.S. § 7B-1110(a): Ivey's age, her likelihood of adoption, her permanent plan, her bond with respondent-father, her relationship with her current caregivers, and other relevant considerations. The evidence showed that Ivey was adoptable and that her foster parents were interested in adopting her, that Ivey was bonded with her foster parents, that Ivey did not have a bond with respondent-father, that Ivey lived in the foster home with a half-sister, and that the foster parents encouraged the paternal grandmother to bring Ivey's half-brother to the foster home so that Ivey could visit with him. This evidence

amply supported the trial court's determination that termination of respondent-father's parental rights was in Ivey's best interests.

¶ 8 For the aforementioned reasons, the trial court's order terminating the parental rights of respondent-father is affirmed.

AFFIRMED.

IN THE MATTER OF J.B.

No. 514A20

Filed 5 November 2021

1. Termination of Parental Rights—grounds for termination—neglect—incarceration for abuse of another child—likelihood of future neglect

In a private termination of parental rights matter initiated by a mother after her son's father entered an *Alford* plea in another state to molesting a different child, the trial court properly terminated the father's rights to his son on the ground of neglect (N.C.G.S. § 7B-1111(a)(1)). The mother's testimony supported the trial court's findings that the father repeatedly molested his victim and that at least one incident occurred when the son was in the same bed. Further, the trial court's determination that there was a likelihood of future neglect was supported by evidence that the father made no effort to learn about his son's welfare in more than four years and would be unable to provide future care due to additional pending criminal charges. The father's incarceration and court-ordered prohibition from contacting his son did not absolve him of all parental responsibilities.

2. Termination of Parental Rights—best interests of the child—stability—lack of adoptive placement

In a private termination of parental rights matter initiated by a child's mother, the trial court did not abuse its discretion by determining that termination of the father's parental rights was in the best interests of the child where the court's findings that termination would facilitate continued consistency and stability for the child was supported by the mother's testimony. Moreover, termination was not precluded by the lack of a potential adoptive second parent for the child.

IN RE J.B.

[379 N.C. 233, 2021-NCSC-135]

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from an order entered on 18 September 2020 by Judge J.H. Corpening II in District Court, New Hanover County. This matter was calendared for argument in the Supreme Court on 30 September 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 filed for petitioner-appellee.

No brief filed for appellee Guardian ad Litem.

Richard Croutharmel for respondent-appellant father.

HUDSON, Justice.

¶ 1 Respondent appeals from the trial court's order terminating his parental rights in his minor child J.B. (Jeb).[1] He challenges the four grounds for termination found by the trial court as well as the court's conclusion that termination of his parental rights was in Jeb's best interests. We conclude that the trial court's findings supported its determination that respondent's rights were subject to termination based on neglect and that the trial court did not abuse its discretion when deciding Jeb's best interests. Accordingly, we affirm the termination order.

I. Background

¶ 2 On 7 August 2019, Jeb's mother (petitioner) filed a petition to terminate respondent's parental rights to Jeb. Petitioner alleged that respondent had been incarcerated for several years after he was convicted of child molestation in Georgia. The victim was the daughter of a family friend, and the molestation occurred in the family home where petitioner, respondent, and Jeb resided. Petitioner sought to terminate respondent's rights based on four grounds: neglect, failure to legitimate, dependency, and committing felony assault that resulted in serious bodily injury to another child in the home. *See* N.C.G.S. § 7B-1111(a)(1), (5), (6), (8) (2019).

¶ 3 The petition was heard on 3 August 2020. Petitioner testified that when she confronted respondent with the molestation allegations, he did not deny them but instead responded, "[t]hat's not how it hap-

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

pened." Petitioner then took Jeb and went to live with petitioner's father in Wilmington; respondent was arrested a few weeks later. Petitioner identified the victim as the daughter of her best friend, who often came to visit for a few days at a time, and petitioner testified that one of the molestation incidents happened in Jeb's presence. Petitioner also noted that under the terms of his Georgia criminal judgment, respondent would not be allowed to have contact with Jeb until Jeb turns eighteen and that respondent still faced additional charges in North Carolina. She explained that she was seeking termination of respondent's rights to ensure Jeb was protected from respondent.

¶ 4 Respondent also testified at the hearing. He explained that he agreed to enter an *Alford* plea in Georgia to mitigate against the risk of receiving a very long sentence. He also stated that he had taken classes in prison, including a sex offender prevention class, a motivation for change class, and a reentry class. Respondent acknowledged that he could not have contact or develop a relationship with Jeb until Jeb turns eighteen, but he also expressed his wish to retain his parental rights.

¶ 5 On 18 September 2020, the trial court entered an order terminating respondent's parental rights. The court concluded that all four grounds for termination alleged by petitioner existed and that termination would be in Jeb's best interests. Respondent appeals.

II. Standard of Review

¶ 6 Termination-of-parental-rights cases consist of two phases. First, the trial court adjudicates the existence of the alleged grounds for termination under N.C.G.S. § 7B-1111. *See* N.C.G.S. § 7B-1109(e) (2019). The petitioner must prove by clear, cogent, and convincing evidence that one or more grounds for termination exist. *In re A.U.D.*, 373 N.C. 3, 5–6 (2019). When reviewing the trial court's adjudication of a ground for termination, we examine whether its findings of fact are supported by clear, cogent, and convincing evidence and whether those findings in turn support the trial court's conclusions of law. *In re E.H.P.*, 372 N.C. 388, 392 (2019). 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).

¶ 7 If the trial court determines that at least one ground for termination has been established, the case proceeds to the dispositional phase, where the court "determine[s] whether terminating the parent's rights is in the juvenile's best interest." N.C.G.S. § 7B-1110(a) (2019). The court's

dispositional findings are binding on appeal if supported by any competent evidence. *In re K.N.K.*, 374 N.C. 50, 57 (2020). The trial court's conclusion regarding the child's best interests is reviewed for an abuse of discretion, and thus it is subject to reversal "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 M.A.*, 374 N.C. 865, 876 (2020) (cleaned up).

III. Grounds for Termination

¶ 8 **[1]** Respondent challenges all four grounds for termination found by the trial court. We begin by assessing the trial court's determination that respondent's rights were subject to termination based on neglect.

¶ 9 Under N.C.G.S. § 7B-1111(a)(1), parental rights may be terminated if the trial court finds that a parent has neglected their child to such an extent that the child fits the statutory definition of a "neglected juvenile." 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). "[E]vidence 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).

¶ 10 Here, the trial court found the following with respect to neglect:

> 6. That on or about December 2013, Petitioner discovered that Respondent Father had repeatedly

molested and engaged [in] inappropriate behavior with a minor child. The behavior occurred in their home and the home of the minor child.

7. That [Petitioner] confronted the Respondent-Father but he did not deny the allegations against him. In fact, all he replied was "that's not how it happened." This made [Petitioner] feel sick and she began packing to leave with the minor child.

8. That the Respondent-Father has neglected the minor child by failing to provide proper care, supervision or discipline for him and allowed him to live in an environment injurious to his welfare. That the Respondent-Father molested another juvenile who was present in his home, and on several occasions, [Jeb] was in the same bed during the molestation.

9. That Respondent-Father entered an Alford Plea to child molestation and was convicted. A child molestation charge in Georgia would be prosecuted under a different statute in North Carolina. A person who commits the offense of aggravated child molestation in Georgia requires that an act physically injures the child or involves an act of sodomy. While this charge is substantially similar to Felony Assault that results in bodily injury, the conviction of the crime in North Carolina would require the individual register as a Sex Offender in North Carolina. It is noted that charges in North Carolina are forthcoming. Within the meaning of N.C.G.S. § 7B-1111(a)(8), Respondent-Father's child molestation is substantially similar to felony assault that results in serious bodily injury to the child.

10. That during the past four years since being apart from the minor child, Respondent-Father has not inquired about the health, physical or emotional well-being of the Juvenile. That Respondent-Father failed to attempt to contact Juvenile, failed to write or send cards to Juvenile on birthdays or other special occasions. [Jeb] has not received birthday gifts, or Christmas gifts from Respondent-Father. That Respondent-Father faces charges in New Hanover

> County that will likely prevent him from properly caring for and providing supervision of minor child for the foreseeable future.
>
> 11. In the event that legal custody would be restored to Respondent-Father, there would be the likelihood of repetition of neglect. That the conduct of the Respondent-Father has been such as to demonstrate that he will not promote the Juvenile's health, physical and emotional well-being. Respondent-Father demonstrated this through his conduct with the juvenile girl he molested in the same home as, and in the presence, of [Jeb].
>
> 12. Respondent-Father also faces uncertainty about charges in New Hanover County and it is likely that he will continue to be unable to provide proper care and supervision of the minor child due to these charges. It is in the best interests of [Jeb] that the parental rights of [Respondent] be terminated.
>
> 13. Respondent-Father neglected the minor child in that [Jeb] did not receive proper care, supervision, or discipline as detailed in the preceding paragraphs of the Findings of Fact in this Order. Sufficient improvements in parenting have not been made in order to justify that safe placement would ever be possible with Respondent-Father.

Respondent challenges various portions of these findings as unsupported by the evidence.

¶ 11 First, respondent challenges the trial court's findings of fact 6, 7, and 8, in which the trial court discussed his past neglect. He contends that his *Alford* plea was insufficient to establish that he actually molested a child, that there was no evidence he failed to deny the allegations against him when confronted by petitioner, and that there was no evidence that the molestation occurred while Jeb was in the same bed.

¶ 12 These challenged findings were consistent with petitioner's testimony. She testified that respondent was arrested for child molestation, that the victim was the daughter of her best friend, and that when she confronted respondent, he did not deny the allegations but instead stated, "[t]hat's not how it happened." She also stated that the offenses that formed the basis for respondent's charges in Georgia happened in their

family home, including one occasion where Jeb was also present. She further testified:

> I believe that he was grooming [the victim] the whole time—our whole relationship. And then, with the incidents that happened in Georgia, [Jeb] was in the bed during the snuggle times, and that concerns me that he was in the same room as the things—whatever was happening was happening.

Based on this testimony, the trial court could reasonably infer that petitioner engaged in repeated child molestation and that at least one incident occurred while Jeb was in the same bed. *See In re D.L.W.*, 368 N.C. 835, 843 (2016) (recognizing 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" (cleaned up)). However, we agree with respondent that the evidence does not support the trial court's finding that the molestation occurred while Jeb was present "on several occasions," and we therefore disregard that portion of finding of fact 8. *See In re S.M.*, 375 N.C. 673, 684 (2020). Respondent's challenges to findings of fact 6 through 8 otherwise fail.

¶ 13 Respondent also challenges finding of fact 9 to the extent that it suggests he was convicted of aggravated child molestation. The finding begins by specifically stating that "Respondent-Father entered an Alford Plea to child molestation and was convicted[,]" a statement respondent's objection appears to concede is true. The remainder of the finding, which discusses the legal similarities between a Georgia conviction for aggravated child molestation and a North Carolina conviction for felony assault inflicting serious bodily injury, applied to the trial court's adjudication under N.C.G.S. § 7B-1111(a)(8) but was not applicable to the neglect ground under N.C.G.S. § 7B-1111(a)(1); thus, we do not address respondent's challenge to it here. *See In re N.G.*, 374 N.C. 891, 900 (2020) (this Court limits its "review to those challenged findings that are necessary to support the trial court's determination that . . . parental rights should be terminated"). Taken together, the trial court's findings of fact 6 through 9 provide evidence of past neglect by respondent that the trial court could consider as part of its adjudication of the neglect ground. *See In re Ballard*, 311 N.C. at 715; N.C.G.S. § 7B-101(15) ("In determining whether a juvenile is a neglected juvenile, it is relevant whether that juvenile lives in a home . . . where another juvenile has been subjected to abuse or neglect by an adult who regularly lives in the home.").

¶ 14 Next, respondent challenges findings of fact 11, 12, and 13, which together reflect the trial court's ultimate determination that there would

be future neglect if Jeb was returned to respondent's care. Respondent argues that there is no possibility of future neglect because under the terms of his probation, he is not allowed to have any contact with Jeb until he reaches the age of majority. We rejected a similar argument in *In re J.S.*, a case in which the respondent-father, who was serving a twenty-eight year prison sentence, argued

> that since he will be incarcerated for the next twenty-eight years, it is neither likely nor probable that the children will be in his care again during their minority, and such "an extremely remote possibility . . . does not support a conclusion that neglect during physical care and custody of the children is likely to recur."

In re J.S., 377 N.C. 73, 2021-NCSC-28, ¶ 20 (alteration in original). In responding to this claim, we noted that "the extent to which a parent's incarceration or violation of the terms and conditions of probation support a finding of neglect depends upon an analysis of the relevant facts and circumstances, including the length of the parent's incarceration." *Id.*, ¶ 21 (cleaned up). We concluded that the respondent's "lengthy incarceration implicates a future likelihood of neglect, as respondent cannot provide 'proper care, supervision, or discipline' while he is incarcerated, N.C.G.S. § 7B-101(15), and while not the only factor, is a relevant and necessary consideration in the trial court's finding of neglect." *Id.*, ¶ 22. Thus, while a lengthy period of incarceration (or in this case, probation) cannot be the sole basis for a determination that future neglect is likely, it is a highly relevant factor. So long as other factors which also implicate a likelihood of future neglect are present, the trial court was permitted to use respondent's inability to contact Jeb for the rest of his childhood to reach its determination that neglect existed as a ground for termination.

¶ 15 The trial court's order reflects another factor supporting a likelihood of a repetition of neglect was present in this case. Specifically, the trial court found in finding of fact 10 that respondent never "inquired about the health, physical or emotional well-being" of Jeb at any point during the four years between his arrest and the termination hearing. Respondent concedes that this finding is accurate but argues that it fails "to account for Respondent's inability to maintain some sort of relationship with Jeb or even inquire as to his wellbeing where Respondent was not willfully refusing to do so."

¶ 16 Respondent is correct that his criminal judgment in Georgia included, as a term of probation, the following prohibition:

> **Contact with minors.** You shall have no contact, whether directly in person or indirectly through any means of communication, with any child under the age of eighteen (18), including your own children, nor with any person unable to give consent because of mental or emotional limitations. Neither shall you attempt contact with the aforementioned except under circumstances approved in advance and in writing by the Court. If you have incidental contact with children, you will be civil and courteous to the child and immediately remove yourself from the situation. You will discuss the contact at your next meeting with your Probation Officer.

But while this provision precludes respondent from having either direct or indirect contact with Jeb, it did not absolve him of all of his parenting responsibilities for the remainder of Jeb's childhood. This Court has previously explained that a situation like extended incarceration

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

In re S.D., 374 N.C. 67, 76 (2020) (cleaned up). In this case, it is undisputed that respondent failed to show interest in Jeb's welfare by whatever means available. The prohibition against contact with Jeb did not forbid respondent from seeking information about Jeb's welfare through his family or other means, but he failed to even attempt to find a way to learn about Jeb's wellbeing. Respondent's total inaction was properly considered by the trial court in adjudicating the existence of the neglect ground. *See id.* (upholding an adjudication of neglect as a ground for termination in part because the "respondent-father made minimal efforts to show interest in [his minor child] while incarcerated, sending just a single birthday card to her after the trial court advised him that 'he may send any mail or gifts to [the minor child] through the social worker' and after [the petitioner] encouraged him to do so").

¶ 17 By conceding that he is "precluded from having contact with any minors whatsoever until 2037," respondent necessarily also concedes

that he will be unable to provide care for Jeb for the remainder of his minority, regardless of whether respondent is convicted of further crimes. As a result, like the respondent-father in *In re J.S.*, he necessarily cannot provide Jeb with "proper care, supervision, or discipline," even if he is released from prison after the completion of his Georgia sentence. *In re J.S.*, 2021-NCSC-28, ¶ 22. Combined with respondent's failure to make any effort to show an interest in Jeb's welfare for more than four years preceding the termination hearing, the trial court had a sufficient basis to determine that there was a likelihood of future neglect in this case. *See id.*, ¶ 23.

¶ 18 Consequently, the trial court properly determined that respondent's parental rights were subject to termination based on neglect. Since we have concluded this ground has ample support in the trial court's findings, we need not address respondent's arguments as to the remaining termination grounds found by the trial court under N.C.G.S. § 7B-1111(a)(5), (6), and (8). *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 . . . .").

IV. Best Interests Determination

¶ 19 **[2]** Respondent also argues that the trial court erred by concluding that termination of his parental rights was in Jeb's best interests. Under N.C.G.S. § 7B-1110, a court making a best interests determination

> 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). In this case, the trial court made the following findings regarding Jeb's best interests:

22. That [Jeb] currently lives with [Petitioner] in their home. He has lived there since late July of 2016. [Petitioner] is committed to ensuring [Jeb] is well cared for and happy. All of minor child's needs are being met. [Jeb] is healthy, well-adjusted and in a stable environment.

23. That the Attorney Guardian ad Litem, Mark J. Ihnat found [Petitioner] providing a stable environment and attentiveness to [Jeb]'s needs. [Petitioner] has provided him with a spacious and well-appointed home. [Jeb] is an active child who has access to his toys and various activities. Juvenile has a strong relationship with [Petitioner] and his maternal grandparents.

24. That the Juvenile is six years old and needs consistency and stability. That the Guardian ad Litem recommended to the Court that it was in the best interests of [Jeb] that the parental rights of Respondent-Father be terminated. Currently, [Petitioner] is committed to caring for [Jeb] and engaged in his educational, social and medical well-being. The termination of the parental rights of [Respondent] would allow [Jeb]'s well-being to continue.

. . . .

27. That the minor child has not seen nor heard from Respondent-Father since he was a toddler. There is no close bond between Juvenile and Respondent-Father due to Respondent-Father's incarceration. [Jeb] does not inquire about his father. He [is] well-adjusted and happy.

28. While the Respondent-Father cares for [Jeb], the Court finds termination of parental rights is in the best interests of the minor child at this time. Termination of parental rights will aid in the additional stability and permanence of [Jeb]'s life and well-being.

¶ 20 Respondent challenges two of these findings. He contends that findings of fact 24 and 28 are unsupported to the extent that they suggest that Jeb lacked consistency and stability and that termination would aid

in additional consistency and stability. He also contends that these findings do not adequately take into consideration the fact that there was no pending adoption for Jeb. Respondent believes that, since Jeb is currently in a stable, permanent placement, termination would not result in any changes for him, and "[t]he trial court's best interest determination was therefore based on nonexistent justifications."

¶ 21 The only evidence presented during the dispositional phase of the hearing was a report prepared by Jeb's guardian ad litem. In his report, the guardian ad litem stated that "[i]f the [termination of parental rights] were granted, [Jeb] would be afforded additional stability and permanence." The trial court's challenged findings of fact are consistent with the guardian ad litem's statement. In proper context, the court's findings reflect that Jeb will need *continued* stability and permanence in the future and that termination would provide additional aid towards that goal.

¶ 22 Moreover, the lack of a potential adoptive second parent for Jeb was irrelevant. As we have previously explained, "the trial court need not find a likelihood of adoption in order to terminate parental rights." *In re C.B.*, 375 N.C. 556, 561 (2020); *see also In re A.R.A.*, 373 N.C. at 200 ("[T]he absence of an adoptive placement for a juvenile at the time of the termination hearing is not a bar to terminating parental rights." (alteration in original) (quoting *In re D.H.*, 232 N.C. App. 217, 223 (2014))).

¶ 23 The trial court's order reflects that it considered the relevant factors under N.C.G.S. § 7B-1110(a), and the trial court's conclusion that terminating respondent's parental rights was in Jeb's best interests was neither manifestly unsupported by reason nor so arbitrary that it could not have been the result of a reasoned decision. *See In re M.A.*, 374 N.C. at 876. We therefore hold there was no abuse of discretion in the trial court's conclusion that termination of respondent's parental rights was in his son's best interests.

V. Conclusion

¶ 24 The trial court made sufficient findings of fact, supported by clear, cogent, and convincing evidence, to establish that respondent previously neglected Jeb by molesting another child in his presence and that respondent would be unable to provide proper care and supervision to Jeb in the future. Accordingly, we hold the trial court properly concluded that respondent's parental rights were subject to termination based on neglect under N.C.G.S. § 7B-1111(a)(1).

¶ 25 The trial court also made sufficient findings, supported by competent evidence, to support its discretionary determination that termination was in Jeb's best interests. We affirm the termination order.

AFFIRMED.

IN THE MATTER OF J.G.S.

No. 193A21

Filed 5 November 2021

Termination of Parental Rights—no-merit brief—termination on multiple grounds

The termination of a father's parental rights based on neglect, willful failure to make reasonable progress, dependency, and willful abandonment was affirmed where the father's counsel filed a no-merit brief and the termination order was supported by clear, cogent, and convincing evidence and based on proper legal grounds.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from an order entered on 4 March 2021 by Judge Burford A. Cherry in District Court, Burke County. This matter was calendared in the Supreme Court on 30 September 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. Thomas Diepenbrock for respondent-appellant father.

Amanda C. Perez for petitioner-appellee Burke County Department of Social Services.

Michelle FormyDuval Lynch for appellee Guardian ad Litem.

NEWBY, Chief Justice.

¶ 1 Respondent-father appeals from the trial court's order terminating his parental rights to J.G.S. (Jamal).[1] Counsel for respondent-father has

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

filed a no-merit brief under Rule 3.1(e) of the North Carolina Rules of Appellate Procedure. We conclude that the issues identified by counsel in respondent-father's brief as arguably supporting the appeal are meritless and therefore affirm the trial court's order.

¶ 2 This case arises from a termination action filed by Burke County Department of Social Services (DSS). Jamal was born on 24 December 2011 to mother and respondent-father. On 15 January 2019, while Jamal was living with his mother and half-siblings,[2] DSS filed a juvenile petition alleging Jamal was a neglected and dependent juvenile. The petition alleged that respondent-father had not been an active caregiver for Jamal, that he was incarcerated at the Marion Correctional Facility due to his conviction of robbery with a dangerous weapon, and that he would not be released from prison until 2025. On 1 May 2019, Jamal was adjudicated a neglected and dependent juvenile.

¶ 3 On 23 September 2020, DSS filed a motion to terminate respondent-father's parental rights. At the termination hearing on 5 February 2021, a DSS social worker, Lori Potter, testified that in the six months prior to the filing of the motion to terminate parental rights, respondent-father did not provide any support or inquire into Jamal's health, safety, or welfare. Ms. Potter also testified that Jamal did not remember meeting respondent-father but recalled that he was in prison. Respondent-father testified that he had been incarcerated since 21 April 2015 and that his projected release date is 12 July 2025. He also testified that he had only seen Jamal two times. The trial court entered an order on 4 March 2021 in which it determined grounds existed to terminate respondent-father's parental rights for neglect, willfully leaving the juvenile in placement outside the home without correcting the conditions that led to his removal, dependency, and willful abandonment. N.C.G.S. § 7B-1111(a)(1), (2), (6), (7) (2019). The trial court further concluded it was in Jamal's best interests that respondent-father's parental rights be terminated.

¶ 4 Counsel for respondent-father has filed a no-merit brief on his client's behalf under Rule 3.1(e) of the Rules of Appellate Procedure.[3]

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2. Jamal's mother, his half-siblings, and the respective fathers of his half-siblings are not parties to this appeal.

3. In respondent-father's notice of appeal, he erroneously designated the Court of Appeals, rather than this Court, as the judicial body to which his appeal would lie. At the time respondent-father gave notice of appeal, however, this Court was the only judicial body to which he could appeal. *See* N.C.G.S. § 7A-27(a)(5) (2019); N.C.G.S. § 7B-1001(a1)(1) (2019). Therefore, we elect to treat respondent-father's brief as a petition for certiorari and issue that writ authorizing review of his challenges to the trial court's termination order. *See In re N.D.A.*, 373 N.C. 71, 73–74, 833 S.E.2d 768, 771 (2019).

Counsel identified five issues that could arguably support an appeal but also explained why he believed these issues lack merit. Counsel has advised respondent-father of his right to file *pro se* written arguments on his own behalf and provided him with the documents necessary to do so. Respondent-father has not submitted written arguments to this Court.

¶ 5 We carefully and independently review issues identified by counsel in a no-merit brief filed under Rule 3.1(e) in light of the entire record. *In re L.E.M.*, 372 N.C. 396, 402, 831 S.E.2d 341, 345 (2019). After conducting this review, we are satisfied the trial court's 4 March 2021 order is supported by clear, cogent, and convincing evidence and based on proper legal grounds. Accordingly, we affirm the trial court's order terminating respondent-father's parental rights.

AFFIRMED.

IN THE MATTER OF J.K.F., H.N.F., N.L.F.

No. 82A21

Filed 5 November 2021

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

The trial court properly terminated a mother's parental rights to her three children based on willfully failing to pay a reasonable portion of the cost of their care although physically and financially able to do so (N.C.G.S. § 7B-1111(a)(3)), where clear, cogent, and convincing evidence showed that the mother had entered into a voluntary support agreement that she never moved to modify, she was employed during at least part of the six-month determinative period, but she had not voluntarily paid any support for her children.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from an order entered on 28 October 2020 by Judge David V. Byrd in District Court, Yadkin County. This matter was calendared for argument in the Supreme Court on 30 September 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.K.F.

[379 N.C. 247, 2021-NCSC-137]

James N. Freeman Jr. for petitioner-appellee Yadkin County Human Services Agency.

Paul W. Freeman Jr. for appellee Guardian ad Litem.

Mercedes O. Chut for respondent-appellant mother.

EARLS, Justice.

¶ 1 Respondent-mother appeals from the trial court's order terminating her parental rights in the minor children, "Jack,"[1] "Hannah," and "Nicole." We affirm the trial court's order and hold that the trial court had sufficient evidence to support the conclusion that grounds existed pursuant to N.C.G.S. § 7B-1111(a)(3) to terminate respondent-mother's parental rights for her failure to pay a reasonable portion of the cost of care for the children.

I. Factual and Procedural Background

¶ 2 On 13 September 2019, the Yadkin County Human Services Agency (YCHSA) moved to terminate respondent-mother's parental rights in the minor children, Jack, Hannah, and Nicole. Although he is discussed in this opinion, the children's father died in an automobile accident in May 2019 and is not a party to this appeal. On 28 August 2020, the trial court held a hearing on YCHSA's motion to terminate respondent-mother's parental rights. The trial court entered its order terminating respondent-mother's parental rights on 28 October 2020. Respondent filed timely notice of appeal from the termination order on 25 November 2020.

¶ 3 In June 2018, YCHSA first investigated respondent-mother and the father based on a report that they had engaged in domestic violence at home while the children were present. In the course of its investigation, YCHSA observed that the father and respondent-mother were struggling financially and lacked electricity in their home. YCHSA recommended services for the family including mental health treatment and parenting education, but the parents declined to participate at that time.

¶ 4 YCHSA encountered the family again in August 2018 when they received a report that Hannah had been inappropriately touched by her grandfather. While these allegations ultimately were unsubstantiated, in the course of investigating them, YCHSA observed that the home still lacked electricity, and the father and respondent-mother were having

1. We use pseudonyms to protect the juveniles' identities and for ease of reading.

difficulty meeting their children's basic needs. Shortly thereafter, the family relocated to Forsyth County. There, the father and respondent-mother attempted to enroll Jack in elementary school but could not provide the school with a permanent address, which caused Jack to miss several weeks of school.

¶ 5 The father contacted YCHSA on 22 October 2018, stating that he could not properly care for the children, that respondent-mother refused to bathe the children, and that she would not take care of them. The father brought a YCHSA employee to the camper trailer located on his brother's property where the family was living. There, the YCHSA employee observed the following: the trailer had multiple broken windows covered with wood; the three children shared a single twin mattress; the toilet appeared to be clogged with feces and toilet paper; the trailer was heated by a small space heater which was insufficient to maintain heat in the structure; nails were protruding from the trailer door, creating a hazard to the children; and the only food in the trailer was a box of macaroni and cheese and an open bottle of soda. The three children were dressed in t-shirts and shorts though the temperature was in the fifties.

¶ 6 The father advised YCHSA that he wanted treatment for his mental health and anger issues. Respondent-mother also acknowledged having untreated mental health issues. The father consented to YCHSA placing the children in foster care in order to meet their needs.

¶ 7 On 23 October 2018, YCHSA filed juvenile petitions alleging that Jack, Hannah, and Nicole were neglected juveniles, as they did not receive proper care, supervision, or discipline from their parents, and they lived in an injurious home environment. *See* N.C.G.S. § 7B-101(15) (2019). The trial court placed the children in nonsecure custody pending its ruling on the petitions.

¶ 8 Respondent-mother signed an Out of Home Family Services Agreement (case plan) with YCHSA on 11 December 2018, which required her to complete a psychological assessment and a substance abuse assessment and comply with any recommendations; submit to random drug screens as requested; complete a parenting education program; obtain and maintain housing suitable for the children for at least six months; and obtain and maintain consistent employment for at least six months.

¶ 9 After a hearing on 3 January 2019, the trial court entered an order on 6 February 2019 adjudicating the children to be neglected juveniles. On 29 April 2019, respondent-mother signed a voluntary support agreement.

Pursuant to the agreement, she was ordered to pay $35.66 per child in monthly child support.

¶ 10 Based on respondent-mother's additional positive drug screens and lack of progress on her case plan, the trial court concluded in an order entered on 6 August 2019 that additional "[r]eunification efforts would clearly be unsuccessful or inconsistent with the [children's] health and safety." The court established a primary permanent plan of adoption with a secondary plan of reunification and ordered the director of YCHSA to initiate a termination-of-parental-rights proceeding.

¶ 11 On 13 September 2019, YCHSA moved to terminate respondent-mother's parental rights in Jack, Hannah, and Nicole. As grounds for termination, the motion alleged that respondent-mother neglected the children under N.C.G.S. § 7B-1111(a)(1); that she had willfully left the children in an out-of-home placement for more than twelve months without making reasonable progress to correct the conditions leading to removal under N.C.G.S. § 7B-1111(a)(2); and that she had willfully failed to pay a reasonable portion of the children's cost of care in YCHSA custody for the six months immediately preceding the filing of the motion under N.C.G.S. § 7B-1111(a)(3). Respondent-mother responded denying the motion's material allegations.

¶ 12 On 28 August 2020, the trial court held a hearing on YCHSA's motion to terminate respondent-mother's parental rights. At the time of the hearing, respondent-mother was homeless, unemployed, and receiving no treatment for her mental health or substance abuse issues. She had not completed the required parenting education program and had last visited the children in October 2019.

¶ 13 The trial court entered its order terminating respondent-mother's parental rights on 28 October 2020. The court concluded YCHSA had proved the existence of each of the asserted statutory grounds for termination by clear, cogent, and convincing evidence. After considering the dispositional factors in N.C.G.S. § 7B-1110(a), the court further concluded that terminating respondent-mother's parental rights was in each of the children's best interests. Respondent-mother filed timely notice of appeal from the termination order.

II. Issues on Appeal

¶ 14 On appeal, respondent-mother argues that the trial court erred by finding that grounds existed to terminate respondent-mother's rights to her children pursuant to N.C.G.S. § 7B-1111(a)(1)–(3). The trial court found that three grounds existed to terminate respondent-mother's

rights: neglect under N.C.G.S. § 7B-1111(a)(1), failure to make reasonable progress under N.C.G.S. § 7B-1111(a)(2), and willful failure to pay cost of care under N.C.G.S. § 7B-1111(a)(3). As the law allows us to decide on one ground, we affirm the lower court's decision on the third ground. *See* N.C.G.S. § 7B-1111(a) (2019) ("The court may terminate the parental rights upon a finding of one or more of the following [grounds for termination.]").

A. Standard of Review

¶ 15 "Proceedings to terminate parental rights consist of an adjudicatory stage and a dispositional stage." *In re K.H.*, 375 N.C. 610, 612 (2020). At the adjudicatory stage, "the petitioner bears the burden of proving by clear, cogent, and convincing evidence that grounds exist for termination pursuant to" the statute. *In re E.H.P.*, 372 N.C. 388, 391 (2019). "The trial court's conclusions of law are reviewable de novo on appeal." *In re K.H.*, 375 N.C. at 612. Respondent-mother does not allege any error at the dispositional stage. Therefore, this opinion focuses on the findings of the trial court at the adjudicatory stage.

B. Analysis

¶ 16 Granting the motion to terminate respondent-mother's parental rights, the trial court found that grounds existed under N.C.G.S. § 7B-1111(a)(3), which reads as follows:

> The juvenile has been placed in the custody of a county department of social services, a licensed child-placing agency, a child-caring institution, or a foster home, and the parent has for a continuous period of six months immediately preceding the filing of the petition or motion willfully failed to pay a reasonable portion of the cost of care for the juvenile although physically and financially able to do so.

N.C.G.S. § 7B-1111(a)(3).

¶ 17 Since the motion for termination of parental rights was filed on 13 September 2019, the trial court needed to make specific findings about the relevant six-month statutory period which was from 13 March 2019 to 13 September 2019. *See In re K.H.*, 375 N.C. at 616 (analyzing the trial court's findings for evidence of willful nonpayment during the exact six-month period).

¶ 18 For the purposes of N.C.G.S. § 7B-1111(a)(3), "[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 (2020) (quoting *In re Clark*, 303 N.C. 592, 604 (1981)). The existence of a valid child support order or voluntary support agreement is evidence of the parent's ability to pay the amount prescribed therein. *In re A.P.W.*, 2021-NCSC-93, ¶ 44 (quoting *In re J.M.*, 373 N.C. at 359).

¶ 19 Respondent-mother argues that petitioner did not meet its burden to prove that she had the ability to pay child support during that period, and therefore, the nonpayment was not shown to be willful. She claims that her dates of incarceration and dates of working for her aunt were not entered into the record and there was no finding of employment during that time.

¶ 20 Respondent-mother's argument is undermined by the undisputed facts that (1) she entered into a voluntary support agreement on 29 April 2019—during the six-month period at issue—which is evidence of her ability to pay a monthly sum, as defined in that agreement, of "$107.00 in ongoing support, with $30.00 towards the arrears, split amongst all three children[,]" and (2) she paid no child support during the relevant statutory period. *See In re A.P.W.*, 2021-NCSC-93, ¶ 44. As this Court explained in *In re A.P.W.*, where a parent is subject to a valid child support order or voluntary support agreement establishing her ability to pay a particular amount, it is not fatal to petitioner's case if the trial court fails to make "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)." *Id.* ¶¶ 42, 44 (alterations in original). Moreover, respondent-mother adduced no evidence that she was incarcerated between 13 March 2019 and 13 September 2019. The record shows that, in addition to attending the 14 March 2019 dispositional hearing, she attended the 27 June 2019 permanency-planning hearing and submitted to drug screens requested by YCHSA on 4 April 2019 and 2 May 2019.

¶ 21 In fact, the evidence further shows that respondent-mother worked during at least part of the six-month period. The trial court substantiated that conclusion with the following findings of fact and conclusion of law:

> 18. . . . [Respondent-mother] indicated she was working in early to mid-March 2019 with a relative. She indicated that work was available to her with an Aunt as well. She further indicated via her testimony that she lacked the motivation to get out and work

> because she didn't have her kids and that if she did she would have [gone] to work. She never made a single voluntary payment towards the support of her children. The only form of payment received was a $642.00 intercept [on 21 July 2020, outside of the six-month range] that was split amongst the children. Her current arrears in support are $534.90 as to [Jack], $535.05 as to [Hannah] and $715.05 as to [Nicole].
>
> . . . .
>
> 20. The Court finds that [respondent-mother] has for a continuous period of more than 6 months immediately preceding the filing of this Motion for Termination of Parental Rights, failed to pay a reasonable portion of each child's cost of care despite having been physically and financially capable of doing so.
>
> . . . .
>
> 3. [YCHSA] has shown by clear, cogent, and convincing evidence that the following grounds exist to terminate the [respondent-mother's] parental rights to the minor children:
>
> . . . .
>
> c. N.C.G.S. [§] 7B-1111(a)(3) in that the minor children are placed in the custody of [YCHSA] and [respondent-mother] has for a continuous period of 6 months immediately preceding the filing of the Motion to Terminate Parental Rights willfully failed to pay a reasonable portion of the cost of care for the minor children although she is physically and financially able to do so.

To the extent respondent-mother does not challenge the trial court's findings of fact, they are binding.

¶ 22 Respondent-mother claims that "no evidence" supports the trial court's statement in finding of fact 18 that she "indicated she was working in early to mid-March 2019 with a relative." However, the Guardian ad Litem's report dated 20 June 2019 and received into evidence at the

27 June 2019 ninety-day review hearing,[2] which was during the statutory period, includes a statement that respondent-mother indicated "she is working part-time in a thrift store owned by her aunt" but is not paying child support. Respondent-mother testified about working for her aunt during the termination hearing, where she stated:

> I had worked with my aunt off and on [in] the past – actually, I've worked with her numerous times since I've been out of jail with her lawn care service and her thrift shop, but it's nothing major. I was only getting paid, like, maybe $200.00 to $300.00 a week, if that.

Thus, the corresponding portions of finding of fact 18 are supported by the evidence, and we accept that respondent-mother worked during the relevant period.

¶ 23 Finally, respondent-mother observes that "no finding relevant to [N.C.G.S. § 7B-1111(a)(3)] includes the language that [she] *willfully* failed to pay support or a reasonable portion of the cost of care." Although the term "willfully" does not appear in the findings pertinent to this adjudication, the trial court's conclusion of law 3(c) expressly states that respondent-mother "has for a continuous period of 6 months immediately preceding the filing of the Motion to Terminate Parental Rights willfully failed to pay a reasonable portion of the cost of care for the minor children although she is physically and financially able to do so."

¶ 24 The location of the trial court's finding of willfulness has no bearing on its efficacy. *In re J.S.*, 374 N.C. 811, 818 (2020). In light of the evidence that respondent-mother signed a voluntary support agreement which she never moved to modify or set aside, that she had some gainful employment during the relevant period, and that she subsequently did not make reasonable payments toward the children's cost of care during the relevant six-month period, we conclude "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)." *In re A.P.W.*, 2021-NCSC-93, ¶ 45.

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2. The trial court took "judicial notice of all orders, court reports, attachments to court reports, and other documents contained in the underlying juvenile files . . . and in so doing consider[ed] the burden of proof under which such documents were accepted into evidence at the time." *See generally In re T.N.H.*, 372 N.C. 403, 410 (2019) ("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.").

III. Conclusion

¶ 25 Because we uphold the trial court's adjudication under N.C.G.S. § 7B-1111(a)(3), we need not review the two remaining grounds found by the court under N.C.G.S. § 7B-1111(a)(1)–(2). Respondent-mother offers no argument regarding the trial court's assessment of the children's best interests at the dispositional stage of the proceeding under N.C.G.S. § 7B-1110(a). The order terminating respondent-mother's parental rights in Jack, Hannah, and Nicole is therefore affirmed.

AFFIRMED.

IN THE MATTER OF K.W.

No. 175A21

Filed 5 November 2021

Termination of Parental Rights—no-merit brief—neglect

The trial court's order terminating a mother's parental rights to her daughter on the grounds of neglect was affirmed where her counsel filed a no-merit brief and the termination order was supported by clear, cogent, and convincing evidence and based upon proper legal grounds.

On writ of certiorari pursuant to N.C.G.S. § 7A-32(b) to review an order entered on 25 February 2021 by Judge Annette W. Turik in District Court, Wayne County. This matter was calendared for argument in the Supreme Court on 30 September 2021 but determined on the record and briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

Delaina Davis Boyd and E.B. Borden Parker for petitioner-appellee Wayne County Department of Social Services.

Neil A. Riemann for appellee Guardian ad Litem.

Edward Eldred for respondent-appellant mother.

BERGER, Justice.

IN RE K.W.

[379 N.C. 255, 2021-NCSC-138]

¶ 1 Respondent, the mother of minor child K.W. (Kate),[1] attempted to appeal from a February 25, 2021 order terminating her parental rights.[2] However, the notice of appeal incorrectly identified the North Carolina Court of Appeals as the court to which the appeal was taken. On our own motion, we grant certiorari.

¶ 2 Respondent's counsel filed a no-merit brief pursuant to Rule 3.1(e) of the North Carolina Rules of Appellate Procedure. We conclude the purported issue addressed by counsel in support of the appeal is meritless and therefore affirm the trial court's order.

¶ 3 Kate was born on December 24, 2007. She had multiple health conditions that were not being addressed by her parents, including cystic fibrosis and end-stage liver disease which required a liver transplant. The family also had issues related to their living arrangement at a local motel and housing stability. The Wayne County Department of Social Services (DSS) filed petitions in February and March 2019 alleging that Kate was a neglected juvenile. DSS obtained custody of the juvenile, and the trial court subsequently adjudicated Kate as a neglected juvenile.

¶ 4 The adjudication order included findings that respondent had (1) tested positive for amphetamine and methamphetamine on the day of the hearing; (2) failed to make necessary appointments for Kate; (3) failed to take Kate to all scheduled appointments; and (4) failed to obtain mental health treatment for Kate. The trial court also determined that respondent had acted inconsistently with her constitutionally protected status "by failing to provide proper care and supervision in a safe home, specifically with regard to unstable housing, substance misuse, [and] unment (sic) medical and educational needs for [Kate]."

¶ 5 In subsequent review and permanency-planning orders, the trial court found that respondent had not submitted to drug tests or complied with Court orders, and that she was "thought to be living underneath an abandoned mobile home." Respondent was ordered to have no contact or visitation with Kate.

¶ 6 DSS filed a petition to terminate respondent's parental rights on June 30, 2020. The petition alleged grounds for termination based on neglect and a willful failure to pay a reasonable portion of the cost of care.

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

2. The petition for termination also sought to terminate the parental rights of Kate's father, but he died shortly after the petition was filed.

¶ 7 A hearing was held on the petition to terminate parental rights on February 4, 2021. The trial court found that grounds existed to terminate respondent's parental rights and that it was in Kate's best interest to terminate parental rights. Specifically, the trial court found:

> 18. That [Kate] was not receiving proper medical care at [the time of the filing of the underlying petition] for her diagnosis of Cystic Fibrosis and Liver Failure among other things.
>
> 19. That [Kate] was placed in foster care where she began to receive the necessary medical care that she needed. She also had mental health issues that were being addressed.
>
> . . . .
>
> 32. That [respondent] has not followed through with her mental health treatment or her substance abuse treatment. . . .
>
> . . . .
>
> 42. That [respondent] does not acknowledge that she was unable to properly care for [Kate's] extensive medical needs while they were living in a motel. She admits that they missed some appointments, reportedly due to car trouble. She has not had a vehicle or a valid driver's license.
>
> 43. That a Child and Family Evaluation completed by Lauren Rockwell, an expert in abused and neglected children, was admitted into evidence. The family participated in that Child and Family Evaluation. The examiner expressed serious concerns about the juvenile receiving proper care, both medically and mentally, when she was with her parents.

The trial court further determined that "neglect is likely to continue based on [respondent's] lack of progress toward improving her situation."

¶ 8 Respondent's appellate counsel states that he has reviewed the record and discussed the case with the Office of the Parent Defender. Counsel subsequently filed a no-merit brief on respondent's behalf under Rule 3.1(e) of the Rules of Appellate Procedure. Counsel for respondent identified one issue that could arguably support an appeal but also stated that in his opinion that the issue lacks merit. Counsel has advised

respondent and provided her with the documents necessary to pursue her appeal. Respondent was appropriately notified of her right to file *pro se* written arguments on her own behalf pursuant to Rule 3.1(e), and she has failed to file a brief or any additional documents with this Court.

¶ 9 This Court conducts an independent review of issues identified by respondent's counsel in a no-merit brief filed under Rule 3.1(e). *In re L.E.M.*, 372 N.C. 396, 402, 831 S.E.2d 341, 345 (2019). We have carefully reviewed the issue identified in the no-merit brief in light of the entire record. We are satisfied that the trial court's order terminating respondent's parental rights was supported by clear, cogent, and convincing evidence and based upon proper legal grounds. Accordingly, we affirm the order terminating respondent's parental rights.

AFFIRMED.

IN THE MATTER OF L.G.G., L.G., AND L.J.G.

No. 458A20

Filed 5 November 2021

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

The trial court properly terminated respondents' parental rights to their three sons on grounds of neglect (N.C.G.S. § 7B-1111(a)(1)) where the court's findings of fact were supported by clear, cogent, and convincing evidence demonstrating that the children had been exposed to domestic violence, substance abuse, and pornography in the home; the children were diagnosed with post-traumatic stress disorder and exhibited behavioral issues, including sexualized behavior between the brothers; respondents completed most of their family case plans but failed to take responsibility for the children's traumas, to address the inappropriate incidents between the children (other than to fervently deny that they happened), or to understand why the children were removed from the home; and, therefore, there was a high likelihood of future neglect if the children were returned to respondents' care.

2. Termination of Parental Rights—best interests of the child—consideration of factors—sufficiency of findings

The trial court did not abuse its discretion in concluding that terminating a father's parental rights to his oldest son was in the child's best interests where the court properly weighed and analyzed the appropriate statutory factors. The court found that the child was highly functioning—despite his autism, attention-deficit/hyperactivity disorder, and aggression problems—and was making progress in therapy while in foster care, the child had an "unhealthy" bond with his parents, the child expressed a desire to be adopted, adoption was not an immediate possibility for the child but was a realistic one, and terminating parental rights would aid in achieving the permanent plan of adoption.

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

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

Michelle FormyDuval Lynch for appellee Guardian ad Litem.

Robert W. Ewing for respondent-appellant mother.

Sean P. Vitrano for respondent-appellant father.

HUDSON, Justice.

¶ 1 Respondents appeal from the trial court's order terminating their parental rights in the minor children L.G.G., L.G., and L.J.G. (Gary, Richard, and John).[1] Because we hold the trial court did not err in concluding grounds existed to terminate respondents' parental rights based on neglect and did not abuse its discretion in determining that termination of respondent-father's parental rights was in Gary's best interests, we affirm.

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

I. Facts and Procedural History

¶ 2 On 23 January 2018, Watauga County Department of Social Services (DSS) filed juvenile petitions alleging that seven-year-old Gary, three-year-old Richard, and two-year-old John were neglected juveniles. The petitions alleged that on or about 22 September 2017, DSS received a report alleging issues of inappropriate discipline and lack of supervision of the children. During the first week of DSS's assessment, respondent-mother called DSS and reported that she and respondent-father had gotten into a fight the night before and that she had left the home. She further reported that the children were in the home during the domestic violence incident but were sleeping. The social worker observed respondents' home to be "in an extreme state of despair and filth."

¶ 3 The family entered into a safety plan on or about 6 October 2017. Respondents agreed to refrain from domestic violence and to clean up their house and the surrounding area. On or about 11 October 2017, DSS transferred the case to In-Home Services finding the family to be in need of continuing services. During the initial visit by the In-Home Services Social Worker on 17 October 2017, "the home was again in a deplorable state." DSS discussed the need for additional services with respondents and they entered into a case plan agreeing to conduct an intake with Daymark Recovery Services for Intensive In-Home Services and to follow all recommendations for treatment.

¶ 4 Respondents missed several of their scheduled intake sessions and ongoing appointments with Daymark. Respondents did not complete their intake appointment until two months after entering into the case plan. Daymark recommended that the family participate in Intensive In-Home Services and that Gary be transferred to a day treatment program "to address his extreme behavioral problems[.]" Respondents did not enroll Gary within the thirty days required under the assessment, and an additional intake session was required in order for any services to be provided. After Daymark was able to initiate their Intensive In-Home Services program, respondents attended their first meeting but failed to schedule another visit.

¶ 5 Gary's elementary school reported that he frequently complained of tooth pain and that it hurt for him to eat. A dental screening on 16 November 2017 at Gary's elementary school revealed that he had several cavities and "required extensive dental work." Respondent-mother did not schedule a dentist appointment or verify that Gary was still on Medicaid for several weeks, and DSS ultimately scheduled the appointment for 20 December 2017. The day before the appointment,

respondent-mother contacted DSS to reschedule the appointment stating that Gary had a Christmas presentation at school the next day and insisted he be allowed to participate. DSS rescheduled the appointment for 2 January 2018. The dental appointment confirmed Gary had multiple cavities and required "extensive treatment." The dentist stated that Gary may need to be hospitalized in order to conduct all of the necessary work. A follow-up appointment was scheduled for 22 January 2018 to begin the dental work. DSS attempted to contact respondent-mother the morning of the appointment to confirm her need for transportation. However, DSS did not receive a response from the family the entire day, and Gary did not attend the appointment.

¶ 6 On 8 February 2018, respondents appeared in court for an adjudicatory hearing on the juvenile petitions. Following an agreement between respondents and DSS, the matter was continued until 1 March 2018 to allow respondents time to demonstrate compliance and engagement in their case plan activities.

¶ 7 After the hearing, respondents allowed their Medicaid insurance to lapse again by failing to provide the Medicaid office with the necessary paperwork, and Gary's 12 February 2018 follow-up dental appointment had to be rescheduled. Respondent-mother rescheduled the appointment for one month later on 5 March 2018. Meanwhile Gary continued to complain of constant teeth pain to his teachers. On 13 February 2018, respondents did not pick up Gary from the school bus, and school personnel were unable to get in contact with them.

¶ 8 On 14 February 2018, DSS took the children into nonsecure custody and filed additional petitions alleging the children to be neglected and dependent juveniles. Following a 17 April 2018 hearing on the juvenile petitions, the trial court entered a consent order on 31 May 2018 adjudicating the children as neglected juveniles. The court ordered respondents to enter into and comply with the components of a case plan requiring them to complete a substance abuse assessment and follow all treatment recommendations; complete a parenting assessment and follow all recommendations; complete parenting classes; secure reliable transportation; maintain safe, stable, appropriate housing; participate in recommended services for the children; meet with DSS to discuss the needs of the children and family; tend to the children's medical and dental needs; and attend visitations. Respondents were granted a minimum of one hour of supervised visitation per week.

¶ 9 The trial court held a review hearing on 14 June 2018. In an order entered 6 August 2018, the court found that respondents were not being

cooperative with DSS or the court; "continued to use methamphetamine and have demonstrated no willingness to deal with that problem[;]" and admitted they would fail drug screens for methamphetamine. The trial court set the primary plan as reunification with a concurrent plan of adoption. Respondents' visitation was suspended until they showed to the satisfaction of DSS that they were making progress with their substance abuse treatment by providing a clean drug screen.

¶ 10 Following a permanency planning hearing held 6 December 2018, the trial court entered an order on 17 January 2019 maintaining the permanent plan of reunification with a secondary plan of adoption finding that the parents had "recently made considerable progress" "after doing essentially nothing for a long period of time[.]"

¶ 11 In its next review order entered 16 April 2019, the trial court found that respondents "seem to be making great effort to comply" with their case plans at times, and "[a]t other times, they appear to be ignoring the requests of DSS and the mandates of [the c]ourt." The court found respondents had missed several drug screens and that respondent-mother tested positive for methamphetamines on or about 7 November 2018 but denied using drugs. Although respondents were attending visitations and behaving appropriately, the court found the children's behaviors had regressed since the visitations had resumed.

¶ 12 On or about July 2019, Gary and Richard reported to their therapist, Robin Spicer, that they had viewed pornography while in respondents' home. Richard also disclosed instances where he observed Gary and John engaging in sexualized behavior with each other. John acknowledged the behavior to Ms. Spicer. Richard later disclosed that he also engaged in the sexual behavior with his brothers. Ms. Spicer testified at the termination hearing that the children's assessment score was "the highest level of these kind of sexualized behaviors" and that the children "had really high symptoms that were off the charts[.]" The children all exhibited sexualized behaviors when they entered foster care. On 31 July 2019, DSS and Ms. Spicer discussed with respondents the recent disclosures by the children. Respondents did not believe the sexual behavior had happened in their home.

¶ 13 In a permanency planning order entered 4 October 2019, the trial court changed the permanent plan to adoption with a secondary plan of guardianship and relieved DSS of further reunification efforts. The trial court found the children's behaviors had further regressed and they "appear to be out of control." Gary became more aggressive towards himself and defiant of his foster parents, Richard began wetting the bed, and

John started showing aggression toward animals in his foster home. The court found that respondents both missed an appointment with the children's therapist; that respondents "have charged out of therapy sessions with the therapists, expressing frustration and doubts about the validity of these therapy sessions"; and that although respondents had made progress in improving the condition of their home, their two bedroom home "would not be adequate to meet the needs of the three Juveniles." The court found that respondents had "failed to do those things which were asked of them in March" and "still deny any responsibility for their actions, blaming the Department and the Court for their difficulties."

¶ 14 On 12 March 2020, DSS filed motions to terminate respondents' parental rights to the children. DSS alleged that grounds existed to terminate respondents' parental rights based on neglect, willfully leaving the children in foster care for more than twelve months without making reasonable progress to correct the conditions that led to the children's removal from the home, and dependency. *See* N.C.G.S. § 7B-1111(a)(1)–(2), (6) (2019). Respondents filed their answers to the motions on 23–24 April 2020.

¶ 15 Following a hearing held 16 and 18 June 2020, the trial court entered an order terminating respondents' parental rights to the children on 13 August 2020. The court concluded that grounds existed to terminate respondents' parental rights based on neglect and willful failure to make reasonable progress and that termination of respondents' parental rights was in the children's best interests. Respondents appealed.

II. Analysis

¶ 16 Respondents challenge the trial court's adjudication that grounds existed to terminate their parental rights to their children. Respondent-father separately challenges the trial court's dispositional determination that terminating his parental rights was in Gary's best interests.

¶ 17 The Juvenile Code provides for a two-stage process for the termination of parental rights: adjudication and disposition. N.C.G.S. §§ 7B-1109, -1110 (2019). At the adjudicatory stage, the petitioner bears the burden of proving by "clear, cogent, and convincing evidence" that one or more grounds for termination exists under N.C.G.S. § 7B-1111(a). N.C.G.S. § 7B-1109(e), (f) (2019). "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[,]" *In re A.U.D.*, 373 N.C. 3, 6 (2019), at which it "determine[s] whether terminating the parent's rights is in the juvenile's best interest." N.C.G.S. § 7B-1110(a) (2019).

A. Adjudication

¶ 18 **[1]** Respondents contend the trial court erred by adjudicating grounds for termination of their parental rights under N.C.G.S. § 7B-1111(a)(1) and (2).

¶ 19 "We review a trial court's adjudication under N.C.G.S. § 7B-1111 'to determine whether the findings are supported by clear, cogent and convincing evidence and the findings support the conclusions of law.' " *In re E.H.P.*, 372 N.C. 388, 392 (2019) (quoting *In re Montgomery*, 311 N.C. 101, 111 (1984)). "Findings of fact not challenged by respondent are deemed supported by competent evidence and are binding on appeal. Moreover, we review only those findings necessary to support the trial court's determination that grounds existed to terminate respondent's parental rights." *In re T.N.H.*, 372 N.C. 403, 407 (2019) (citations omitted). "The trial court's conclusions of law are reviewed de novo." *In re M.C.*, 374 N.C. 882, 886 (2020).

¶ 20 Pursuant to N.C.G.S. § 7B-1111(a)(1), a trial court may terminate parental rights if it concludes the parent has neglected the juvenile within the meaning of N.C.G.S. § 7B-101(15) (2019). N.C.G.S. § 7B-1111(a)(1). Section 7B-101(15) defines a neglected juvenile, in pertinent part, as a juvenile "whose parent, guardian, custodian, or caretaker does not provide proper care, supervision, or discipline; or who has been abandoned; or who is not provided necessary medical care; or who is not provided necessary remedial care; or who lives in an environment injurious to the juvenile's welfare[.]" N.C.G.S. § 7B-101(15).

> 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). "The determinative factors must be the best interests of the child and the fitness of the parent to care for the child at the time of the termination proceeding." *In re Z.V.A.*, 373 N.C. 207, 212 (2019) (citing *In re Ballard*, 311 N.C. at 715).

¶ 21 On appeal, respondents challenge several of the trial court's findings of fact and argue that the remaining findings do not support a conclusion that grounds for termination exist based on neglect under N.C.G.S. § 7B-1111(a)(1). We address only those challenged findings that are necessary to support the court's adjudication of neglect. *See In re T.N.H.*, 372 N.C. at 407.

¶ 22 Respondent-mother first objects to finding of fact 8(sss) in which the court found that "[r]espondents told [child and family therapist Robin Spicer] that they did not feel that the parenting classes they took prior to August 29, 2019 taught them anything new and believed the classes were not helpful to them." Respondent-mother notes she took multiple parenting classes and "testified that she did not learn anything new because the material in [the] second class was [the] same material." However, Ms. Spicer testified respondents reported to her that they had completed their parenting and mental health groups and "they repeatedly stated that they did not learn anything new about parenting and that the groups were not helpful." This testimony supports the trial court's finding of fact 8(sss). *See In re G.G.M.*, 377 N.C. 29, 2021-NCSC-25, ¶18 ("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." (cleaned up)).

¶ 23 Respondent-father challenges the evidentiary support for finding of fact 8(uuu), which states:

> Even after taking additional parenting classes since the August 2019 hearing, during the life of this case, Respondents have failed to take responsibility for their actions, failed to meaningfully engage in therapy to address the reasons their children came into DSS custody and, failed to acknowledge or address the disturbing disclosures made by the Juveniles in therapy – other than to deny them and become combative when they were brought up.

Respondent-father points to his and respondent-mother's testimonies regarding the classes they completed, the therapy they participated in, and their interest in the children's medical diagnoses and communication with the children's therapists.

¶ 24 At the termination hearing, Social Worker Melanie Ellis acknowledged respondents' participation in the components of their case plans but noted they waited for more than a year after the children entered

DSS custody to begin to engage in the case plans. Ms. Ellis also testified respondents never fully acknowledged responsibility and had a significant pattern of denial throughout the case, never admitted to any instances of domestic violence or inappropriate sexual behavior in the home, and have "continued some of the repeated concerns and issues that . . . led to the removal of the children[.]" Ms. Spicer testified that when respondents were informed of the sexual behavior disclosures, respondent-father "was very angry and reactive and agitated and stated that [Ms. Spicer] told [Richard] to make those statements." She further testified that respondent-father neither believed the disclosures nor that the children "had done those things under their supervision in the home[.]" This testimony supports the trial court's findings in finding of fact 8(uuu).

¶ 25 Respondent-father next challenges findings of fact 8(iiii)–(kkkk) pertaining to respondents' progress with their housing. The trial court found that respondents were not able to secure suitable housing and that the suitability of their housing had been a reoccurring issue in the case. The court further found that respondents' two-bedroom home was not adequate to meet the needs of the three boys with a history of boy-to-boy sexual misbehavior and that the therapists "are also of the opinion that it would not be appropriate for [Gary] to share a bedroom and believe that all the boys will need additional and hypervigilant supervision."

¶ 26 Respondent-father argues that respondents took steps to improve the safety and cleanliness of their home and that the home was now suitable to live in. He notes that both he and respondent-mother testified that they would be willing to sleep in another area of the home so the boys would not have to share the same room. Respondent-father asserts that Ms. Spicer testified she had no concerns regarding Richard and John sharing a room, and in regard to Gary, that "families are able to work these situations out but there has to be . . . hypervigilance, especially at night with sleeping so that children who have engaged in improper sexualized behavior are not . . . co-sleeping." Finally, respondent-father asserts that the two other therapists who testified at the hearing "offered no opinions regarding the appropriateness of the home."

¶ 27 Respondents were aware the trial court did not find their two-bedroom home suitable for the three children after the court found in the 4 October 2019 permanency planning order that the two-bedroom home "would not be adequate to meet the needs of the three Juveniles." Yet respondent-father testified at the termination hearing that he believed the two bedrooms in the home would be sufficient. Respondent-father

also testified that he planned to add a third bedroom but did not provide any further explanation regarding his plans or expected time frame for the addition. Additionally, although respondents both testified that they would sleep in a different area of the home so the three children would not have to share a bedroom, respondents did not offer any plan in providing the additional supervision and hypervigilance recommended by Ms. Spicer.

¶ 28 Ms. Spicer testified that respondents "did not feel comfortable acknowledging and talking about like [sic] path forward if the court decided to send the boys back home, where the boys would share a bedroom, that was a point of contention for them as far as like how would they work that out . . . ." Her testimony supports a finding that she is of the opinion that it would not be appropriate for Gary to share a bedroom and that the children "will need additional and hypervigilant supervision." However, respondent-father is correct that the other two therapists at the termination hearing did not express an opinion on the appropriateness of the home. Thus, we disregard finding of fact 8(kkkk) to the extent it indicates that all of the therapists that testified at the hearing are of the opinion that Gary should not share a bedroom and that the children will need additional supervision. *See In re N.G.*, 374 N.C. 891, 901 (2020) (disregarding findings of fact not supported by clear, cogent, and convincing evidence).

¶ 29 Respondents both challenge finding of fact 8(llll) but for different reasons. Finding of fact 8(llll) states:

> Given their continued lack of appreciation, acceptance of responsibility, and the pattern of behavior exhibited by the parents of technically – but not meaningfully – engaging in their case plan, these Juveniles are very likely to be neglected in the future if they are returned to the Respondent Parents.

¶ 30 Respondent-father contends that the finding concerning the likelihood of neglect is speculative and inconsistent with the record. Respondent-father challenges the trial court's characterization of his attitude and actions, arguing that the record establishes that he accepted responsibility for the condition of the home, domestic violence, and his lack of supervision of the children. He asserts that his "completion of his case plan and participation in services even after the change in the permanent plan demonstrated his desire and willingness to do whatever was necessary to regain custody of his children." Thus, he contends the trial court's finding of a likelihood of repetition of neglect is mere speculation. We disagree.

¶ 31 Ms. Ellis testified that respondents had not fully acknowledged responsibility for why the children came into DSS's care. Ms. Spicer testified that respondents never acknowledged "any kind of responsibility for the children's" behavior and that "[t]he only event that [respondents] both acknowledged that could have possibly been negative was the missed dental appointment for [Gary]." This testimony supports the trial court's finding that respondent-father continued to lack an appreciation and acceptance of responsibility.

¶ 32 Additionally, the trial court made the following unchallenged findings of fact:

> [8.]ooo. . . . [W]hen Ms. Spicer attempted to discuss the boys' behaviors with Respondents, especially the disclosures regarding inappropriate sexual behavior, Respondent Father became angry and abruptly left the therapy session yelling [and] creating a scene in Ms. Spicer's office/waiting room. Respondent Mother remained, but Respondent Father returned shortly thereafter to demand that she leave as well. Respondents expressed displeasure with Ms. Spicer, questioned the validity of the therapy and accused Ms. Spicer of telling the Juvenile, [Richard], "to say that" – referring to the disclosures about inappropriate sexual behaviors between the Juveniles.
>
> ppp. Although it is not uncommon for parents of children taken into custody of DSS to feel initial anger and be resistant, the failure by Respondents here to accept responsibility appears heightened and has persisted through the life of the case.
>
> . . . .
>
> vvv. Further, at this termination hearing, over two years since the Juveniles were taken into custody, Respondents' testimony regarding the disclosure by the Juveniles about viewing pornography defies human logic. Respondents have offered conflicting testimony as to the source of the pornography to which the Juveniles were exposed, how it happened and who was to blame.
>
> . . . .
>
> dddd. Respondents completed substantially all of their case plan but, despite their participation, they have

> shown that they have not gleaned sufficient insight into why their three children came into DSS custody.
>
> eeee. When Respondent Mother was asked what trauma, if any, she believed the Juveniles experienced, the only event she acknowledged was the death of the Juveniles' grandmother. Respondent Father also failed to voice an acknowledgment of the traumas about which the Juveniles' therapists testified[.]
>
> ffff. At no point during this termination hearing did Respondent Mother or Respondent Father acknowledge that the Juveniles' diagnoses and behaviors were linked to any inappropriate sexual event/behavior, viewing pornography, domestic violence or substance abuse in the home. This failure on Respondents' part is especially concerning when, according to therapist testimony, the Juveniles' sexualized behaviors were considered "extreme."

These findings demonstrate that respondent-father failed to acknowledge responsibility for his actions and how they affected the children and failed to acknowledge the traumas experienced by the children, and that these failures rendered it difficult for respondent-father to understand how the children's past experiences impact their behavior issues. The unchallenged findings also show that respondent-father failed to acknowledge any responsibility throughout the life of the case. The trial court's findings and the record evidence support the court's finding that the children would likely be neglected if returned to respondents' care.

¶ 33 Respondent-mother challenges as unsupported by the evidence the trial court's statement in finding of fact 8(llll) that she "technically – but not meaningfully – engag[ed] in [her] case plan[.]"Respondent-mother "admits that the evidence in the case shows that [she] did not totally appreciate or accept responsibility for her conduct in this case which resulted in the removal of the children from her home." She argues, however, that her "failure to accept responsibility does not equate to a conclusion that . . . the children would be neglected in the future if they were returned home because of [her] progress with her court ordered case plan."[2] She contends that "[a]lthough [she] has not taken responsibility for her prior conduct, [she] nevertheless has corrected the conditions

2. Respondent-mother also challenges finding of fact 8.mmmm. However, 8.mmmm pertains more to the ground of N.C.G.S. § 7B-1111(a)(2) and is not necessary to support the ground of neglect. Therefore, we do not address this challenge. *See In re T.N.H.*, 372 at 407.

which led to the children's removal" because she has refrained from using illegal drugs, refrained from domestic violence, participated in dialectical behavioral therapy through Daymark, participated in numerous parenting classes, and engaged in appropriate visits with the children.

¶ 34 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)); *see also In re Y.Y.E.T.*, 205 N.C. App. 120, 131 (2010) (acknowledging that "parents must demonstrate acknowledgement and understanding of why the juvenile entered DSS custody as well as changed behaviors"). Here, the trial court found that respondents "completed substantially all of their case plan but, despite their participation, they have shown that they have not gleaned sufficient insight into why their three children came into DSS custody." Respondent-mother does not challenge this finding. Therefore, respondent-mother's argument is without merit. As stated above, the trial court's findings and the record evidence support the trial court's finding that the children would likely be neglected if returned to respondents' care.

¶ 35 Finally, respondents argue the trial court's findings do not support the conclusion that their parental rights were subject to termination based on neglect. Respondents do not challenge the children's prior adjudication of neglect. Rather, they contend that the evidence and findings of fact do not support the trial court's determination that there was a likelihood of future neglect if the children were returned to their care.

¶ 36 Terminating parental rights on the ground of neglect

> requires a showing of neglect at the time of the termination hearing or, if the child has been separated from the parent for a long period of time, there must be a showing of 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. at 841 (2020) (cleaned up).

¶ 37 The children were previously adjudicated neglected on 30 May 2018. The trial court's findings establish that the children were diagnosed with post-traumatic stress disorder and suffered from behavioral issues as a result of the trauma experienced while in respondents' care. The find-

ings also establish that respondents failed to accept responsibility for their actions and for the trauma the children experienced and failed to acknowledge or address the disclosures of inappropriate sexual behavior between the children. Consequently, we conclude the trial court's findings of fact support its conclusion that respondents neglected the children and that there was a high likelihood there would be a repetition of neglect if they were returned to their care. Therefore, the trial court did not err in determining that grounds existed to terminate respondents' parental rights based on neglect under N.C.G.S. § 7B-1111(a)(1). Because the ground of neglect is sufficient to support the trial court's order of termination, we need not address respondents' arguments as to the remaining ground under N.C.G.S. § 7B-1111(a)(2). *In re A.W.*, 377 N.C. 238, 2021-NCSC-44, ¶44.

B. Disposition

¶ 38 **[2]** Respondent-mother does not challenge the trial court's dispositional determination that termination of her parental rights was in the children's best interests. Respondent-father challenges the court's conclusion only with regard to his oldest child, Gary. Respondent-father argues the trial court abused its discretion in determining that termination of his parental rights was in Gary's best interests. We disagree.

¶ 39 If the trial court finds a ground to terminate parental rights under N.C.G.S. § 7B-1111(a), it proceeds to the dispositional stage where it must "determine whether terminating the parent's rights is in the juvenile's best interest" based on the following factors:

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

N.C.G.S. § 7B-1110(a) (2019). Although the trial court must consider all six of the enumerated factors, it is required to enter written findings of fact concerning only those factors that are relevant. *In re A.K.O.*, 375 N.C 698, 704 (2020).

¶ 40 We review the trial court's dispositional findings of fact to determine whether they are supported by the evidence received before the trial court. *See In re J.J.B.*, 374 N.C. 787, 793 (2020). Dispositional findings not challenged by respondent are binding on appeal. *In re Z.L.W.*, 372 N.C. 432, 437 (2019). "The trial court's assessment of a juvenile's best interests at the dispositional stage is reviewed solely for abuse of discretion." *In re A.U.D.*, 373 N.C. 3, 6 (2019). "[A]buse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *In re T.L.H.*, 368 N.C. 101, 107 (2015) (citing *State v. Hennis*, 323 N.C. 279, 285 (1988)).

¶ 41 In determining termination of respondent-father's parental rights was in Gary's best interests, the trial court made the following pertinent findings of fact:

> 10. Disposition. . . . All statutory factors were considered including, but not limited to those discussed below:
>
> . . . .
>
> b. As to [Gary], despite his diagnosis unrelated to trauma – those being Autism and ADHD – [Gary] is highly functioning and has made progress in therapy and while in foster care. He has learned and exhibited better coping skills and a greater awareness of his behaviors ("Why can I be good when I don't see my parents?"). [Gary] does have a bond with Respondent parents because of his age when he came into DSS custody. However, that bond is, in some ways, unhealthy. [Gary] is more concerned about his two younger brothers and shows a greater desire to visit them than he does his parents. [Gary] has viewed himself as the caregiver for the two younger children for too long. He has memories of his relationship with Respondents which are unhealthy. In fact, [Gary] has expressed a desire to be adopted and to not return to Respondents' home. His current placement is a good placement but not an adoptive placement. Adoption, while not an immediate option because he is not in an adoptive placement, is a realistic possibility for him as he continues to show improvement over the next year or two.

> c. The best way this Court can give these Juveniles the opportunity to lead healthy, successful lives is for the Respondents' parental rights to be terminated.
>
> 11. Best Interest/Placement/Visitation. The best interests of the Juveniles would be served by terminating the parental rights of Respondent Mother and Respondent Father in order to achieve the permanency plan of Adoption for the Juveniles. It is also in the Juveniles' best interests that there be no further contact with Respondents.

¶ 42 Respondent-father first challenges as "speculative and unsupported by the evidence" the trial court's finding that adoption was a "realistic possibility" for Gary. Respondent-father argues the evidence showed that Gary was at risk of losing his current foster placement and that his likelihood of adoption was low. Respondent-father specifically points to incidents occurring one week before the termination hearing where the foster parents called the police multiple times, reported that Gary had tried to assault them, and called mobile crisis due to his behavior.

¶ 43 Licensed clinical social worker associate Nicholas Bailey testified regarding the incidents occurring the week before the termination hearing and stated that Gary had an increase in aggression and "[a] moderate regression" in behavior. However, he also testified that "since then, he has actually been doing quite well over the last three to four days" and that the foster mother informed him the morning of the hearing that Gary "was doing quite well." Social worker Ms. Ellis testified that "there was some concern that [Gary] might not be able to remain in that foster home[.]" However, she also testified that Gary's behavior had improved and that his medications had been addressed.

¶ 44 Ms. Ellis testified that although Gary was not in a position for adoption at the time of the hearing and that it was uncertain when he may be in a position to be adopted because "it depend[ed] on his treatment and his continued progress[,]" she also testified that "he's continuing to progress and has – you know, last year, he . . . stepped down to a therapeutic foster home, and he's begun to stabilize." Ms. Ellis testified that she believed it was possible for him to eventually step down from leveled care and find a long-term or adoptive foster home. This testimony supports the trial court's finding that adoption "is a realistic possibility for [Gary] as he continues to show improvement over the next year or two."

¶ 45 Respondent-father does not challenge the remainder of the trial court's findings of fact, and they are binding on appeal. He argues,

however, that the statutory factors do not support the trial court's determination that it was in Gary's best interests to terminate his parental rights because Gary "was nearly ten years old at the time of the hearing, would have remained bonded to his parents but for the trial court's termination of visitation, and had special needs that respondents were prepared to manage."

¶ 46 However, the record and findings of fact demonstrate that the trial court considered the appropriate dispositional factors and "performed a reasoned analysis weighing those factors." *In re Z.A.M.*, 374 N.C. at 101. The court found that Gary was highly functioning despite his diagnoses and was making progress in his treatment and in foster care; that his bond with respondents was "in some ways, unhealthy[;]" that Gary had expressed a desire to be adopted and to not return to respondents; and that termination would aid in achieving the plan of adoption. Although Gary was not in an adoptive placement at the time, "[t]he absence of an adoptive placement for a juvenile at the time of the termination hearing is not a bar to terminating parental rights." *In re A.J.T.*, 374 N.C. 504, 512 (2020); *see also In re C.B.*, 375 N.C. 556, 561 (2020) ("[T]he trial court need not find a likelihood of adoption in order to terminate parental rights."). We conclude the trial court's determination that terminating respondent-father's parental rights was in Gary's best interests was not so manifestly unsupported by reason as to constitute an abuse of discretion.

III. Conclusion

¶ 47 In summary, we conclude the trial court did not err in concluding that grounds existed to terminate respondents' parental rights on the ground of neglect and did not abuse its discretion in determining that termination of respondent-father's parental rights was in Gary's best interests. Respondent-mother did not challenge the trial court's best interests determination, and respondent-father did not challenge the trial court's best interests determination regarding Richard and John. Accordingly, we affirm the trial court's order terminating respondents' parental rights to the children.

AFFIRMED.

IN RE M.E.S.

[379 N.C. 275, 2021-NCSC-140]

IN THE MATTER OF M.E.S.

No. 69A21

Filed 5 November 2021

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

In a private termination of parental rights proceeding, the trial court properly terminated a father's parental rights to his daughter based on the ground of willful abandonment (N.C.G.S. § 7B-1111(a)(7)). Clear, cogent, and convincing evidence supported the court's findings that, prior to the filing of the termination petition and for far longer than the determinative six-month period, the father did not send any cards or gifts to his daughter or make any attempts to contact her directly or through other family members, he did not take any steps to modify a prior custody order in order to secure visitation rights, and he only paid a third of his monthly child support obligation.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from an order entered on 20 November 2020 by Judge Monica M. Bousman in District Court, Wake County. This matter was calendared for argument in the Supreme Court on 30 September 2021 but determined on the record and brief without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

No brief for petitioner-appellee mother.

Mary McCullers Reece for respondent-appellant father.

NEWBY, Chief Justice.

¶ 1 Respondent, the father of M.E.S. (Molly),[1] appeals from the trial court's order terminating his parental rights. After careful review, we affirm.

¶ 2 Molly was born on 7 March 2009. Though respondent and petitioner, Molly's mother, lived together for two brief periods shortly after Molly's birth, they were never married. Despite respondent's presence, petitioner alone attended to Molly's needs during this time.

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

¶ 3 On 18 February 2015, a permanent child custody and support order (Permanent Order) was entered in District Court, Union County. That court found petitioner "has been primarily responsible for attending to [Molly]'s educational, nutritional, housing, shelter, food and healthcare needs" since Molly's birth. On the other hand, it found respondent "suffered from a substance abuse addiction" and "anger control issues." It also found "[t]hat [respondent] has engaged in varying and different episodes of domestic violence against [petitioner] both prior to [petitioner's] pregnancy and during [petitioner's] pregnancy" with Molly. Specifically, on one occasion respondent "took a hammer to [petitioner's] car, and was so impaired at the time that he did not remember doing that until the next morning" when petitioner reminded him. On another occasion, respondent "made [petitioner] get out of an automobile when they were traveling together, and made her walk" in the rain.

¶ 4 Based on these findings, that court concluded petitioner was "a fit and proper person to have the permanent care, custody and control of the minor child." It also concluded respondent was "not a fit and proper person to have visitation with the minor child at th[at] time" because of domestic violence, anger control, and substance abuse issues. Accordingly, the court awarded physical and legal custody of Molly to petitioner. Moreover, it ordered

> [t]hat if [respondent] wishes visitation with the minor child, [respondent] shall have to come to Court and present evidence of anger control management skills, substance abuse assessment, and following through with treatment recommendations. If [respondent] can come to court and show these things, then the Court shall upon proper filing of a Motion to Modify, consider these issues amongst others about whether [respondent] should have visitation with [Molly].

The court also ordered respondent to pay $300.34 per month in child support.

¶ 5 In 2016 respondent saw a therapist at Monarch Behavioral Health. After several sessions, the therapist recommended respondent attend the New Options for Violent Actions (NOVA) group therapy program offered in Mecklenburg County. Respondent attended and completed NOVA in 2016. Respondent also testified he had six or seven negative drug tests at the McLeod Center by 2018. At the termination hearing, respondent introduced into evidence negative results from an additional drug test that occurred on 16 September 2019.

¶ 6 Four years after the entry of the Permanent Order, on 31 May 2019, petitioner filed a petition to terminate respondent's parental rights in District Court, Wake County. The petition alleged that respondent had "willfully and intentionally abandoned the minor child for at least six (6) consecutive months immediately preceding the filing of this petition and ha[d] forgone [sic] all his parental duties." *See* N.C.G.S. § 7B-1111(a)(7) (2019) (willful abandonment of the juvenile for at least six consecutive months preceding the filing of the petition). The petition also alleged that respondent "willfully fail[ed] without justification to pay for any of the care, support, and education of the minor child." *See* N.C.G.S. § 7B-1111(a)(4) (willful failure to pay for the care, support, and education of the juvenile pursuant to a custody agreement).

¶ 7 On 20 November 2020, the trial court entered an order determining that grounds existed to terminate respondent's parental rights pursuant to, *inter alia*, N.C.G.S. § 7B-1111(a)(4) and (7).[2] The trial court further concluded that it was in Molly's best interests that respondent's parental rights be terminated. Accordingly, the trial court terminated respondent's parental rights. Respondent appeals.

¶ 8 On appeal respondent contends the trial court erred by concluding a ground existed to terminate his parental rights based on willful abandonment. Respondent argues the trial court's findings of fact were not supported by clear, cogent, and convincing evidence and those findings do not support the conclusions of law. Respondent also argues he did not exhibit the requisite willful intent to abandon Molly. Finally, respondent argues the trial court improperly terminated his parental rights under N.C.G.S. § 7B-1111(a)(4).

¶ 9 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). The

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2. The trial court also stated it was terminating respondent's parental rights under N.C.G.S. § 7B-1111(a)(1) (neglect). In the petition for termination, however, there was no language mirroring the statutory ground of neglect. Additionally, when asked during argument on respondent's motion to dismiss whether the petition alleged any grounds other than N.C.G.S. § 7B-1111(a)(4) and (7), petitioner's counsel responded, "No." *See In re B.L.H.*, 190 N.C. App. 142, 147, 660 S.E.2d 255, 257 (stating that "the factual allegations in the petition [must] give the respondent sufficient notice of the ground" for the trial court to terminate parental rights on that ground), *aff'd per curiam*, 362 N.C. 674, 669 S.E.2d 320 (2008); N.C.G.S. § 7B-1104(6) (2019). Notably, respondent has not challenged this ground for termination in his brief to this Court. Nonetheless, because we hold the trial court properly terminated respondent's parental rights under N.C.G.S. § 7B-1111(a)(7), we do not address this ground.

petitioner bears the burden at the adjudicatory stage of proving by "clear, cogent, and convincing evidence" the existence of one or more grounds for termination under subsection 7B-1111(a) of our General Statutes. N.C.G.S. § 7B-1109(f). We review a trial court's adjudication "to determine whether the findings are supported by clear, cogent and convincing evidence and the findings support the conclusions of law." *In re Montgomery*, 311 N.C. at 111, 316 S.E.2d at 253 (citing *In re Moore*, 306 N.C. 394, 404, 293 S.E.2d 127, 133 (1982)). Unchallenged findings of fact "are deemed supported by competent evidence and are binding on appeal." *In re T.N.H.*, 372 N.C. 403, 407, 831 S.E.2d 54, 58 (2019) (citing *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991)). We review only those findings necessary to support the trial court's conclusion that a ground existed to terminate parental rights. *In re B.C.B.*, 374 N.C. 32, 38, 839 S.E.2d 748, 753 (2020) (citing *In re T.N.H.*, 372 N.C. at 407, 831 S.E.2d at 58–59).

¶ 10 Here the trial court concluded that a ground existed to terminate respondent's parental rights based on willful abandonment. A trial court may terminate parental rights when "[t]he parent has willfully abandoned the juvenile for at least six consecutive months immediately preceding the filing of the petition." N.C.G.S. § 7B-1111(a)(7). In this case, the determinative six-month period is from 30 November 2018 to 31 May 2019. "[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) (citing *In re Davison's Adoption*, 44 N.Y.S. 2d 763 (1943)). "As used in N.C.G.S. § 7B-1111(a)(7), abandonment requires a 'purposeful, deliberative and manifest willful determination to forego all parental duties and relinquish all parental claims to [the child].' " *In re I.R.M.B.*, 377 N.C. 64, 2021-NCSC-27, ¶ 15 (alteration in original) (quoting *In re A.G.D.*, 374 N.C. 317, 319, 841 S.E.2d 238, 240 (2020)). "The existence of willful intent 'is an integral part of abandonment' and is determined according to the evidence before the trial court." *Id.* (quoting *Pratt*, 257 N.C. at 501, 126 S.E.2d at 608). "[A]lthough the trial court may consider a parent's conduct outside the six-month window in evaluating a parent's credibility and intentions, the 'determinative' period for adjudicating willful abandonment is the six consecutive months preceding the filing of the petition." *In re B.C.B.*, 374 N.C. at 36, 839 S.E.2d at 752 (quoting *In re N.D.A.*, 373 N.C. 71, 77, 833 S.E.2d 768, 773 (2019)). In support of its conclusion that respondent willfully abandoned Molly, the trial court made the following findings of fact:

32. At no time since entry of the Permanent Order has a Motion to Modify been filed by either party in Union County District Court File No. 11CVD2655 and at no time has a subsequent order been issued regarding the custody or child support of the minor child.

. . . .

44. Respondent testified that between the entry of the Permanent Order and the filing of the petition he purchased gifts for the minor child but did not deliver them to her.

45. Respondent's mother delivered gifts from herself to the child on several occasions to the [p]etitioner's parents' house. The last delivery of any gifts was in 2016. The gifts were not substantial nor regular.

46. Prior to the petition being filed, [r]espondent not once sent a card to the minor child. The Permanent Order did not order no contact or include any language preventing the [r]espondent from sending gifts or cards yet he chose not to do so.

47. Prior to the Petition being filed, [r]espondent last saw the minor child in June 2012. This was prior to the Union County Court ordering no visitation in the Permanent Order.

48. Although the Permanent Order failed to establish visitation with the minor child, the court order put in place steps for the [r]espondent to take should he desire visitation with the minor child.

49. At no time since entry of the Permanent Order has [r]espondent filed a Motion to Modify or made any filings in the Union County custody action.

. . . .

55. Petitioner changed her phone number in or around 2012 and did not inform the [r]espondent.

56. Petitioner had two email addresses at the time she and [r]espondent stopped communicating with one another. Respondent knew both of those email addresses which are still active email addresses.

Petitioner did not receive any emails or inquiries from [r]espondent since at least 2013. She did not block [r]espondent from her emails. Respondent testified he assumed the email addresses were no longer used but admitted he did not send any emails.

. . . .

58. Respondent has had knowledge of [p]etitioner's step-father's address but has failed to send any cards or gifts for the child to that address.

. . . .

60. Although the Permanent Order did not prevent [r]espondent from having contact with the minor child by means other than visitation, at no point since June 2012 until the date petition filed [sic] had the [r]espondent sent a gift, a card, a message through a third party, or any other form of communication to the child.

61. Since June 2012 until the date the Petition was filed, [r]espondent at no time emailed [p]etitioner, called [p]etitioner, or contacted [p]etitioner through a third party. Respondent had sufficient information regarding an attempt to contact other family of [p]etitioner as well as the email addresses of [p]etitioner that could have demonstrated his love, care, and affection for the child. Respondent made no such attempts. His testimony that he "loves her", "misses her", and "thinks about her everyday" has not been demonstrated in any of his actions since he last saw her. His lack of attempts to contact [p]etitioner or her family members demonstrates that he willfully withheld his love, care, and affection from the child and that he abandoned the child.

. . . .

64. Respondent has willfully abandoned the juvenile for at least six consecutive months immediately preceding the filling of this petition or motion in that he has failed to have any visitation or to seek visitation through the existing custody action, made no attempt

> to have any contact with the minor child, or make any inquiries regarding her welfare since June 2012.

¶ 11 Respondent argues that portions of findings of fact 46, 58, 60, 61, and 64 are unsupported by the evidence. Specifically, respondent argues the trial court erred by finding that he "never tried to send Molly gifts, even by way of third parties." We review each finding in turn.

¶ 12 Respondent argues finding of fact 46 is erroneous because it states respondent "chose not to" send Molly a gift. At the termination hearing, respondent and his mother testified that respondent gave his mother gifts to send to Molly through petitioner's family members. The evidence, however, does not demonstrate whether these gifts were from respondent or respondent's mother. The trial court found the gifts delivered to Molly were from respondent's mother. In doing so, the trial court weighed the evidence and determined that the testimony stating the gifts were from respondent was not credible. *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). Therefore, the trial court did not err and finding of fact 46 is binding on appeal.

¶ 13 Respondent argues findings of fact 58 and 60 are also erroneous because those findings state he did not send a gift to Molly. We reject these challenges for the reasons stated above. Finally, finding of fact 61 concerns respondent's attempts to contact petitioner or petitioner's family members about Molly; this finding does not mention whether respondent sent a gift. Respondent makes no challenge relevant to finding of fact 61. Thus, finding of fact 61 is binding on appeal.[3] *See In re T.N.H.*, 372 N.C. at 407, 831 S.E.2d at 58 ("Findings of fact not challenged by respondent are deemed supported by competent evidence and are binding on appeal." (citing *Koufman*, 330 N.C. at 97, 408 S.E.2d at 731)).

¶ 14 Respondent next argues finding of fact 54 was not supported by clear, cogent, and convincing evidence. Respondent challenges finding of fact 54 "to the extent [it] might be construed as an affirmative finding that [respondent] had the financial means or the legal ability to succeed

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3. Respondent also challenges finding of fact 64 to the extent it found respondent never sent a gift to Molly. In finding of fact 64, the trial court found respondent willfully abandoned Molly because he failed to have or seek visitation and made no attempt to contact Molly or inquire about her welfare since June of 2012. Whether respondent willfully abandoned Molly is a conclusion of law. *See In re S.C.L.R.*, 2021-NCSC-101, ¶ 27 (treating determination of willful abandonment as a conclusion of law). As such, we include this finding under our discussion of respondent's challenge to the trial court's conclusion that respondent willfully abandoned Molly.

in modifying" the Permanent Order. Respondent, however, does not challenge finding of fact 32 or 49, which both state that neither party has filed a motion to modify the child custody order. Therefore, these findings are binding on appeal. *See id.* Regardless of whether respondent had the financial means or legal ability to succeed, these findings are sufficient to establish respondent did not attempt to seek visitation with Molly during the relevant six-month timeframe.[4]

¶ 15 The trial court's findings of fact support its conclusion that respondent's parental rights were subject to termination based on willful abandonment. Here the findings show that respondent last saw Molly in June of 2012. In the Permanent Order, entered almost three years later in 2015, respondent was not awarded visitation due to domestic violence, anger control, and substance abuse issues. That order, however, also outlined the steps respondent could take to receive visitation. Throughout 2016, respondent took some steps to address these issues, including individual and group therapy. By 2018, however, respondent stopped addressing these issues. Despite taking these steps, respondent never attempted legal action to modify the Permanent Order to allow visitation.

¶ 16 Additionally, the trial court found the Permanent Order "did not prevent [r]espondent from having contact with the minor child," and respondent knew how to contact petitioner or her family such that he "could have demonstrated his love, care, and affection for the child." Nonetheless, respondent did not attempt to contact petitioner or Molly, nor did he send Molly a gift or card. Moreover, from 2018 until the petition was filed, respondent never paid more than a third of his monthly child-support obligation. Because these findings considered as a whole show respondent willfully abandoned Molly, the trial court properly terminated respondent's parental rights pursuant to N.C.G.S. § 7B-1111(a)(7).

¶ 17 Respondent also argues the trial court erred in terminating his rights under N.C.G.S. § 7B-1111(a)(4). Because we conclude the trial court properly terminated respondent's parental rights based on N.C.G.S. § 7B-1111(a)(7), we do not address respondent's remaining arguments. *See In re Moore*, 306 N.C. at 404, 293 S.E.2d at 132 (holding that an appealed order should be affirmed when any one of the grounds found by the trial court is supported by findings of fact based on clear, cogent, and

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4. Respondent also argues the trial court erred by considering evidence outside the record by " 'Googling' [petitioner]'s address to see whether [respondent] could have located [petitioner] to make direct contact with Molly." Even assuming this extraneous research was improper, as discussed, the findings as a whole support the trial court's decision to terminate respondent's parental rights under N.C.G.S. § 7B-1111(a)(7).

convincing evidence); *see also* N.C.G.S. § 7B-1111(a) ("The court may terminate the parental rights upon a finding of one or more [grounds for termination.]"). Thus, we affirm the trial court's order terminating respondent's parental rights.

AFFIRMED.

IN THE MATTER OF N.C.E. AND N.D.C.

No. 366A20

Filed 5 November 2021

Termination of Parental Rights—best interests of the child—statutory factors—proposed placement with relatives

The trial court did not abuse its discretion in concluding that termination of a mother's parental rights to her two sons was in the children's best interests, where the court properly considered and made sufficient factual findings regarding the statutory dispositional factors, including the relationship between the children and the proposed permanent placements (N.C.G.S. § 7B-1110(a)(5)). The court properly rejected the maternal grandmother and the maternal great-grandparents as permanent placements for the children based on findings supported by competent evidence, and—although the availability of a relative placement can be a "relevant consideration" under section 7B-1110(a)(6)—section 7B-1110 did not require the court to prioritize placing the children with relatives over non-relatives.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from orders entered on 29 April 2020 by Judge Meader W. Harriss III in District Court, Pasquotank County. This matter was calendared for argument in the Supreme Court on 30 September 2021 but determined on the record and briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

Frank P. Hiner IV for petitioner-appellee Pasquotank County Department of Social Services.

Chelsea K. Barnes for appellee Guardian ad Litem.

Robert W. Ewing for respondent-appellant mother.

HUDSON, Justice.

¶ 1 Respondent-mother appeals from the trial court's orders terminating her parental rights to N.C.E. (Nathan) and N.D.C. (Nick).[1] Because we hold the trial court did not abuse its discretion by concluding that it was in Nathan's and Nick's best interests to terminate respondent-mother's parental rights, we affirm the trial court's orders.

I. Factual and Procedural Background

¶ 2 During a thunderstorm on the evening of 18 August 2018, respondent-mother left then twenty-month-old Nathan on the front porch of the maternal grandmother's temporary residence. After leaving, respondent-mother called the maternal grandmother to let her know that Nathan was on the porch and that respondent-mother would be back to pick him up in the morning. The maternal grandmother reported this incident to the Elizabeth City Police Department.

¶ 3 A law enforcement officer and a social worker with the Pasquotank County Department of Social Services (DSS) responded to the maternal grandmother's residence. The maternal grandmother was unable to provide respondent-mother's location or the location of Nathan's younger brother, Nick, and respondent-mother did not respond to attempts to contact her. The social worker initiated a Child Protective Services investigation and determined that neither the maternal grandmother nor the children's maternal aunt (with whom the maternal grandmother was residing) were willing or able to provide care for Nathan on an ongoing basis.

¶ 4 On 20 August 2018, after learning that DSS had opened an investigation, Nick's purported paternal grandmother brought him to DSS. The purported paternal grandmother stated that she often cared for Nick. The next day, respondent-mother and Nick's purported paternal grandmother reported to DSS along with several other parties. A domestic incident occurred at the agency which resulted in a law enforcement officer taking respondent-mother into custody, whereupon she requested that DSS take custody of Nathan and Nick.

¶ 5 On 22 August 2018, DSS filed separate juvenile petitions in District Court, Pasquotank County, alleging that Nathan and Nick were neglected

1. Pseudonyms are used to protect the identity of the juveniles.

and dependent juveniles. On 17 October 2018, the trial court entered an adjudication order concluding that Nathan and Nick were neglected and dependent juveniles. *See* N.C.G.S. § 7B-101(9), (15) (2019). In a disposition order entered the same day, the trial court ordered that respondent-mother participate in a Parenting Capacity Evaluation and follow all recommendations, participate in outpatient mental health counseling/therapy addressing anger management and parenting education, secure employment and stable independent housing, keep all scheduled visitations with her children, maintain weekly contact with DSS regarding her whereabouts, and meet with a social worker monthly. The trial court allowed respondent-mother two hours of weekly supervised visitation with the children. The trial court granted DSS custody and placement authority over the children and ordered DSS to place the children in a licensed foster home or other court-approved placement.

¶ 6 On 18 December 2018, the matter came on for a ninety-day review hearing. In the resulting order entered on 30 January 2019, the trial court ordered that DSS continue to provide for and arrange placement of the children in a licensed foster home or any other home approved by the court.

¶ 7 On 24 May 2019, the trial court entered a permanency-planning order. The trial court set the permanent plan for the children as reunification with a concurrent plan of custody with a relative or court-approved caretaker. The trial court also ordered that if respondent-mother "ha[d] not done the items ordered [by the next review hearing], [DSS] shall recommend changing the permanent plan to adoption." The matter came on for review on 27 August 2019. In its 10 October 2019 permanency-planning order, the trial court set the permanent plan for the children as adoption and the concurrent plan as reunification. The trial court ordered DSS to file a petition to terminate respondent-mother's parental rights.

¶ 8 On 3 December 2019, DSS filed separate petitions for termination of respondent-mother's parental rights in Nathan and Nick. With respect to each child, DSS alleged that respondent-mother had neglected the children within the meaning of N.C.G.S. § 7B-1111(a)(1); willfully left the children in foster care or placement outside the home for more than twelve months without showing to the satisfaction of the court that reasonable progress under the circumstances had been made in correcting those conditions which led to the children's removal within the meaning of N.C.G.S. § 7B-1111(a)(2); and for a continuous period of six months next preceding the filing of the petition to terminate her parental rights, willfully failed to pay a reasonable portion of the children's cost of care

in DSS custody although physically and financially able to do so within the meaning of N.C.G.S. § 7B-1111(a)(3).

¶ 9 On 11 March 2020, the trial court conducted an adjudication hearing on DSS's petitions to terminate respondent-mother's parental rights in Nathan and Nick. On 29 April 2020, the trial court entered orders adjudicating grounds for termination of respondent-mother's parental rights and concluded that as alleged by DSS, grounds existed under N.C.G.S. § 7B-1111(a)(1), (2), and (3).

¶ 10 On 23 March 2020, the trial court conducted a disposition hearing. It concluded that termination of respondent-mother's parental rights was in the best interests of Nathan and Nick. Accordingly, in orders entered 29 April 2020, the trial court terminated respondent-mother's parental rights in both children. Respondent-mother appeals.

II. Analysis

¶ 11 Respondent-mother does not contest the trial court's adjudication of grounds to terminate her parental rights under N.C.G.S. § 7B-1111(a)(1)–(3). She confines her appeal to challenging the trial court's dispositional determination under N.C.G.S. § 7B-1110(a), that it was in the children's best interests to terminate her parental rights.

¶ 12 At the disposition stage of a termination-of-parental-rights proceeding, the trial court must "determine whether terminating the parent's rights is in the juvenile's best interest[s]." N.C.G.S. § 7B-1110(a) (2019). In making its determination,

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

> (5) The quality of the relationship between the juvenile and the proposed adoptive parent, guardian, custodian, or other permanent placement.
>
> (6) Any relevant consideration.

Id. "Although the trial court must consider each of the factors in N.C.G.S. § 7B-1110(a), written findings of fact are required only 'if there is conflicting evidence concerning the factor, such that it is placed in issue by virtue of the evidence presented before the district court.' " *In re G.G.M.*, 377 N.C. 29, 2021-NCSC-25, ¶ 22 (quoting *In re A.R.A.*, 373 N.C. 190, 199 (2019)).

¶ 13 "The trial court's dispositional findings of fact are reviewed under a 'competent evidence' standard." *In re A.J.T.*, 374 N.C. 504, 508 (2020) (quoting *In re K.N.K.*, 374 N.C. 50, 57 (2020)). "We are likewise bound by all uncontested dispositional findings." *In re E.F.*, 375 N.C. 88, 91 (2020) (citing *In re Z.L.W.*, 372 N.C. 432, 437 (2019)). We review a trial court's assessment of a juvenile's best interests only for abuse of discretion. *In re A.R.A.*, 373 N.C. at 199. "Under this standard, we defer to the trial court's decision unless it is 'manifestly unsupported by reason or one so arbitrary that it could not have been the result of a reasoned decision.' " *In re J.J.B.*, 374 N.C. 787, 791 (2020) (quoting *In re Z.A.M.*, 374 N.C. 88, 100 (2020)).

¶ 14 As an initial matter, we note the trial court entered separate disposition orders for Nathan and Nick, with substantially similar, if not identical, findings of fact. In addressing respondent-mother's challenges to specific findings of fact, we will quote from the "Disposition Order for Termination of Parental Rights" in Nathan's case.

¶ 15 In both of its disposition orders, the trial court made findings of fact correlating to each of the statutory criteria in N.C.G.S. § 7B-1110(a)(1)–(5). Addressing N.C.G.S. § 7B-1110(a)(1) and (2), the trial court noted Nathan's and Nick's ages and found the likelihood of their adoption "extremely high" due to their ages, health, and personalities. Addressing N.C.G.S. § 7B-1110(a)(3), the trial court found that termination of parental rights was necessary to accomplish the permanent plan of adoption. Addressing N.C.G.S. § 7B-1110(a)(4), the trial court found that "no bond" existed between respondent-mother and either child. Addressing N.C.G.S. § 7B-1110(a)(5), the trial court found that because neither child was in an adoptive placement, "there [was] no information on the quality of the relationship between [the children] and the proposed adoptive parent[s]." As respondent-mother does not challenge these findings, they are binding on appeal. *See In re E.F.*, 375 N.C. at 91.

A. Sufficiency of findings under N.C.G.S. § 7B-1110(a)(5)

¶ 16 Respondent-mother first argues that the trial court failed to make additional findings of fact required by N.C.G.S. § 7B-1110(a)(5) to address the quality of the relationship between the children and the permanent placements proposed by respondent-mother, specifically the children's maternal grandmother and maternal great-grandparents.

¶ 17 Although respondent-mother did not attend the disposition hearing, the transcript and the trial court's findings show that the maternal grandmother testified and offered herself as a permanent placement for the children. However, the record provides no indication that the maternal great-grandparents were proposed as a placement option during the termination proceedings. Moreover, while the maternal grandmother sought to be considered as a permanent placement, a review of the record reveals no conflict in the evidence regarding the quality of her relationship with Nathan or Nick. Therefore, the trial court did not err by failing to make written findings on this issue under N.C.G.S. § 7B-1110(a)(5). *See In re A.R.A.*, 373 N.C. at 199.

B. Accuracy of findings under N.C.G.S. § 7B-1110(a)(6)

¶ 18 Respondent-mother next argues that "the trial court's findings of fact which held the maternal great-grandparents and maternal grandmother were not appropriate placement providers for the children were not supported by . . . competent evidence." She further contends that "[t]he competent evidence supports a finding that the children's placement with the maternal great grandparents and the maternal grandmother [is] appropriate."

¶ 19 Although the availability of a relative placement is not among the specific dispositional factors set forth in N.C.G.S. § 7B-1110(a)(1)–(5), we have held the trial court "may treat the availability of a relative placement as a 'relevant consideration' " under N.C.G.S. § 7B-1110(a)(6). *In re S.D.C.*, 373 N.C. 285, 290 (2020). "[T]he extent to which it is appropriate to do so in any particular proceeding [is] dependent upon the extent to which the record contains evidence tending to show whether such a relative placement is, in fact, available." *Id.*

¶ 20 Here, respondent-mother challenges the following findings as unsupported by the evidence: the trial court had previously denied respondent-mother's request to place the children with the maternal great-grandparents at the ninety-day review hearing on 18 December 2018; the maternal grandmother believed respondent-mother was a "good mother" and blamed others for the children being in DSS custody;

and the trial court received "scant evidence" about the quality of care the children would receive if placed with their maternal relatives.

¶ 21 With regard to the finding that the trial court had declined to place the children with the maternal great-grandparents at the ninety-day review hearing, DSS Social Worker Dale Corbin testified during the termination hearing about the assessment conducted with the maternal great-grandparents as a potential placement option. At the time of the initial kinship assessment on 29 August 2018, the maternal great-grandparents' 48-year-old son, who has a "criminal background," was living in the home. DSS's concerns are also reflected in the trial court's findings in the 30 January 2019 ninety-day review order.[2] The maternal great-grandparents made the following disclosures to Social Worker Corbin at a meeting on 29 November 2018:

> [The maternal great-grandmother] stated they could not have the children placed in their home as neither she nor her husband were capable of caring for the children, given [Nathan] being a very active child and needing to be watched constantly. [The maternal great-grandparents] advised they know what would happen if the children were placed with them citing that neither [respondent-mother] nor their maternal grandmother . . . would do anything. [The maternal great-grandmother] stated that neither [the maternal grandmother] nor [respondent-mother] "want the children" and were not going to do what they are supposed to do to get the children back. . . . Further, [the maternal great-grandmother] advised the children would just be left with them and they could not care for them full time. [She] stated she feels better knowing the children are currently being cared for and are safe where they were.

The trial court also found that the maternal great-grandmother had contacted Social Worker Corbin on 3 December 2018 in an attempt to disavow these statements, explaining that respondent-mother and the maternal grandmother "were very upset and angry with her and [the maternal great-grandfather] for telling Social Worker Corbin that they could not care for the children" and claiming that "she and her

2. The trial court took judicial notice of all orders entered in the underlying juvenile proceedings.

husband wanted the children brought to her home to stay." However, Social Worker Corbin believed the maternal great-grandparents had been "upfront, honest and not hesitant in advising of their situation" on 29 November 2018.

¶ 22 Although the ninety-day review order did not expressly reject the maternal great-grandparents' request to serve as a placement for Nathan and Nick, the order maintained the children in DSS custody and directed DSS to continue to arrange for their placement "in a licensed foster home or . . . any other home or facility approved by the Court." Given the order's findings and Social Worker Corbin's testimony at the disposition hearing, one could reasonably infer that the trial court had deliberately chosen not to place the children with the maternal great-grandparents at the prior hearing in December 2018. We further conclude that any error in this dispositional finding is harmless, inasmuch as the maternal great-grandparents were not proposed as a placement option for the children at the time of the termination hearing. *See In re E.F.*, 375 N.C. at 94.

¶ 23 The trial court's findings that the maternal grandmother believed respondent-mother to be a "good mother" and assigned blame "to everyone except her daughter" are fully supported by the maternal grandmother's testimony at the disposition hearing. Respondent-mother argues the trial court's findings misconstrue this testimony, noting the maternal grandmother's qualification that she did not agree with the way respondent-mother had been "handling things" and that respondent-mother is a good mother in "some aspects." However, the transcript reflects the maternal grandmother testified that "[w]hen I say she's a good mother, she loves her children. She—she was never abusive to them or, you know, anything that would rule you out as a good mother. She just was a good mother in general."

¶ 24 As for the maternal grandmother assigning blame to people other than respondent-mother for the children remaining in DSS custody, the maternal grandmother testified that the children's relatives had asked DSS to be a kinship placement for the children but were refused "because of little things . . . little stuff" despite her assurance to Social Worker Corbin that "whatever h[e] and DSS needed us to do we would do it." The maternal grandmother repeatedly expressed her frustration that respondent-mother and her family were being held to an unrealistic standard of perfection in being denied custody of the children. She characterized the court proceedings as "a mess[,]" "ridiculous[,]"and "unnecessary[,]" and insisted the children should be with their family rather than in foster care. While acknowledging she had disapproved

of respondent-mother's past behavior, the maternal grandmother explained that

> her problem—her issue is is that she's young and some of the things that she wanted to do were just not appropriate for you having two children at the time. Some things that I didn't agree with. Maybe hanging out a little bit and things like that and I'm having to babysit. Things that can be fixed. Nothing like she was abusive or—or on drugs or anything out of the way like that.

Because the trial court's findings fairly characterize the maternal grandmother's testimony, we overrule respondent-mother's challenge. *See In re A.J.T.*, 374 N.C. at 508.

¶ 25 Competent evidence also supports the trial court's findings that it received "scant" evidence about the quality of care that the maternal grandmother could provide the children. In contesting these findings, respondent-mother asserts the trial court previously found the maternal grandmother's home to be a "perfect" placement for Nathan in its initial disposition order entered following the children's adjudication as neglected and dependent juveniles in October 2018. Having reviewed the trial court's 17 October 2018 disposition order we find respondent-mother's argument unpersuasive.

¶ 26 The finding cited by respondent-mother states as follows:

> 32. [The maternal grandmother] testified that she called [DSS] and reported her daughter because . . . [she] was not taking her parenting seriously. . . . [The maternal grandmother] believes [respondent-mother] gets the seriousness of it now. In the past [the maternal grandmother] has been a placement provider for the children. [Nathan] has always been with her and [maternal grandmother] can handle [Nathan]'s behavioral problems. [*The maternal grandmother*]*'s home is the perfect place for* [*Nathan*] *to be placed*. [The maternal grandmother] wants both of the children out of foster care and placed with her and/or her mother[, the maternal great-grandmother].

Fairly construed, this finding merely summarizes the maternal grandmother's testimony and does not reflect the trial court's own assessment that her residence is "perfect" for Nathan. As respondent-mother does

not direct our attention to any other evidence probative of the quality of care the maternal grandmother could provide the children, we reject respondent-mother's challenge to the trial court's findings of "scant" evidence on the subject. *See In re A.J.T.*, 374 N.C. at 508.

¶ 27 To the extent respondent-mother separately contends there is competent evidence to support a finding that the maternal grandmother or maternal great-grandmother would be an appropriate placement for the children, we find no merit to her contention. "Although the question of the sufficiency of the evidence to support the findings may be raised on appeal, our appellate courts are bound by the trial courts' findings of fact where there is some evidence to support those findings, even though the evidence might sustain findings to the contrary." *In re Montgomery*, 311 N.C. 101, 110–11 (1984) (citation omitted).

¶ 28 The trial court heard no evidence the maternal great-grandmother was willing or able to provide a permanent home for the children. *See In re E.F.*, 375 N.C. at 94. Moreover, although the maternal grandmother testified about her own willingness and ability to care for the children, it was the trial court's role as fact-finder "to pass upon the credibility of the witnesses and the weight to be given their testimony and the reasonable inferences to be drawn therefrom." *In re A.R.A.*, 373 N.C. at 196 (cleaned up). The trial court expressly found that

> It would not be in the best interest of the minor child[ren] to be placed with either [the maternal grandmother] or [the maternal aunt]. The Court was able to observe them during their testimony and hear the tone in which they spoke. They both believe that [respondent-mother] is a good mother in spite of the facts made known in the termination of parental rights proceeding, the fact that [respondent-mother] was not at the hearing, and the fact that her child[ren do] not have a bond with her. Amongst other things, this Court is concerned with their judgment and especially their ability to provide a safe and nurturing environment for [the children], especially at [their] tender age[s].

Respondent-mother's exception is overruled.

C. The best interests determination under N.C.G.S. § 7B-1110(a)

¶ 29 Finally, respondent-mother claims the trial court abused its discretion by concluding it was in Nathan's and Nick's best interests to

terminate her parental rights. She contends the trial court failed to follow a statutory preference for placing children with relatives over non-relatives when children are removed from the parent's home. Respondent-mother cites N.C.G.S. §§ 7B-900 and 7B-903(a1) under Article 9, which governs dispositions in abuse, neglect, and dependency proceedings, as an example of this preference. *See In re S.D.C.*, 373 N.C. at 290 (citing N.C.G.S. §§ 7B-903(a1) and 7B-906.1(e)(2) for the proposition that "[a] trial court is required to consider whether a relative placement is available for a juvenile in deciding the issues raised in an abuse, neglect, and dependency proceeding"). *But cf. id.* ("[T]he trial court is not expressly directed to consider the availability of a relative placement in the course of deciding a termination of parental rights proceeding . . . ."). Respondent-mother further notes that custody with a relative or court-approved caretaker was designated as the children's concurrent permanent plan throughout the underlying juvenile proceedings. Because "[t]he trial court did not adequately evaluate the appropriateness of [the] maternal relatives' placement" proposed by [the] maternal grandmother at the termination hearing, respondent-mother argues the court "failed to make [a] reasoned decision" about the children's best interests.

¶ 30 It is true that Article 9 of the Juvenile Code—which governs dispositions entered in ongoing juvenile abuse, neglect, and dependency proceedings—provides that a juvenile receiving out-of-home care should be placed with a suitable relative when such a placement is available, "unless the court finds that the placement is contrary to the best interests of the juvenile." N.C.G.S. § 7B-903(a1) (2019). However, "[a] termination proceeding is separate and distinct from an underlying adjudication proceeding" and is governed by the statutes in Article 11. *In re A.S.M.R.*, 375 N.C. 539, 542 (2020). Article 11's dispositional statute, N.C.G.S. § 7B-1110, gives no priority to relative placements, focusing solely upon identifying the best interests of the child. *See* N.C.G.S. § 7B-1110(a)–(b). While the availability of an appropriate relative placement may be a "relevant consideration" under N.C.G.S. § 7B-1110(a)(6), *In re S.D.C.*, 373 N.C. at 290, it is left to the trial court's discretion to weigh the various competing factors in N.C.G.S. § 7B-1110(a) in arriving at its determination of the child's best interests. *See In re J.J.B.*, 374 N.C. at 795 (explaining 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" (quoting *In re Z.L.W.*, 372 N.C. at 437)).

¶ 31 The court's unchallenged findings of fact show DSS had contacted and assessed fourteen potential relative placements during the course

of the underlying proceedings but found none to be acceptable. As discussed above, the trial court acknowledged the maternal grandmother's request that the children be placed with her but made findings explaining why such a placement would be inappropriate and contrary to the children's best interests. While the court "d[id] find value in placing a child with relatives[,]" the court concluded, based on the evidence before it, that freeing Nathan and Nick for adoption would afford them "the greatest opportunity to be nurtured, loved, and cared for in a safe and stable environment" and "to reach [the] full development of [their] physical, mental, emotional, moral and spiritual faculties."

¶ 32 Because the trial court made sufficient dispositional findings of fact under N.C.G.S. § 7B-1110(a)(1)–(5) and provided a reasoned explanation of its weighing of the statutory factors, we hold that the trial court did not abuse its discretion by concluding that termination of respondent-mother's parental rights in Nathan and Nick was in the children's best interests. *See In re J.J.B.*, 374 N.C. at 791. Accordingly, the trial court's orders are affirmed.

AFFIRMED.

IN THE MATTER OF N.K.

No. 506A20

Filed 5 November 2021

Termination of Parental Rights—no-merit brief—multiple grounds for termination

The termination of a mother's parental rights to her daughter on the grounds of neglect and willful failure to make reasonable progress was affirmed where the mother's counsel filed a no-merit brief, the trial court's findings of fact were supported by clear, cogent, and convincing evidence, and the termination order was based on proper legal grounds.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from an order entered on 2 October 2020 by Judge April C. Wood in District Court, Davie County. This matter was calendared for argument in the Supreme Court on 30 September 2021 but determined on the record and briefs without

oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

Holly M. Groce for petitioner-appellee Davie County Department of Social Services.

Kip David Nelson for appellee Guardian ad Litem.

Peter Wood for respondent-appellant mother.

BERGER, Justice.

¶ 1 Respondent appeals from an order terminating her parental rights[1] to N.K. (Nancy),[2] born in September 2016. Counsel for respondent filed a no-merit brief pursuant to Rule 3.1(e) of the North Carolina Rules of Appellate Procedure.

¶ 2 On November 2, 2016, the Davie County Department of Social Services (DSS) filed a petition alleging that Nancy was a neglected and dependent juvenile, and DSS obtained a nonsecure custody order. The petition alleged that Nancy's older half-sibling, Carl, was assaulted by a family friend in Nancy's presence, and respondent did not intervene or stop the attack.

¶ 3 In a subsequent interview with Carl, DSS noted bruising and marks on Carl's body, including his back, face, neck, arms, side, and legs. Carl disclosed that the family friend, who often acted as a caretaker for him and Nancy, regularly hit him with a belt and that respondent had hit him on the legs with a tire iron. Respondent denied any knowledge of how Carl obtained the marks on his body, though she acknowledged the family friend often supervised him. Additional information was provided that Nancy was exposed to threats by her father, and drug use and other acts of domestic violence by respondent. Respondent, the children's father, and the family friend were arrested on charges related to the assaults on Carl.

¶ 4 Respondent entered into a case plan with DSS on November 8, 2016. The case plan required her to communicate regularly with DSS

1. The trial court also terminated the parental rights of Nancy's father; however, he did not appeal and is not a party to this proceeding.

2. Pseudonyms are used in this opinion to protect the juvenile's identity and for ease of reading.

and attend, complete, and follow any necessary recommendations from a substance abuse assessment, a psychological evaluation, and separate parenting assessments. In addition, respondent was required to provide proof of employment and income, proof of current residence and stability in maintaining that residence, proof of a job search if she became unemployed, and proof of reliable transportation.

¶ 5 Following an adjudication hearing, the trial court entered an order on December 21, 2016, concluding that Nancy was a neglected juvenile. In an accompanying disposition order, the trial court ordered respondent to comply with her case plan by completing a psychological evaluation, completing a parenting assessment, completing a substance abuse assessment, and complying with any recommendations. The court also ordered that Nancy remain in DSS custody and authorized twice-weekly supervised visitation.

¶ 6 After the initial permanency-planning hearing, the trial court entered an order on March 13, 2017, establishing a primary permanent plan of reunification with a concurrent plan of guardianship with a court-approved caretaker. In light of respondent's lack of progress with the requirements of her case plan and an increase in substance abuse and domestic violence, the trial court changed the primary permanent plan to adoption with a secondary plan of reunification. Nancy was moved to a potential adoptive placement following that permanency-planning hearing.

¶ 7 Due to respondent's continued failure to make "any significant progress" toward her case plan requirements, the trial court changed the secondary plan to guardianship, and, in a January 27, 2020 permanency-planning order, relieved DSS of continued reunification efforts. The trial court also directed DSS to file a petition to terminate respondent's parental rights.[3]

¶ 8 On April 8, 2020, DSS filed a second petition to terminate respondent's parental rights on the grounds of neglect, willfully leaving Nancy in foster care for more than twelve months without a showing of reasonable progress, and respondent having her parental rights to another child terminated. *See* N.C.G.S. § 7B-1111(a)(1)–(2), (9) (2019). Following

3. DSS previously filed a petition to terminate respondent's parental rights on November 14, 2018, on the grounds of neglect and willfully leaving Nancy in foster care for more than twelve months without a showing of reasonable progress, *See* N.C.G.S. § 7B-1111(a)(1)–(2) (2019). However, the trial court dismissed that petition upon concluding DSS had failed to present sufficient evidence that grounds existed to terminate respondent's parental rights.

a hearing, the trial court entered an order on October 2, 2020, terminating respondent's parental rights. The trial court concluded grounds existed to terminate her parental rights based on the grounds of neglect and willful failure to make reasonable progress.[4] The trial court made findings of respondent's continued substance abuse, positive drug screens up to the month of the termination hearing, and issues with domestic violence that resulted in her incarceration at the time of the hearing. Further, the trial court found respondent had failed to make any progress on the requirements of her case plan. The trial court concluded it was in Nancy's best interests that respondent's parental rights be terminated. *See* N.C.G.S. § 7B-1110(a) (2019). Respondent appeals.

¶ 9 Counsel for respondent filed a no-merit brief on his client's behalf under Rule 3.1(e) of the Rules of Appellate Procedure. Counsel identified three issues that could arguably support an appeal but also explained why he believed these issues lacked merit. Counsel advised respondent of her right to file *pro se* written arguments on her own behalf and provided her with the documents necessary to do so. Respondent has not submitted written arguments to this Court.

¶ 10 We independently review issues identified by counsel in a no-merit brief filed pursuant to Rule 3.1(e). *In re L.E.M.*, 372 N.C. 396, 402, 831 S.E.2d 341, 345 (2019). After considering the entire record and reviewing the issues identified in the no-merit brief, we conclude that the order terminating respondent's parental rights is supported by clear, cogent, and convincing evidence and is based on proper legal grounds. Accordingly, we affirm the order of the trial court.

AFFIRMED.

4. The trial court did not conclude grounds existed to respondent's parental under N.C.G.S. § 7B-1111(a)(9) because respondent appealed the termination order related to that child and the matter was pending at the Court of Appeals.

IN RE P.R.F.

[379 N.C. 298, 2021-NCSC-143]

IN THE MATTER OF P.R.F., S.G.F., Z.N.V., AND M.A.V.

No. 109A21

Filed 5 November 2021

Termination of Parental Rights—no-merit brief—failure to pay a reasonable portion of the cost of care—best interests of the child

The termination of a mother's parental rights to her three children on multiple grounds was affirmed where her counsel filed a no-merit brief, both the evidence and the trial court's findings of fact supported termination on grounds of willful failure to pay the reasonable costs of child care (N.C.G.S. § 7B-1111(a)(3)), and the trial court did not abuse its discretion in finding that termination was in the children's best interests.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from an order entered on 17 December 2020 by Judge Mark L. Killian in District Court, Burke County. This matter was calendared for argument in the Supreme Court on 30 September 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.

Mark D. Frederick for appellee Guardian ad Litem.

Anné C. Wright for respondent-appellant mother.

PER CURIAM.

¶ 1 Respondent-mother appeals from the trial court's order terminating her parental rights in her minor children P.R.F., S.G.F., Z.N.V., and M.A.V, aged three, seven, twelve, and fourteen, respectively, at the time of termination.[1] Respondent-mother's appellate counsel has filed a no-merit brief on her client's behalf pursuant to N.C. R. App. P. 3.1(e).

1. The children will respectively be referred to throughout the remainder of this opinion using the pseudonyms Pat, Sara, Zed, and Meg, as consistent with the briefing in this case, for ease of reading and to protect the identity of the juveniles.

After careful consideration of the record in light of the applicable law, we conclude that the issues identified by respondent-mother's appellate counsel as potentially supporting an award of relief from the trial court's termination order lack merit and therefore affirm the trial court's order.

¶ 2 In May 2018, a social worker with the Burke County Department of Social Services (BCDSS) visited respondent-mother's home following a report of concerns of injurious environment, improper discipline, and substance abuse. After acknowledging daily marijuana use, respondent-mother agreed with BCDSS's request to place the children in a safety resource placement with family members and friends.

¶ 3 On 1 July 2018, the family taking care of Pat took him to the emergency room when he was having difficulty breathing. Subsequent imaging at Levine Children's Hospital revealed that Pat suffered from a heart condition that should have been addressed earlier. Later that month, Zed and Meg were seen for a Child Medical Exam during which they described seeing respondent-mother and her husband use marijuana and engage in domestic violence.

¶ 4 On 30 July 2018, BCDSS filed a petition alleging that the four children were neglected juveniles. On 20 September 2018, BCDSS filed a new petition alleging that Pat was a neglected and dependent juvenile. That same day, the trial court granted non-secure custody of Pat to BCDSS. On 8 November 2018, the trial court entered an order adjudicating Sara, Zed, and Meg to be neglected juveniles, and adjudicating Pat to be a neglected and dependent juvenile. BCDSS gained custody of the children, and respondent-mother was given one hour of supervised visitation per week with the older three children and was allowed to attend Pat's ongoing medical appointments.

¶ 5 The trial court ordered respondent-mother to enter into a case plan with BCDSS and required that before she could reunite with her children, respondent-mother must: complete domestic violence, mental health, and substance abuse assessments and follow all recommendations; submit to random drug screens; obtain safe, sanitary, and stable housing; obtain legal and verifiable income; complete an age-appropriate parenting program; and ensure that the health needs of the children were met.

¶ 6 Respondent-mother entered into the case plan as ordered and made some progress toward addressing some of its goals, in that she completed parenting education, completed a domestic violence assessment, obtained consistent employment, and participated in some visitations with the children. However, she missed several random drug screens, and tested positive for marijuana on several other occasions.

Respondent-mother missed several visitation appointments due to her work schedule or failing to confirm the visits 48 hours in advance. As a result of respondent-mother's 9 January 2020 mental health assessment, the psychologist diagnosed her with borderline personality disorder, obsessive compulsive disorder, and cannabis use disorder. During this case-plan period, respondent-mother contributed zero dollars to the cost of care of her children until August 2020, when child support began to be garnished from her wages.

¶ 7 On 21 January 2020, BCDSS filed a petition seeking to terminate respondent-mother's parental rights. The substantive portions of the adjudication stage of the termination of parental rights process were heard on 14, 27, and 28 August 2020, and the disposition stage occurred on 24 September 2020.

¶ 8 On 17 December 2020, the trial court entered an order terminating respondent-mother's parental rights.[2] Specifically, the trial court concluded that grounds had been proven by clear, cogent, and convincing evidence to terminate respondent-mother's parental rights pursuant to: N.C.G.S. § 7B-1111(a)(1) (neglected the juveniles); N.C.G.S. § 7B-1111(a)(3) (willfully failed to pay a reasonable portion of cost of care for the juveniles although physically and financially able to do so); N.C.G.S. § 7B-1111(a)(6) (dependency); and N.C.G.S. § 7B-1111(a)(7) (willful abandonment of the juveniles). After considering the requisite criteria under N.C.G.S. § 7B-1110, the trial court found that termination was in the best interests of the juveniles. Respondent-mother timely filed a notice of appeal on 7 January 2021.

¶ 9 As noted above, respondent-mother's appellate counsel has filed a no-merit brief on her client's behalf as authorized by N.C. R. App. P. Rule 3.1(e). In her no-merit brief, respondent-mother's appellate counsel asserted that the trial court's conclusions of law that grounds had been proven to terminate respondent-mother's parental rights on the basis of subsections (a)(1), (6), and (7) of N.C.G.S. § 7B-1111 were not supported by competent findings of fact or evidence. However, respondent-mother's appellate counsel found no merit to the argument that the trial court's conclusion that grounds for termination had been proven on the basis of N.C.G.S. § 7B-1111(a)(3) lacked competent findings of fact or evidence.

¶ 10 N.C.G.S. § 7B-1111(a)(3) provides that a parent's parental rights may be terminated when it is shown by clear, cogent, and convincing

2. The trial court also terminated the parental rights of one father and an unknown father, while a third father relinquished his parental rights prior to the termination hearing. None of the fathers are a party in this appeal.

evidence that a parent of a juvenile in the custody of a county department of social services, a licensed child-placing agency, a child-caring institution, or a foster home 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 held that "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); *see also In re J.A.E.W.*, 375 N.C. 112, 117–18 (2020). Rather, "[w]here a parent has the ability to pay some amount greater than zero but pays nothing, the parent has failed to pay a reasonable portion of the cost of care within the meaning of N.C.G.S. § 7B-1111(a)(3)." *In re J.M.*, 377 N.C. 298, 2021-NCSC-48, ¶ 29.

¶ 11 Here, respondent-mother's appellate counsel asserts that the trial court made findings of fact indicating that respondent-mother willingly failed to pay child support or reasonably contribute to the cost of care for the juveniles during the six months prior to the filing of the petition to terminate parental rights despite having the funds and ability to do so. Specifically, the trial court found that while respondent-mother maintained consistent employment in the months before the petition was filed and had in excess of $10,000 in her savings account as of March 2020, she did not pay any child support or for the juveniles' reasonable cost of care, and conditioned payment on her ability to see the juveniles. Respondent-mother's appellate counsel found that any argument against these trial court findings would be without merit.

¶ 12 Because "an adjudication of any single ground in N.C.G.S. § 7B-1111(a) is sufficient to support a termination of parental rights[,]" respondent-mother's appellate counsel did not address the additional grounds that the trial court determined had been proven for the termination of respondent-mother's parental rights. *In re E.H.P.*, 372 N.C. 388, 395 (2019).

¶ 13 Additionally, respondent-mother's appellate counsel asserted that the trial court here conducted the required analysis regarding the best interests of the children. A trial court's best interests determination must be based on the criteria set forth in N.C.G.S. § 7B-1110, and is reviewed on appeal for abuse of discretion. Here, respondent-mother's appellate counsel's no-merit brief noted that the trial court considered these criteria in its best interests determination, including the children's ages, the children's likelihood of adoption, whether termination

would aid in accomplishment of the permanent plan, the bond between respondent-mother and the children, and the bond between the children and their foster families. Accordingly, respondent-mother's appellate counsel asserted that she could not make a meritorious argument that the trial court erred by determining that termination of respondent-mother's parental rights was in Pat's, Sara's, Zed's, and Meg's best interests.

¶ 14 Finally, respondent-mother's appellate counsel duly advised respondent-mother of her right to file pro se written arguments on her own behalf. Respondent-mother has not, however, submitted any written arguments for our consideration.

¶ 15 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-mother's appellate counsel 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 or abuse its discretion in determining that respondent-mother's parental rights in the children were subject to termination and that the termination of respondent-mother's parental rights would be in the children's best interests. As a result, we affirm the trial court's order terminating respondent-mother's parental rights in Pat, Sara, Zed, and Meg.

AFFIRMED.

IN RE S.C.C.

[379 N.C. 303, 2021-NCSC-144]

IN THE MATTER OF S.C.C.

No. 511A20

Filed 5 November 2021

1. Termination of Parental Rights—grounds for termination—willful failure to pay a reasonable portion of the cost of care—sufficiency of findings

The trial court properly terminated both parents' parental rights to their daughter on the ground that they willfully failed to pay a reasonable portion of the cost of care although physically and financially able to do so (N.C.G.S. § 7B-1111(a)(3)), based on unchallenged findings that the parents were obligated by court order to pay child support but, despite being employed and not under a disability, neither parent had paid any support. The Supreme Court declined to revisit the principle established in *In re J.M.*, 373 N.C. 352 (2020), that when a parent is subject to a valid child support order, the petitioner in a termination of parental rights case is not required to independently prove that a parent had the ability to pay support during the relevant time period.

2. Termination of Parental Rights—best interests of the child—statutory factors—probability of reunification within reasonable amount of time—bond between child and parent

The trial court did not abuse its discretion by determining that termination of both parents' rights to their daughter was in the daughter's best interests, based on unchallenged findings of fact addressing the dispositional factors in N.C.G.S. § 7B-1110(a). The parents' lack of progress on various aspects of their case plans—including lack of visitation with their daughter and failing to complete drug screens and mental health evaluations—supported the court's conclusion that there was no reasonable probability that reunification with the parents could be achieved in a reasonable amount of time. Further, the court's conclusion that the child had no bond with her parents was supported by evidence from the social worker and the guardian ad litem.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from an order entered 20 August 2020 by Judge Jeanie R. Houston in District Court, Yadkin County. This matter was calendared in the Supreme Court on 30 September 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.

James N. Freeman, Jr., for petitioner-appellee Yadkin County Human Services Agency.

Paul W. Freeman, Jr., for appellee Guardian ad Litem.

Benjamin J. Kull for respondent-appellant mother.

Garron T. Michael for respondent-appellant father.

ERVIN, Justice.

¶ 1 Respondent-mother Eden K. and respondent-father Lovell C. appeal from the trial court's order terminating their parental rights in their daughter, S.C.C.[1] After careful consideration of the parents' challenges to the trial court's termination order, we conclude that it should be affirmed.

¶ 2 Sandra was born in September 2015. On 9 February 2018, the Yadkin County Human Services Agency received a child protective services report alleging that Sandra was being neglected and that there were concerns about the presence of domestic violence and substance abuse in the home. On 12 February 2018, a social worker, accompanied by an officer of the Jonesville Police Department, went to respondent-mother's home for the purpose of investigating the allegations. At the time, Sandra lived with respondent-mother, her maternal grandmother, and her maternal great-grandparents.

¶ 3 As they were being interviewed by the social worker, the adults yelled at one another until the law enforcement officer who was in attendance managed to separate them. The adults told the social worker that they frequently argued among themselves. In addition, the social worker learned that, on 5 February 2018, a law enforcement officer had responded to a report concerning a domestic disturbance that had occurred at the residence.

¶ 4 On 11 February 2018, the maternal grandmother was arrested for possession of cocaine and released on bond on the same day. According to statements that respondent-mother made to a social worker, the

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

maternal grandmother used impairing substances that had not been prescribed for her. Respondent-mother also had a history of substance abuse that included the use of heroin and other opiates. As a result of the fact that Sandra had been addicted to opiates at the time of her birth, the child had not lived with respondent-mother for one year while respondent-mother underwent substance abuse treatment. Although respondent-mother had returned to the home five to six months before her interview with the social worker, respondent-mother admitted that she had relapsed and that, in the event that she was tested for the presence of controlled substances, the results would be positive for marijuana. In addition, Sandra's maternal great-grandfather reported that respondent-mother would leave Sandra with the maternal grandmother for weeks at a time and had only returned from such an absence two days before speaking with the social worker.

¶ 5 After determining that it was not safe for Sandra to continue residing in the home, the social worker transported Sandra and respondent-mother to the YCHSA office. In an attempt to make arrangements for Sandra's care, respondent-mother contacted respondent-father, who came to the YCHSA office. At that time, respondent-father informed agency employees that he did not know what took place in respondent-mother's home in spite of the fact that he had been contacted in the course of earlier child protective services assessments and that he had not ever served as Sandra's primary caretaker. While performing a background check concerning respondent-father, YCHSA discovered that there was an outstanding warrant for his arrest. As a result, respondent-father was taken into custody by law enforcement officers.

¶ 6 On 13 February 2018, YCHSA filed a juvenile petition alleging that Sandra was a neglected juvenile, obtained the entry of an order taking Sandra into non-secure custody, and placed Sandra in a licensed foster home. After a hearing held on 29 March 2018, the trial court entered an adjudication and disposition order on 23 April 2018 in which it determined that Sandra was a neglected juvenile, placed Sandra in YCHSA custody, awarded placement authority to YCHSA, and noted that both parents had entered into an Out of Home Family Services Agreement that had been developed for the purpose of remedying the problems that had led to Sandra's removal from the family home. The case plans adopted for the parents required each of them to complete a substance abuse assessment, submit to random drug screens, complete a psychological assessment and a parenting education program, maintain consistent employment, and obtain appropriate housing.

¶ 7 In an order that was entered on 13 July 2018 following a review hearing held on 14 June 2018, Judge David V. Byrd found that both parents had tested negative for the presence of controlled substances, completed a psychological assessment, and procured housing. In addition, respondent-father had obtained employment. On the other hand, the parents were "inconsistent" in their visits with Sandra, consistently claiming that their multiple cancelled visits stemmed from a "lack of transportation."

¶ 8 After a hearing held on 3 January 2019, Judge William F. Brooks entered a permanency planning order on 6 February 2019 in which he found that neither parent had visited Sandra since August 2018, with the parents having attributed their failure to visit with Sandra to a lack of transportation and conflicting work schedules. In addition, the parents had failed to send Sandra any "letters, cards, gifts, or other tokens of love and affection during that same time period." Although Judge Brooks found that there was "very little bond, if any, between the [respondent-] parents and [Sandra,]" he concluded that reunification efforts would not "clearly" be unsuccessful and established a primary permanent plan of reunification coupled with a secondary plan of guardianship.

¶ 9 In a permanency planning order that was entered on 24 May 2019 following a hearing held on 26 April 2019, Judge Byrd found that the parents had resumed their visits with Sandra in January 2019. On the other hand, Judge Byrd found that, even though both parents were subject to child support orders and had been employed for the past year, respondent-mother had failed to pay any child support. In addition, Judge Byrd described the progress being made by both parents as "slow and delayed." Although the primary permanent plan for Sandra remained one of reunification, Judge Byrd changed the secondary plan to one of adoption.

¶ 10 After a hearing held on 29 August 2019, Judge Brooks entered a third permanency planning order on 1 October 2019 in which he found that, even though both parents had obtained a psychological assessment, the assessors had been unable to properly evaluate the parents in light of their "defensive" or "guarded" statements. For that reason, Judge Brooks required the parents to submit to new psychological assessments. In addition, Judge Brooks found that, even though respondent-mother had been subject to a child support order that required her to pay $110 each month, plus an additional $20 monthly payment that was to be applied to an existing arrearage, since 11 November 2018 and respondent-father had been subject to a child support order that required him to pay $451 each month, plus an additional $59 monthly amount that was to be

applied to an existing arrearage, since 1 June 2018, each parent had, "at most," made a single payment. As a result, Judge Brooks concluded that the parents "ha[d] made just enough progress during the life of this case to justify continuing to work towards reunification," ordered the parents to provide updated psychological assessments, changed the primary plan to one of adoption and the secondary plan to one of reunification, and ordered YCHSA to file a petition for the purpose of terminating the parents' parental rights in Sandra. On 20 November 2019, YCHSA filed a motion seeking the termination of the parents' parental rights in Sandra in which it alleged that the parents' parental rights were subject to termination 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 Sandra's removal from the family home, N.C.G.S. § 7B-1111(a)(2); and willfully failing to pay a reasonable portion of the cost of the care that Sandra had received after being taken into YCHSA custody, N.C.G.S. § 7B-1111(a)(3).

¶ 11 After a hearing held on 27 February 2020, the trial court entered an order on 31 March 2020 in which it concluded that continued efforts to reunite Sandra with either parent within a reasonable period of time would be unsuccessful and inconsistent with Sandra's health, safety, and need for a safe, permanent home. In addition, the trial court determined that continued visits between Sandra and the parents would be contrary to Sandra's best interests. After ordering that Sandra's primary permanent plan remain one of adoption, the trial court changed Sandra's secondary permanent plan to one of guardianship.

¶ 12 In the aftermath of a hearing held on 30 June 2020, the trial court entered a permanency planning order on 20 August 2020 in which it found that both parents were employed, that neither of them was disabled, and that neither of them had sought to have their existing child support obligation modified. In addition, the trial court found that respondent-father had never made a child support payment and that respondent-mother had never made a voluntary child support payment. After determining that both parents had failed to make reasonable progress toward satisfying the requirements of their case plans in the twenty-eight months since Sandra entered YCHSA custody, that there was no reasonable likelihood that the family could be reunited within a reasonable period of time, that the child's foster parent intended to adopt Sandra once the child became legally eligible for adoption, and that there were no concerns relating to Sandra's current placement given the existence of a strong bond between Sandra and her foster parent, the trial court relieved YCHSA from any further obligation to continue to reunify Sandra with either of her parents.

¶ 13 The YCHSA termination motion also came on for hearing before the trial court at the 30 June 2020 session of the District Court, Yadkin County. On 20 August 2020, the trial court entered an order in which it found, by clear, cogent, and convincing evidence, that the parents' parental rights in Sandra were subject to termination 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 Sandra's removal from the family home, N.C.G.S. § 7B-1111(a)(2); and willful failure to pay a reasonable portion of the cost of the care that Sandra had received while in YCHSA custody, N.C.G.S. § 7B-1111(a)(3), and determined that the termination of the parents' parental rights would be in Sandra's best interests. As a result, the trial court terminated the parents' parental rights in Sandra. Both parents noted appeals to this Court from the trial court's termination order.

¶ 14 **[1]** The relevant provisions of the North Carolina General Statutes establish a two-step process for the holding of a termination of parental rights proceeding consisting of an adjudicatory stage followed by a dispositional stage. At the adjudicatory stage, the trial court must determine whether any of the grounds for termination delineated in N.C.G.S. § 7B-1111(a) have been shown to exist on the basis of clear, cogent, and convincing evidence. N.C.G.S. § 7B-1109(e)–(f) (2019). This Court "reviews a trial court's adjudication under N.C.G.S. § 7B-1109 'to determine whether the findings are supported by clear, cogent and convincing evidence and the findings support the conclusions of law.' " *In re C.B.C.*, 373 N.C. 16, 19 (2019) (quoting *In re Montgomery*, 311 N.C. 101, 111 (1984)). The existence of a single ground for termination is sufficient to support a trial court's adjudication decision. *See* N.C.G.S. § 7B-1111(a); *In re Moore*, 306 N.C. 394, 404 (1982) (stating that, "[i]f either of the three grounds aforesaid is supported by findings of fact based on clear, cogent and convincing evidence, the order appealed from should be affirmed"). As a result, we will begin our analysis of the parents' challenge to the trial court's termination order by determining whether the trial court properly found that the parents' parental rights in Sandra were subject to termination pursuant to N.C.G.S. § 7B-1111(a)(3).

¶ 15 A trial court may terminate the parental rights of a parent in the event that:

> [t]he juvenile has been placed in the custody of a county department of social services . . . 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). As we have previously stated:

> 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 (2020) (cleaned up). According to respondent-parents, the trial court erred by determining that they had "willfully failed to pay a reasonable portion of the cost of care for the minor child although they [we]re physically and financially able to do so."[2] We disagree.

¶ 16 In its termination order, the trial court found as a fact that:

> 19. A child support obligation in regard to [Sandra] was established with [respondent-father] on May 13th, 2019. [Respondent-father] has been employed . . . for the life of the obligation. He made approximately $7,000 in the first quarter of 2019, $8,000 in the second quarter, $5,000 in the third quarter, $6,200 in the fourth quarter and $8,000 in the first quarter of 2020. Pursuant to the NC child support guidelines his established obligation is $451.00 monthly. He is not disabled, has never been approved for any form of disability benefits and has never attempted to motion the Court to modify his obligation in any way. [Respondent-father] did not make a single payment towards [Sandra]'s child support in the 6 months preceding the filing of the TPR before the Court. [Respondent-father] has never made a single child support payment at all. His current arrearage is $12,907 and there is an outstanding order for his arrest based on child support contempt.
>
> 20. A child support obligation in regard to [Sandra] was established with [respondent-mother]

2. Respondent-father has adopted the argument set forth in respondent-mother's brief with respect to the issue of whether his parental rights in Sandra were subject to termination pursuant to N.C.G.S. § 7B-1111(a)(3).

> on October 22nd, 2018. [Respondent-mother] is employed, is not disabled and has never been approved for any form of disability benefits. Pursuant to the NC child support guidelines her established obligation is $110.00 per month plus $20.00 monthly to be applied to her arrearage. [Respondent-mother] has never motioned the Court or attempted to modify her child support obligation in any way. [Respondent-mother] did not make a single payment of any kind towards [Sandra]'s child support in the 6 months preceding the filing of this TPR. In fact, she has never made a voluntary payment at all.
>
> 21. The Court finds that both [respondent-father] and [respondent-mother] have for a continuous period of more than 6 months immediately preceding the filing of this Motion for Termination of Parental Rights, failed to pay a reasonable portion of [Sandra]'s cost of care despite having been physically and financially capable of doing so.

Neither respondent-mother nor respondent-father has challenged the sufficiency of the evidentiary support for these findings of fact. *See In re T.N.H.*, 372 N.C. 403, 407 (2019) (stating that unchallenged findings of fact are deemed to be supported by competent evidence and are binding for purposes of appellate review).

¶ 17 In attempting to persuade us that the trial court erred by concluding that their parental rights in Sandra were subject to termination pursuant to N.C.G.S. § 7B-1111(a)(3), the parents focus their attention upon this Court's decision in *In re J.M.*, 373 N.C. at 352 (2020), which addressed a parent's challenge to the trial court's finding that she had the ability to work in the period of time preceding the filing of the termination motion. *In re J.M.*, 373 N.C. at 358. In that case, after observing that the parent was subject to a valid child support order that had established her ability to financially support her children, we affirmed the trial court's determination that the parent's parental rights were subject to termination pursuant to N.C.G.S. § 7B-1111(a)(3) on the grounds that, since "[a] proper decree for child support will be based on the supporting parent's ability to pay as well as the child's needs, there is no requirement that petitioner independently prove or that the termination order find as fact respondent's ability to pay support during the relevant statutory time period." *Id.* at 359 (quoting *In re S.T.B.*, 235 N.C. App. 290, 296 (2014)).

¶ 18 According to the parents, the principle adopted in *In re J.M.* to the effect that a valid child support order is sufficient, without more, to establish a parent's ability to pay support involves the erroneous use of a "simplified analysis under N.C.G.S. § 7B-1111(a)(3)" and should be abandoned on the theory that "a trial court must consider and make findings about—at a minimum—the income, assets, and legitimate reasonable needs and expenses of the parent, regardless of whether the parent has a child support order." We are not persuaded by the parents' argument.

¶ 19 As this Court has previously held, "[a] finding that a parent has ability to pay support is essential to termination for nonsupport . . . ." *In re Ballard*, 311 N.C. 708, 716–17 (1984) (citing *In re Clark*, 303 N.C. 592 (1981)). According to well-established North Carolina law, a valid child support order must rest upon an analysis of "(1) the amount of support necessary to meet the reasonable needs of the child and (2) the relative ability of the parties to provide that amount." *Coble v. Coble*, 300 N.C. 708, 712 (1980) (cleaned up). In determining whether a parent's parental rights in a child are subject to termination pursuant to N.C.G.S. § 7B-1111(a)(3) in the context of a situation in which the parent is subject to a valid child support order, "there is no requirement that petitioner independently prove or that the termination order find as fact respondent's ability to pay support during the relevant statutory time period." *In re J.M.*, 373 N.C. at 359 (quoting *In re S.T.B.*, 235 N.C. App. at 296). Thus, this Court has directly and explicitly rejected the argument that the parents have advanced in opposition to the trial court's determination that their parental rights in Sandra were subject to termination pursuant to N.C.G.S. § 7B-1111(a)(3).

¶ 20 The need for consistency with the principle of stare decisis causes us to reject the parents' challenge to the trial court's determination that their parental rights in Sandra were subject to termination pursuant to N.C.G.S. § 7B-1111(a)(3) and their concomitant argument that *In re J.M.* should be overruled. As this Court has clearly stated:

> [i]t 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 (1940) (cleaned up); *see also Bacon v. Lee*, 353 N.C. 696, 712 (2001) (stating that "[a] primary goal of adjudicatory proceedings is the uniform application of law" and that, "[i]n 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 (1991) (stating that "[s]tare decisis is the preferred course because it promotes the even-handed, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process"). As a result, in light of the critical function played by the doctrine of stare decisis in our legal system we adhere to our prior decision in *In re J.M.* and decline the parents' invitation to revisit the issue that was decided in that case.

¶ 21 A careful analysis of the trial court's unchallenged findings of fact shows the existence of ample support for its conclusion that the parents had willfully failed to pay a reasonable portion of the cost of care for Sandra despite having the physical and financial ability to do so. *See In re J.A.E.W.*, 375 N.C. 112, 117–18 (2020) (affirming a determination that a parent's parental rights in a child were subject to termination pursuant to N.C.G.S. § 7B-1111(a)(3) based upon the fact that, even though the parent had income during the relevant period, no contribution at all was made toward the payment of the child's expenses and stating that the parents' "living expenses might be relevant evidence to be taken into account if he had made some child support payments during the applicable time period and the issue was whether the amount he contributed to the cost of [the minor child]'s care was reasonable"). As a result, the trial court did not err by determining that the parents' parental rights in Sandra were subject to termination pursuant to N.C.G.S. § 7B-1111(a)(3). In view of our determination that the trial court did not err by concluding that the ground for termination established by N.C.G.S. § 7B-1111(a)(3) existed in this case, *In re E.H.P.*, 372 N.C. 388, 395 (2019), we need not address the parents' challenge to the trial court's conclusion that their parental rights in Sandra were also subject to termination for neglect pursuant to N.C.G.S. § 7B-1111(a)(1) and willful failure to make reasonable progress toward correcting the conditions that had led to Sandra's removal from the family home pursuant to N.C.G.S. § 7B-1111(a)(2).

¶ 22 **[2]** In the event that the trial court finds the existence of one or more of the grounds for termination delineated in N.C.G.S. § 7B-1111(a), it is required to proceed to the dispositional stage, at which it "shall determine whether terminating the parent's rights is in the juvenile's best interest." N.C.G.S. § 7B-1110(a) (2019). In making its dispositional decision,

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

N.C.G.S. § 7B-1110(a) (2019). We review the trial court's dispositional findings of fact to determine whether they are supported by the evidence received during the termination hearing, *see In re J.J.B.*, 374 N.C. 787, 793 (2020), with a reviewing court being "bound by all uncontested dispositional findings." *In re E.F.*, 375 N.C. 88, 91 (2020) (citing *In re Z.L.W.*, 372 N.C. 432, 437 (2019)). The trial court's dispositional decision is evaluated on appeal using an abuse of discretion standard of appellate review. *In re A.U.D.*, 373 N.C. 3, 6 (2019). "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.' " *J.J.B.*, 374 N.C. at 791 (quoting *In re Z.A.M.*, 374 N.C. 88, 100 (2020)).

¶ 23 In the dispositional portion of its termination order, the trial court found that Sandra had not experienced emotional or developmental delays and did not have any ongoing medical problems; that the foster

home in which Sandra resided was safe and appropriate; that Sandra's foster parent would adopt her as soon as it was legally possible for the foster parent to do so; that it had no concerns about the appropriateness of Sandra's current placement; that Sandra's foster parent was gainfully employed, did not suffer from any physical or mental disability or other similar limitation and had the ability to provide for Sandra's financial, mental, and physical health needs; that Sandra and her foster parent were "strongly bonded"; that terminating the parents' parental rights in Sandra was the only remaining barrier to implementing the permanent plan of adoption; and that "[t]here [wa]s no reasonable probability that the family unit c[ould] be reunited within a reasonable or foreseeable period of time." As part of this process, the trial court made the following unchallenged findings of fact relating to the dispositional criteria enumerated in N.C.G.S. § 7B-1110(a):

> a. The minor child is only four years old and she has been in foster care for approximately 28 months.
>
> b. There is a very high likelihood that [Sandra] will be adopted by her current foster parent.
>
> c. Termination of the parents' parental rights will aid in the accomplishment of the permanent plan for the juvenile.
>
> d. There is no bond between the minor child and her biological parents.
>
> e. There is a strong and loving bond between [Sandra] and her foster mother.
>
> f. The minor child is deserving of a stable home free from domestic violence, substance abuse, and strife where her needs will be attended to until she reaches adulthood. She is further deserving of permanency and an opportunity to flourish and excel. Terminating her parents' parental rights will further these objectives.

¶ 24 In urging us to overturn the trial court's dispositional decision, the parents argue that the trial court's finding that Sandra has "no reasonable probability" of being reunified with respondents "within a reasonable or foreseeable period of time" lacks sufficient evidentiary support. According to the parents, the only barrier precluding their reunification with Sandra consisted of their poverty, which deprived them of the ability

to afford the services that were required by their case plans. We do not find this argument persuasive.

¶ 25 A review of the trial court's unchallenged findings of fact reveals that Sandra was placed in foster care on 13 February 2018 and that she had been in foster care for 28 months at the time of the termination hearing. Although the parents were allowed to have supervised visits with Sandra twice each month, neither of them took advantage of their opportunity for a visit with Sandra during the period between August 2018 and January 2019. In addition, the record reflects that the aspects of their case plans that the parents failed to complete, including mental health evaluations and random drug screens, were initially made available to them by YCHSA; that, even though each parent participated in a psychological assessment, the results of that process were inconclusive given their "defensive" or "guarded" responses; and that YCHSA provided drug screens to the parents until they indicated that they could not participate in the drug screening process in light of the transportation-related difficulties that they were experiencing. Although the parents' residence was found to be appropriate for a child, the trial court found that, "at no point in time since the minor child came into care, has the visitation plan been expanded to include unsupervised/overnight visitation or a trial home placement," with visitation between the parents and Sandra having been ended on 27 February 2020. As a result, we hold that the trial court's unchallenged findings support its determination that, as of the date of the termination hearing, there was no reasonable probability that the parents could be reunited with Sandra within a reasonable period of time. *See In re R.D.*, 376 N.C. 244, 258 (2020) (stating that, "[i]n making findings of fact, 'it is the trial judge's duty to consider all the evidence, pass upon the credibility of the witnesses, and determine the reasonable inferences to be drawn from the testimony' " (quoting *In re T.N.H.*, 372 N.C. 403, 411 (2019))).

¶ 26 In addition, the parents argue that the trial court's finding that they had "no bond" with Sandra was devoid of record support. However, a social worker testified that, as of the date of the termination hearing, "there is not a strong bond between [Sandra] and the parents as visitation ha[d] been ceased since February 27th, 2020." In addition, the guardian ad litem's report, which was admitted into evidence at the dispositional hearing, stated that:

> - Although there was no bond observed between [Sandra] and her parents who did not visit her at all for the first 6 months she was in YCHSA custody, they began visiting in January 2019.

- At first [Sandra] was afraid of [her parents]. She resisted going to visits and had nightmares about "the man coming to get her."
- With time, [Sandra] became more comfortable and GAL observed she was willing to play with her parents in the YCHSA meeting room, however, GAL never observed [Sandra] act with affection toward them. She was observed to be willing to play with them, but resistant to hugs. She was always anxious to go "home."
- More recently, [Sandra] became so anxious about visiting her parents that it affected her behaviors both at home and school. Visits were stopped on her therapist's advice.

As a result, we hold that the record contains ample evidentiary support for the trial court's finding that there was no bond between Sandra and her parents. *In re R.D.*, 376 N.C. at 258 (stating that "findings of fact are binding 'where there is some evidence to support those findings, even though the evidence might sustain findings to the contrary' " (quoting *In re Montgomery*, 311 N.C. 101, 110–11 (1984))).

¶ 27 Thus, we hold that the trial court's dispositional findings adequately address the dispositional criteria enumerated in N.C.G.S. § 7B-1110(a) and demonstrate that the trial court, having made a reasonable dispositional decision, did not abuse its discretion in determining that the termination of the parents' parental rights would be in Sandra's best interests. As a result, given that the trial court did not commit any error of law in determining that the parents' parental rights in Sandra were subject to termination pursuant to N.C.G.S. § 7B-1111(a)(3) and did not abuse its discretion in determining that the termination of the parents' parental rights would be in Sandra's best interests, the trial court's termination order is affirmed with respect to both parents.

AFFIRMED.

IN RE T.T.

[379 N.C. 317, 2021-NCSC-145]

IN THE MATTER OF T.T.

No. 363A20

Filed 5 November 2021

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

An order terminating a mother's parental rights to her daughter was affirmed where the trial court's findings—that the mother failed to complete the programs required by her out-of-home family services agreement to address her domestic violence and parenting issues—supported the conclusion that the mother had failed to make reasonable progress under the circumstances to correct the conditions that led to the child's removal, pursuant to N.C.G.S. § 7B-1111(a)(2).

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from an order entered on 13 March 2020 by Judge Joy A. Jones in District Court, Harnett County. This matter was calendared in the Supreme Court on 30 September 2021 but determined on the record and briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

Duncan B. McCormick, Staff Attorney, for petitioner-appellee Harnett County Department of Social Services.

Mobley Law Office, P.A., by Marie H. Mobley, for appellee Guardian ad Litem.

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

HUDSON, Justice.

¶ 1 Respondent appeals from the trial court's order terminating her parental rights to her minor daughter, T.T. (Tiffany).[1] After careful review, we affirm.

1. Pseudonyms are used to protect the identities of the juveniles referred to in this opinion and for ease of reading. The order also terminated the parental rights of Tiffany's legal father, Steven, and putative biological father, LaDarion, neither of whom are parties to this appeal.

I. Background

¶ 2 On 22 May 2014, Harnett County Department of Social Services (DSS) filed a juvenile petition alleging that ten-year-old Tiffany was neglected and obtained nonsecure custody of her.[2] Tiffany was placed in a foster care placement.

¶ 3 The juvenile petition noted the family's extensive history with social services in Prince George's County, Maryland, and in Rockingham County, North Carolina, prior to DSS becoming involved. The petition alleged that, while the family lived in Maryland, the children were removed from respondent and Steven's care in 2008 and placed in foster care due to domestic violence and Steven's issues with mental health, anger, and substance abuse. After the children were returned to respondent's care, social services in Maryland received a report in 2009 that Riley had been sexually abused by a family friend. Respondent did not comply with the investigation. The petition also noted other investigations of sexual and physical abuse of the children by family friends in the home, which found that respondent had a history of allowing people in her home who placed the children at risk. The petition further alleged that after the family relocated to Rockingham County, reports were made in 2009 and 2010 claiming neglect, lack of care, inappropriate supervision and discipline, domestic violence, and an injurious environment. The reports in Rockingham County resulted in a determination in June 2010 that the family was in need of services. However, the family had fled the area and could not be contacted or located.

¶ 4 The petition also alleged that DSS received reports in Harnett County regarding the family on 5 December 2013 and 10 and 21 January 2014. The reports included concerns of neglect, improper supervision and care, inappropriate discipline, domestic violence, substance abuse, and an injurious environment. DSS's assessment of the reports resulted in a case decision that the family was in need of services, and the case was transferred to In-Home Services on 7 February 2014. During a home visit with the family made in order to establish a Family Services Agreement (FSA), social workers had to separate respondent and Steven because they were yelling and screaming at each other in the presence of the children. The petition noted that respondent blamed the social workers for the incident. The petition indicated that respondent entered into a

2. DSS also filed juvenile petitions concerning Tiffany's minor siblings—sixteen-year-old J.H. (John), fifteen-year-old A.H. (Aiden), eleven-year-old R.T. (Riley), six-year-old S.T. (Scott), and five-year-old N.T. (Nina)—and obtained nonsecure custody of the siblings. Although referred to in this opinion, Tiffany's siblings were not subjects of the termination proceeding and are not subjects of this appeal.

services agreement but alleged she only "minimally complied with the objectives and activities" provided therein.

¶ 5 The petition alleged the children's safety and welfare continued to be a concern despite the services offered, and DSS received reports on 16 and 20 May 2014 about another domestic violence incident between respondent and Steven and about an incident where Nina was almost struck by a utility vehicle while she and Scott were outside near the road unsupervised. Lastly, the petition noted concerns with the children's school attendance, which was so poor that respondent was charged and incarcerated for Aiden's truancy; the children being out of medication for behavioral problems; respondent's withdrawal of the children from mental health services; and the parents' failure to take John to the dentist for decayed teeth.

¶ 6 On 10 June 2014, respondent agreed to a visitation plan and an Out-of-Home Family Services Agreement (OHFSA). The visitation plan allowed respondent one hour of weekly supervised visitation with the children. The OHFSA required respondent to complete a psychiatric evaluation and follow recommendations, including consistent individual counseling; participate in domestic violence counseling through the SAFE program; complete a psychological evaluation with David Rademacher; enroll in and complete twenty-six weeks of the PRIDE parenting program, which was to include thirteen weeks of anger management classes; and attend regular visits with the children.

¶ 7 On 25 July 2014, the juvenile petition was heard jointly with petitions for Tiffany's siblings, and the trial court entered a combined adjudication and disposition order for all the children. The trial court adjudicated Tiffany and her siblings neglected juveniles based on findings of fact echoing the allegations in the juvenile petition, including that respondent and Steven did not provide appropriate care or supervision to the children and exposed the children to domestic violence and that the children lived in an environment injurious to their welfare. The trial court awarded DSS custody of the children; continued respondent's visitation in accordance with an amended visitation plan; continued DSS's reunification efforts; endorsed respondent's OHFSA; and ordered respondent to demonstrate her compliance with all aspects of her OHFSA, to sign any consents or releases for information requested by DSS or the guardian ad litem (GAL), and to refrain from discussing the case with the children or encouraging the children to run away from foster care, which the trial court found she had done during visits. The trial court found that Steven had moved to Washington, D.C. after the children's removal from the home and had not entered a services agreement.

¶ 8 The case came on for a permanency planning review hearing on 17 October 2014, and the trial court entered its order on the same day. The trial court's findings reflect respondent's initial engagement in her OHFSA but subsequent failure to follow through with services. The trial court found respondent had completed a psychiatric evaluation with Daymark and a psychological evaluation with David Rademacher. The psychological evaluation resulted in diagnoses of adjustment disorder not otherwise specified, personality disorder not otherwise specified, and cannabis abuse, as well as recommendations for parenting classes, substance abuse counseling, psychotherapy, and domestic violence counseling. Dissatisfied with the results of the psychological evaluation, respondent refused to sign a release allowing the evaluation to be forwarded to Daymark for services. The court found respondent did not want to participate in psychotherapy or any similar service. The court also found that respondent had completed intake and started domestic violence counseling sessions through the SAFE program and that she had completed intake and started parenting and anger management classes in the PRIDE program. However, respondent's attendance had been inconsistent, and she had to restart classes due to absences. Respondent also tested positive for marijuana and brought a "shank" to the PRIDE program classes in August 2014. Because of the positive drug screen, it was recommended in September 2014 that respondent also complete thirteen weeks of Recovery Strategies, a substance abuse treatment program provided by the PRIDE parenting program. Lastly, the court found respondent regularly attended visits with the children but noted concerns with the visits, including: respondent did not use skills from parenting classes to correct the children's out-of-control behavior; the visits were often loud and chaotic; respondent encouraged the children to disregard instructions from the social worker; and the GAL overheard inappropriate conversations between respondent and the children and observed respondent become aggressive, angry, upset, and confrontational.

¶ 9 In the 17 October 2014 permanency planning order, the trial court continued DSS's custody of the children, set the permanent plan for the children as reunification with respondent, and continued respondent's visitation with directives that she refrain from discussing certain topics with the children. The court ordered respondent to comply with all aspects of her OHFSA, including the signing of requested releases of information, completion of anger management and parenting classes through the PRIDE program, and participation in psychotherapy or another form of therapeutic counseling. The court additionally ordered respondent to refrain from illegal drug use, begin thirteen weeks of the Recovery

Strategies substance abuse program upon her completion of thirteen weeks of anger management through the PRIDE program, and cooperate with home visits by DSS and the GAL.

¶ 10 The next permanency planning hearing was conducted over the course of 22 May and 12 June 2015. In an order entered on 30 July 2015, the trial court found that Steven had returned from Washington, D.C., resumed his relationship with respondent, and continued to live in the same home as respondent. The court found that respondent reported she returned to Daymark for group therapy in March 2015 and that she signed a release for Daymark to provide DSS with her records in April 2015. However, respondent revoked her release before Daymark could provide records to DSS. The court's findings also show that respondent's participation in domestic violence counseling through the SAFE program and participation in parenting, anger management, and substance abuse classes through the PRIDE program remained inconsistent, and respondent would have to restart all classes in the PRIDE program due to absences. The court's findings noted that respondent completed twelve hours of anger management classes through a program in Fayetteville, but the court also found that there continued to be arguments and fights between respondent and Steven, and between respondent and her adult daughter. Moreover, the court found respondent had been late to almost every visit; some visits were canceled; visits remained loud and chaotic; respondent did not correct the children and encouraged misbehavior; respondent often argued with the staff supervising visits, one time refusing to leave until being escorted away by a sheriff's deputy; and respondent continued to discuss the case with the children. Lastly, the court found it concerning that respondent minimized her own responsibility for the circumstances; respondent was always on call for her job as a taxi driver and indicated she would rely on her adult daughter to care for the children; and respondent reported a plan to move to Fayetteville with some of the children while leaving other children to live with her adult daughter or Steven. Based on its findings, the trial court ceased reunification efforts with respondent, suspended respondent's visitation with the children, and changed the permanent plan to guardianship.

¶ 11 The case continued to come on for regular permanency planning review hearings until the termination hearing. There were few updates from the hearings related to respondent and Tiffany's case,[3] and the trial

3. Regarding Tiffany's siblings: John and Aiden reached the age of majority during the case; Scott and Nina were placed in legal guardianship with a paternal great aunt, and further review hearings in their cases were waived; and Riley remained in DSS

court consistently found respondent had not made significant progress and reunification efforts should remain ceased. Following a hearing on 11 March 2016, the court added custody with a relative or other suitable person as a secondary permanent plan while continuing guardianship as Tiffany's primary permanent plan. Following a hearing on 1 June 2018, the court found that Tiffany wanted to be adopted by her foster parents, with whom she had been placed since entering DSS custody on 22 May 2014 and that her foster parents were willing to adopt her. By order entered 6 July 2018, the trial court changed the primary permanent plan for Tiffany to adoption and the secondary permanent plan to guardianship.

¶ 12 On 29 November 2018, DSS filed a termination petition alleging grounds existed to terminate respondent's parental rights to Tiffany pursuant to N.C.G.S. § 7B-1111(a)(1)–(3) for neglect, willful failure to make reasonable progress, and willful failure to pay a reasonable portion of Tiffany's cost of care. After numerous continuances and after respondent filed an answer to the petition opposing termination on 28 August 2019, the termination petition was heard on 27 September 2019. On 13 March 2020, the trial court entered an order terminating respondent's parental rights. The trial court concluded that all three of the alleged grounds existed to terminate respondent's parental rights to Tiffany and that termination was in Tiffany's best interests. Respondent appealed.

II. Analysis

¶ 13 On appeal, respondent challenges the trial court's adjudication of the existence of grounds to terminate her parental rights.

A. Standard of Review

¶ 14 This Court has explained the standard of review for termination of parental rights appeals as follows:

> Proceedings to terminate parental rights consist of an adjudicatory stage and a dispositional stage. At the adjudicatory stage, the petitioner bears the burden of proving by clear, cogent, and convincing evidence that one or more grounds for termination exist under

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custody, and her primary permanent plan changed to APPLA (Another Planned Permanent Living Arrangement) upon her reaching the age of sixteen.

After it was reported that LaDarion may be Tiffany's biological father, the trial court made him a party to Tiffany's case as a putative father on 1 November 2016 and allowed visitation between Tiffany and LaDarion. However, reunification efforts with LaDarion were ceased on 30 June 2017 due to his failure to exercise visitation rights or establish paternity.

> section 7B-1111(a) of the North Carolina General Statutes. We review a trial court's adjudication under N.C.G.S. § 7B-1109 to determine whether the findings are supported by clear, cogent and convincing evidence and the findings support the conclusions of law. The trial court's conclusions of law are reviewable de novo on appeal.

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

B. Grounds for Termination

¶ 15 The trial court terminated respondent's parental rights to Tiffany on grounds of neglect, willful failure to make reasonable progress, and willful failure to pay a reasonable portion of Tiffany's cost of care. *See* N.C.G.S. § 7B-1111(a)(1)–(3) (2019). "It is well established that an adjudication of any single ground for termination under N.C.G.S. § 7B-1111(a) will suffice to support a trial court's order terminating parental rights." *In re L.M.M.*, 375 N.C. 346, 349 (2020).

¶ 16 The trial court may terminate parental rights pursuant to N.C.G.S. § 7B-1111(a)(2) upon finding "[t]he parent has willfully left the juvenile in foster care or placement outside the home for more than 12 months without showing to the satisfaction of the court that reasonable progress under the circumstances has been made in correcting those conditions which led to the removal of the juvenile." N.C.G.S. § 7B-1111(a)(2). This Court has explained that

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

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

¶ 17 Relevant to the adjudication of grounds to terminate respondent's parental rights under N.C.G.S. § 7B-1111(a)(2), the trial court made the following findings of fact based on clear, cogent and convincing evidence concerning Tiffany's removal from the home and placement in DSS custody and respondent's lack of progress to correct the conditions leading to Tiffany's removal:

1. On 22 May 2014, [DSS] filed a juvenile petition alleging [Tiffany] and siblings to be neglected. On the same day, a court entered nonsecure orders placing [Tiffany] and siblings in nonsecure custody of DSS with authority for care and placement. . . .

. . . .

4. A court conducted a permanency planning review hearing on May 22 and June 12, 2015. . . . The court ceased reunification efforts with the mother, suspended the mother's visitation, and changed the permanent plan to guardianship . . . .

. . . .

13. DSS filed a petition to terminate parental rights of [respondent] . . . on November 29, 2018.

. . . .

28. [Tiffany] has been in the custody of DSS since May 22, 2014.

. . . .

30. [Tiffany] and her siblings lived with [respondent] and [Steven] prior to the filing of the underlying juvenile petitions on May 22, 2014.

31. DSS received child protective services reports as to the family in December 2013 and January 2014.

32. DSS found the family to be in need of services. DSS transferred the case to in-home services on February 7, 2014.

33. During a social worker's attempt at a home visit, [respondent] and [Steven] yelled and screamed at each other to the point [respondent] felt the need to remove [Tiffany] and the siblings from the situation. . . . [Respondent] blamed the social worker for the incident.

34. The social worker separated [respondent] and [Steven]. The social worker was able to formulate an agreement with [respondent].

35. [Respondent] . . . minimally complied with the objectives and activities on [her] case plan during the provision of in-home services.

36. [Respondent] withdrew [Tiffany] and the siblings from their mental health services.

37. [Respondent] delayed seeking other services.

38. [Respondent] was charged and incarcerated for a school attendance law violation with respect to an older sibling, [Aiden].

39. [Respondent] withdrew a younger sibling, [Scott], from kindergarten. [Scott] was a second[-]year kindergarten student at the time of his withdrawal.

40. On May 16, 2014, DSS received a report of neglect, domestic violence[,] and injurious environment due to an incident between the [respondent] and [Steven]. The argument escalated. [Respondent] attempted to leave with an adult daughter. [Steven] jumped on top of the van. [Steven] banged and kicked the windshield of the van as [respondent] drove away. [Tiffany] was present at the time of the incident. [Tiffany] witnessed the incident.

41. On May 20, 2014, DSS received a report of neglect, improper supervision, and injurious environment. The reporter found younger siblings, [Nina] and [Scott], outside near the road unsupervised. The reporter knocked on the door. The reporter informed [respondent] and an adult daughter that the siblings were outside unsupervised.

42. [Nina] was in the road. A truck slammed on brakes to avoid hitting her.

43. [Respondent] and [Steven] exposed [Tiffany] to domestic violence at the time of and prior to the filing of the underlying juvenile petition.

44. [Tiffany] described violence between [respondent] and [Steven]. They struck each other.

They threw things at each other. [Tiffany] saw bruises on [respondent], but she did not see any serious injuries.

45. [Tiffany] described seeing [respondent] and [Steven] verbally argue.

. . . .

48. [Respondent] and [Steven] did not provide appropriate care or supervision to [Tiffany] at the time of and prior to the filing of the underlying juvenile petition.

49. [Tiffany] lived in an environment injurious to her welfare in the home of [respondent] and [Steven] at the time of and prior to the filing of the underlying juvenile petition.

. . . .

52. [Respondent] and [Steven] argued with each other in the presence of others in April 2015.

53. [Respondent] in 2015 revoked a consent to allow DSS to review records at Daymark Recovery Services.

54. [Respondent] was required to participate in domestic violence counseling through SAFE. [Respondent] did not complete that program.

55. [Respondent] and an adult daughter fought in the home on April 15, 2015. [Steven] intervened on the side of the adult daughter. [Respondent] got upset and accused the adult daughter of sleeping with [Steven].

56. [Respondent] and [Steven] got into a scuffle several weeks after the April 15, 2015 incident when [Steven] purchased windows that were too big.

57. [Respondent] was required to enroll and complete parenting classes at PRIDE.

58. [Respondent] did not complete the PRIDE program.

59. [Respondent] completed a 12-hour parenting class in Fayetteville, but this class was not the equivalent of PRIDE.

60. [Respondent] was referred to the Recovery Strategies program at PRIDE following a positive drug screen. [Respondent] did not complete this program.

61. [Respondent] did not make any significant progress on her case plan between 2015 and the date of this hearing.

62. [Respondent] did not complete an anger management program.

63. [Respondent] did not complete an intensive parenting education program.

64. [Respondent] did not complete a substance abuse treatment program.

65. [Respondent] did not participate in consistent, regular, therapeutic counseling.

¶ 18 Based on these findings of fact, the trial court found and concluded that respondent willfully left Tiffany in foster care or placement outside the home for more than twelve months prior to the filing of the termination petition without showing to the satisfaction of the court that reasonable progress under the circumstances had been made in correcting the conditions which led to Tiffany's removal. The court thus concluded grounds existed to terminate respondent's parental rights pursuant to N.C.G.S. § 7B-1111(a)(2).

¶ 19 Respondent does not challenge any of the above findings of fact. "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)).

¶ 20 Respondent's challenges to the trial court's adjudication of grounds for termination under N.C.G.S. § 7B-1111(a)(2) focus on the second step of the analysis regarding reasonable progress. *See In re Z.A.M.*, 374 N.C. at 95. Respondent argues the trial court's findings do not support the court's determination that she failed to make reasonable progress under the circumstances to correct the conditions that led to Tiffany's removal. We disagree.

¶ 21 This Court has explained,

> 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). 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. However, a trial court has ample authority to determine that a parent's extremely limited progress in correcting the conditions leading to removal adequately supports a determination that a parent's parental rights in a particular child are subject to termination pursuant to N.C.G.S. § 7B-1111(a)(2).

In re E.C., 375 N.C. 581, 585 (2020) (cleaned up).

¶ 22 Here, the evidence and unchallenged findings establish the conditions resulting in Tiffany's removal from the home were domestic violence, improper care and supervision, and an injurious environment. It is undisputed that respondent agreed to an OHFSA with DSS on 10 June 2014 with components to address domestic violence and parenting. The OHFSA specifically required respondent to participate in domestic violence counseling through the SAFE program and to complete twenty-six weeks of the PRIDE parenting program, which was to include thirteen weeks of anger management. The OHFSA also required respondent to complete psychiatric and psychological evaluations and follow all recommendations, including individual counseling. There is no contention that the OHFSA requirements were not directly or indirectly related to addressing the conditions of removal. As set forth in the trial court's findings above, the trial court found that respondent did not complete the required domestic violence counseling through the SAFE program and that she did not complete the required parenting classes through the PRIDE program. The court found respondent completed a different parenting program, but the program was not the equivalent of the PRIDE program specified in the OHFSA. The court also found respondent was referred to the Recovery Strategies substance abuse program at PRIDE following a positive drug screen, but she did not complete the substance abuse program. Lastly, in findings sixty-one through sixty-five, the trial court succinctly found that respondent had not completed each of the programs required by her OHFSA and had not made "any significant progress on her case plan between 2015 and the date of [the termination] hearing."

¶ 23 Respondent does not contest the trial court's findings that she did not complete the requirements of her case plan. She instead argues her lack of case plan progress is not dispositive, and there was no evidence that the conditions that led to Tiffany's removal still existed. Respondent relies on the Court of Appeals' decisions in *In re Y.Y.E.T.*, 205 N.C. App. 120, 131, *disc. review denied*, 364 N.C. 434 (2010), and *In re D.A.H.-C.*, 227 N.C. App. 489, 501 (2013), which note 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." We are not persuaded the trial court erred and believe respondent's reliance on these Court of Appeals cases is misplaced.

¶ 24 In both *In re Y.Y.E.T.* and *In re D.A.H.-C.*, the court reviewed the termination of parental rights decision on grounds of neglect under N.C.G.S. § 7B-1111(a)(1). *In re Y.Y.E.T.*, 205 N.C. App. at 127–30; *In re D.A.H.-C.*, 227 N.C. App. at 499–501. Nevertheless, the court addressed arguments in each case that termination was improper because the respondents had made progress in their case plans.[4] *In re Y.Y.E.T.*, 205 N.C. App. at 130–31; *In re D.A.H.-C.*, 227 N.C. App. at 500. Although noting the respondents' progress, the court upheld termination in each case. *In re Y.Y.E.T.*, 205 N.C. App. at 131; *In re D.A.H.-C.*, 227 N.C. App. at 501. It was in this context—where the respondents had shown progress in their case plans, but the trial court nevertheless found a repetition of neglect was likely because the respondents had not demonstrated changed behavior—that the court noted a "case plan is not just a check list[.]" *In re Y.Y.E.T.*, 205 N.C. App. at 131 (explaining that despite the respondent's case plan compliance, he refused to acknowledge how the juvenile was injured and who perpetrated the injury); *In re D.A.H.-C.*, 227 N.C. App. at 500–01 (explaining that despite the respondent's progress, she failed to recognize the conditions which led to the prior adjudications and continued to associate with individuals who mistreat her children). Neither case stands for the proposition that a lack of case plan compliance should be overlooked in determining whether there has been reasonable progress under N.C.G.S. § 7B-1111(a)(2).

¶ 25 Unlike *In re Y.Y.E.T.* and *In re D.A.H.-C.*, this is not a case where there was substantial case plan compliance.[5] This is not even a case

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4. In *In re Y.Y.E.T.*, the respondent raised his compliance with his case plan as an argument challenging disposition. 205 N.C. App. at 130–31. The trial court addressed the argument but noted "compliance with the case plan is not one of the factors the trial court is to consider in making the best interest determination." *Id.* at 131.

5. Respondent also cites to *In re J.S.L.*, 177 N.C. App. 151 (2006), asserting that the Court of Appeals reversed a termination of parental rights order based on N.C.G.S.

where respondent completed some aspects of her case plan and where we are left to judge whether the trial court's determination that respondent failed to make reasonable progress is sound. It is clear in this case that respondent did not complete any of the programs required in her OHFSA to correct the conditions resulting in Tiffany's removal. We are satisfied the findings in this case, that respondent did not complete the programs required by her OHFSA to address the domestic violence and parenting issues in the home, are supported by the evidence of record and support the trial court's determination that respondent had not made reasonable progress under the circumstances to correct the conditions leading to Tiffany's removal.

III. Conclusion

¶ 26 We conclude that the trial court did not err in finding grounds existed to terminate respondent's parental rights to Tiffany under N.C.G.S. § 7B-1111(a)(2). Because "an adjudication of any single ground for termination under N.C.G.S. § 7B-1111(a) will suffice to support a trial court's order terminating parental rights[,]" *In re L.M.M.*, 375 N.C. at 349, we need not address respondent's arguments regarding N.C.G.S. § 7B-1111(a)(1) and (3), the other grounds adjudicated by the trial court. Furthermore, respondent does not contest the trial court's conclusion that termination of her parental rights was in Tiffany's best interests. *See* N.C.G.S. § 7B-1110(a) (2019). Accordingly, we affirm the trial court's termination order.

AFFIRMED.

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§ 7B-1111(a)(2) because the trial court found only one specific instance of domestic violence after the removal of the children from the home. However, the court's reversal in *In re J.S.L.* was not based solely on the lack of findings of specific instances of domestic violence in the home. As in *In re Y.Y.E.T.* and *In re D.A.H.-C.*, and unlike the instant case, the respondent in *In re J.S.L.* had substantially complied with the requirements of his case plan. *In re J.S.L.*, 177 N.C. App. at 163–64, 628 App. at 394.

IN RE W.K.

[379 N.C. 331, 2021-NCSC-146]

IN THE MATTER OF W.K.

No. 530A20

Filed 5 November 2021

1. Termination of Parental Rights—grounds for termination—not stated in conclusion section of order—referenced in findings—harmless error

Where the trial court's order terminating a father's parental rights to his son referenced the statutory ground of neglect (N.C.G.S. § 7B-1111(a)(1)) in its findings of fact, the specific statutory grounds supporting termination did not have to be stated in the order's conclusion section. Any potential error was harmless given the court's extensive findings of fact, which were supported by ample evidence, demonstrating how the court reached its decision to terminate based on neglect.

2. Termination of Parental Rights—grounds for termination—neglect—findings—sufficiency of evidence

In a private termination of parental rights matter filed by the child's grandparents, the trial court's findings of fact in its order terminating the father's parental rights to his son based on neglect (N.C.G.S. § 7B-1111(a)(1)) were supported by clear, cogent, and convincing evidence regarding the father's lengthy history of drug use and criminal conduct, continued drug use while incarcerated, failure to address his addiction despite the availability of services in prison, lack of a bond or relationship with his son, and lack of consistent interest in the welfare or health of his son (who had special medical needs).

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

In a private termination of parental rights matter filed by the child's grandparents, the trial court's conclusions that there existed a high probability of future neglect if the child were returned to his father's care and that the father's rights should be terminated on the ground of neglect (N.C.G.S. § 7B-1111(a)(1)) were supported by the findings of fact detailing the father's lengthy history of drug use and criminal conduct, failure to address his substance abuse, and minimal interest in the health of his son (who had special medical needs). The father's argument that he lacked the ability to pay any support while incarcerated was undermined by the unchallenged

finding that he paid support for his daughter, in whom he showed more interest and with whom he sought more of a relationship than with his son.

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

Andrew L. Fitzgerald for petitioner-appellees.

No brief for appellee Guardian ad Litem.

Peter Wood for respondent-appellant father.

HUDSON, Justice.

¶ 1 This case involves a private termination of parental rights proceeding initiated by petitioners, the paternal grandmother and step-grandfather of W.K. (Wallace).[1] Respondent, Wallace's father, appeals from the trial court's order terminating his parental rights. We affirm.

I. Factual Background and Procedural History

¶ 2 In April 2015, Wallace was born to respondent and Wallace's biological mother in Virginia. Respondent and Wallace's mother were never married. Wallace lived with his mother. Respondent did not live with them. On 25 November 2015, respondent was indicted on federal drug-related charges and subsequently pled guilty in the United States District Court for the Western District of Virginia to conspiracy to possess with intent to distribute fifty grams or more of methamphetamine. On 23 September 2016, respondent was sentenced to a term of ninety-five months imprisonment, followed by four years of supervised release. His projected release date is 4 July 2022.

¶ 3 In June 2017, petitioners were contacted by the Wythe County Department of Social Services in Virginia after Wallace's mother was arrested. A 16 June 2017 safety plan developed by the Wythe County Department of Social Services reflects allegations of physical and men-

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

tal abuse and neglect of Wallace by his mother. Petitioners traveled to Virginia to pick up Wallace, and Wallace has been in petitioners' custody in North Carolina since 16 June 2017. On 13 July 2017, petitioners were granted sole legal and physical custody of Wallace.

¶ 4 On 2 May 2019, petitioners filed a petition to adopt Wallace. That same day, petitioners filed a petition to terminate respondent's parental rights.[2] Petitioners alleged that in December 2015, prior to having custody of Wallace, they reported to Wallace's mother their observations that Wallace had weakness in the left side of his body and did not appear to be hitting age-appropriate milestones. However, Wallace's mother did not seek medical attention for Wallace to address their concerns. After they took custody of Wallace, petitioners immediately established medical care for Wallace, and on 29 June 2017, Wallace was diagnosed with cerebral palsy. Wallace was also diagnosed with a vision development disorder. He has numerous medical caregivers, including a primary care provider, pediatric neurologist, pediatric orthopedist, occupational therapist, physical therapist, and speech therapist, and petitioners have managed all medical care for Wallace since June 2017.

¶ 5 Petitioners further alleged as follows: respondent failed to obtain adequate medical care for Wallace; Wallace had been abused or neglected by respondent; respondent was incapable of providing for the proper care and supervision of Wallace such that Wallace was a dependent juvenile, and there was a reasonable probability that the incapacity would continue for the foreseeable future; respondent had willfully abandoned Wallace for at least six consecutive months immediately preceding the filing of the petition; respondent had not had any physical contact or communication with Wallace since August 2018; and respondent had not made any payments to petitioners for the benefit of Wallace.

¶ 6 A hearing on the petition to terminate respondent's parental rights was held on 14 July 2020. The trial court entered an order on 22 September 2020 concluding that grounds existed to terminate respondent's parental rights in Wallace based on neglect, willfully leaving Wallace in a placement outside of the home for more than twelve months without making reasonable progress to correct the conditions that led to his removal, failure to pay child support, and willful abandonment. The trial court also determined that it was in Wallace's best interests that respondent's parental rights be terminated, and the court terminated his parental rights. Respondent appeals.

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2. Petitioners also filed a petition to terminate the parental rights of Wallace's mother, and her rights were terminated. She is not a party to this appeal.

II. Analysis

¶7 **[1]** Initially, respondent argues that the trial court committed prejudicial error by terminating his parental rights when it failed to articulate the specific statutory grounds supporting termination. Respondent's argument is based on the failure of the trial court to state in its "CONCLUSIONS OF LAW" section of the termination order which subsection of N.C.G.S. § 7B-1111 it was relying upon when determining that grounds existed to terminate his parental rights. We are not persuaded.

¶8 It is well established that in order to terminate a respondent's parental rights, the trial court must "adjudicate the existence . . . of any of the circumstances set forth in G.S. 7B-1111." N.C.G.S. § 7B-1109(e) (2019). "[T]he trial court must enter sufficient findings of fact and conclusions of law to reveal the reasoning which led to the court's ultimate decision." *In re D.R.B.*, 182 N.C. App. 733, 736 (2007). Whether a trial court classifies statements as findings of fact or conclusions of law, "that classification decision does not alter the fact that the trial court's determination concerning the extent to which a parent's parental rights in a child are subject to termination on the basis of a particular ground must have sufficient support in the trial court's factual findings." *In re N.D.A.*, 373 N.C. 71, 77 (2019).

¶9 Under N.C.G.S. § 7B-1111(a)(1), a trial court may terminate parental rights if it concludes that the parent has neglected the juvenile within the meaning of N.C.G.S. § 7B-101. N.C.G.S. § 7B-1111(a)(1) (2019). A neglected juvenile is defined, in pertinent part, as a juvenile "whose parent, guardian, custodian, or caretaker does not provide proper care, supervision, or discipline; or who has been abandoned; . . . 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).

¶ 10 Here, the trial court stated in finding of fact 88 that "[a]s to the ground of neglect in the for [sic] termination of parental rights, this Court has found herein neglect in the past in 2017." Wallace was placed with petitioners in 2017 due to respondent's and Wallace's mother's drug addictions and the injurious environment in which Wallace was living. The trial court further found that there was a high probability of future neglect by respondent because he had not demonstrated that he had overcome his drug habit through completing substance abuse treatment in prison, by attending Narcotics Anonymous, or by receiving negative drug tests, and he had not completed any significant substance abuse treatment for methamphetamine use. In addition, the trial court found that respondent's pattern of inconsistent contact and lack of interest in Wallace, both before and after incarceration, revealed "a pattern of neglectful behavior and a higher likelihood of neglect in the future." These findings clearly reveal the trial court's reasoning which led to its ultimate determination to terminate respondent's parental rights for neglect under N.C.G.S. § 7B-1111(a)(1). Moreover, as later discussed, this determination is supported by ample evidence and findings. Thus, any potential error is harmless. *See In re Bluebird*, 105 N.C. App. 42, 51 (1992) (holding that although "[t]he more efficient and prudent practice for trial courts is to delineate the specific grounds for termination," the error is harmless when the findings of fact support a legal conclusion that grounds for termination exist).

¶ 11 **[2]** Next, respondent argues that the trial court erred in concluding that grounds existed to terminate his parental rights based on neglect. We disagree.

¶ 12 "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)). If the trial court finds the existence of one or more grounds to terminate the respondent's parental rights, the matter proceeds to the dispositional stage where the court must determine whether terminating the parent's rights is in the juvenile's best interests. N.C.G.S. § 7B-1110(a).

¶ 13 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).

¶ 14 Here, the trial court found that Wallace was born in April 2015, at a time when respondent was addicted to illegal drugs. In 2015, respondent was addicted to methamphetamines and supported his addiction by selling methamphetamines. After Wallace's birth, respondent did not live with Wallace, had minimal contact with him, and did not bond with him. Respondent never paid child support to Wallace's mother, who had custody of Wallace from his birth until 14 June 2017. Respondent was convicted in May 2016 in the United States District Court for the Western District of Virginia for conspiring to distribute methamphetamine and has a projected release date of July 2022. The trial court also made the following relevant findings of fact:

> 48. This Court finds that [Wallace] was a neglected juvenile in June of 2017; neglect has been proven by clear cogent and convincing evidence. [Wallace] had cerebral palsy and blindness in his left eye for a considerable time period and the Respondents, both who were addicted to drugs, failed to treat these medical issues, or get adequate medical treatment causing [Wallace] to suffer. Further, while he was in the physical custody of Respondent/Biological mother, [Wallace] was left in an area accessible to illegal drugs and marijuana and left alone in an unsafe and injurious environment. Further, Respondent/Biological Father had a long history of criminal activity and drug addiction that led to his incarceration, and Respondent/Biological Father could not protect [Wallace] or provide safe placement for him.
>
> 49. Since the Petitioners have had custody of [Wallace] from June 2017, [Wallace] has visited with Respondent/Biological Father at the Bennettsville, S.C. Federal Prison facility. The visits occurred in 2016, 2017, and 2018 when [Wallace] was 2, 3, and 4 years old. He has not visited with Respondent/Biological Father in 2019 and in 2020, for a period

of two years. [Wallace] does not remember the visits with Respondent/Biological Father. . . .

50. From June of 2017 to February 2020, Respondent/Biological Father called his mother[/]petitioner approximately once a month. Respondent/Biological Father asked his mother for money for his jail commissary account. Respondent/Biological Father said "hello" to [Wallace] on some calls. Respondent/Biological Father did not always ask to speak to [Wallace]. When he did ask, he was never denied the chance to speak to [Wallace]. Any of Respondent/Biological Father's conversations with [Wallace] at two and three years old were not substantive communication. When [Wallace] was 4 or 5, there was slightly more communication but not much. Respondent/Biological Father testified "it's hard to get a child that age to talk". The Court finds there was no meaningful substantive conversation between [Wallace] and Respondent/Biological Father during the calls that established a bond or a relationship between them. The Respondent/Biological Father did not inquire about [Wallace's] health, but the Petitioners did tell Respondent/Biological Father about updates on his serious health conditions. [Wallace] did not call Respondent/Biological Father "Dad" on the phone calls.

51. Since June of 2017 to June 11, 2020, the Respondent/Biological Father has sent emails on the Federal Bureau of Prisons website Core Links to his mother . . . . Respondent/Biological Father's emails to her were about his own status in jail and requests for money and were not concerned about [Wallace]. [Respondent's mother] told him Respondent/Biological Father that [Wallace] had cerebral palsy and about updates about [Wallace's] health. The Court finds that the emails did not help establish a bond or relationship between Respondent/Biological Father and [Wallace].

52. Respondent/Biological Father has not read books on cerebral palsy or any of [Wallace's] medical conditions or educated himself on those topics by using the prison library.

53. Respondent/Biological Father has never written a letter to [Wallace]. Respondent/Biological Father sent [Wallace] one birthday card. Respondent/Biological Father has been in prison for all five of [Wallace]'s birthdays.

54. Respondent/Biological Father sent one gift to [Wallace] at Christmas 2018 through the Toys for Tots program in prison.

. . . .

60. That [Wallace] has numerous medical and related caregivers in Forsyth County, including, but not limited to a primary care provider, a pediatric neurologist, a pediatric orthopedist, an occupational therapist . . . , a physical therapist . . . , speech therapists . . . , and psychologists.

. . . .

74. Respondent/Father has not assisted, offered to assist, contacted, or requested any information regarding [Wallace]'s numerous providers.

. . . .

77. Neither Respondent has assisted, offered to assist, contacted, or requested any information about [Wallace]'s daycare, early childhood, or school enrollment, or academic progress.

. . . .

79. The Respondent/Biological Father testified he has completed a mandatory 12-hour substance abuse treatment course in 2017. He did not offer into evidence a certificate of completion. Therefore, the Court cannot assess the program. The Court does not find by clear, cogent, and convincing evidence that he completed a substance abuse program.

80. Respondent/Biological Father testified that there is a residential drug abuse treatment program [RDAP] for 12 months in the federal prison system. He stated he was on a waitlist. Significant to the Court is that he has not completed the program in the four (4) years

he has been incarcerated. If he had completed it, [Wallace] would have been able to attend "family day" at prison and Respondent/Biological Father would have been able to spend quality time with [Wallace].

81. Respondent/Biological Father testified that he completed a parenting course in prison in 2017. He did not introduce a certificate of completion. Therefore, the Court cannot assess the program. The Court does not find by clear, cogent, and convincing evidence that Respondent/Biological Father completed a parenting class.

82. [Respondent's mother] testified that Respondent/Biological Father has admitted to her he still uses drugs in prison. She was concerned that the money she sent him was used to pay for drugs. On one occasion, she stated Respondent/Biological Father asked her to put money in a third party commissary account. When Petitioner looked up the third party on the Federal Bureau of Prisons 'Find An Inmate' website, she found this third person had been charged with selling drugs inside the prison. The Court does not find by clear, cogent, and convincing evidence that Respondent/Biological Father has continued to use illegal drugs in prison. He is given random drug screens in prison and no positive or negative tests were introduced into evidence for the Court to consider and make a finding of fact concerning drug use in prison.

. . . .

84. Respondent/Biological Father has a daughter . . . who is six months younger than [Wallace] . . . . Respondent/Biological Father communicates with [his daughter's mother] weekly and speaks to [his daughter] weekly. There was no evidence [his daughter] has special needs. Respondent/Biological Father has paid child support . . . [for his daughter] while incarcerated in 2016. . . . Respondent/Biological Father asks the Petitioners to bring [his daughter] to visit him in prison, but not [Wallace]. The Court finds as a fact that Respondent/Biological Father

favors [his daughter] over [Wallace] in that he talks to her regularly, is interested in her wellbeing, and has sent financial support for her maintenance and not for [Wallace].

. . . .

86. On June 11, 2020, Respondent/Biological Father removed Petitioners from his email contact list on Core Links. . . . This prevented email contact between the parties from June 11, 2020, to present, approximately one month. . . .

. . . .

88. As to the ground of neglect in the for [sic] termination of parental rights, this Court has found herein neglect in the past in 2017. The Court must further determine whether there is a future likelihood of neglect when the child has been separated from the Respondents for a long period of time. In the instant case, [Wallace] was placed with the Petitioners in 2017 due to both of the Respondents' drug addictions and injurious environments. When Respondent/Biological Father was out on bail, he attempted a thirty day inpatient program for his methamphetamine addiction and failed to complete it. There has been no substantial change in three years to show the Court that either Respondent has beaten their drug habits. There has been no substantial change in three years to show the Court that the Respondent/Biological Father has beaten his drug habit through substance abuse treatment in prison, by attending NA, or by negative drug tests. The Court finds there is high probability of neglect by both of Respondents as neither has completed any significant substance abuse treatment for methamphetamine. [This is true even if the Court considers Respondent/Biological Father's 12 hours of treatment, as it is not enough for his level of addiction]. Each of the Respondents' future behavior as addicts or using methamphetamines would create an injurious environment and have a severely adverse impact on [Wallace] and his course of treatment for serious medical conditions.

> This failure of both Respondents to complete substance abuse treatment is indicative of future neglect. The Court finds as a fact that the future likelihood of neglect has been proven by clear, cogent, and convincing evidence.
>
> 89. Respondent/Biological Father's incarceration is neither a sword nor a shield for him in this case. His incarceration does not shield him from his neglect of [Wallace]. The Court has looked at the Respondent/Biological Father's behavior before and during his incarceration. In looking at his behavior before incarceration, Respondent/Biological Father has a long history of drug use and criminal activity which leads to the conclusion that there is a high indication of future neglect. Before his incarceration, Respondent/Biological Father had no bond or relationship with [Wallace]. His prior history of inconsistent visitation and contact with [Wallace] [when he was in Respondent/Biological Mother's custody until the age of two] shows the Court a pattern of neglect. After Respondent/Biological Father's incarceration, he has continued a pattern of inconsistent contact with [Wallace] through July of 2020 by sending no letters, sending one card, and only sending one gift in 4 years. During his [incarceration], the Respondent/Biological Father has established no bond or relationship with [Wallace]. Both periods of time, before and after incarceration, show inconsistent contact and lack of interest in [Wallace] by Respondent/Biological Father. This shows a pattern of neglectful behavior and a higher likelihood of neglect in the future.

¶ 15 Respondent challenges findings of fact 48, 50, 82, 88, and 89. With regard to finding of fact 48, petitioners' exhibit 3, which was submitted into evidence at the termination hearing, detailed respondent's lengthy criminal history dating back to 2012. Respondent's mother testified to respondent's history of drug use and that drugs were found within Wallace's reach while Wallace was in his mother's custody. Respondent's mother testified that as far back as December 2015, she observed Wallace and had concerns about his development. Wallace was not using his left arm, crawling, or attempting to stand. Respondent's mother voiced her concerns to Wallace's mother, but Wallace's mother did not seek medical

attention. Immediately upon gaining custody of Wallace, petitioners took Wallace to get examined, and he was diagnosed with cerebral palsy and blindness in his left eye. Therefore, the trial court's finding of fact 48 is supported by clear, cogent, and convincing evidence.

¶ 16 As to finding of fact 50, testimony given at the termination hearing confirms that from the time petitioners had custody of Wallace until February, respondent would call his mother from prison approximately once a month. Petitioners testified that during these calls, respondent would ask his mother for money. Respondent testified that he would talk to Wallace on the phone "sometimes here and there." While respondent's mother allowed respondent to speak with Wallace, respondent admitted that he could not "hold a conversation with a child [Wallace's] age." Wallace stopped calling respondent " 'dad' a while ago." Petitioners testified that although they shared Wallace's diagnoses with respondent, respondent did not inquire about Wallace's diagnoses or status of his health, inquire about Wallace's medical treatment, request copies of medical records, or ask for the names of Wallace's medical providers. Thus, finding of fact 50 is supported by clear, cogent, and convincing evidence, and the trial court's finding that there was "no meaningful substantive conversation" between respondent and Wallace is a reasonable inference from that evidence. *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).

¶ 17 Record evidence also supports finding of fact 82. Respondent's mother testified that respondent admitted to still using drugs in prison. Respondent asked her to put money in another prisoner's account, and when respondent's mother searched online for that inmate's name, she discovered that inmate was under investigation for smuggling drugs into prison. Respondent later testified that the prison administered random drug tests. From this evidence, it was within the trial court's discretion to not find by clear, cogent, and convincing evidence that respondent had continued to abuse illegal drugs in prison. *See In re D.L.W.*, 368 N.C. at 843.

¶ 18 With regard to finding of fact 88, respondent's mother testified that prior to respondent pleading guilty to conspiracy to possess with intent to distribute fifty grams or more of methamphetamine in May 2016, he was out on bail. During this time, respondent began a thirty-day inpatient program for his drug addiction but failed to complete it. In June of 2017, Wallace entered petitioners' custody after his mother was arrested. Respondent testified that he finished a twelve-hour substance abuse

treatment program in 2017. However, an unchallenged finding of fact, which is binding on appeal, establishes that respondent did not offer a certificate of completion for the twelve-hour program, and the trial court could not find by clear, cogent, and convincing evidence that he actually completed the program. Unchallenged finding of fact 80 also indicates that there was a twelve-month residential drug treatment program available to respondent, but he failed to complete the program during the four years he had been incarcerated. As such, the trial court's finding of fact 88 is supported by clear, cogent, and convincing evidence. Based upon the foregoing evidence and findings, the trial court made the reasonable inference that respondent had not made any substantial change in three years to demonstrate he had overcome his substance abuse issues and that respondent's future behavior of abusing drugs would create an injurious environment for Wallace. *See id.* The trial court's determination that there existed a high probability of future neglect by respondent is more properly classified a conclusion of law, *see Sparks*, 362 N.C. at 185, and we address respondent's challenge to this conclusion later.

¶ 19 Finally, respondent challenges finding of fact 89, but this finding is supported by clear, cogent, and convincing evidence. As previously discussed, petitioners' exhibit 3 reveals respondent's lengthy criminal history, and respondent's mother attested to respondent's history of drug use. Respondent was not present at Wallace's birth, and between Wallace's birth and respondent's arrest, Wallace visited respondent's house twice. During his four years of incarceration, respondent admitted to sending no letters, sending a single birthday card, and sending only one gift to Wallace. Respondent would talk to Wallace on the phone "sometimes here and there" when he called petitioners but stated that it was difficult to "hold a conversation" with Wallace. Wallace's guardian ad litem testified that Wallace considered petitioners his parents, not respondent or Wallace's mother. Accordingly, the trial court's finding of fact 88 is supported by clear, cogent, and convincing evidence. The trial court reasonably inferred from the foregoing evidence that respondent's inactions showed inconsistent contact and lack of interest in Wallace. *See In re D.L.W.*, 368 N.C. at 843. The trial court's determination that this showed a pattern of neglectful behavior and a higher likelihood of neglect in the future is more properly classified a conclusion of law, *see Sparks*, 362 N.C. at 185, and we address respondent's challenge to this conclusion next.

¶ 20 **[3]** Respondent argues that evidence at the termination hearing showed his changed circumstances, in that he was no longer "the same man who had plead guilty and went to prison" and that "[g]iven the steps taken by

[him], the trial court erroneously found a probability of future neglect." He specifically contends that given his inability to pay child support and the efforts he made by taking advantage of programs offered in prison, the trial court erred in concluding there was a probability of future neglect. We disagree.

¶ 21 "Our precedents are quite clear—and remain in full force—that '[i]ncarceration, standing alone, is neither a sword nor a shield in a termination of parental rights decision.' " *In re M.A.W.*, 370 N.C. 149, 153 (2017) (alteration in original) (quoting *In re P.L.P.*, 173 N.C. App. 1, 10 (2005)). Incarceration

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

In re S.D., 374 N.C. 67, 76 (2020) (alterations in original) (quoting *In re C.L.S.*, 245 N.C. App. 75, 78, *aff'd per curiam*, 369 N.C. 58 (2016)).

¶ 22 Respondent's argument that he lacked the ability to pay any child support because he only made $14 a month is undermined by the trial court's unchallenged finding that he sent money for his daughter's care while he was incarcerated. Moreover, the trial court also found, based on respondent's testimony, that respondent made small salaries from various positions he had while in prison but did not provide support for Wallace. *See, e.g.*, *In re Bradshaw*, 160 N.C. App. 677, 682 (2003) (affirming termination of parental rights based on neglect when the incarcerated respondent was able to earn a small income in prison but failed to provide any financial aid to the petitioner in support of his child).

¶ 23 Respondent's contention that the efforts he made by taking advantage of programs offered by the prison are likewise without merit. It is undisputed that Wallace was placed with petitioners in 2017 due to both respondent's and Wallace's mother's drug addictions and the injurious environment in which Wallace was living. The record demonstrates that respondent was incarcerated prior to the period of past neglect in June 2017 and was still incarcerated at the time of the termination hearing. Unchallenged finding of fact 80 establishes that during the four years respondent had been incarcerated, he did not engage in a residential drug abuse treatment program accessible to him through the prison system. This program would have given respondent the opportunity to spend

quality time with Wallace through the attendance at "family day" in the prison. Unchallenged findings 79 and 81 also establish that respondent could not produce proof that he completed a twelve-hour substance abuse program and parenting course available to him in prison, and thus the trial court could not find by clear, cogent, and convincing evidence that respondent completed either. The foregoing findings support the trial court's determination that because respondent had not completed substance abuse treatment, there had not been a substantial change in circumstances occurring between the period of past neglect and the time of the termination hearing.

¶ 24 In addition, the evidence and findings show that respondent made minimal efforts to show interest in Wallace's welfare while incarcerated. The last time respondent saw Wallace was in 2018. Although respondent called his mother approximately once a month, he did not always request to speak with Wallace and when he did, there was no meaningful, substantive conversation between them. Respondent's communications with his mother concerned his status in jail and requests for money. Despite being informed of Wallace's serious medical conditions from petitioners, respondent failed to inquire about Wallace's health, ask for updates on Wallace's serious health conditions, research any of Wallace's medical conditions, or request any information regarding Wallace's healthcare providers. In addition, he failed to request any information about Wallace's daycare or academic progress. While he was in prison for all five of Wallace's birthdays, he only sent a single birthday card to Wallace, never wrote a letter to Wallace, and sent only one Christmas gift to Wallace. Respondent removed petitioners from his email contact list in early June 2020, preventing the parties from communicating. Moreover, the evidence and findings show how differently he treated his daughter by communicating with her weekly, sending money for her benefit, inquiring about her welfare, and requesting that petitioners bring her to visit him in prison but not asking that they bring Wallace.

¶ 25 The record evidence and the trial court's findings establish that respondent had not completed substance abuse treatment by the time of the termination hearing, and he failed to show interest in Wallace's welfare through the means available to him. Thus, the trial court reasonably concluded that there was a high probability that Wallace would be neglected in the future were he placed in respondent's care. *See In re D.L.A.D.*, 375 N.C. 565, 572 (2020) (holding that the trial court reasonably concluded the minor child would be neglected in the future if he were placed in the respondent-mother's care when she originally stated she wished to have her parental rights terminated, did not attempt to

visit her child for a period of over a year, had substance abuse issues and no evidence showed she ever received treatment for those issues, and her boyfriend who had substance abuse issues lived in her home); *In re S.D.*, 374 N.C. at 87–88 (holding that evidence supported findings of past neglect and a repetition of neglect when the respondent had a history of criminal activity and substance abuse that resulted in his incarceration, failed to establish a relationship with his daughter prior to her being removed from the mother's care, only made minimal efforts to show interest in his daughter while incarcerated, failed to develop a relationship with or show an ability to care for his daughter since his release from incarceration, and failed to make significant progress toward correcting the barriers to reunification).

¶ 26 The trial court's finding that Wallace was previously neglected, which respondent does not challenge, and its determination that there was a high probability of a repetition of neglect support its conclusion that grounds existed to terminate respondent's parental rights under N.C.G.S. § 7B-1111(a)(1). Because we uphold the trial court's adjudication of grounds to terminate respondent's parental rights under N.C.G.S. § 7B-1111(a)(1) and respondent does not challenge the trial court's best interests determination at the dispositional stage, we do not address respondent's remaining arguments[3] and affirm the trial court's order terminating his parental rights in Wallace. *In re Moore*, 306 N.C. 394, 404 (1982) (holding that an appealed order should be affirmed when any of the grounds for termination upon which the trial court relied are supported by findings of fact based on clear, cogent, and convincing evidence); *see also* N.C.G.S. § 7B-1111(a) ("The court may terminate the parental rights upon a finding of one or more [grounds for termination.]").

AFFIRMED.

3. Respondent challenges the trial court's conclusion that grounds existed to terminate his parental rights under N.C.G.S. § 7B-1111(a)(2)–(3), (7). He also argues that the petition to terminate his parental rights failed to provide sufficient notice that petitioners were alleging grounds under N.C.G.S. § 7B-1111(a)(2).

CUMMINGS v. CARROLL

[379 N.C. 347, 2021-NCSC-147]

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

No. 216A20

Filed 17 December 2021

1. Negligence—economic loss rule—sale of real property—disclosure statement—water damage

In an action by buyers of a beach house to recover damages after discovering severe water damage that appeared to have been intentionally concealed, the buyers' claims against the selling parties were not barred by the economic loss rule where the claims—for negligent misrepresentation, fraud, and negligence—rested upon allegations that the selling parties had failed to disclose the existence of a long history of water intrusion problems and had unreasonably relied upon a painter's assurances that he had fully repaired the problems. The disclosure statement upon which the buyers' claims relied was not incorporated into the purchase contract and therefore could not serve as the basis for application of the economic loss rule.

2. Negligence—sale of real property—duty of realtor to disclose—material facts—water intrusion problems

In an action by buyers of a beach house to recover damages after discovering severe water damage that appeared to have been intentionally concealed, the buyers' negligence claims against the sellers' realtor and real estate company (defendants) presented a genuine issue of material fact as to whether defendants had a duty to disclose the history of water intrusion into the house, where the realtor knew of the previous water intrusion, hired a painter to repair the source of a leak, and received equivocal assurances from the painter that he had located and fixed the leak.

3. Negligence—negligent misrepresentation—sale of real property—water intrusion problems

In an action by buyers of a beach house to recover damages after discovering severe water damage that appeared to have been intentionally concealed, the buyers' negligent misrepresentation

claims against the sellers presented genuine issues of material fact as to whether the sellers reasonably relied upon the work of a painter to repair a leak when they represented in the disclosure statement that they did not know of any water intrusion problems, and whether the buyers reasonably relied upon the disclosure statement in light of their home inspector's report noting no significant water intrusion issues.

4. Fraud—inducement—sale of real property—water intrusion problems

In an action by buyers of a beach house to recover damages after discovering severe water damage that appeared to have been intentionally concealed, the buyers' fraud-related claims against the sellers and the sellers' realtor (defendants) presented genuine issues of material fact as to whether defendants reasonably relied upon the work of a painter to repair a leak, and whether the buyers reasonably relied upon their home inspector's report noting no significant water intrusion issues.

5. Evidence—inferences running backward—sale of real property—water intrusion problems—inspection after closing

In an action by buyers of a beach house to recover damages after discovering severe water damage that appeared to have been intentionally concealed, the Court of Appeals did not violate any prohibition against relying upon "inferences running backwards" when, in partially reversing the trial court's order granting summary judgment for defendants, it relied upon the testimony of a general contractor concerning his discovery of previous water damage during his inspection three months after the closing, where a jury could properly determine that the damage existed at the time of the closing.

6. Fiduciary Relationship—breach of fiduciary duty—buyer's real estate agent—material information—reasonable diligence

In an action by buyers of a beach house to recover damages after discovering severe water damage that appeared to have been intentionally concealed, the buyers failed to present a genuine issue of material fact as to whether their realtors breached their fiduciary duty by failing to procure, on their own initiative, maintenance records for the home and by hiring the licensed home inspector who failed to discover the home's water intrusion problems.

Justice BERGER concurring in part and dissenting in part.

Chief Justice NEWBY joins in this opinion concurring in part and dissenting in part.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 270 N.C. App. 204 (2020), affirming, in part, and reversing and remanding, in part, an order entered on 31 July 2018 by Judge Alma L. Hinton in Superior Court, Brunswick County, granting summary judgment in favor of defendants Robert Patton Carroll; DHR Sales Corp. d/b/a Re/Max Community Brokers; Berkeley Investors, LLC; George C. Bell; Brooke Elizabeth Rudd-Gaglie f/k/a Brooke Elizabeth Rudd; Margaret Rudd & Associates, Inc.; and James C. Goodman. On 15 December 2020, the Supreme Court allowed defendants Berkeley Investors' and Mr. Bell's petition for discretionary review as to additional issues. Heard in the Supreme Court on 30 August 2021.

Chleborowicz Law Firm, PLLC, by Christopher A. Chleborowicz and Elijah A.T. Huston, for plaintiff-appellees.

Wallace, Morris, Barwick, Landis & Stroud, P.A., by Stuart Stroud and Kimberly Connor Benton for defendants-appellants Brooke Elizabeth Rudd-Gaglie f/k/a Brooke Elizabeth Rudd; Margaret Rudd & Associates, Inc.; and James C. Goodman.

Alexander C. Dale and Ryal W. Tayloe for defendants-appellants George C. Bell and Berkeley Investors, LLC.

Crossley McIntosh Collier Hanley & Edes, PLLC, by Clay Allen Collier, for defendants-appellants Robert Patton Carroll and DHR Sales Corp. d/b/a Re/Max Community Brokers.

ERVIN, Justice.

¶ 1 This case stems from a dispute surrounding the purchase of an oceanfront beach house located on Oak Island by plaintiffs James Cummings and his wife, Connie Cummings. Several months after closing, plaintiffs discovered the existence of significant structural damage to the house arising from past water intrusion, prompting them to assert claims against defendants for negligence, negligent misrepresentation, fraud, unfair and deceptive trade practices, breach of contract, breach of the implied covenant of good faith and fair dealing, and breach of fiduciary duty. After the conclusion of discovery, the trial court granted defendants' motions for summary judgment. On appeal, we have been asked to determine if the trial court correctly granted summary judgment

with respect to the claims of negligence and fraud against Re/Max and Mr. Carroll, negligent misrepresentation and fraud against Berkeley Investors and Mr. Bell, and breach of fiduciary duty against Rudd & Associates, Ms. Rudd-Gaglie, and Mr. Goodman. After careful consideration of the record in light of the applicable law, we affirm the decision of the Court of Appeals, in part; reverse the decision of the Court of Appeals, in part; and remand this case to Superior Court, Brunswick County, for a trial on the merits with respect to these claims.

I. Factual Background

A. Substantive Facts

¶ 2 On 15 August 2014, plaintiffs purchased an oceanfront beach house located on Oak Island from Berkeley Investors. Plaintiffs were represented in connection with the transaction by Rudd & Associates, acting through Ms. Rudd-Gaglie and Mr. Goodman. On the other hand, Berkeley Investors was represented by Re/Max, with Mr. Carroll serving as the listing agent. At all times relevant to this case, Mr. Bell and defendant Thornley Holdings, LLC, which is an entity owned by defendant Kim Durham, each owned a fifty-percent interest in Berkeley Investors.

¶ 3 Berkeley Investors had purchased the house, which had been built in 2003, for use as a short-term rental property.[1] Berkeley Investors retained Oak Island Accommodations, Inc., for the purpose of renting, cleaning, and otherwise maintaining the property. According to maintenance records maintained by Oak Island Accommodations, the house had experienced numerous maintenance-related problems from 2005 through 2014, including water damage to the ceiling, a number of internal water leaks, and mold growth.

¶ 4 On 2 January 2013, Berkeley Investors hired Mr. Carroll for the purpose of listing the house for sale. Subsequently, on 20 January 2013, Berkeley Investors executed a State of North Carolina Residential Property and Owners' Association Disclosure Statement, which residential property owners are required to provide to prospective buyers in accordance with N.C.G.S. § 47E-4. Mr. Bell and Ms. Durham, who completed the form on behalf of Berkeley Investors, answered the following questions in the negative:

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1. The house is elevated above the ground level by pilings, with the second floor, which is used as a guest area, containing a living room and two bedrooms, while the third floor, which constitutes the main level, contains a central living area, a kitchen and dining area, and a master bedroom.

> Regarding the [house] . . . to your knowledge is there any problem (malfunction or defect) with any of the following:
>
> . . . .
>
> 1. FOUNDATION, SLAB, FIREPLACES/CHIMNEYS, FLOORS, WINDOWS (INCLUDING STORM WINDOWS AND SCREENS), DOORS, CEILINGS, INTERIOR AND EXTERIOR WALLS, ATTACHED GARAGE, PATIO, DECK OR OTHER STRUCTURAL COMPONENTS including any modifications to them?
>
> 2. ROOF (leakage or other problem)?
>
> 3. WATER SEEPAGE, LEAKAGE, DAMPNESS OR STANDING WATER in the basement, crawl space or slab?
>
> . . . .
>
> 10. PRESENT INFESTATION, OR DAMAGE FROM PAST INFESTATION OF WOOD DESTROYING INSECTS OR ORGANISMS which has not been repaired?

According to the disclosure statement, if "something happens to the property to make your [d]isclosure [s]tatement incorrect or inaccurate (for example, the roof begins to leak), [the sellers] must promptly give the purchaser a corrected [d]isclosure [s]tatement or correct the problem."

¶ 5 Mr. Bell and Ms. Durham knew of and had discussed problems relating to water intrusion into the house as early as January 2011, with Mr. Carroll having been included in these discussions as early as 14 October 2013, following his engagement as the listing agent. For example, in a 14 October 2013 e-mail to Ms. Durham and Mr. Carroll, Mr. Bell stated that the owners needed to "trace the source of the water leakage evident on the ceiling" of the guest room and "[f]ix the separated/rotted wood in the guest room level from the water leakage." In addition, Mr. Bell noted that he had "[f]ound a small plumbing leak in the kitchen" that he had "fixed with tape."

¶ 6 On 20 January 2014, Mr. Bell sent an e-mail to Ms. Durham that contained a list of repairs that needed to be made to the house and in which he noted that:

> [t]here has been a lot of water-intrusion that has come into [the guest-level] ceiling from wind driven rain from above and has stained it badly about 15 feet into the room ceiling. It's right in the center of the room and seems to originate on the upper level and flow down through the interior column between the doors.

Mr. Bell recommended that the owners "[f]ind and repair the source of this leak that is causing the damage. We'll need to get a few boards replaced on the columns as well; they are buckled from the water-intrusion." In addition, Mr. Bell suggested that the owners paint the wooden trim around the doors leading to the lower deck because it was "in real danger of beginning to rot." Although records obtained from Oak Island Accommodations dated 13 February 2014 indicate that it was seeking estimates relating to the cost of the work needed to repair these problems, an entry in its records dated 25 March 2014 notes that "[o]wner is having this work completed by another vendor."

¶ 7 In March 2014, Mr. Carroll enlisted the services of Randy Cribb, a painter who had performed painting work on the house during the preceding year. In addition to painting the living room walls and ceiling, an exterior wall, and the upper and lower decks, Mr. Cribb agreed to repair "cracks" and "cracked caulk" in the ceiling. At some time prior to 24 March 2014, Mr. Cribb sent a text message to Mr. Carroll in which he stated that he was almost finished with the work that he had been engaged to perform, that he "may have found that leak," and that he "hope[d] that was it." On the other hand, Mr. Cribb's deposition testimony indicated that he had not looked behind the walls for the purpose of determining whether any water intrusion had occurred.

¶ 8 In April 2014, plaintiffs contacted Ms. Rudd-Gaglie, with whom they had worked in the past, for the purpose of assisting them in exploring the option of purchasing the house. As a result, Ms. Rudd-Gaglie contacted Mr. Carroll and arranged for an initial site visit, which she attended with plaintiffs. On 26 June 2014, plaintiffs employed Rudd & Associates to represent them in connection with the purchase of the house by executing an Exclusive Buyer Agency Agreement which provided, among other things, that (1) Rudd & Associates had a duty to "disclos[e] to [plaintiffs] all material facts related to the property or concerning the transaction of which [Rudd & Associates] has actual knowledge" and would "exercise ordinary care, comply with all applicable laws and regulations, and treat all prospective sellers honestly" in the process; (2) plaintiffs were "advised to seek other professional advice in matters of

. . . wood-destroying insect infestation, structural soundness, engineering, and other matters pertaining to any proposed transaction"; and (3), although Rudd & Associates "may provide [plaintiffs] the names of providers who claim to perform such services, [plaintiffs] understand[ ] that [it] cannot guarantee the quality of service or level of expertise of any such provider." The buyer agency agreement also specified that plaintiffs "agree[d] to indemnify and hold [Rudd & Associates] harmless" for any liability arising "either as a result of [plaintiffs'] selection and use of any such provider or [plaintiffs'] election not to have one or more of such services performed."

¶ 9 On 12 July 2014, plaintiffs made an offer to purchase the house for $1.25 million, which was accepted on behalf of Berkeley Investors by Mr. Bell on 12 July 2014 and by Ms. Durham on 13 July 2014. The Offer to Purchase and Contract between plaintiffs and Berkeley Investors included a 30-day due diligence period, during which plaintiffs or their agents were entitled to "conduct all desired tests, surveys, appraisals, investigations, examinations and inspections of the Property as [plaintiffs'] deem [ ] appropriate" and specifically provided for the performance of inspections "to determine . . . the presence of unusual drainage conditions or evidence of excessive moisture adversely affecting any improvements on the Property" or "evidence of wood-destroying insects or damage therefrom." After noting that plaintiffs acknowledged having received and reviewed the disclosure statement, the purchase contract provided that "THE PROPERTY IS BEING SOLD IN ITS CURRENT CONDITION" and that Berkeley Investors had not extended any warranty to plaintiffs in connection with the sale.

¶ 10 Ms. Rudd-Gaglie recommended that plaintiffs employ Jeff Williams, a licensed home inspector, to inspect the house. On 19 July 2014, Mr. Williams conducted his inspection, with Mr. Cummings, Mr. Carroll, Ms. Rudd-Gaglie, and Mr. Goodman, who was the broker-in-charge at Rudd & Associates, in attendance. Mr. Cummings testified during his deposition that, after the conclusion of the inspection, he asked Mr. Carroll if the house was "a good, watertight, sound house?" and that Mr. Carroll had responded by stating that, "if [he] had the money, [he would] buy it."

¶ 11 In the detailed report that he prepared for Ms. Rudd-Gaglie following the completion of the inspection, Mr. Williams outlined the scope of the work that he had performed by indicating that he would, among other things, (1) "[r]eport signs of abnormal or harmful water penetration into the building or signs of abnormal or harmful condensation on building components" and (2) "[p]robe structural components where deterioration is suspected." On the other hand, the report stated that Mr. Williams

would not "[e]nter any area or perform any procedure that may damage the property or its components" and that he would not be required to "[m]ove personal items, panels, furniture, equipment, plant life, soil, snow, ice or debris that obstructs access or visibility" or "inspect[ ] behind furniture, area rugs or areas obstructed from view." At the end of each section, the report stated that, "[w]hile the inspector makes every effort to find all areas of concern, some areas can go unnoticed" and that "[i]t is recommended that qualified contractors be used in your further inspection or repair issues as it relates to the comments in this inspection report." In addition, Section 1 of the report, which addressed issues relating to "Roofing," specifically noted that "[o]ur inspection makes an attempt to find a leak but sometimes cannot."

¶ 12 In the more structure-specific portions of his report, Mr. Williams noted the existence of numerous problems with the house that needed to be repaired, including: (1) the presence of minor damage to the roof; (2) the need for portions of the exterior walls "to be sealed to keep water and insect[s] from entering the home"; (3) the presence of certain doors that would not close or seal properly; (4) the difficulty of opening certain sliding doors and windows and the presence of rust stains on some of those fixtures; and (5) the presence of loose drywall tape near the guest-level entryway, a condition that Mr. Williams attributed to a "lack of air movement" and that led him to recommended the installation of a dehumidifier "to remove moisture." On the other hand, nothing in Mr. Williams' report suggested that the house had experienced significant water intrusion. In his deposition, Mr. Williams testified that he had not seen any evidence of water intrusion; that, if he had, he "most definitely" would have conducted a moisture test by using an awl to probe the wall and identify spots in which the drywall had been softened by moisture; that no one had made him aware that the house had a history of water intrusion; and that, had he been informed that water intrusion had occurred at the house, he would have either conducted a moisture test or declined to perform the inspection.

¶ 13 On 21 July 2014, Ms. Rudd-Gaglie e-mailed the inspection report to plaintiffs, stating that Mr. Williams had told her that, while the issues that needed to be addressed included "mostly small items," "the bigger items were the doors and windows." Ms. Rudd-Gaglie advised plaintiffs to "look over the report" and then call her to "discuss how [plaintiffs] would like to proceed with repairs." In light of the report, plaintiffs and Berkeley Investors amended the purchase contract to provide that Berkeley Investors would pay $4,500 relating to plaintiffs' "expenses associated with the purchase of the Property," with this amount having

been intended, according to Mr. Cummings, to cover the costs of making the repairs that had been identified in Mr. Williams' report. The sale of the house closed on 15 August 2014.

¶ 14 In November 2014, plaintiffs and various members of their family came to the house for the purpose of celebrating Thanksgiving. At that time, which occurred shortly after a major thunderstorm, plaintiffs observed evidence of significant water intrusion extending approximately fifteen feet into the guest floor ceiling. After cutting away a section of the sheetrock in the wall, Mr. Cummings and his son-in-law discovered the presence of black mold and a large termite nest. Mr. Cummings contacted Ms. Rudd-Gaglie to advise her of this discovery, and she recommended that Mr. Cummings contact Craig Moore, a licensed general contractor, for the purpose of getting him to inspect the house.

¶ 15 On the following morning, Mr. Moore conducted an initial inspection of the house. In his deposition testimony, Mr. Moore stated that, at the time of his initial visit to the house, he had observed that the ocean-side wall on the guest level displayed signs of significant water and termite damage and "massive rot," which he described as a "structural issue." Mr. Moore stated that such problems would "take[ ] quite a while" to develop and that such extensive termite damage "doesn't happen in a couple of days." After removing the interior sheetrock walls, Mr. Moore observed the presence of more extensive water damage and rot and discovered that someone had shoved newspaper into holes in the wall before caulking over the newspaper-filled holes.

¶ 16 In the aftermath of at least one additional visit to the house, Mr. Moore sent plaintiffs a letter dated 5 December 2014 in which he noted that the house had "many active and substantial leaks, which need to be repaired as quickly as possible"; warned that "[t]he structural integrity of the house is or will be compromised as the combination of active leaks and active termite infestation worsen[s]"; and opined that there appeared to have been some "recent aesthetic repairs made to many of the questionable areas." According to Mr. Moore, the extensive damage to the house that he had discovered showed that, while the house had not been "properly maintained," "work had been done to make the house look better." In addition, Mr. Moore concluded that the "previous damage to the house, wherever it was, was carefully painted and hidden so that the only way to discover that there was an ongoing water-intrusion problem would have been to do extensive intrusion testing into the walls" and opined that anyone performing minor paint and repair work at the house "could [not] have done that work without knowing they were covering up a major problem."

¶ 17 According to Mr. Moore, the conditions that he observed in the house would not have given someone performing a visual inspection any reason to believe that conducting intrusive testing for the presence of moisture would have been appropriate. On the other hand, Mr. Moore also testified that, had he inspected the house, he would have identified the moisture intrusion problems given that he had been trained to recognize when cosmetic repairs had been performed. For this reason, Mr. Moore had advised plaintiffs that they should always have a general contractor, rather than a home inspector, perform any needed home inspections. Plaintiffs paid Mr. Moore in excess of $300,000 to repair the damage that the house had sustained.

B. Procedural History

¶ 18 On 2 September 2015, plaintiffs filed a complaint asserting certain claims arising from their purchase of the house. After obtaining leave of court, plaintiffs filed an amended complaint on 12 September 2016 in which they asserted claims for (1) negligence against Re/Max, Mr. Carroll, Rudd & Associates, Ms. Rudd-Gaglie, and Mr. Goodman; (2) negligent misrepresentation against all defendants; (3) breach of fiduciary duty against Rudd & Associates, Ms. Rudd-Gaglie, and Mr. Goodman; (4) unfair and deceptive trade practices, pursuant to N.C.G.S. § 75-1.1 et seq., against Berkeley Investors, Mr. Bell, Re/Max, and Mr. Carroll; (5) breach of contract against Berkeley Investors and Mr. Bell; (6) breach of the implied covenant of good faith and fair dealing against Berkeley Investors and Mr. Bell; (7) fraud and fraud in the inducement against Berkeley Investors, Mr. Bell, Re/Max, and Mr. Carroll; (8) fraud by concealment against Berkeley Investors, Mr. Bell, Re/Max, and Mr. Carroll; and (9) personal liability against Mr. Bell.[2] In essence, plaintiffs alleged that defendants had induced them to purchase the house in spite of its damaged condition, with the damage having resulted from, among other things, undisclosed water-intrusion problems and termite infestation, and sought to recover compensatory damages related to the costs that they had incurred in repairing the house, treble damages pursuant to N.C.G.S. §75-1.1 et seq., and punitive damages.

¶ 19 On 18 October 2016, 14 November 2016, and 30 November 2016, defendants filed responsive pleadings in which they denied the material allegations of the amended complaint, asserted various defenses, and

2. Although plaintiffs asserted claims against defendants Thornley Holdings, LLC; David H. Roos; Margaret N. Singer; and Ms. Durham in their amended complaint, they voluntarily dismissed those claims prior to the entry of the trial court's summary judgment order. As a result, we will refrain from discussing plaintiffs' claims against these additional defendants in this opinion.

sought the dismissal of the amended complaint. On 24 and 31 May 2018, defendants filed motions seeking the entry of summary judgment in their favor. Defendants' summary judgment motions were heard before the trial court at the 11 June 2018 civil session of Superior Court, Brunswick County. On 31 July 2018, the trial court entered an order granting defendants' motions for summary judgment in their entirety. Plaintiffs noted an appeal to the Court of Appeals from the trial court's order.

C. Court of Appeals Decision

¶ 20 In seeking relief from the trial court's order before the Court of Appeals, plaintiffs argued that the trial court had erred by granting summary judgment in favor of all defendants. After affirming the trial court's decision to grant summary judgment in defendants' favor with respect to plaintiffs' claims for (1) negligence against Rudd & Associates, Ms. Rudd-Gaglie, and Mr. Goodman; (2) negligent misrepresentation against Rudd & Associates, Ms. Rudd-Gaglie, Mr. Goodman, Re/Max, and Mr. Carroll; (3) unfair and deceptive trade practices against Berkeley Investors, Mr. Bell, Re/Max, and Mr. Carroll; (4) breach of contract against Mr. Bell; (5) breach of the implied covenant of good faith and fair dealing against Berkeley Investors and Mr. Bell; and (6) personal liability against Mr. Bell, the Court of Appeals unanimously reversed the trial court's decision to grant summary judgment in favor of defendants with respect to plaintiffs' claims for negligent misrepresentation and fraud against Berkeley Investors and Mr. Bell. *Cummings v. Carroll*, 270 N.C. App. 204, 235 (2020). Finally, although a majority of the Court of Appeals voted to reverse the trial court's decision to grant summary judgment in favor of defendants with respect to plaintiffs' claims for (1) negligence against Re/Max and Mr. Carroll; (2) fraud and fraud in the inducement against Re/Max and Mr. Carroll; (3) fraud by concealment against Re/Max and Mr. Carroll; and (4) breach of fiduciary duty against Rudd & Associates, Ms. Rudd-Gaglie, and Mr. Goodman, *id.*, Judge Arrowood dissented from this aspect of his colleagues' decision. Re/Max, Mr. Carroll, Rudd & Associates, Ms. Rudd-Gaglie, and Mr. Goodman noted an appeal to this Court from the Court of Appeals' decision based upon Judge Arrowood's dissent. This Court allowed a petition for discretionary review with respect to additional issues filed by Berkeley Investors and Mr. Bell on 18 December 2020.[3]

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3. As a result of the fact that plaintiffs have not sought review of the Court of Appeals' decision to affirm the trial court's decision to grant summary judgment in favor of defendants with respect to certain claims that were asserted in their amended complaint, we will not consider the correctness of the relevant aspects of the Court of Appeals' decision in this opinion.

II. Substantive Legal Analysis

A. Standard of Review

¶ 21 This Court reviews decisions arising from trial court orders granting or denying motions for summary judgment using a de novo standard of review. *Dallaire v. Bank of Am., N.A.*, 367 N.C. 363, 367 (2014). The entry of an order granting summary judgment in favor of a particular party is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C.G.S. § 1A-1; Rule 56(c) (2019). In evaluating the appropriateness of a trial court's decision to grant or deny a summary judgment motion in a particular case, "we view the pleadings and all other evidence in the record in the light most favorable to the nonmovant and draw all reasonable inferences in that party's favor." *N.C. Farm Bureau Mut. Ins. Co. v. Sadler*, 365 N.C. 178, 182 (2011). Although the party seeking the entry of summary judgment in its favor "bears the burden of establishing that there is no triable issue of material fact," the burden shifts to the nonmoving party to "produce a forecast of evidence demonstrating that the [nonmoving party] will be able to make out at least a prima facie case at trial" in the event that the moving party makes the necessary preliminary showing. *DeWitt v. Eveready Battery Co.*, 355 N.C. 672, 681–82 (2002) (quoting *Collingwood v. Gen. Elec. Real Est. Equities, Inc.*, 324 N.C. 63, 66 (1989)) (alteration in original).

B. Economic Loss Rule

¶ 22 **[1]** As an initial matter, Berkeley Investors and Mr. Bell and Re/Max and Mr. Carroll argue that certain claims that plaintiffs have asserted against them are barred by the economic loss rule.[4] In rejecting this contention, the Court of Appeals held that the economic loss rule did not provide any protection against the claims that plaintiffs had asserted against these defendants because none of the conduct that allegedly underlay those claims implicated the terms of the purchase contract between plaintiffs and Berkeley Investors. *Cummings*, 270 N.C. App. at 219. In addition, the Court of Appeals concluded that Re/Max and Mr. Carroll were not entitled to claim the protections of the economic loss rule because they

4. Rudd & Associates, Ms. Rudd-Gaglie, and Mr. Goodman did successfully invoke the economic loss rule in opposition to certain claims that plaintiffs had asserted against them in light of the provisions of the buyer's agency agreement. However, no party has sought or obtained review of the Court of Appeals' decision with respect to these claims before this Court.

lacked privity of contract with plaintiffs. *Id.* We conclude that the Court of Appeals correctly resolved this issue.

¶ 23 "[T]he economic loss rule bars recovery in tort by a plaintiff against a promisor for his simple failure to perform his contract, even though such failure was due to negligence or lack of skill." *Crescent Univ. City Venture, LLC v. Trussway Mfg., Inc.*, 376 N.C. 54, 58 (2020) (cleaned up); *see also N.C. State Ports Auth. v. Lloyd A. Fry Roofing Co.*, 294 N.C. 73, 81 (1978) (observing that, "[o]rdinarily, a breach of contract does not give rise to a tort action by the promisee against the promisor"). In such situations, "[i]t is the law of contract and not the law of negligence which defines the obligations and remedies of the parties," *Boone Ford, Inc. v. IME Scheduler, Inc.*, 262 N.C. App. 169, 174 (2018), with the purpose of the economic loss rule being to prevent "contract law [from] drown[ing] in a sea of tort," *E. River S.S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 866 (1986).

¶ 24 Plaintiffs' remaining claims for negligent misrepresentation and fraud against Berkeley Investors and Mr. Bell and for negligence and fraud against Re/Max and Mr. Carroll center on the alleged failure of those defendants to disclose or adequately repair any defects in the house and upon Berkeley Investors' alleged misrepresentations concerning the condition of the house. Specifically, plaintiffs allege that the relevant defendants failed to disclose the existence of a long history of water-intrusion issues at the house and unreasonably relied upon Mr. Cribb's assurances that he had fully repaired the problem prior to closing. In our view, the Court of Appeals correctly concluded that none of these allegations rely upon the relevant contractual provisions.

¶ 25 According to Berkeley Investors and Mr. Bell and Re/Max and Mr. Carroll, the disclosure statement upon which these claims rely constitutes a part of the purchase contract, so that claims relating to the disclosure statement implicate contractual duties for purposes of the economic loss rule. In support of this assertion, the relevant defendants direct our attention to N.C.G.S. § 47E-5(a), which authorizes the inclusion of a residential property disclosure statement into a contract for the sale of real estate, and point out that Paragraph 5 of the North Carolina Standard Form 2-T Offer to Purchase and Contract relating to the "Buyer Representations," which was used in this transaction, explicitly incorporates the disclosure statement into the purchase contract.

¶ 26 A careful examination of Standard Form 2-T reveals, however, that the document in question simply acknowledges that "Buyer has received a signed copy of the N.C. Residential Property and Owners' Association

Disclosure Statement prior to the signing of this offer." For that reason, the language upon which Berkeley Investors and Mr. Bell and Re/Max and Mr. Carroll rely in support of their economic loss rule arguments represents nothing more than an acknowledgement that the owner had complied with its obligation to provide a residential disclosure statement to the purchaser without addressing the substance of the disclosure statement. *See* N.C.G.S. § 47E-5 (2019). As the Court of Appeals recognized, the disclosure statement also indicates that purchasers "understand that this is not a warranty by owners or owner's agent," with nothing in the contract serving to make the representations contained in the disclosure statement part of the terms of the purchase contract. Thus, since the substance of the disclosure statement is not incorporated into the purchase contact, it cannot serve as the basis for the application of the economic loss rule in this case.

¶ 27 In seeking to persuade us to reach a contrary conclusion, Berkeley Investors and Mr. Bell and Re/Max and Mr. Carroll point to our statement in *Crescent University City Venture* that:

> [w]hen a plaintiff asserts that the subject matter of a contract has, in its operation or mere existence, caused injury to itself or failed to perform as bargained for, the damages are merely economic, and a purchaser has no right to assert a claim for negligence against the seller . . . for those economic losses under the economic loss rule.

376 N.C. at 62. The principle enunciated in *Crescent University City Venture*, which involved a claim brought by the owner of a tract of real estate and a subcontractor based upon the allegedly negligent construction of a critical component of an apartment complex, does not control in this instance given that the present case arose in the context of a subsequent sale of an existing residence between individuals or privately held entities that the individual participants controlled rather than in the context of a large commercial real estate transaction in which the rights and responsibilities of the parties were comprehensively controlled by a series of inter-related contracts and sub-contracts.

¶ 28 In its opinion in this case, the Court of Appeals referenced its own decision in *Bradley Woodcraft, Inc. v. Bodden*, in which it had held that, "while claims for negligence are barred by the economic loss rule where a valid contract exists between the litigants, claims for fraud are not so barred and, indeed, the law is, in fact, to the contrary: a plaintiff may assert both claims." 251 N.C. App. 27, 34 (2016) (cleaned up). According

to Berkeley Investors and Mr. Bell, *Bradley Woodcraft* should not be understood as categorically excluding fraud claims from the reach of the economic loss rule, citing decisions by the United States Court of Appeals in *Broussard v. Meineke Disc. Muffler Shops, Inc.*, 155 F.3d 331 (4th Cir. 1998), and *Legacy Data Access, Inc. v. Cadrillion, LLC*, 889 F.3d 158 (4th Cir. 2018), and pointing to the Fourth Circuit's statement in *Legacy Data Access* that "*Bradley Woodcraft* is simply another application of the principle that the economic loss rule does not bar tort claims based on an independent legal duty, which is identifiable and distinct from the contractual duty," *Legacy Data Access, Inc.*, 889 F.3d at 166 (cleaned up).

¶ 29 Aside from the fact that this Court is not bound by the Fourth Circuit's interpretation of North Carolina state law, *State ex rel. Martin v. Preston*, 325 N.C. 438, 449–50 (1989), any decision to adopt the Fourth Circuit's reasoning in *Legacy Data Access* would not change the outcome in this case. As we have already noted, the allegedly tortious conduct at issue in this case cannot have constituted a violation of the purchase contract because the representations set out in the disclosure agreement were not incorporated into that document. As a result, even if the Court of Appeals did categorically exempt fraud claims from the economic loss rule in *Bradley Woodcraft* and even if *Bradley Woodcraft* was decided in error, the adoption of such a rule would not preclude the assertion of plaintiffs' fraud and negligent misrepresentation claims against Berkeley Investors and Mr. Bell in this case. As a result, the Court of Appeals did not err by holding that the economic loss rule did not bar the assertion of fraud claims against Berkeley Investors, Mr. Bell, Re/Max, and Mr. Carroll and the negligent misrepresentation claim against Berkeley Investors and Mr. Bell that rests upon the contents of the disclosure statement that was provided to plaintiffs.

¶ 30 Although our conclusion that the disclosure statement was not a term of the purchase contract seems to us to adequately support a decision to affirm the Court of Appeals' decision with respect to this issue, we will take this opportunity to address the privity of contract issue as it relates to Re/Max and Mr. Carroll. The Court of Appeals held that, even if the plaintiffs' negligent misrepresentation and fraud claims against Berkeley Investors and Mr. Bell were barred by the economic loss rule, Re/Max and Mr. Carroll were not entitled to claim the protections of the economic loss rule because they were not parties to the purchase contract. *Cummings*, 270 N.C. App. at 219. Arguing in reliance upon the Court of Appeals' decision in *Simmons v. Cherry*, 43 N.C. App. 499 (1979), Re/Max and Mr. Carroll assert that, in light of the statements that

Mr. Carroll had made and the conduct in which Mr. Carroll had engaged for the purpose of ensuring that the transaction closed during the course of his representation of Berkeley Investors and its owners, Mr. Carroll had bound himself to the terms of the purchase contract and was entitled to the same economic loss rule protections as Berkeley Investors and Mr. Bell. We are not, however, persuaded that, aside from its status as a decision of the Court of Appeals rather than of this Court, *Simmons* should be deemed controlling in this case.

¶ 31 In *Simmons*, the president of a corporation contracted with a real estate appraiser for the purpose of obtaining the performance of a feasibility study. The corporation's president did not, at any point during the transaction, mention any involvement on the part of the corporation and, instead, provided a personal assurance that the appraiser's bill would be paid. *Simmons*, 43 N.C. App. at 499–500. In light of these facts, the Court of Appeals concluded that the record contained sufficient support for a finding that the president had bound himself to the contract. *Id.* at 501. In this case, on the other hand, the record contains no evidence suggesting that Mr. Carroll had similarly bound "himself to performance of the contract and personal liability therefore." *Id.* As a result, we agree with the Court of Appeals' determination that Re/Max and Mr. Carroll lacked the privity of contract necessary to support the invocation of the economic loss rule.

C. Negligence

¶ 32 **[2]** Next, we consider the viability of plaintiffs' negligence claims against Re/Max and Mr. Carroll. In reversing the trial court's decision to grant summary judgment in defendant's favor with respect to these claims, the Court of Appeals held that the record disclosed the existence of a genuine issue of material fact concerning the extent to which Re/Max and Mr. Carroll had a duty to disclose the history of water intrusion into the house given the equivocal nature of Mr. Cribb's statements about the extent to which he had repaired the leak that he had been hired to address. *Cummings*, 270 N.C. App. at 218. We agree.

¶ 33 "[U]nder established common law negligence principles, a plaintiff must offer evidence of four essential elements in order to prevail: duty, breach of duty, proximate cause, and damages," *Estate of Mullis v. Monroe Oil Co.*, 349 N.C. 196, 201 (1998), with "[a]ctionable negligence [being] the failure to exercise that degree of care which a reasonable and prudent person would exercise under similar conditions." *Hart v. Ivey*, 332 N.C. 299, 305 (1992). In their amended complaint and on appeal to the Court of Appeals, plaintiffs asserted that Re/Max

and Mr. Carroll owed them a number of legal duties, including the duty to (1) "take all reasonable steps to ascertain all known and readily available material facts about the condition" of the house; (2) make specific inquiry of the owners, including Berkeley Investors and Mr. Bell, for the purpose of obtaining information relating to facts or circumstances that may materially affect plaintiffs' decision to purchase the house; (3) "take all reasonable steps" to ensure that any prior leaks or water-intrusion problems had been repaired by a licensed professional; and (4) ensure that the disclosure statement was accurate, that the house did not contain any defects and that Re/Max and Mr. Carroll had breached those duties by, among other things, (1) failing to discover and correct any material defects in the house or to disclose the defects to plaintiffs; (2) hiring Mr. Cribb, who was a painter, to fix a suspected leak in the guest level living room; (3) permitting Berkeley Investors to provide a disclosure statement that stated that the house did not have any known defects; and (4) failing to disclose the history of water-intrusion problems at the house.

¶ 34 We have previously held that a real estate broker:

> who makes fraudulent misrepresentations or *who conceals a material fact* when there is a duty to speak to a prospective purchaser in connection with the sale of the principal's property is personally liable to the purchaser notwithstanding that the broker was acting in the capacity of agent for the seller.

Johnson v. Beverly-Hanks & Assocs., Inc., 328 N.C. 202, 210 (1991) (quoting P. Hetrick & J. McLaughlin, *Webster's Real Estate Law in North Carolina* § 132, at 165 (3d ed. 1988)). Put another way, "[a] broker has a duty not to conceal from the purchasers any material facts and to make full and open disclosure of all such information." *Id.* According to the Court of Appeals' decision in *Clouse v. Gordon*, a real estate broker's duty to share information with a buyer is limited to "material facts *known to the broker* and to representations made by the broker." 115 N.C. App. 500, 508 (1994) (emphasis added).

¶ 35 Acting in reliance upon *Clouse*, the Court of Appeals rejected plaintiffs' contention that the failure of Re/Max and Mr. Carroll to discover "ascertainable" defects in the house rendered those defendants negligent given that "a seller's agent only has a duty to disclose material facts that are *known to him*." *Cummings*, 270 N.C. App. at 217 (emphasis added). In addition, the Court of Appeals held that Re/Max and Mr. Carroll "owed [p]laintiffs no duty to ensure that the [h]ouse was in

any particular condition at the time of closing" and could not, for that reason, be liable in negligence for any failure to make necessary repairs. *Id.* Finally, the Court of Appeals concluded that Re/Max and Mr. Carroll could not be found negligent based upon the theory that they had provided plaintiffs with the disclosure statement because (1) they did not sign it, (2) the disclosure statement provided that "the representations are made by the owner and not the owner's agent(s) or subagent(s)," and (3) the disclosure statement included representations regarding the actual knowledge possessed by Berkeley Investors. *Id.*

¶ 36 Although the Court of Appeals was correct in reaching all of these conclusions, that fact does not completely resolve the issue of whether Re/Max and Mr. Carroll can be held liable to plaintiffs on the basis of negligence. As we have already noted, a real estate broker must disclose all material facts that he or she knows to the potential buyer, with such "material facts" including those that an agent "knows or should know would reasonably affect the [purchaser's] judgment." *Brown v. Roth*, 133 N.C. App. 52, 55 (1999) (quoting James A. Webster, Jr., *Webster's Real Estate Law in North Carolina* §§ 8–9, at 243 (4th ed. 1994)). In other words, Re/Max and Mr. Carroll had a duty to disclose any fact of which they were aware that might reasonably have impacted plaintiffs' decision to purchase the house.

¶ 37 A careful review of the record discloses the existence of evidence tending to show that Mr. Carroll knew of previous water-intrusion issues at the house and that he had hired Mr. Cribb to, among other things, attempt to locate and repair the source of a leak in the guest-level living room. After completing the required work, Mr. Cribb sent a text message to Mr. Carroll informing Mr. Carroll that he "may have found that leak" and that he "hope[d] that was it." Re/Max and Mr. Carroll point to this communication in arguing that Mr. Carroll "was told that the condition had been repaired" and contend, in reliance upon *Clouse*, in which the Court of Appeals held that a real estate agent could not be held liable for relying upon an opinion provided by a professional surveyor whose survey map failed to indicate that the property was located in a flood hazard zone, *Clouse*, 115 N.C. App. at 503, 509–10, that Mr. Carroll had reasonably relied upon the assurance that he had received from Mr. Cribb, whom Re/Max and Mr. Carroll describe as an "experienced professional," in failing to disclose the existence of the relevant incident of water intrusion to plaintiffs. In response, plaintiffs challenge the adequacy of Mr. Cribb's professional qualifications and the reasonableness of Mr. Carroll's reliance upon Mr. Cribb's statements given their ambiguous and uncertain nature.

¶ 38 A careful review of the record precludes us from holding that the reasonableness of Mr. Carroll's reliance upon Mr. Cribb's statements has been established as a matter of law. Despite Re/Max and Mr. Carroll's characterization of Mr. Cribb as an "experienced professional," he was a painter and pressure washer rather than a licensed contractor. Moreover, even if one was to accept Mr. Cribb's qualifications as sufficient, the equivocal nature of the statements made in the text messages upon which Re/Max and Mr. Carroll rely raises a genuine issue of material fact concerning the extent to which Mr. Carroll reasonably relied upon those statements in failing to disclose to plaintiffs the existence of this instance of water intrusion into the house. Thus, unlike the situation at issue in *Clouse*, in which the qualifications of the relevant professional and the clarity of that professional's assurances do not appear to have been in question, the same cannot be said of either Mr. Cribb or the statements that he made to Mr. Carroll. *See Clouse*, 115 N.C. App. at 508–09. As a result, a rational juror could properly conclude that Mr. Carroll acted unreasonably in relying upon the adequacy of Mr. Cribb's performance in rectifying the problems evidenced by the water intrusion into the house.

¶ 39 Both Re/Max and Mr. Carroll, in their brief, and Judge Arrowood, in his dissenting opinion at the Court of Appeals, argue that the home inspection conducted by Mr. Williams, in which the inspector failed to discover that the house had water-intrusion problems, provided further evidence that Mr. Carroll had reasonably concluded that the water-intrusion issue that Mr. Cribb had been hired to address had been adequately repaired. *Cummings*, 270 N.C. App. at 238 (Arrowood, J., concurring, in part, and dissenting, in part). Although a home inspection might, under other circumstances, suffice to preclude a finding of potential liability on the part of the agent representing the seller in a real estate transaction, the record before us in this case, which includes evidence tending to show that Mr. Cribb was primarily hired to repaint, rather than repair, the affected area; that the damage to the home was extensive and longstanding; that Mr. Moore testified that efforts had been made to conceal the extent of the water intrusion that had occurred at the home, that the nature and extent of the damage to the house was not immediately apparent, and that there was no reason for either Mr. Williams or plaintiffs to have conducted further investigation in light of that fact coupled with the fact that Mr. Williams testified that he did not find any evidence of water intrusion or moisture damage that would have prompted him to conduct moisture testing, precludes such a result in this instance. Thus, the results of the inspection performed by Mr. Williams fail to justify a determination that, as a matter of law, the

record does not disclose the existence of a genuine issue of material fact relating to plaintiffs' negligence-based claimes resting upon the failure of Re/Max and Mr. Carroll to disclose to plaintiffs the existence of water intrusion into the house.

D. Negligent Misrepresentation

¶ 40 **[3]** The Court of Appeals held, with respect to plaintiffs' claim against Berkeley Investors and Mr. Bell for negligent misrepresentation, that the record disclosed the existence of a genuine issue of material fact concerning whether (1) Berkeley Investors and Mr. Bell reasonably relied upon the work performed by Mr. Cribb and (2) the inspection conducted by Mr. Williams amounted to "reasonable diligence" entitling plaintiffs to rely upon the representations made in the disclosure statement. *Cummings*, 270 N.C. App. at 223–24. We agree.

¶ 41 "The tort of negligent misrepresentation occurs when a party justifiably relies to his detriment on information prepared without reasonable care by one who owed the relying party a duty of care." *Dallaire*, 367 N.C. at 369 (quoting *Raritan River Steel Co. v. Cherry, Bekaert & Holland*, 322 N.C. 200, 206 (1988)). However, "[a] party cannot establish justified reliance on an alleged misrepresentation if the party fails to make reasonable inquiry regarding the alleged statement." *Id.* The extent to which a party justifiably relied upon items of information is generally a question of fact for the jury in the absence of a showing that "the facts are so clear as to permit only one conclusion." *Marcus Bros. Textiles, Inc. v. Price Waterhouse, LLP*, 350 N.C. 214, 225 (1999) (quoting Restatement (Second) of Torts § 552 cmt. e (1977)).

¶ 42 As an initial matter, Berkeley Investors and Mr. Bell argue that they did not make any misrepresentations in the disclosure statement given that, in spite of their knowledge that there had been a leak in the house, they reasonably relied upon the assurances that had been received from Mr. Cribb, as conveyed to them by Mr. Carroll, that the leak had been fixed. In support of this assertion, Berkeley Investors and Mr. Bell direct our attention to the unpublished decision of the Court of Appeals in *Dykes v. Long*, which addressed the issue of whether the seller of a house had fraudulently represented in a disclosure statement that she had no knowledge of defects in a house in spite of the fact that she had previously discovered the existence of cracks in the front porch and had had them repaired by a general contractor. *Dykes v. Long*, No. COA14-148, 2014 WL 2993986, at *3 (N.C. Ct. App. July 1, 2014) (unpublished). In holding that the sellers' conduct in failing to disclose the crack-related problems of which they were aware did not constitute

actionable fraud, the Court of Appeals emphasized that the sellers had taken steps to address the problem, had been assured by the contractor that the problem in question had been rectified, and had observed no further problems with respect to the porch prior to closing. *Id*. Similarly, Berkeley Investors and Mr. Bell contend that they cannot be held liable to plaintiffs for negligent misrepresentation given that they had received assurances from Mr. Carroll that the leak had been repaired, that Mr. Cribb was fully qualified to repair the leak in light of his extensive experience in performing painting and general repair work, and that no further problems had been observed in the house after the performance of the relevant repair work.

¶ 43 As we have already indicated in addressing the negligence-related claims that plaintiffs have asserted against Re/Max and Mr. Carroll, the record does, in fact, contain evidence tending to show "that [Mr.] Cribb was not qualified to fix the leak in the guest level ceiling," including, but not limited to, the fact that Mr. Cribb was not a licensed contractor and claimed to be engaged in the business of painting and pressure washing, the fact that Mr. Cribb testified that he could not specifically remember having identified and repaired any leaks in the house, and the fact that Mr. Cribb acknowledged that he had not done any work that involved penetrating the interior walls of the house. As a result, aside from the fact that *Dykes* has no precedential value, N.C. R. App. P. 30(4)(3), this case is distinguishable from *Dykes* given the existence of a conflict in the evidence concerning the nature and extent of Mr. Cribb's ability to repair leaks and the fact that, while the problems at issue in *Dykes* did not reappear until sixteen years after performance of the necessary repair work, only a few months had elapsed between the date upon which Mr. Cribb worked on the house and the plaintiffs' discovery that extensive water-related damage had occurred to that structure. *See Dykes*, 2014 WL 2993986, at *3. As a result, we hold that, when the evidence in the present record is taken in the light most favorable to plaintiffs, it discloses the existence of genuine issues of material fact concerning the reasonableness of Berkeley Investors' and Mr. Bell's reliance upon the repair work that Mr. Cribb performed.

¶ 44 In addition, Berkeley Investors and Mr. Bell argue that, even if they were not entitled to rely upon the repair work performed by Mr. Cribb in preparing the disclosure statement that they delivered to plaintiffs, plaintiffs were not entitled to rely upon the representations made in the disclosure statement given that they had an obligation to perform their own investigation into the condition of the property and failed to do so. In support of this assertion, Berkeley Investors and Mr. Bell direct our

attention to *Stevens v. Heller*, in which the Court of Appeals stated that a purchaser of real estate is "not entitled to rely solely on the property disclosure statement prepared by the seller and conduct no independent due diligence . . . unless the buyer can show that the seller's misrepresentations caused the lack of reasonable diligence." 268 N.C. App. 654, 660 (2019).

¶ 45 According to Berkeley Investors and Mr. Bell, plaintiffs should have been aware of the need to conduct a further investigation into the condition of the house for a number of reasons, including (1) the presence of language in the disclosure statement disclaiming any warranties and recommending that plaintiffs retain a licensed home inspector; (2) the existence of language in the purchase contract indicating that the house was being sold in its "current condition" and disclaiming all warranties; (3) the fact that Mr. Williams noted the need to seal areas on the exterior of the house and to rectify problems with windows and doors that would either not open and close or would not seal properly; and (4) the statement in Mr. Williams' report that he had "attempt[ed] to find a leak but sometimes cannot" and his "recommend[ation] that qualified contractors be used" to inspect and repair the problems identified in the report. According to Berkeley Investors and Mr. Bell, this information should have prompted plaintiffs to request that Mr. Williams conduct additional testing for the presence of moisture and rendered plaintiffs' reliance upon the representations contained in the disclosure statement unreasonable as a matter of law.

¶ 46 In light of the fact-intensive nature of the relevant inquiry, "[t]he reasonableness of a party's reliance is a question for the jury, unless the facts are so clear that they support only one conclusion." *Forbis v. Neal*, 361 N.C. 519, 527 (2007). Unlike the plaintiffs in *Stevens*, who failed to conduct any inspection of the relevant property prior to the closing, 268 N.C. App. at 656, plaintiffs hired a licensed home inspector and general contractor for the purpose of performing a home inspection. As a result, the operative question for the purpose of this case is whether obtaining the performance of the inspection conducted by Mr. Williams constituted "reasonable diligence" on the part of plaintiffs or whether plaintiffs should have obtained additional inspections, including the performance of more intrusive moisture testing.

¶ 47 According to Mr. Williams, the absence of any visual evidence tending to suggest the existence of a moisture problem with the house rendered the performance of intrusive moisture testing unnecessary, a determination that Mr. Moore characterized as reasonable. In addition, as the majority at the Court of Appeals observed, the "alleged efforts

[by Berkeley Investors and Mr. Bell] to conceal the water-intrusion issues might have caused [p]laintiffs to forego moisture testing and more reasonably rely upon the [d]isclosure [s]tatement where [p]laintiffs otherwise might not have." *Cummings*, 270 N.C. App. at 224. As a result, the record contains ample evidence tending to show that plaintiffs reasonably relied upon Mr. Williams' inspection report.

¶ 48 In seeking to persuade us to reach a different result, Berkeley Investors and Mr. Bell, along with the dissenting opinion at the Court of Appeals, emphasize the problems with the house that Mr. Williams identified in his report, including (1) the presence of minor roof damage; (2) the need to seal certain locations on the exterior of the house for the purpose of excluding water and insects; (3) the existence of doors that failed to either close or seal property; (4) the presence of windows that exhibited rust stains and would not open; and (5) the existence of minor leaks that could lead to the development of mold and the recommendation that Mr. Williams made at numerous locations in his report that "qualified contractors be used in your further inspection or repair issues as it relates to the comments in this inspection report." However, we do not believe that any of this information would have necessarily put plaintiffs on notice that the house might have a serious water-intrusion problem. For example, the reference in the inspection report to leaks "causing mold to grow" involved a condensation line that drained under the house, with mold having developed on the concrete foundation, rather than anything relating to the structure's walls. Similarly, in discussing the areas on the exterior of the house that needed sealing, Mr. Williams stated that "a handy-man can easily make these repairs," a comment that could reasonably be interpreted to suggest that a more in-depth inspection of these areas was not required. In addition, none of the problems mentioned in Mr. Williams' report appear to have been related to either any repair work that Mr. Cribb performed or the extensive water damage problem that Mr. Moore identified. Finally, the recommendation that qualified contractors be used for further inspection and repair work, aside from appearing to be generically applicable "boilerplate" language rather than a recommendation that plaintiffs take any particular action, relates to "the comments in this inspection report," none of which pertained to moisture intrusion into the walls of the house or the need for further testing of the house for its presence.

¶ 49 In addition, Berkeley Investors and Mr. Bell, along with the dissenting opinion at the Court of Appeals, rely upon *MacFadden v. Louf*, in which the Court of Appeals held that a home buyer could not reasonably rely upon alleged misrepresentations contained in a disclosure

statement "because [the buyer] conducted a home inspection before closing and that inspection report put her on notice of potential problems with the home." 182 N.C. App. 745, 748 (2007). *MacFadden* is distinguishable from this case, however, given that the inspection report at issue there specifically instructed the plaintiff to hire a roofing contractor in light of the existence of extensive evidence tending to suggest that a potential for water to pond existed, with this evidence including the presence of stains on the chimney and in the attic area; the fact that the floor sagged, deflected, and was uneven; and the fact that other evidence of moisture and pest infestation was present. *Id.* As we have already noted, the report that Mr. Williams prepared concerning the house that is at issue in this case made only generalized comments about the need for further inspections and did not suggest that any significant amount of water intrusion had occurred.

¶ 50 Admittedly, plaintiffs could have engaged in additional investigative activities, including requesting Oak Island Accommodations' maintenance records or having more intrusive moisture testing performed. On the basis of the present record, however, the extent to which plaintiffs' failure to take such additional steps constituted a failure to exercise "reasonable diligence" is a question of fact for the jury rather than a question of law for the Court. As a result, after viewing the record evidence in the light most favorable to the plaintiffs, we hold that there are genuine issues of material fact concerning the extent to which Berkeley Investors and Mr. Bell reasonably relied upon Mr. Cribb's repair work in representing in the disclosure statement that they did not know of the existence of any water-intrusion problems and the extent to which plaintiffs reasonably relied upon these statements in light of the inspection performed by Mr. Williams.

E. Fraud

¶ 51 **[4]** According to the Court of Appeals, the record also disclosed the existence of genuine issues of material fact concerning the extent to which Berkeley Investors and Mr. Bell defrauded plaintiffs by providing them with a disclosure statement that contained untruthful information concerning the condition of the house and whether Berkeley Investors, Mr. Bell, Re/Max and Mr. Carroll defrauded plaintiffs by failing to disclose the existence of the history of water-intrusion problems at the house and the nature and extent of the steps that had been taken for the purpose of addressing those problems.[5] *Cummings*, 270 N.C. App. at 233–34. Once

5. Although plaintiffs identified Mr. Carroll's assertion that he would buy the house as evidence of fraud, the Court of Appeals concluded that this statement constituted "mere

again, we conclude that the Court of Appeals reached the correct decision with respect to this issue.

¶ 52 As an initial matter, plaintiffs asserted separate claims for "fraud and fraud in the inducement" and "fraud by concealment" in their amended complaint. The Court of Appeals concluded that, "[b]ecause: (1) the purportedly distinct causes of action each allege false representations or omissions in inducing [p]laintiffs to purchase the [h]ouse; and (2) the respective elements of fraud, fraud in the inducement, and fraudulent concealment overlap on these facts," it would analyze plaintiffs' fraud claims "as separate theories of a single cause of action alleging fraud in the inducement." *Cummings*, 270 N.C. App. at 229. We conclude that the approach adopted by the Court of Appeals with respect to this issue was a reasonable one and will adopt it as our own.

¶ 53 As we have previously stated, "[f]raud has no all-embracing definition"; instead, as a general proposition, fraud "may be said to embrace all acts, omissions, and concealments involving a breach of legal or equitable duty and resulting in damage to another, or the taking of undue or unconscientious advantage of another." *Vail v. Vail*, 233 N.C. 109, 113 (1951) (cleaned up). The following essential elements of actionable fraud are well established: "(1) False representation or concealment of a material fact, (2) reasonably calculated to deceive, (3) made with intent to deceive, (4) which does in fact deceive, (5) resulting in damage to the injured party." *Forbis*, 361 N.C. at 526–27 (quoting *Ragsdale v. Kennedy*, 286 N.C. 130, 138 (1974)). On the other hand, "any reliance on the allegedly false representations must be reasonable." *Id.* at 527 (citing *Johnson v. Owens*, 263 N.C. 754, 757 (1965)).

¶ 54 Berkeley Investors, Mr. Bell, Re/Max, and Mr. Carroll argue that they are not liable for fraud for the same essential reasons that cause them to contend that a finding of liability on the basis of negligence would be inappropriate. Berkeley Investors and Mr. Bell insist that (1) neither the record nor the applicable law provide any support for a finding that they knowingly made a false statement in the disclosure statement and that (2), even if they made such a statement, plaintiffs cannot show that they reasonably relied upon the alleged misrepresentations. More specifically, Berkeley Investors and Mr. Bell assert that Mr. Carroll, who

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puffing" rather than actionable fraud, having reached this result in reliance upon *Rowan County Board of Education v. United States Gypsum Co.*, 332 N.C. 1, 17 (1992). Plaintiffs did not seek further review of this aspect of the Court of Appeals' decision by this Court, which renders it final for purposes of further proceedings in this case. *See* N.C. R. App. P. 28(b)(6).

represented them in the relevant transaction, had no obligation to inform plaintiffs of the existence of the leak that had been repaired by Mr. Cribb given Mr. Cribb's assurances that the leak had been successfully remediated and that it was reasonable for everyone involved to rely upon Mr. Cribb's professional judgment. In addition, Berkeley Investors and Mr. Bell argue that plaintiffs could not reasonably rely on the representations made in the disclosure statement given their failure to heed the recommendations set out in that document, the purchase contract, and Mr. Williams' report that they obtain additional inspections of the house. Similarly, Re/Max and Mr. Carroll contend that Mr. Carroll "did not have a duty to disclose the condition of the repaired leak because he justifiably relied on [Mr. Cribb's] representations that the leak was repaired and believed (also based on months of observation and the findings of other professionals) the leak to be repaired." In their view, plaintiffs could not prove that Berkeley Investors, Mr. Bell, Re/Max, or Mr. Carroll knew of the existence of any problems that had not been reported in the disclosure statement, with plaintiffs having been put on notice of the existence of additional potential problems that they failed to adequately investigate.

¶ 55 We are unable, for the reasons set forth above, to accept the validity of any of these arguments. In our view, as the Court of Appeals correctly determined, the record discloses the existence of genuine issues of material fact concerning (1) the reasonableness of any reliance that Berkeley Investors, Mr. Bell, Re/Max, and Mr. Carroll may have placed upon the repair work performed by Mr. Cribb and (2) whether plaintiffs reasonably relied upon the inspection report prepared by Mr. Williams. Although we have focused much of our discussion of this issue upon the reasonableness of the reliance placed by Berkeley Investors, Mr. Bell, Re/Max, and Mr. Carroll upon the repair work performed by Mr. Cribb and the reliance placed upon Mr. Williams' report by plaintiffs, we have not lost sight of the fact that the record contains evidence tending to show that significant water intrusion had occurred in the past and that Berkeley Investors and Mr. Bell knew of the existence of this condition. After acknowledging that the maintenance records maintained by Oak Island Accommodations showed that water intrusion had occurred at the house in the past, Berkeley Investors, Mr. Bell, Re/Max, and Mr. Carroll insist that the records "also show that each and every issue was addressed and resolved" and that plaintiffs had failed to request that they be provided with the relevant maintenance records in spite of the fact that they knew of their existence. We agree, for the reasons stated below, that none of defendants had a legal duty to ob-

tain the Oak Island Accommodations maintenance records and to provide them to plaintiffs. We also conclude, however, that the existence of these records, coupled with the e-mails exchanged between Mr. Bell, Mr. Carroll, and Ms. Durham concerning water-intrusion problems at the house over the course of nearly a year prior to the closing, provide additional support for our conclusion that the record discloses the existence of a genuine issue of material fact concerning the validity of plaintiffs' fraud claims given that awareness of the existence of these problems tends to undercut the accuracy of the representations contained in the disclosure statement concerning the condition of the house.

¶ 56 We are not, obviously, holding that these facts compel a finding of liability or that a jury would not be able, depending upon its evaluation of the evidence, to return a verdict in favor of Berkeley Investors, Mr. Bell, Re/Max, and Mr. Carroll or that either sellers or real estate agents owe a fiduciary duty to buyers or to disclose defects that do not exist. Instead, we are simply holding that, in light of the present record, a reasonable jury could, but was not required, to find in plaintiffs' favor with respect to these fraud-related claims. As a result, for all of these reasons, we hold that the Court of Appeals correctly held that the trial court had erred by entering summary judgment in defendants' favor with respect to the fraud claims that plaintiffs had asserted against Berkeley Investors, Mr. Bell, Re/Max, and Mr. Carroll.

F. Inference Running Backwards

¶ 57 **[5]** Finally, Berkeley Investors and Mr. Bell argue that the Court of Appeals erred in reversing the trial court's summary judgment order by violating the prohibition against relying upon inferences that "r[a]n backward." In support of this argument, Berkeley Investors and Mr. Bell direct our attention to our decision in *Childress v. Nordman*, which they claim enunciates a "general rule that mere proof of the existence of a condition or state of facts at a given time does not raise an inference or presumption that the same condition or state of facts existed on a former occasion." 238 N.C. 708, 712 (1953). In light of this principle, Berkeley Investors and Mr. Bell argue that the Court of Appeals erred by relying upon Mr. Moore's testimony, which rested upon an inspection of the house that he conducted three months after the closing, given the absence of any "evidence before the Court of Appeals sufficient to show that [the] representations concerning the [h]ouse's condition [made by Berkeley Investors and Mr. Bell] were false either when made by them or when acted on by [plaintiffs]—despite [Mr.] Moore's opinion . . . that the problems had been 'going on for quite some time.' "

¶ 58 As Berkeley Investors and Mr. Bell have conceded, however, subsequent decisions of this Court and the Court of Appeals have held that the principle articulated in *Childress* was "not of universal application" and that its application was, instead, dependent upon the "facts and circumstances of the individual case, and on the likelihood of intervening circumstances as the true origin of the present existence or the existence at a given time," *Jenkins v. Hawthorne*, 269 N.C. 672, 674–75 (1967) (cleaned up) (holding that a reasonable jury could infer from evidence that the house at issue in that case was in the same condition at the time that the defendant made her allegedly false representations as it was when the problems were discovered several months later), with this Court having stated in *Jenkins* that "so much depends upon circumstances that it seems a mistake to think in terms of a 'rule' with respect to this or any other of the many factors that must be considered," *id.* at 675 (quoting Stansbury, N.C. Evidence § 90 (2d ed. 1963)), and with the Court of Appeals having described the *Childress* "rule" as being "riddled with exceptions" and having stated that "[t]he trend is toward permitting the fact finder to consider the subsequent condition or fact along with all of the surrounding circumstances in arriving at its conclusion as to the existence of the condition or fact at the relevant time," *Plow v. Bug Man Exterminators, Inc.*, 57 N.C. App. 159, 162 (1982). A careful examination of the record that is before us in the present case satisfies us that a reasonable jury could determine, based upon Mr. Moore's testimony, that the damage that he discovered had been in existence at the time of closing, particularly given the emphasis that Berkeley Investors and Mr. Bell have placed upon Mr. Cribb's repair work and the absence of any evidence tending to show that any event that might have caused the damage that Mr. Moore observed had occurred between August and November 2014. As a result, we hold that the Court of Appeals did not violate any rule against "inferences running backwards" in partially reversing the trial court's summary judgment order.

G. Breach of Fiduciary Duty

¶ 59 **[6]** Finally, in addressing the validity of the Court of Appeals' determination that the record disclosed the existence of genuine issues of material fact concerning the extent to which Rudd & Associates, Ms. Rudd-Gaglie, and Mr. Goodman breached a fiduciary duty to plaintiffs by (1) failing to procure the Oak Island Accommodations maintenance records on behalf of plaintiffs and (2) hiring Mr. Williams to inspect the house given his failure to conduct intrusive moisture testing, we begin by noting that the relationship between a real estate agent and his or her client is by, definition, one of agency, with the agent owing a fiduciary

duty to the buyer in all matters relating to the relevant transaction. *See* Restatement (Third) of Agency § 8.01 (2006). More specifically:

> A real estate agent has the fiduciary duty to exercise reasonable care, skill, and diligence in the transaction of business entrusted to him, and he will be responsible to his principal for any loss resulting from his negligence in failing to do so. The care and skill required is that generally possessed and exercised by persons engaged in the same business. This duty requires the agent to make a full and truthful disclosure to the principal of all facts known to him, or discoverable with reasonable diligence and likely to affect the principal. The principal has the right to rely on his agent's statements, and is not required to make his own investigation.

Brown, 133 N.C. App. at 54–55 (cleaned up). In the same vein, the North Carolina Real Estate Manual, which is published by the North Carolina Real Estate Commission, notes that real estate agents have a duty to disclose any material facts known to the agent and to "discover and disclose to the principal all material facts about which the agent *should reasonably have known*." *N.C. Real Est. Manual* 209 (Patrick K. Hetrick, Larry A. Outlaw & Patricia A. Moylan, eds., 2013) (emphasis omitted).

¶ 60 In arguing that they did not breach any fiduciary duty that they owed to plaintiffs, Rudd & Associates, Ms. Rudd-Gaglie, and Mr. Goodman claim that the duties that they owed to plaintiffs were "define[d]" by the Exclusive Buyer Agency Agreement, which provided, in pertinent part, that Rudd & Associates, Ms. Rudd-Gaglie, and Mr. Goodman had a duty to "disclos[e] to [plaintiffs] all material facts related to the property or concerning the transaction of which [they] ha[d] actual knowledge"; advised plaintiffs to "seek other professional advice in matters of . . . surveying, wood-destroying insect infestation, structural soundness, engineering, and other matters"; and warned plaintiffs that, while Rudd & Associates, Ms. Rudd-Gaglie, and Mr. Goodman "may provide [plaintiffs] the names of providers who claim to perform such services, [plaintiffs] understand[ ] that [Rudd & Associates, Ms. Rudd-Gaglie, and Mr. Goodman] cannot guarantee the quality of service or level of expertise of any such provider." Finally, the agency agreement provided that plaintiffs would "indemnify and hold [Rudd & Associates, Ms. Rudd-Gaglie, and Mr. Goodman] harmless" from any claims or liability arising from plaintiffs' selection of any such service provider or their decision not to have a particular service performed.

¶ 61 As the Court of Appeals correctly held, "a real-estate agent's fiduciary duty is not prescribed by contract, but is instead imposed by operation of law." *Cummings*, 270, N.C. App. at 225. The fiduciary duty that a real estate agent owes to his or her principal arises from the agency relationship itself, *Raleigh Real Est. & Tr. Co. v. Adams*, 145 N.C. 161 (1907), with the duties that flow from that relationship being dependent upon the level of skill, knowledge, and professional practices in accordance with which real estate professionals generally operate rather than upon the nature of the contractual provisions governing any specific agent-principal relationship. *See* Restatement (Third) of Agency § 8.08 cmt. c (2006); *see also Firemen's Mut. Ins. Co. v. High Point Sprinkler Co.*, 266 N.C. 134, 142 (1966) (observing that, when a professional undertakes to represent a principal, he or she "implies that he [or she] possesses the degree of professional learning, skill and ability which others of that profession ordinarily possess, he [or she] will exercise reasonable care in the use of his [or her] skill and application of his [or her] knowledge to the assignment undertaken, and will exercise his [or her] best judgment in the performance of the undertaking"). Rudd & Associates, Ms. Rudd-Gagle, and Mr. Goodman have failed to cite any authority for the proposition that a real estate agent may limit or "define" his or her fiduciary duties by contract, and we know of none. As a result, we decline to hold that the extent of the duties that Rudd & Associates, Ms. Rudd-Gaglie, and Mr. Goodman owed to plaintiffs in connection with the transaction that is at issue in this case hinged upon the language of the agency agreement rather than upon general principles of North Carolina agency law.[6]

¶ 62 As we have already noted, the relevant Real Estate Commission guidelines indicate that a real estate agent is obligated to "*discover and disclose*" those material facts that "may affect [plaintiffs'] rights and interests or influence [plaintiffs'] decision in the transaction" rather than to simply disclose those of which the agent has "actual knowledge." *N.C. Real Est. Manual* 209, 211. In view of the fact that plaintiffs do not contend that Rudd & Associates, Ms. Rudd-Gaglie, or Mr. Goodman had actual knowledge of the water-intrusion problems that existed at the house, the relevant issue with respect to plaintiffs' breach of fiduciary duty claim against Rudd & Associates, Ms. Rudd-Gaglie, and Mr.

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6. Although Rudd & Associates, Ms. Rudd-Gaglie, and Mr. Goodman contend that, rather than "restrict[ing] or limit[ing their] fiduciary duty," the Exclusive Buyer Agency Agreement simply "defines that duty," this distinction strikes us as without legal effect to the extent that it defines the duties that Rudd & Associates, Ms. Rudd-Gaglie, and Mr. Goodman owed to plaintiffs as something less than what would otherwise be required by law.

Goodman is whether the record discloses the existence of a genuine issue concerning the extent to which Rudd & Associates, Ms. Rudd-Gaglie, and Mr. Goodman exercised a level of diligence consistent with applicable professional standards. *See Brown*, 133 N.C. App. at 54.

¶ 63 In attempting to persuade this Court that the record does not contain any evidence tending to suggest that they failed to meet the applicable standard, Rudd & Associates, Ms. Rudd-Gaglie, and Mr. Goodman begin by arguing that plaintiffs failed to adduce evidence tending to show that they had an affirmative duty to obtain the relevant Oak Island Accommodations maintenance records or that it was "customary or necessary" for them to do so. In support of this argument, Rudd & Associates, Ms. Rudd-Gaglie, and Mr. Goodman point out that, unlike the situation at issue in *Brown*, in which a specific Real Estate Commission guideline required the agent to make his or her own measurement of the square footage of the property rather than relying upon the measurements provided by an appraiser, no guideline requires an agent to procure prior maintenance records in the event that the house in question had previously been used as a rental property. In addition, Rudd & Associates, Ms. Rudd-Gaglie, and Mr. Goodman emphasize that Ms. Rudd-Gaglie obtained all of the information that plaintiffs requested, with plaintiffs having failed to ask them to obtain the relevant maintenance records.

¶ 64 In rejecting these arguments, the Court of Appeals concluded that, since Rudd & Associates, Ms. Rudd-Gaglie, and Mr. Goodman had failed to cite any authority for the proposition that "a real-estate agent's duty to investigate and disclose is limited, as a matter of law, by the [ ] Real Estate Commission [or] the requests made by the agent's client," *Cummings*, 270 N.C. App. at 226, the record disclosed the existence of a genuine issue of material fact concerning the extent to which Rudd & Associates, Ms. Rudd-Gaglie, and Mr. Goodman had a duty to obtain the Oak Island Accommodations maintenance records and provide them to plaintiffs. In our view, however, the question that the Court of Appeals should have addressed is whether the Oak Island Accommodations maintenance records encompassed material information and, if so, whether Rudd & Associates, Ms. Rudd-Gaglie, and Mr. Goodman had an independent duty to request these records in their exercise of "reasonable diligence." *Brown*, 133 N.C. App. at 55.

¶ 65 The only evidence that plaintiffs cite in support of their contention that Rudd & Associates, Ms. Rudd-Gaglie, and Mr. Goodman had an independent duty to obtain the relevant maintenance records is the deposition testimony of Walter LaRoque, a real estate agent who

served as an expert witness for Rudd & Associates, Ms. Rudd-Gaglie, and Mr. Goodman. Although Mr. LaRoque acknowledged that the extent to which particular facts are material can be buyer-specific and that Ms. Rudd-Gaglie had an obligation to conduct an independent investigation into the condition of the property, he never stated that the Oak Island Accommodations maintenance records constituted material information for purposes of this transaction or that Ms. Rudd-Gaglie had an independent duty to request them. On the contrary, while it is clear from an analysis of his deposition testimony that Mr. LaRoque believed that the *cost* of maintaining the house would be a material fact given the impact that such information would have had upon the viability of the house as rental property, he did not, as best we can ascertain, testify that Ms. Rudd-Gaglie had an affirmative obligation to make an independent request for the relevant maintenance records themselves. In the absence of such evidence, we hold that the record does not reveal the existence of a disputed issue of material fact with respect to this issue and that Rudd & Associates, Ms. Rudd-Gaglie, and Mr. Goodman are entitled to judgment as a matter of law with respect to the issue of whether they breached their fiduciary duty to plaintiffs by failing to obtain the relevant Oak Island Accommodations maintenance records.

¶ 66 Secondly, Rudd & Associates, Ms. Rudd-Gaglie, and Mr. Goodman contend that they fulfilled their fiduciary duty to plaintiffs by recommending that Mr. Williams, who was a licensed home inspector, inspect the house and emphasize that, despite plaintiffs' contention before the Court of Appeals that the performance of moisture testing was a "usual and customary" component of a home inspection, Mr. Williams had testified that he only performed intrusive moisture testing when he concluded that it was necessary to do so and that they reasonably relied upon his determination that there was no need for him to conduct such testing in this case.[7] In addition, Rudd & Associates, Ms. Rudd-Gaglie, and Mr. Goodman point to Mr. Moore's testimony that there was no reason for Mr. Williams to have performed such moisture testing given the absence of readily apparent water damage.

¶ 67 In rejecting this aspect of the position espoused by Rudd & Associates, Ms. Rudd-Gaglie, and Mr. Goodman, the Court of Appeals pointed to Mr. Moore's testimony that *he* would have identified the water-intrusion problem has he inspected the property and the lack of

7. Although plaintiffs emphasize the results of Mr. Williams' inspection in the factual statements set out in their brief, they do not mention it in discussing their breach of fiduciary duty claim against Rudd & Associates, Ms. Rudd-Gaglie, and Mr. Goodman.

clarity concerning the extent to which the performance of a moisture test was a "usual and customary" component of a home inspection before stating that it was "unable to conclude that [Mr.] Williams' failure to conduct such a test was unobjectionable." *Cummings*, 270 N.C. App. at 226–27. However, the undisputed record evidence tends to show that Rudd & Associates, Ms. Rudd-Gaglie, and Mr. Goodman recommended Mr. Williams on the basis of his expertise in detecting moisture-related problems, that neither Ms. Rudd-Gaglie nor Mr. Goodman were licensed home inspectors or general contractors and did not know what the components of a proper home inspection would be, and that, at the time of his employment, Mr. Williams was a licensed home inspector, general contractor, and insurance adjuster who had never been subject to any sort of professional discipline. In addition, Mr. Moore corroborated Mr. Williams' contention that there was no reason, based upon what he had seen while inspecting the house, for the performance of additional moisture testing given that the water damage that the house had sustained was not readily apparent in light of the cosmetic repairs that had been made. As a result of the fact that plaintiffs did not successfully impeach Mr. Williams' qualifications or demonstrate that Rudd & Associates, Ms. Rudd-Gaglie, or Mr. Goodman had any reason to conclude that Mr. Williams had failed to act in an appropriate manner, the record contains no basis for concluding that Rudd & Associates, Ms. Rudd-Gaglie, or Mr. Goodman failed to exercise "reasonable diligence" in recommending that plaintiffs employ Mr. Williams or in relying upon his expertise.[8] *See Clouse*, 115 N.C. App. at 509 (holding that a real estate agent reasonably relied upon the expert opinion of an independent surveyor). As a result, we hold that the Court of Appeals erred by reversing the trial court's decision to grant summary judgment in favor of Rudd & Associates, Ms. Rudd-Gaglie, and Mr. Goodman with respect to this issue.

III. Conclusion

¶ 68 Thus, for the reasons set forth above, we hold that the Court of Appeals correctly determined that the trial court had erred by granting summary judgment in defendants' favor with respect to plaintiffs' claims for negligence and fraud against Re/Max and Mr. Carroll and for negligent misrepresentation and fraud against Berkeley Investors and Mr. Bell and that the Court of Appeals erred by reversing the trial court's

8. Although plaintiffs have argued that the performance of a moisture test was "usual and customary" and that Mr. Williams had failed to perform such a test, it seems to us that such an argument tends to support a claim against Mr. Williams relating to the manner in which he conducted his inspection rather than a claim for breach of fiduciary duty against Rudd & Associates, Ms. Rudd-Gaglie, and Mr. Goodman.

decision to grant summary judgment in favor of Rudd & Associates, Ms. Rudd-Gaglie, and Mr. Goodman. As a result, the Court of Appeals' decision is affirmed, in part, and reversed, in part, with this case being remanded to the Court of Appeals for further remand to Superior Court, Brunswick County, for a trial on the merits with respect to plaintiffs' remaining claims against Berkeley Investors, Mr. Bell, Re/Max, and Mr. Carroll and for the dismissal of the entirety of their claims against Rudd & Associates, Ms. Rudd-Gaglie, and Mr. Goodman.

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

Justice BERGER concurring in part and dissenting in part.

¶ 69 I concur with the portion of the majority opinion that reverses the Court of Appeals' decision regarding plaintiffs' agents and affirms the claims of negligent misrepresentation and fraud against the sellers. For the reasons below, however, I respectfully dissent from the majority opinion addressing the claims of negligence and fraud against the sellers' agents.

¶ 70 Summary judgment is appropriate when "there is no genuine issue as to any material fact and . . . any party is entitled to a judgment as a matter of law." *Dallaire v. Bank of Am., N.A.*, 367 N.C. 363, 367 (2014). To be a "genuine issue" for purposes of summary judgment, an issue must be "maintained by substantial evidence." *Kessing v. Nat'l Mortg. Corp.*, 278 N.C. 523, 534 (1971).

¶ 71 The duties owed by real estate agents are well settled in this state.

> A real estate agent has the fiduciary duty to exercise reasonable care, skill, and diligence in the transaction of business entrusted to him, and he will be responsible *to his principal* for any loss resulting from his negligence in failing to do so. The care and skill required is that generally possessed and exercised by persons engaged in the same business. This duty requires the agent to make a full and truthful disclosure to the principal of all facts known to him, or discoverable with reasonable diligence and likely to affect the principal.

Brown v. Roth, 133 N.C. App. 52, 54–55 (1999) (cleaned up) (emphasis added).

¶ 72 In addition to the fiduciary duties owed by agents to their principals, real estate agents also owe duties to third parties. Specifically, "[a] broker has a duty not to conceal from the purchasers any material facts and to make full and open disclosure of all such information." *Johnson v. Beverly-Hanks & Assocs., Inc.*, 328 N.C. 202, 210 (1991) (citing *Spence v. Spaulding & Perkins, Ltd.*, 82 N.C. App. 665 (1986)). This duty arises from N.C.G.S. § 93A-6(a), which states that the North Carolina Real Estate Commission (the Commission) has the authority to discipline a broker for "[m]aking any willful or negligent misrepresentation or any willful or negligent omission of material fact." N.C.G.S. § 93A-6(a) (2019). "Material fact" is defined in the Commission's Student Manual generally as "[a]ny fact that could affect a reasonable person's decision to buy, sell, or lease" the property in question. 2019–2020 General Update Course, Student Manual 28 (N.C. Real Est. Comm'n, 2019), https://www.superiorschoolnc.com/wp-content/uploads/2020/03/2019-20-General-Update-version-9.2019.pdf. More specifically, when the fact in question involves the condition of the property itself, as in the present case, the manual describes a material fact as follows: "significant property defects or abnormalities such as[ ] structural defect(s), malfunctioning system(s), [a] leaking roof, or drainage or flooding problem(s)." *Id.* Where a defective condition is repaired, the prior defect need not be disclosed because the condition is no longer "material."

¶ 73 Here, the majority agrees with plaintiffs' contention that (1) the adequacy of Cribb's qualifications and (2) the equivocal nature of his statements to Carroll that he "may have found the leak" and that he "hope[d] that was it" raise an issue of material fact as to whether Carroll's belief that the leak had been fixed was reasonable. Cribb's qualifications, however, have no bearing on the present analysis. Rather, Carroll's reasonable conclusion that the leak had been fixed was bolstered by the result of plaintiffs' inspection. That inspection, which was conducted by a licensed contractor just three days after it had rained, revealed no evidence of an ongoing leak.

¶ 74 At some time prior to March 24, 2014, Cribb completed several repairs to the exterior of the home in an effort to fix a leak that had stained the ceiling. On July 12, 2014, plaintiffs made an offer to purchase the subject property. Nearly four months after Cribb's repairs, plaintiffs commissioned a property inspection to be conducted by a licensed home inspector on July 19, 2014. Despite the rain that occurred three days before the inspection, the inspector found no evidence of an ongoing leak where the stain had previously been. Carroll was present during the inspection and received a copy of the report. It was not until after a

major thunderstorm in November 2014 that further evidence of water intrusion emerged. The relevant record evidence, viewed in the light most favorable to plaintiffs, thus demonstrates that Carroll hired a handyman to repair a leak, the handyman conducted repairs, and four months later, a licensed home inspector found no evidence of an existing leak even after it had recently rained.

¶ 75 Under these circumstances alone, it was reasonable for Carroll to believe that the leak had been remedied. As such, the fact that there had previously been a leak was no longer "material." *See* 2019–2020 General Update Course, Student Manual 28 (N.C. Real Est. Comm'n, 2019). Carroll was thus under no duty to disclose this information to plaintiffs. Since plaintiffs have failed to forecast sufficient evidence to show that the sellers' agents owed a duty, plaintiffs cannot prevail on their negligence claim. For similar reasons, I would also conclude that the sellers' agents did not commit fraud.

¶ 76 Moreover, the majority expands the duty a seller's agent owes a purchaser to the functional equivalent of a fiduciary duty. The obligations seller's agents owe to purchasers are fairly well established. At least they were. The majority opinion seems to suggest a seller's real estate broker is now a guarantor of the condition of the subject property and faces potential liability for failure to disclose any potential deficiency mentioned by the seller. Inevitably, the expansion of this duty will lead to uncertainty as to the responsibilities of seller's agent to the seller vis à vis this new duty to the buyer.

Chief Justice NEWBY joins in this opinion.

IN RE A.L.A.

[379 N.C. 383, 2021-NCSC-148]

IN THE MATTER OF A.L.A.

No. 496A20

Filed 17 December 2021

Termination of Parental Rights—grounds for termination—neglect—likelihood of future neglect—sufficiency of findings

The trial court properly terminated a mother's parental rights in her son on grounds of neglect where competent evidence supported the court's factual findings, including that, at the time of the termination hearing, the mother had failed to maintain a safe home environment (she lived in the maternal grandmother's house, which was found covered in animal feces, moldy food, and piles of trash), routinely missed drug screens required under her case plan despite her methamphetamine and marijuana use disorders, attended only twenty-eight out of the seventy-seven visits she was offered with her son, and failed to correct any of those conditions while her son was in foster care. Further, these findings supported a conclusion that the child faced a high likelihood of future neglect if returned to the mother's care.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from an order entered on 18 August 2020 by Judge David V. Byrd in District Court, Wilkes County. This matter was calendared for argument in the Supreme Court on 12 November 2021 but determined on the record and briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

Vannoy, Colvard, Triplett & Vannoy, P.L.L.C., by Daniel S. Johnson, for petitioner-appellee Wilkes County Department of Social Services.

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

Sydney Batch for respondent-appellant mother.

NEWBY, Chief Justice.

¶ 1 Respondent, the mother of A.L.A. (Adam), appeals from the trial court's order terminating her parental rights.[1] After careful review, we affirm.

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

¶ 2 Adam was born on 29 January 2016 and lived with respondent in the maternal grandmother's house. Respondent would often leave Adam alone with the maternal grandmother despite the grandmother's inability to properly care for Adam. Moreover, respondent and the maternal grandmother would constantly fight in Adam's presence and engage in substance abuse. Because of this improper supervision and injurious home environment, Wilkes County Department of Social Services (DSS) obtained nonsecure custody of Adam on 27 October 2017 and filed a juvenile petition alleging that he was a neglected and dependent juvenile.[2]

¶ 3 At a hearing on 4 December 2017, respondent consented to the trial court's order adjudicating Adam to be neglected and dependent. The consent order continued Adam in DSS custody, established reunification as the primary plan, and allowed respondent weekly supervised visitation subject to drug screening.

¶ 4 Respondent signed a case plan with DSS on 17 December 2017, which required her to do the following:

> 1) Complete parenting classes at the Wilkes Pregnancy Center;
>
> 2) Provide a written statement identifying at least ten (10) things learned in parenting classes and how those things would be implemented in her home;
>
> 3) Provide a written statement on why [Adam] was in foster care;
>
> 4) Maintain safe and appropriate housing for all of her children;
>
> 5) Obtain and maintain employment;
>
> 6) Attend mental health and substance abuse assessments;
>
> 7) Sign a voluntary support agreement and remain current in paying child support;
>
> 8) Attend random drug screens;
>
> 9) Participate in all scheduled visitation; [and]
>
> 10) Maintain contact with her assigned social worker.

¶ 5 On 14 March 2018, the trial court entered a review order in which it found that respondent was unemployed and continued to reside in

2. DSS also filed petitions for Adam's brother and sister, but they are not a part of this appeal.

the maternal grandmother's home. The trial court further found respondent had made no "recognizable effort or progress" on her case plan and noted its concerns that respondent and the maternal grandmother were continuing to engage in substance abuse. After a hearing on 20 November 2018, the trial court entered a permanency-planning review order establishing reunification as Adam's primary permanent plan with a secondary plan of adoption.[3] The trial court reiterated its concern regarding substance abuse and found respondent had made only "limited progress" on her case plan. Specifically, the trial court noted respondent's lack of "stability with regard to employment, visiting the children, submitting to drug screens, [and] maintaining appropriate contact with [her] social worker." Respondent was also delinquent in her child support payments. The trial court further found that the home in which respondent continued to reside was not in suitable condition based on a surprise visit on 14 November 2018. Specifically, "[t]here were animal feces on the floor"; "trash [was] everywhere"; and "molded food and dirty dishes [were seen] throughout the home."

¶ 6 After reviewing Adam's permanent plan on 25 March 2019, the trial court entered an order on 30 April 2019 and found:

> Due to the time that [Adam has] been in care and [respondent's] failure to make satisfactory progress to correct the conditions that led to [Adam] being placed in care, it is not possible for [Adam] to be returned to the home of [respondent] immediately or within the next six months.

As such, the trial court changed the permanent plan to adoption with a secondary or concurrent plan of reunification.

¶ 7 On 3 September 2019, DSS filed a petition to terminate respondent's parental rights. DSS alleged that respondent had neglected Adam, *see* N.C.G.S. § 7B-1111(a)(1) (2019), willfully left him in placement outside the home without making reasonable progress to correct the conditions that led to his removal, *see id.* § 7B-1111(a)(2) (2019), and willfully failed to pay a reasonable portion of Adam's costs of care during the preceding six months, *see id.* § 7B-1111(a)(3) (2019).

¶ 8 Following a hearing on 30 June 2020, the trial court entered an order concluding that grounds existed to terminate respondent's parental

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3. The trial court initially entered a review order but filed an amended order converting the 20 November 2018 proceeding into a permanency-planning hearing by consent of the parties.

rights based on neglect and failure to make reasonable progress. *See id.* § 7B-1111(a)(1), (2). The trial court also determined that it was in Adam's best interest that respondent's parental rights be terminated. *See id.* § 7B-1110(a) (2019). Respondent appeals.

¶ 9 Respondent first argues that the trial court erred by terminating her parental rights based on neglect. Specifically, respondent contends that the trial court improperly relied on circumstances that no longer existed at the time of the termination hearing.

¶ 10 A termination of parental rights proceeding consists of an adjudicatory stage and a dispositional stage. *Id.* §§ 7B-1109, -1110 (2019); *In re Montgomery*, 311 N.C. 101, 110, 316 S.E.2d 246, 252 (1984). At the adjudicatory stage, the petitioner bears the burden of proving by "clear, cogent, and convincing evidence" the existence of one or more grounds for termination under N.C.G.S. § 7B-1111(a). N.C.G.S. § 7B-1109(f). We review a trial court's adjudication "to determine whether the findings are supported by clear, cogent and convincing evidence and the findings support the conclusions of law." *In re Montgomery*, 311 N.C. at 111, 316 S.E.2d at 253 (citing *In re Moore*, 306 N.C. 394, 404, 293 S.E.2d 127, 133 (1982)). "Findings of fact not challenged by respondent are deemed supported by competent evidence and are binding on appeal." *In re T.N.H.*, 372 N.C. 403, 407, 831 S.E.2d 54, 58 (2019) (citing *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991)).

¶ 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) 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 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." *Id.* § 7B-101(15) (2019). We have recently explained that

> [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, 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 (2016) (alteration in original); then quoting *In re Z.V.A.*, 373 N.C. 207, 212, 835 S.E.2d 425, 430 (2019)). The determination that a child is likely to experience further neglect if returned to the parent's custody is a conclusion of law and is reviewed de novo. *In re J.O.D.*, 374 N.C. 797, 801, 807, 844 S.E.2d 570, 574, 578 (2020).

¶ 12 In support of its conclusion of neglect pursuant to N.C.G.S. § 7B-1111(a)(1), the trial court made the following findings of fact:

> 9. [Respondent] completed parenting classes on August 27, 2018.
>
> 10. [Respondent] provided DSS with a written statement regarding things she learned in parenting classes and the reasons that her children were in foster care.
>
> 11. [Respondent] has maintained employment and signed a voluntary support agreement. She had a child support arrearage of $822.62 at the time of this hearing.
>
> 12. [Respondent] completed substance abuse and mental health assessments. [Respondent] was diagnosed as suffering from an adjustment disorder with depressed mood and anxiety. [Respondent] was found to meet criteria for methamphetamine use disorder and marijuana use disorder.
>
> 13. [Respondent's] housing was not appropriate as documented by DSS on home visits. In November 2018, DSS social workers visited [respondent's] home and found it in a state of disarray. There were animal feces and urine on the floor. Moldy food and trash were piled up in the kitchen and the home was cluttered with buckets of cigarettes. In February 2019, [respondent] had a pet pig living in the home. The home still needed improvements, although [respondent] had corrected some items.
>
> 14. At an attempted home visit in October 2019, [respondent] told DSS that it was not a good time for the visit because her father had "trashed" the home and assaulted her.

> 15. [Respondent] did not consistently submit to drug screens and did not consistently visit with [Adam].
>
> 16. During the time that [Adam] has been in DSS custody, [respondent] was asked to submit to fifty-two random drug screens. She submitted to thirty-four screens. Thirty-two screens were negative and two were positive. She failed to submit to eighteen drug screens.
>
> 17. During the time that [Adam] has been in DSS custody, [respondent] could have had seventy-seven visits with [Adam]. [Respondent] participated in only twenty-eight total visits during the pendency of this case.
>
> 18. DSS routinely had difficulty contacting [respondent] to come in for random drug screens.
>
> 19. [Respondent] appeared overwhelmed during her visits and [Adam] seemed confused. [Adam] acted out following visits with [respondent].
>
> 20. [Respondent] and [Adam] do not have a bond.
>
> 21. [Adam] has spent one-half of his life in foster care.
>
> 22. [Respondent has] neglected [Adam]. . . . [Respondent] has provided no care for [Adam] since January 2017.
>
> 23. There is a significant possibility of future neglect by [respondent] in the event [Adam] was to be returned to her care. [Respondent] has failed to correct the conditions that led [Adam] to be placed in foster care.
>
> . . . .
>
> 26. [Respondent] has failed to show that [she] could serve as a responsible custodian for [Adam] during the period that [Adam] has been in foster care.

¶ 13 We first address respondent's challenges to findings of fact 13, 19, 20, 22, 23, and 26. Respondent contends that in finding of fact 13, the characterization of her housing as "not appropriate" at the time of the termination hearing is unsupported by the evidence. We disagree. The hearing

evidence shows that respondent remained in the residence owned by the maternal grandmother where she resided when DSS removed Adam in October 2017. DSS social worker Jamie Seager testified that at no time did she observe respondent's residence in a condition suitable for Adam. At a home visit in November 2018, she found "animal urine and feces all over the house," "animal shavings poured in the living room floor," "molded food on the tables [and] on the stove," and piles of trash in the kitchen. In February 2019, respondent and her boyfriend "had a pig living inside the home," "a sandbox that appeared that the pig stayed in in the living room floor," and "buckets of cigarette butts and trash on the living room floor." In October 2019, respondent refused to allow Ms. Seager into the residence, claiming her father had assaulted her and "trashed their house." Ms. Seager attempted home visits on three additional dates in 2019, but respondent was either not at home or did not answer the door. While respondent argues that her housing conditions and relationship with the maternal grandmother had improved, the trial court was free to disbelieve respondent's testimony. The evidence thus supports the finding that respondent failed to obtain safe and appropriate housing.

¶ 14 Respondent next challenges finding of fact 19, which states that she "appeared overwhelmed" during visits and that Adam "seemed confused." Respondent's challenge is meritless. Ms. Seager described respondent as being "overwhelmed" during the visitations that she supervised. She also described Adam as "very confused during the visits" and "more interested in playing with toys than interacting with . . . [respondent]."

¶ 15 Respondent next contends that finding of fact 20 incorrectly states that she and Adam "do not have a bond." Respondent's argument lacks merit. Ms. Seager testified that respondent appeared to share a bond with Adam's brother but not with Adam. DSS community support technician Lisa Phillips, who arranged respondent's drug screens and assisted in supervising approximately eleven of her visits, gave the following response when asked to describe respondent's bond with Adam:

> Well, I noticed that [respondent] would go to [Adam], you know. I'm not saying that was her favorite, but she did go to [Adam]. And he -- I think he recognized her, you know, as the person that came to do the visits, but I didn't see like a real bond of any kind other than, you know, they're just -- I mean, he didn't -- he wasn't afraid of her.

To the extent that these accounts conflict, the trial court was free to accept Ms. Seager's testimony. *See In re T.N.H.*, 372 N.C. at 411, 831 S.E.2d at 61 ("[I]t is the trial judge's duty to consider all the evidence, pass upon the credibility of the witnesses, and determine the reasonable inferences to be drawn from the testimony." (citing *In re D.L.W.*, 368 N.C. at 843, 788 S.E.2d at 167–68)).

¶ 16 Respondent next argues that finding of fact 22 incorrectly states that she "neglected the minor child" and "has provided no care for [Adam] since January 2017." To the extent this finding refers to respondent's prior neglect of Adam, which led to his removal from the home by DSS on 27 October 2017 and his adjudication as a neglected juvenile on 4 December 2017, finding of fact 22 is supported by the evidence.[4]

¶ 17 Respondent next contends that finding of fact 23 incorrectly states that she "failed to correct the conditions that led [Adam] to be placed in foster care" and that finding of fact 26 incorrectly states that she "failed to show that [she] could serve as a responsible custodian for [Adam] during the period that [he] has been in foster care." We disagree. Though the parties consented to the trial court's adjudication of Adam as neglected on 4 December 2017 without any findings of fact, the juvenile petition filed by DSS alleged Adam was neglected because of a lack of proper supervision and continuing conflicts in the home between respondent and the maternal grandmother. Subsequent events revealed that respondent's substance abuse and the squalid conditions in the home were additional problems contributing to the need for Adam's removal.

¶ 18 At the time of the termination hearing, respondent continued to live in the maternal grandmother's residence, which DSS never observed to be in a condition suitable for children. The evidence thus shows respondent failed to correct the problems with Adam's home environment which contributed to his removal. Though respondent completed parenting classes, mental health and substance abuse assessments, and twenty hours of substance abuse counseling in 2018, she failed to submit to eighteen drug screens requested by DSS and tested positive for controlled substances on two occasions. Respondent's routine noncompliance with the drug testing requirement of her case plan, particularly in light of her diagnoses of methamphetamine use disorder and marijuana use disorder, supports a finding that she had failed to resolve the issue of substance abuse. Respondent also contends that any difficulties

4. Though not raised by the parties, the reference to January 2017 in finding of fact 22 appears to be a scrivener's error because DSS did not obtain custody of Adam until 27 October 2017. As such, the evidence supports the finding that respondent had provided no care for Adam since 27 October 2017 rather than January 2017.

she displayed in managing multiple children were no longer an issue because she had signed relinquishments of her parental rights to Adam's brother and sister the day before the hearing. As the trial court correctly noted, however, respondent was still able to revoke her relinquishments at the time of the termination hearing. *See* N.C.G.S. § 48-3-706(a) (2019) ("A relinquishment of . . . any minor may be revoked within seven days following the day on which it is executed by the . . . minor's parent or guardian, inclusive of weekends and holidays."). Further, respondent attended only twenty-eight of the seventy-seven visits she was offered with Adam, demonstrating her inability or unwillingness to properly care for Adam. Therefore, competent evidence supports findings of fact 23 and 26.

¶ 19 Having addressed each of respondent's challenges to the trial court's findings of fact, we next consider whether the trial court's valid findings support its conclusions of law. *In re S.D.*, 374 N.C. 67, 86, 839 S.E.2d 315, 329 (2020). Respondent contests the trial court's conclusion that Adam faced a significant likelihood of future neglect if returned to respondent's care. Respondent argues the trial court based its conclusion on circumstances that no longer existed and failed to consider her circumstances and fitness to care for Adam at the time of the hearing.

¶ 20 We conclude the trial court's findings accurately portray respondent's status at the time of the termination hearing as required to support an adjudication of neglect under N.C.G.S. § 7B-1111(a)(1). Findings of fact 13 through 18 demonstrate respondent's lack of progress in obtaining appropriate housing, submitting to drug screens, and attending visitations—all of which reflect her inability to provide Adam proper care and supervision in a safe home environment. Specifically, respondent failed to submit to eighteen drug screens and tested positive for use of a controlled substance twice. Owing at least in part to her substance abuse issues, respondent attended only twenty-eight of the seventy-seven visits offered by DSS. Though respondent testified she was afraid of exposing her children to COVID-19, she made no attempt to contact DSS to request video chats or other alternative forms of visitation.

¶ 21 At the time of the hearing, Adam had spent half of his life in DSS custody. Respondent's prior neglect of Adam and her circumstances at the time of the termination hearing support the trial court's conclusion that Adam faced a significant likelihood of future neglect if returned to respondent's care. *See In re M.Y.P.*, 378 N.C. 667, 2021-NCSC-113, ¶¶ 19–20 (concluding "the trial court properly determined that there was a high probability of repetition of neglect" based, in part, on the respondent's failure to visit the child consistently and to address issues of

housing and substance abuse); *In re J.J.H.*, 376 N.C. 161, 185, 851 S.E.2d 336, 352–53 (2020) (concluding there was a likelihood of future neglect where the respondent's housing, though stable, was not appropriate for the children and when the respondent "had missed at least twenty-two scheduled visits" and had not displayed fluency with parenting the children during visits); *In re M.A.*, 374 N.C. 865, 870, 844 S.E.2d 916, 921 (2020) ("A parent's failure to make progress in completing a case plan is indicative of a likelihood of future neglect." (quoting *In re M.J.S.M.*, 257 N.C. App. 633, 637, 810 S.E.2d 370, 373 (2018))). Therefore, the trial court's findings of fact support its conclusion that a ground existed to terminate respondent's parental rights pursuant to N.C.G.S. § 7B-1111(a)(1).

¶ 22 Because "an adjudication of any single ground for termination under N.C.G.S. § 7B-1111(a) will suffice to support a trial court's order terminating parental rights," *In re L.M.M.*, 375 N.C. 346, 349, 847 S.E.2d 770, 773 (2020) (citation omitted), we need not review the trial court's adjudication under N.C.G.S. § 7B-1111(a)(2). As such, we affirm the trial court's order terminating respondent's parental rights.

AFFIRMED.

IN THE MATTER OF C.B.C.B.

No. 521A20

Filed 17 December 2021

Termination of Parental Rights—grounds for termination—aiding and abetting—murder of other child in home

The trial court properly terminated a mother's parental rights in her newborn son under N.C.G.S. § 7B-1111(a)(8) and ceased reunification efforts in the underlying neglect action, where clear, cogent, and convincing evidence supported a finding that she aided and abetted her boyfriend in the second-degree murder of her nineteen-month-old son. Although the mother knew for months that her boyfriend was hitting her children, observed scalding injuries on the children after her boyfriend left them in a hot bathtub, and found patterned linear bruising on her son's back the day before he died (in large part because of the burns and blunt force injuries), she continued to leave the children in her boyfriend's care, did not seek medical care for the children, and actively concealed the injuries from her parents and anyone else who could have offered help.

Justice ERVIN dissenting.

Justice EARLS joins in this dissenting opinion.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from orders entered on 26 May 2020 and 7 October 2020 by Judge Burford A. Cherry in District Court, Catawba County. On 27 January 2021, this Court allowed respondent's petition requesting expedited review of the 23 March 2020 and 5 November 2020 trial court orders that were pending review in the Court of Appeals and related to an underlying neglect proceeding. Additionally, this Court on its own motion consolidated the underlying neglect proceeding with the termination proceeding on direct appeal to this Court. Heard in the Supreme Court on 8 November 2021.

Lauren Vaughan for petitioner-appellee Catawba County Department of Social Services.

Matthew D. Wunsche, GAL Appellate Counsel, for petitioner-appellee Guardian ad Litem.

Robert W. Ewing for respondent-appellant mother.

NEWBY, Chief Justice.

¶ 1 In this case we determine whether the trial court properly terminated respondent-mother's parental rights to C.B.C.B. (Charlie)[1] based upon N.C.G.S. § 7B-1111(a)(8) and thereafter ceased reunification with respondent. Because clear, cogent, and convincing evidence supports the trial court's termination order based on respondent's aiding and abetting second-degree murder, and because the trial court properly ceased reunification efforts in the underlying neglect action, the trial court's orders are affirmed.

¶ 2 On 15 August 2019, respondent gave birth to Charlie. DSS then received a report about Charlie based upon respondent's criminal record and her prior history with DSS involving her two older children, John and Kate. On 3 May 2013, John died after suffering severe abuse and neglect while in the care of respondent and her then-boyfriend, William Howard Lail. That same day, the Catawba County Department of

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

Social Services (DSS) obtained nonsecure custody of Kate based upon respondent and Lail's neglect and abuse of Kate. On 1 October 2013, Kate was adjudicated an abused and neglected child based upon the following facts:

> 20. During the five or six months prior to May 3, 2013, [respondent] and William Lail repeatedly left the minor children [Kate] and [John] at home alone for hours at a time, leaving no one in the home to care for the children. On at least one of these occasions, they left the children asleep in their beds. On multiple other occasions, they left both children strapped in their car seats, at times in a closet, with no one to attend them for hours at a time. Later, when [Kate] learned how to free herself from her car seat, she was placed in a small closet with no light, where she was left for hours at a time. Mr. Lail and [respondent] would push a heavy object, such as a box of ammunition or a cupboard, in front of the door to prevent her from escaping, and would continue to leave [John] strapped in his car seat. On more than one occasion when Mr. Lail and [respondent] left the children at home alone, they went to a bar. On other occasions, the children were left alone for up to several hours when Mr. Lail's and [respondent's] work schedules overlapped.
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> 21. In February or March, Mr. Lail was fired from his job. He did not work again after that. During this time, [respondent] left the children with Mr. Lail.
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> 24. Approximately seven to ten days prior to May 3, 2013, both [Kate] and [John] suffered extensive scalding injuries while in the sole care of William Lail. [Respondent] was at work when the injuries occurred. Although details of his explanations have changed, Mr. Lail has reported that he left the minor children in a bathtub for approximately four minutes with either the tub faucet or the shower head running while he took trash cans to the curb. He reported that while he was gone, the minor child [Kate] must have turned on the hot water, and he returned to find

[Kate] standing outside the tub and [John] in the tub crying. The location and patterns of the burn injuries to these children is not consistent with the accidental explanation provided by Mr. Lail and are more consistent with intentional injury.

25. Despite the severe and extensive burns to the minor children, neither [respondent] nor William Lail sought or obtained any medical care for the minor children from the time the burns occurred through May 3, 2013. They attempted to use over-the-counter items to care for the burns. The failure to obtain appropriate medical care for the children was a deliberate attempt to keep anyone from seeing the extensive injuries to the children and reporting them to the Department of Social Services.

26. During the time between the infliction of the scalding injuries to the children and May 3, 2013, Mr. Lail and [respondent] ensured that no one else saw the minor children. [Respondent] sent a text message to her parents to cancel a visit they had planned with the minor children. [Respondent] deliberately tried to keep her parents from seeing the children, so they would not make a report to the Department of Social Services.

27. During the seven to ten days after the children were scalded and before the death of [John] on May 3, 2013, [John's] behavior changed markedly. Although [John] had been an active and mobile child, he moved very little after being burned. He ate very little solid food during this period. Mr. Lail described that he basically would just lay [sic] there and "eat, sleep, and poop." Because diapers would irritate the extensive burns to [John's] buttocks, on multiple nights he was placed in a bathtub with a pillow, with no diaper or clothing, and no blanket, to sleep at night, so that he could urinate and defecate there in the tub.

28. On the morning of May 3, 2013, the day that the minor child [John] died, William Lail and [respondent] took the minor child [Kate] with them to McLeod Center to obtain methadone for Mr. Lail,

to Bojangle's and to the grocery store for chocolate milk. The minor child [John] was left alone at home, where he lay on the love seat and moved very little. When they returned to the home between 8:00 and 9:00 a.m., Mr. Lail and/or [respondent] placed a biscuit next to [John] on the love seat, but he did not eat.

29. Later on the morning of May 3, 2013, around 10:10 a.m., William Lail and [respondent] left both [Kate] and [John] at home alone while Mr. Lail drove [respondent] to work. [Kate] was placed in a small closet with no light, and a heavy box of ammunition was pushed in front of the door so that she could not get out. [John] was left lying on the love seat. [Respondent] has admitted, and the Court finds, that she was not concerned about leaving her nineteen month old child unattended and unrestrained because he could barely move in the aftermath of the burns he sustained seven to ten days earlier.

30. Still later on May 3, 2013, the same day [John] had been left at home alone twice and [Kate] had been left in the close[t] once, the Department received a third Child Protective Services report involving the minor child [Kate] on May 3, 2013 after EMS was called to the home of [respondent] and William Lail at 629 25th St. NW, Hickory, North Carolina and found the minor child [John], age nineteen months, had passed away. Law enforcement from Longview Police Department and the State Bureau of Investigation also responded to the home.

31. Mr. Lail's account of the events which occurred after he took [respondent] to work on May 3, 2013 and which led to the death of [John] changed over the course of several interviews. He was the sole caretaker for both of the minor children when the minor child [John] died. [Respondent] was at work when [John] died.

32. When law enforcement responded to the home on May 3, 2013, the body of [John] was at the home of a neighbor, where William Lail had gone for help and to call 9-1-1. The body of [John] had obvious injuries

which included but were not limited to apparent burns and scabs to his forehead, back and buttocks and bruising to his forehead.

. . . .

35. An autopsy of [John] was conducted on May 4 and 6, 2013 by Dr. Jerri McLemore of North Carolina Baptist Hospital/Wake Forest University School of Medicine. The presumed cause of death for the minor child was determined to be drowning with significant contributory factor of burns and blunt force injuries.

36. At the time of autopsy, [John] had large areas of scalding injuries to his forehead, predominantly to the front of the head, and extending to the back of the head as well as to the side of the head. The burns to the head were determined to be partial thickness burns, also known as second degree burns, and were in various stages of healing. Testing to the burns indicated that they were at least a couple of days old and could be approximately one week old.

37. In addition to the scalding injuries, a number of other injuries, including blunt force injuries, were found about the head of [John]. There were a number of bruises to [John's] head which were located in at least three different planes, indicating separate impacts to the child. These included a large dark bruise across the child's forehead as well as a patterned bruising and abrasion injury across the top of the child's head. A patterned injury is one which appears to have been inflicted by impact with a particular object. The patterned injury to the top and side of this child's head consisted of two parallel linear patterned combinations of bruises and abrasions which would be consistent with a belt.

38. Other injuries to the head and neck of the minor child [John], as documented during his autopsy, include but are not limited to bruising to the inside corner of his left eye and along the inside of his nose, bruising across the bridge of the child's nose, and a cut to the child's left eyelid. The locations of these specific bruises, as well as those to the top of the

child's head are not consistent with typical accidental injuries to children of this age. There were additional bruises and injuries to the child's face, including but not limited to bruising to the outside of his left cheek, bruising to his right cheek, bruising near the left side of his mouth, and a scraping injury to the lip. The injuries to the child's face were in different planes, suggesting multiple impacts.

. . . .

47. The numerous bruises, abrasions, and scars, as well as the healing rib fracture are indicative of nonaccidental inflicted injury to this child, which occurred on multiple occasions. Many of the bruises, abrasions and scars would have been evident to his mother and caretaker for at least 24 hours prior to the child's death, with many of the injuries likely evident for longer.

. . . .

57. [Respondent] admitted that she has seen William Lail become increasingly aggressive over the last several months prior to [John's] death. She stated that she was afraid of Mr. Lail, wanted to leave him, and had spoken to friends about leaving him, but did not act on that. She has admitted that she has seen him hit the minor children with a double-looped belt, and specifically [Kate] on at least two occasions, and had seen him hit both children on their buttocks with an open hand. She has also admitted that she often came home from work to find bruises on her children for which Mr. Lail would offer excuses. Specifically on the morning of May 3, 2013, she saw unexplained linear bruising to [John's] back. Despite those injuries, she continued to leave her children in his care.

58. Despite the extensive scalding injuries to both children, received while in the sole care of William Lail, [respondent] continued to leave the minor children in his care while she worked.

59. [Respondent] has admitted that she saw the linear marks on [John's] back before she left him in William Lail's care on May 3, 2013.

> 60. Mr. Lail has stated that he took his lead on how to treat the minor children from the way that [respondent] treated the children. He asserts that [respondent] was very impatient with the children, would become angry and scream at them and that she would place her hand over their mouths to stop them from crying. He has reported that [respondent] whipped the children with a belt, a coat hanger, a piece broken off of a mini blind and a wooden spoon.
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> 62. The Court specifically finds that both of the minor children have been struck on multiple occasions by Mr. Lail and/or [respondent] with objects including but not limited to a belt and a coat hanger.
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> 63. The Court specifically finds that both of the minor children sustained inflicted bruising injuries after they received the scalding injuries outlined above.
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> . . . .
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> 65. [Respondent] had opportunities to seek assistance and protection for herself and her children from Mr. Lail, if she was in fact in fear of him. She had experience with obtaining domestic violence protective orders and the services available to victims of domestic violence. She left the home regularly to go to work and had access to a phone to seek assistance from friends and family. Still, despite obvious severe injuries to her children, she took no measures to protect them and instead took active steps to conceal them and prevent them from being seen by those who might offer some measure of protection.

¶ 3 In July of 2013, respondent completed a psychological evaluation and was diagnosed with "Personality Disorder [Not Otherwise Specified] with Dependent features." Almost four years later, on 5 May 2017, respondent was convicted of one count of intentional child abuse inflicting serious physical injury and four counts of negligent child abuse inflicting serious physical injury, all stemming from John's death and Kate's injuries. Respondent was released from prison in August of 2017. On 14 November 2017, William Lail was convicted of second-degree murder for John's death.

¶ 4 On 1 October 2019, DSS filed a petition alleging Charlie to be a neglected juvenile. Shortly thereafter, on 4 November 2019, the Guardian ad Litem (GAL) filed a petition to terminate respondent's parental rights to Charlie based upon N.C.G.S. § 7B-1111(a)(8). On 13 February 2020, the trial court entered an order consolidating the underlying neglect hearing filed by DSS with the termination of parental rights hearing filed by the GAL.

¶ 5 On 23 March 2020, the trial court entered an order of adjudication in which the court concluded that Charlie was a neglected juvenile. On 26 May 2020, the trial court entered an adjudication order on the motion for termination of parental rights, in which it found that:

> 8. Since [Charlie's] birth, during conversations with social workers and even during her testimony before this court, [respondent] has repeatedly minimized and excused her responsibility for the abuse and neglect suffered by her children [John] and [Kate]. When asked about her responsibility for the abuse and neglect, [respondent] focuses on herself as a victim of abuse and violence by Mr. Lail and tends to downplay or deny her own responsibility.
>
> 9. The Court has considered the severity of the abuse and neglect suffered by [Kate] and [John] which ultimately resulted in the death of [John], as well as the statements and testimony of the Respondent mother regarding her responsibility, or lack thereof, for the abuse and neglect of her children. The Court has also considered the extensive and obvious nature of the injuries sustained by [John] prior to his death which were observable by the Respondent mother for a period of time during which she could have taken steps to protect her very young children. The Court finds that the Respondent mother had an affirmative duty to protect her very young minor children, particularly [John] whose injuries were more severe and which contributed to his death. The Court finds that the Respondent mother had an affirmative duty to take all steps reasonably possible to protect her minor children, and specifically [John], from an attack by William Lail and from the dangerous environment in which they were living with Mr. Lail.

> 10. [Respondent] intentionally failed to take [John] for medical care following his scalding burns, and such failure was a deliberate attempt on her part to hide [John's] injuries from professionals (DSS, doctors, etc.) who could have offered him help.
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> 11. In the days prior to the death of [John], [respondent] sent text messages to her parents cancelling their planned visit with the children, in an effort to hide the children's injuries from them.
>
> 12. [Respondent] continued to leave her children in the sole care of William Lail, including on the day of [John's] death, even after observing their scalding injuries, patterned bruising on their bodies, and Lail's increasing aggression.
>
> 13. The Court finds that the Respondent mother, though not present in the home when [John] was killed, knew or should have known of the extreme risk posed by Mr. Lail and took no steps to prevent the injury of both children, [Kate] and [John]; and the death of [John]. The Court finds that the actions, omissions and decisions of the Respondent mother created the opportunity for Mr. Lail to commit the murder of [John] and were tantamount to consent to the conduct of Mr. Lail which resulted in the death of [John], for which he was convicted of Second Degree Murder.

¶ 6 Thus, the trial court concluded that respondent had "aided, abetted, attempted, conspired or solicited to commit murder or voluntary manslaughter of another child of [respondent]: to-wit [John]." As such, the trial court determined that grounds existed to terminate respondent's parental rights to Charlie pursuant to N.C.G.S. § 7B-1111(a)(8). In a separate disposition order entered on 7 October 2020, the trial court concluded that terminating respondent's parental rights was in Charlie's best interests.

¶ 7 Thereafter, on 5 November 2020, the trial court entered a separate disposition order ceasing reunification with respondent in light of the court's previous order terminating her parental rights. Respondent appeals.[2]

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2. Respondent appealed to the North Carolina Court of Appeals the 23 March 2020 and 5 November 2020 orders of adjudication and disposition in the underlying neglect

¶ 8 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 and are binding on appeal." *In re T.N.H.*, 372 N.C. 403, 407, 831 S.E.2d 54, 58 (2019) (citing *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991)).

¶ 9 Section 7B-1111 provides, in pertinent part, that "[t]he court may terminate the parental rights upon a finding . . . [that] [t]he parent has . . . aided, abetted, attempted, conspired, or solicited to commit murder or voluntary manslaughter of the child, another child of the parent, or other child residing in the home." N.C.G.S. § 7B-1111(a)(8) (2019). Absent a prior conviction of a qualifying offense, the petitioner must "prov[e] the elements of the offense" to satisfy its burden to show that a parent's rights should be terminated under subsection 7B-1111(a)(8). *Id.*

¶ 10 Here, though respondent mother was convicted of both intentional and negligent child abuse, she was not convicted of second-degree murder. Therefore, the petitioner must prove the elements of either aiding and abetting, attempt, conspiracy, or solicitation of second-degree murder to satisfy its burden here.

¶ 11 Aiding and abetting occurs when (1) "the crime was committed by some other person;" (2) "the defendant knowingly advised, instigated, encouraged, procured, or aided the other person to commit that crime;" and (3) "the defendant's actions or statements caused or contributed to the commission of the crime by that other person." *State v. Goode*, 350 N.C. 247, 260, 512 S.E.2d 414, 422 (1999) (citation omitted).

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proceeding. Additionally, respondent appealed to the Supreme Court the 26 May 2020 and 7 October 2020 orders in the termination of parental rights proceeding. Because the two actions involve the same facts, respondent filed a petition for discretionary review with this Court, requesting that the appeal of the underlying neglect case bypass the Court of Appeals. On 27 January 2021, this Court allowed respondent's petition and, on its own motion, consolidated the underlying neglect proceeding and termination proceeding. Therefore, both matters are before this Court.

¶ 12 With respect to the second element, "[t]he communication or intent to aid does not have to be shown by express words of the defendant but may be inferred from his actions and from his relation to the actual perpetrators." *Id.* at 260, 512 S.E.2d at 422. Generally an individual's failure to intervene does not make him guilty of aiding and abetting. *See State v. Walden*, 306 N.C. 466, 472, 293 S.E.2d 780, 784–85 (1982) (citing *State v. Birchfield*, 235 N.C. 410, 413, 70 S.E.2d 5, 7 (1952)). Parents, however, "have an affirmative legal duty to protect and provide for their minor children." *Id.* at 473, 293 S.E.2d at 785 (citations omitted). As such, parents must "take every step reasonably possible under the circumstances of a given situation to prevent harm to their children." *Id.* at 475, 293 S.E.2d at 786. Therefore, when a parent has actual knowledge of harm to his or her child and fails to reasonably protect the child from harm, that parent has knowingly aided the perpetrator's commission of the harm. *See id.* at 473–76, 293 S.E.2d at 785. The reasonableness of a parent's response, however, must be determined on a case-by-case basis. *Id.* at 475–76, 293 S.E.2d at 786.[3]

¶ 13 Here the first element of aiding and abetting is clearly met because Lail was convicted of second-degree murder in the death of respondent's older son, John.

¶ 14 As for the second element, the trial court's order and the record support the finding that respondent "knowingly advised, instigated, encouraged, procured, or aided" Lail's murder of respondent's son, John. *Goode*, 350 N.C. at 260, 512 S.E.2d at 422. The trial court stated:

> The Court finds that the Respondent mother, though not present in the home when [John] was killed, knew or should have known of the extreme risk posed by Mr. Lail and took no steps to prevent the injury of both children, [Kate] and [John]; and the death of [John]. The Court finds that the actions, omissions and decisions of the Respondent mother created the opportunity for Mr. Lail to commit the murder of [John] and were tantamount to consent to the conduct of Mr. Lail which resulted in the death of [John], for which he was convicted of Second Degree Murder.

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3. Respondent argues that *Walden* is no longer authoritative given the legislature's enactment of N.C.G.S. § 14-5.2 (2019), which abolished all distinctions between accessories before the fact and principals to a crime. The statutory change, however, has no bearing on the general principle in *Walden* that parents may have a duty to intervene to protect their children.

¶ 15 Because aiding and abetting requires knowledge, the trial court's statement that respondent "should have known" of the risk presented here is an inaccurate statement of the law and should be disregarded. Nevertheless, when read in context, the entire finding shows that the trial court concluded that respondent possessed the actual knowledge required to aid and abet Lail in murdering John. John's presumed cause of death was determined as "drowning with significant contributory factor of burns and blunt force injuries." Respondent's testimony at the trial court hearing and the findings from Kate's adjudication order, which are incorporated in the trial court's order here, consistently show that respondent knew that her children suffered severe abuse and saw the bruises and burns on John, yet intentionally concealed the injuries. Specifically, respondent had "seen William Lail become increasingly aggressive over the last several months prior to [John's] death," "had seen [Lail] hit the minor children with a double-looped belt," "had seen him hit both children on their buttocks with an open hand," "often came home from work to find bruises on her children," and, on the morning of John's death, "saw unexplained linear bruising to [John's] back." Rather than protecting John, respondent deliberately isolated John to conceal his injuries. This concealment was a significant contributory factor in John's death. Respondent refused to take John to the doctor and even cancelled a visit with her parents to avoid medical intervention or DSS involvement. Based upon respondent's conduct, the trial court found that respondent's "actions, omissions and decisions . . . created the opportunity for Mr. Lail to commit the murder of [John] and were tantamount to consent to the conduct of Mr. Lail which resulted in the death of [John]."

¶ 16 Moreover, the trial court found that respondent also took part in the abuse. She and Lail both struck John and Kate "with objects including but not limited to a belt and a coat hanger," and respondent was convicted of intentional and negligent child abuse. Respondent's actions demonstrate that she knew of harm to her children, participated in the abuse, and failed to reasonably protect John and Kate. As such, the trial court correctly determined that respondent knowingly aided Lail in committing second-degree murder.

¶ 17 As for the third element, respondent's actions contributed to Lail's murdering John. Had respondent reasonably protected her children or refrained from concealing John's injuries, Lail would not have had the opportunity to murder John. Instead of seeking help for John, however, respondent prioritized concealing John's injuries to protect herself. Respondent "continued to leave her children in the sole care of William

Lail, including on the day of [John's] death, even after observing their scalding injuries, patterned bruising on their bodies, and Lail's increasing aggression." Respondent's actions, combined with all the facts recounted above, contributed to Lail's murder of John.

¶ 18 Because the elements of aiding and abetting are met in this case, the trial court appropriately terminated respondent's parental rights based upon N.C.G.S. § 7B-1111(a)(8).[4]

¶ 19 Respondent next argues that if this Court reverses the trial court's termination orders, the Court must also vacate the underlying neglect order ceasing her reunification with Charlie. Because we hold that the trial court did not err in terminating respondent's parental rights, however, we conclude that the trial court did not err in ceasing respondent's reunification with Charlie.

¶ 20 Thus, the trial court here properly terminated respondent's parental rights and ceased reunification efforts. Accordingly, the trial court's orders are affirmed.

AFFIRMED.

Justice ERVIN dissenting.

¶ 21 Although I agree with my colleagues that the record in this case provides more than sufficient support for a conclusion that respondent-mother aided and abetted Mr. Lail in murdering John, I am unable to join the Court's conclusion that the trial court's findings and conclusions, as written, suffice to permit an affirmance of the trial court's order. For that reason, rather than affirming the trial court's termination order on the basis set out in the Court's opinion, I would vacate the trial court's order and remand this case to District Court, Catawba County, for further proceedings, including the entry of a new order containing properly drafted findings of fact. As a result, I respectfully dissent.

¶ 22 As the parties to this case acknowledge, "[a] person is guilty of a crime by aiding and abetting if (i) the crime was committed by some other person; (ii) the defendant knowingly advised, instigated, encouraged, procured, or aided the other person to commit that crime; and (iii) the

4. Respondent also argues that the trial court erred in concluding that respondent solicited, conspired, or attempted to murder John. Because we have concluded that the trial court properly determined that respondent aided and abetted Lail in the murder of John, we need not reach these alternate grounds for terminating her rights under N.C.G.S. § 7B-1111(a)(8).

defendant's actions or statements caused or contributed to the commission of the crime by that other person." *State v. Goode*, 350 N.C. 247, 260 (1999); *see also State v. Dick*, 370 N.C. 305, 311 (2017). Although the necessary knowledge may be established by "circumstantial evidence from which an inference of knowledge might reasonably be drawn," *State v. Boone*, 310 N.C. 284, 294–95 (1984), *superseded on other grounds by statute*, *as recognized in State v. Oates*, 366 N.C. 264, 267 (2012), a person does not act "knowingly" in the event that, rather than having actual knowledge of the fact in question, he or she reasonably should have had the required knowledge. *State v. Miller*, 212 N.C. 361, 363 (1937) (stating that "[k]nowledge connotes a more certain and definite mental attitude than reasonable belief," with the extent to which "knowledge [ ] implied from the circumstances [being] sufficient to establish reasonable belief [is] a question for the jury"), *superseded by statute in 1975 N.C. Sess. L. c 165*, *s. 1*, *as recognized in State v. Fearing*, 304 N.C. 471, 478 n.3 (1981). Thus, in order to find the existence of the ground for termination enunciated in N.C.G.S. § 7B-1111(a)(8) (allowing the termination of parental rights in the event that the parent "has . . . aided, abetted, attempted, conspired, or solicited to commit murder or voluntary manslaughter of the child, another child of the parent, or other child residing in the home"), the trial court was required to find that respondent-mother had actual knowledge of the risk that Mr. Lail posed to John. As a result, the trial court erred by finding that respondent-mother's parental rights in Charlie were subject to termination pursuant to N.C.G.S. § 7B-1111(a)(8) on an aiding and abetting theory based upon a finding that, although "not present in the home when [John] was killed, [she] knew or should have known of the extreme risk posed by Mr. Lail and took no steps to prevent the injury of both children."

¶ 23 Although my colleagues acknowledge that "the trial court's statements that [respondent-mother] 'should have known' of the risk presented here is an inaccurate statement of law and should be disregarded," they overlook this error on the grounds that, "when read in context, the entire finding shows that the trial court concluded that respondent possessed the actual knowledge required to aid and abet [Mr. Lail] in murdering John." In reaching this conclusion, my colleagues point to the fact that John died as the result of drowning, that respondent-mother knew of the abuse that Mr. Lail had inflicted upon John while intentionally concealing the injuries that John had sustained, and that she had inflicted abuse upon both John and Kate. The Court has not, however, directed our attention to any direct or explicit statement by the trial court that respondent-mother had actual knowledge of the risks that Mr. Lail's conduct posed to John, with the

remaining findings that the trial court actually made being consistent with both a view that respondent-mother actually knew of the relevant risks and a view that respondent-mother simply should have known of them. For that reason, I cannot conclude that the trial court did not decide that respondent-mother's parental rights in Charlie were subject to termination pursuant to N.C.G.S. § 7B-1111(a)(8) on the basis of a misunderstanding of the applicable law. *Helms v. Rea*, 282 N.C. 610, 620 (1973) (stating that "[i]t is still the rule that '[f]acts found under misapprehension of the law will be set aside on the theory that the evidence should be considered in its true legal light' " (quoting *McGill v. Town of Lumberton*, 215 N.C. 752, 754 (1939))). In light of that determination, I am unable to see how the relevant portion of the trial court's order can withstand this aspect of respondent-mother's challenge to its legal validity.

¶ 24 I fully agree, on the other hand, that the record, including those portions upon which my colleagues rely, would have permitted the trial court to find the actual knowledge necessary to determine that respondent-mother's parental rights in Charlie were subject to termination pursuant to N.C.G.S. § 7B-1111(a)(8) on the grounds that she aided and abetted Mr. Lail in murdering John. However, given the fact that the trial court never found the necessary actual knowledge and that this Court lacks the authority to make the required finding based upon an examination of a cold record, I cannot conclude that the trial court did not err in the course of determining that respondent-mother's parental rights in Charlie were subject to termination pursuant to N.C.G.S. § 7B-1111(a)(8) on the grounds that respondent-mother aided and abetted Mr. Lail in murdering John. Hard cases, once again, seem to me to be making bad law.

¶ 25 The proper manner in which to rectify the trial court's error is readily apparent. Instead of affirming the challenged trial court order, I believe that we should vacate the trial court's termination order and remand this case to District Court, Catawba County, for the entry of a new order containing appropriate findings of fact and conclusions of law. In the event that my colleagues are correct in thinking that the inclusion of the trial court's reference to what respondent-mother "should have known" did not reflect what the trial court actually meant, then the trial court can quickly confirm that understanding by entering a new termination order that finds the facts and makes legal conclusions on the basis of the existing record and a proper understanding of the applicable law. On the other hand, if the trial court did, in fact, mean to find that respondent-mother acted on the basis of something other than the

required actual knowledge, it can take other appropriate action as well. In failing to act in this manner on the basis of the logic that the Court deems persuasive, we risk creating a precedent that allows this Court to draw inferences on appeal that the trial court did not, for whatever reason, draw, placing us in the position of a fact-finder despite the known limitations on the ability of appellate courts to act in that capacity.

¶ 26 My inability to join my colleagues in taking the analytical leap that they deem to be appropriate may seem excessively formalistic in light of the horrific facts that are before us in the case. I certainly understand the strength of the temptation to overlook the insufficiency of the trial court's findings in order to eliminate any conceivable risk that Charlie would be returned to respondent-mother's care. In other words, "[t]he very sordidness of the evidence strongly tempts us to say that justice and law are not always synonymous [ ] and to vote for an affirmance of the judgment . . . on the theory that justice has triumphed, however much law may have suffered." *State v. Bridges*, 231 N.C. 163, 166 (1949) (Ervin, J., dissenting). Although "[i]t might well be that [a remand for additional findings] would result" in the entry of another order terminating respondent-mother's parental rights in Charlie pursuant to N.C.G.S. § 7B-1111(a)(8) on the basis of the theory that she aided and abetted Mr. Lail's homicidal conduct, "[t]hat possibility should not shape our action" given that "what happens to the law in this case is of the gravest moment," that our decision to make a finding concerning the critical issue of knowledge "will be invoked in other [ ] trials as a guiding and binding precedent," and that "[t]he preservation unimpaired of our basic rules of [ ] procedure is an end far more desirable than that of" ensuring that this case comes to an end now. *Id.* at 171. As a result, while "[c]andor compels the confession that it is not altogether easy to hearken to" respondent-mother's arguments in this matter, *id.* at 166, I would, rather than affirming the trial court's order with respect to the issue of whether respondent-mother's parental rights in Charlie are subject to termination pursuant to N.C.G.S. § 7B-1111(a)(8) on the basis of an aiding and abetting theory, vacate the trial court's order and remand this case to District Court, Catawba County, for further proceedings not inconsistent with this opinion, including the entry of a new order containing findings of fact and conclusions of law that are based upon a proper understanding of the applicable law.[1]

Justice EARLS joins in this dissenting opinion.

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1. As my colleagues have noted, the trial court also found that respondent-mother's parental rights in Charlie were subject to termination pursuant to N.C.G.S. § 7B-1111(a)(8) on the basis of a determination that respondent-mother solicited, conspired, or attempted

IN RE C.N.R.

[379 N.C. 409, 2021-NCSC-150]

IN THE MATTER OF C.N.R.

No. 102A21

Filed 17 December 2021

Termination of Parental Rights—subject matter jurisdiction—verification of pleading—missing date of verification—substantial compliance

The trial court had subject matter jurisdiction in a termination of parental rights case where the termination motion substantially complied with the verification requirement under N.C.G.S. § 7B-1104, even though neither the petitioner who verified the motion nor the notary she appeared before had filled in the date of the verification on the attached notarial certificate. A savings clause in the Notary Public Act affords a "presumption of regularity" to notarized documents containing minor technical defects and, at any rate, none of the applicable rules governing verification require that a verified pleading be notarized. Further, where the significant date for purposes of a termination proceeding is the date upon which a termination motion was filed, it did not matter whether the motion was verified contemporaneously with or subsequent to the date it was signed.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from order entered on 10 December 2020 by Judge Robert J. Crumpton in District Court, Yadkin County. This matter was calendared for argument in the Supreme Court on 6 December 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.

James N. Freeman, Jr., for petitioner-appellee Yadkin County Human Services Agency.

Paul W. Freeman, Jr., for appellee guardian ad litem.

Richard Croutharmel for respondent-appellant mother.

J. Thomas Diepenbrock for respondent-appellant father.

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to murder John. In view of the fact that the Court has not addressed the validity of the trial court's findings and conclusions with respect to any of those legal theories, I will refrain from addressing them as well.

ERVIN, Justice.

¶ 1 Respondent-mother Joyce R. and respondent-father Joshua R. appeal from an order entered by the trial court terminating their parental rights in their daughter C.N.R.[1] After careful consideration of the parents' challenges to the trial court's termination order, we conclude that the challenged order should be affirmed.

¶ 2 In 2016, respondent-mother was charged with misdemeanor child abuse as a result of unsanitary conditions that existed in the family home at the time that the Yadkin County Human Services Agency completed a family assessment. The charge against respondent-mother was dismissed in light of respondent-mother's agreement to maintain the home in an appropriate condition and to take proper care of her children.

¶ 3 On 13 October 2018, HSA received a child protective services report concerning Corinne, who had been born in June 2017, and her two half-siblings. According to this report, law enforcement officers had performed an animal welfare check at the parents' residence, during which they found the three children in respondent-father's care. Upon arriving at the home, a social worker

> found multiple dogs in cages that were soiled with large amounts of animal feces. Furthermore, large quantities of animal feces covered the floors in the home, to the point that it was impossible to traverse a certain room in the home without stepping in animal feces. The entire home had a strong smell of animal urine.

In addition, the social worker observed the presence of dirty dishes throughout the home and "pill bottles on a table in the living room within reach of the children."

¶ 4 Upon making these observations, the social worker contacted respondent-mother and the fathers of the other children and asked them to meet her at the HSA office. After initially denying that she had any responsibility for the conditions that the social worker had observed in the family home in light of the fact that "she had been at work that day[,]" respondent-mother subsequently acknowledged that the home had been in the same state in which the social worker had found it when respondent-mother left for work that morning.

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1. "C.N.R." will be referred to throughout the remainder of this opinion as "Corinne," which is a pseudonym used to protect the child's identity and for ease of reading.

¶ 5 Corinne's paternal grandmother, who is disabled, told the social worker that she lived in the residence with respondent-mother, respondent-father, and the children and that she had spent the preceding week "unsuccessfully urging [the parents] to either clean the home or move out." In addition, the paternal grandmother reported that respondent-mother "frequently" left the children in her care even though she is "largely unable to care for [them,]" while Corinne's half-sister told the social worker that she had, "on occasion," witnessed the parents "arguing and fighting in the home to the point that it made her cry."

¶ 6 On 15 October 2018, HSA obtained the entry of an order taking Corinne and her half-siblings into nonsecure custody and filed juvenile petitions alleging that the children were neglected juveniles. On 28 November 2018, the parents signed an Out-of-Home Family Services Agreement in which they agreed to (1) complete a parenting education program, provide certificates of completion, and demonstrate appropriate parenting skills during their visits with the children; (2) obtain stable and appropriate housing and employment and demonstrate the ability to provide for the children's basic needs; and (3) obtain a psychological assessment and complete any recommended treatment.[2]

¶ 7 After a hearing held on 29 November 2018, Judge Jeanie R. Houston entered an order on 10 January 2019 in which she found the children to be neglected juveniles in light of the injurious environment in which they lived. Although Judge Houston awarded legal and physical custody of Corinne's half-sister to the child's father, Corinne and her half-brother remained in HSA custody, with the parents having been granted one hour of biweekly supervised visitation with Corinne, subject to the requirement that they avoid incarceration.

¶ 8 In a ninety-day review order entered on 10 April 2019 following a review hearing held on 7 March 2019, Judge Houston found that, while the parents had been attending visitation sessions with Corinne, they had only engaged in "minimal" interactions with their daughter and had, instead, been "observed to spend much of their visitation time on their cell phones." In addition, Judge Houston ordered the parents to participate in a Marschak Interaction Method assessment at Jodi Province Counseling for the purpose of "clinically evaluat[ing] their approach to parenting[.]"

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2. The trial court's orders refer to the existence of an additional requirement in which the parents were obligated to obtain safe, reliable transportation. However, no such provision appears in the version of the family services agreement that is contained in the record on appeal.

¶ 9 Judge William F. Brooks held a permanency planning hearing in this matter on 19 September 2019. In a permanency planning order entered on 6 November 2019, Judge Brooks found that the parents had completed the required parenting classes and had provided the necessary confirmatory information to HSA and that the parents had also obtained the required psychological and Marschak Interaction Method assessments. In addition, Judge Brooks determined that respondent-mother continued to be employed in the same position that she had occupied at the time of the initial review hearing. On the other hand, Judge Brooks found that the parents had yet to procure housing, that they were "living with friends a[t] an unknown address," and that they had not "demonstrated improved parenting skills during" visits, obtained the counseling recommended at the conclusion of their psychological assessments, or complied with the recommendation set out in their Marschak Interaction Method assessment that they "participate in 'theraplay' treatment to learn how to establish structure, firm limits, and clear expectations" for Corinne. Finally, Judge Brooks determined that respondent-father continued to be unemployed. In light of these findings, Judge Brooks established concurrent permanent plans of adoption and reunification for Corinne while concluding that further efforts to reunify Corinne with respondent-mother or respondent-father "would clearly be unsuccessful or inconsistent with the minor [child's] health, safety, and the need for a safe, permanent home within a reasonable period of time." *See* N.C.G.S. § 7B-906.2(b) (2019). As a result, Judge Brooks directed HSA to "initiate an action to terminate the [parents'] parental rights within sixty days from the filing of [its o]rder."

¶ 10 On 2 July 2020, HSA filed a motion seeking to have the parents' parental rights in Corrine terminated on the basis of neglect, N.C.G.S. § 7B-1111(a)(1) (2019; failure to make reasonable progress toward correcting the conditions that had led to Corinne's removal from the family home, N.C.G.S. § 7B-1111(a)(2); and failure to pay a reasonable portion of the cost of Corinne's care, N.C.G.S. § 7B-1111(a)(3). On 24 November 2020, a hearing was held before the trial court for the purpose of addressing the issues raised by the termination motion. On 10 December 2020, the trial court entered an order in which it concluded that both parents' parental rights in Corinne were subject to termination on the basis of neglect, N.C.G.S. § 7B-1111(a)(1), and failure to make reasonable progress toward correcting the conditions that had led to Corinne's removal from the family home, N.C.G.S. § 7B-1111(a)(2), and that respondent-father's parental rights in Corinne were also subject to termination for failure to pay a reasonable portion of the cost of the care that Corinne had received following her removal from the home, N.C.G.S. § 7B-1111(a)(3).

In addition, the trial court concluded that the termination of the parents' parental rights would be in Corinne's best interests. The parents noted appeals from the trial court's termination order to this Court.[3]

¶ 11 In seeking relief from the trial court's termination order before this Court, both parents have argued that the trial court lacked subject matter jurisdiction to enter the challenged termination order on the grounds that the director of HSA, who had verified the termination motion, and the notary public before whom the director had appeared had failed to date the verification attached to the termination motion. *See* N.C.G.S. § 7B-1104 (2019) (providing that a petition or motion for termination of parental rights "shall be verified by the petitioner or movant"). More specifically, the parents pointed out that, while the verification form associated with the motion contained an indication that it had been "[s]worn to and subscribed before me this ___ day of May, 2020," the blank into which the date was to be inserted had not been filled in. In addition, the parents stated that the termination motion had been signed by counsel for HSA on 30 June 2020 and had been filed with the Clerk of Superior Court of Yadkin County on 2 July 2020.

¶ 12 After noting that this Court had opined in *In re T.R.P.* 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," 360 N.C. 588, 593 (2006), and that the Court of Appeals had held that "[a] violation of the verification requirement of N.C.G.S. § 7B-1104 [constituted] a jurisdictional defect *per se*," *In re T.M.H.*, 186 N.C. App. 451, 454 (2007) (citing *In re Triscari Children*, 109 N.C. App. 285, 287–88 (1993)); *accord In re C.M.H.*, 187 N.C. App. 807, 809 (2007) (stating that "[p]etitioner's failure to verify the petition to terminate parental rights left the trial court without subject matter jurisdiction"), the parents insist that, since a notarial certificate associated with an oath or affirmation must include the date upon which the oath or affirmation had been made, N.C.G.S. § 10B-40(d) (2019), the termination motion had not been properly verified, so that the trial court lacked the subject matter jurisdiction necessary to terminate their parental rights in Corinne.

¶ 13 In response, HSA and the guardian ad litem argue that the failure to date the verification that had been attached to the termination

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3. The certificates of service that accompanied the parents' notices of appeal reflect a failure to effect timely service under N.C. R. App. P. 3.1(b), 26(d). However, given that neither HSA nor the guardian ad litem have objected to the parents' failure to serve their notices of appeal in a timely fashion, "any issue about the deficiency of service has been waived." *In re K.D.C.*, 375 N.C. 784, 787 (2020).

motion did not deprive the trial court of subject matter jurisdiction over the termination proceeding. More specifically, HSA and the guardian ad litem argue that the trial court obtained jurisdiction over this case on 15 October 2018, when HSA filed a properly verified juvenile petition in accordance with N.C.G.S. § 7B-403(a) (2019), in which it alleged that Corinne was a neglected juvenile, citing *In re T.R.P.*, 360 N.C. at 593 (stating that, "[n]ot only did the General Assembly provide that a properly verified juvenile petition would invoke the jurisdiction of the trial court, *it further provided that jurisdiction would extend through all subsequent stages of the action*" (emphasis added)). In addition, HSA and the guardian ad litem argue that, even if the verification requirement of N.C.G.S. § 7B-1104 is jurisdictional with respect to a termination motion filed pursuant to N.C.G.S. § 7B-1102, the director's failure to date her verification of the termination motion in this case does not constitute a fatal defect that would deprive the trial court of subject matter jurisdiction.

> Jurisdiction is the legal power and authority of a court to make a decision that binds the parties to any matter properly brought before it. The court must have personal jurisdiction and, relevant here, subject matter jurisdiction or jurisdiction over the nature of the case and the type of relief sought, in order to decide a case. The [L]egislature, within constitutional limitations, can fix and circumscribe the jurisdiction of the courts of this State. Where jurisdiction is statutory and the Legislature requires the Court to exercise its jurisdiction in a certain manner, to follow a certain procedure, or otherwise subjects the Court to certain limitations, an act of the Court beyond these limits is in excess of its jurisdiction.

Catawba Cnty. ex rel. Rackley v. Loggins, 370 N.C. 83, 88 (2017) (cleaned up). "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). On the other hand, "[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).

¶ 14 The district court division of the General Court of Justice has "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); *see also* N.C.G.S. § 7B-101(6) (2019). According to N.C.G.S. § 7B-1102(a), "[w]hen the district court is exercising jurisdiction over a juvenile and the juvenile's parent in an abuse, neglect, or dependency proceeding, a person or agency specified in [N.C.]G.S. [§] 7B-1103(a) may file in that proceeding a motion for termination of the parent's rights in relation to the juvenile," N.C.G.S. § 7B-1102(a) (2019), with any such motion to "be verified by the petitioner or movant." N.C.G.S. § 7B-1104.

¶ 15 In *In re O.E.M.*, 2021-NCSC-120, we recently held that compliance with the verification requirement set out in N.C.G.S. § 7B-1104 is necessary for the trial court to obtain subject matter jurisdiction over a termination of parental rights proceeding initiated by the filing of a motion pursuant to N.C.G.S. § 7B-1102. *Id.* ¶ 20–21 (stating that "[a] petitioner or movant must satisfy distinct requirements to vest a trial court with jurisdiction to conduct a juvenile proceeding on the one hand and a termination proceeding on the other"). In light of that fact, we further held that a movant's failure to verify a termination motion as required by N.C.G.S. § 7B-1104 has the effect of depriving the trial court of jurisdiction to terminate a parent's parental rights in a child. *Id.*, ¶ 28; *see also In re T.R.P.*, 360 N.C. at 590 (2006) (characterizing subject matter jurisdiction as "[j]urisdiction over the nature of the case *and the type of relief sought*" (alteration in original) (emphasis added) (quoting *Jurisdiction*. *Black's Law Dictionary* (7th ed. 1999)). As a result, we agree with the parents that a termination motion must comply with the verification requirement in N.C.G.S. § 7B-1104 in order for the trial court to have subject matter jurisdiction over a termination of parental rights proceeding, so that the ultimate question before us in this case is whether the termination motion that HSA filed in this case was properly verified.

¶ 16 The Juvenile Code does not prescribe a method for verifying a petition or motion as required by N.C.G.S. §§ 7B-403 and 7B-1104. Acting in reliance upon the relevant portions of the North Carolina Rules of Civil Procedure, we have held that "[a] pleading is verified by means of an affidavit stating 'that the contents of the pleading verified are true to the knowledge of the person making the verification, except as to those matters stated on information and belief, and as to those matters he believes them to be true,' " *In re N.T.*, 368 N.C. 705, 708 (2016) (quoting N.C.G.S. § 1A-1, Rule 11(b) (2015), and that "[a]n affidavit is a written or printed

declaration or statement of facts, made voluntarily, and confirmed by the oath or affirmation of the party making it, taken before an officer having authority to administer such oath," *In re S.E.T.*, 375 N.C. 665, 672 (2020) (cleaned up). According to N.C.G.S. § 1-148, "[a]ny officer competent to take the acknowledgment of deeds, and any judge or clerk of the General Court of Justice, notary public, in or out of the State, or magistrate, is competent to take affidavits for the verification of pleadings." N.C.G.S. § 1-148 (2019). Aside from the fact that neither N.C.G.S. § 1A-1, Rule 11(b), nor N.C.G.S. § 1-148 (nor, for that matter, our decision in *In re S.E.T.*) requires that an affidavit used to verify a pleading must contain the date upon which the verification was made, nothing in N.C.G.S. § 1-148 requires that an affidavit used to verify a motion or other pleading be certified by a notary in accordance with the Notary Public Act, N.C.G.S. §§ 10B-1 to 10B-146 (2019). *Cf. In re N.T.*, 368 N.C. at 708 (upholding the validity of a verification that had been signed before a magistrate).

¶ 17 In this case, the director of HSA verified the termination motion by signing the following printed statement before a notary public:

> [The director], being first duly sworn, says: She is the Director of the Yadkin County Human Services Agency, Movant in the entitled action; she has read the foregoing Motion, knows the contents thereof, and the same is true to her own knowledge except as to those matters as are therein stated on information and belief, and as to those matters, she believes them to be true.

The director signed the verification form below printed text stating that the verification had been "[s]worn to and subscribed before me this ___ day of May, 2020," with that verification form having also identified the notary as a "Notary Public" and having included her notarial stamp and the date upon which her commission expired, which was 14 October 2023. *See* N.C.G.S. §§ 10B-3(4), 10B-9 (2019). As a result, the language contained on the verification page identified the notary as a person "competent to take affidavits for the verification of pleadings" for purposes of N.C.G.S. § 1-148, *see* N.C.G.S. § 10B-20(a)(2) (2019), and satisfies the requirements for attesting to a "notarial act" set out in N.C.G.S. § 10B-20(b).

¶ 18 As the parents have observed, the Notary Public Act prescribes more formal requirements for a "notarial certificate" associated with an

oath inscribed in a notarized "record."[4] *See* N.C.G.S. § 10B-3(12) (defining a "notarial certificate" as "[t]he portion of a notarized record that is completed by the notary, bears the notary's signature and seal, and states the facts attested by the notary in a particular notarization"); *see also* N.C.G.S. § 10B-3(19) (defining a "record" as "[i]nformation that is inscribed on a tangible medium and called a traditional or paper record"). Subsection 10B-40(d) provides that:

> [a] notarial certificate for an oath or affirmation taken by a notary is sufficient and shall be accepted in this State if it is substantially in the form set forth in [N.C.] G.S. [§ 10B-43, if it is substantially in a form otherwise prescribed by the laws of this State, or if it includes all of the following:
>
> (1) Repealed . . . effective October 1, 2006.
>
> (2) Names the principal who appeared in person before the notary unless the name of the principal otherwise is clear from the record itself.
>
> (3) Repealed . . . effective October 1, 2006.
>
> (4) Indicates that the principal who appeared in person before the notary signed the record in question and certified to the notary under oath or by affirmation as to the truth of the matters stated in the record.
>
> (5) *States the date of the oath or affirmation.*
>
> (6) Contains the signature and seal or stamp of the notary who took the oath or affirmation.
>
> (7) States the notary's commission expiration date.

N.C.G.S. § 10B-40(d) (emphasis added). As a result, the notary's failure to date the administration of the oath to the director would constitute a defect in a notarial certificate for purposes of N.C.G.S. § 10B-40(d)(5).[5]

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4. The notary's act in having the director swear to the truth of the contents of the termination motion constitutes the administration of an "oath" for purposes of N.C.G.S. § 10B-3(14) (2019).

5. The guardian ad litem argues that, since the director's verification of the termination motion constitutes an "acknowledgment" under the Notary Public Act, rather than an

¶ 19 On the other hand, the Notary Public Act contains a savings clause that accords a "presumption of regularity" to notarized documents despite the existence of minor technical defects in the notarial certificate. N.C.G.S. § 10B-99(a) (2019). N.C.G.S. § 10B-99 provides that,

> [i]n the absence of evidence of fraud on the part of the notary, or evidence of a knowing and deliberate violation of this Article by the notary, the courts shall grant a presumption of regularity to notarial acts so that those acts may be upheld, provided there has been substantial compliance with the law.

Id.; *see also* N.C.G.S. § 10B-68(a) (2019) (providing that "[t]echnical defects, errors, or omissions in a notarial certificate shall not affect the sufficiency, validity, or enforceability of the notarial certificate or the related instrument or document").[6] As far as we have been able to ascertain, the record contains no suggestion that any fraudulent conduct or a knowing violation of the Notary Public Act occurred in connection with the verification of the termination motion at issue in this case. Moreover, given that neither N.C.G.S. § 1A-1, Rule 11(b), nor N.C.G.S. § 1-148 require that a verified pleading be notarized, *see In re N.T.*, 368 N.C. at 708, we need not determine whether non-compliance with the date requirement set out in N.C.G.S. § 10B-40(d)(5) would have the effect of invalidating the specific type of verification that is at issue in this case. *Cf. In re Simpson*, 544 B.R. 913, 920 (Bankr. N.D. Ga. 2016) ("conclud[ing] that the failure of [the notary] to insert the date of his notarial act of

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oath, the relevant notarial certificate for an acknowledgment need not include the date. *See* N.C.G.S. §§ 10B-3(1), -40(a1)(b), -41(a) (2019). However, given that the act of verifying a pleading requires the individual to vouch for the truth of the allegations contained in the relevant pleading, *In re O.E.M.*, 2021 NCSC-120, ¶¶ 15–18, the notary is necessarily involved in the administration of an oath or affirmation within the meaning of N.C.G.S. § 10B-3(2) or (14) (2019) during the verification process, see N.C.G.S. § 1A-1, Rule 11(b), while an acknowledgment, on the other hand, merely requires an individual to confirm that he or she is the person who signed the document. N.C.G.S. § 10B-3(1). As a result, we do not find this aspect of the guardian ad litem's response to the parents' argument to be persuasive.

6. A technical defect for purposes of N.C.G.S. § 10B-99(a) encompasses those deficiencies that are subject to being cured pursuant to N.C.G.S. § 10B-37(f) and N.C.G.S. § 10B-67 and includes, but is not limited to, "the absence of the legible appearance of the notary's name exactly as shown on the notary's commission as required in [N.C.]G.S. [§] 10B-20(b), the affixation of the notary's seal near the signature of the principal or subscribing witness rather than near the notary's signature, minor typographical mistakes in the spelling of the principal's name, the failure to acknowledge the principal's name exactly as signed by including or omitting initials, or the failure to specify the principal's title or office, if any." N.C.G.S. § 10B-68(c) (2019).

acknowledgment invalidates the acknowledgment" because "[t]he date of acknowledgment can be important for numerous reasons affecting the validity and authenticity of the deed"). As a result, we are satisfied that the director's action in signing the verification before the notary constituted "substantial compliance" for purposes of N.C.G.S. § 10B-99(a). *Cf. In re N.T.*, 368 N.C. at 706 (deeming that a petition sufficed to confer subject matter jurisdiction in a termination proceeding in a case in which "[t]he verification section [contained] a space for " 'Signature of Person Authorized to Administer Oaths' " that bore a signature consisting of the letter "C" followed by "an illegible signature" and that, despite the existence of "a space for the person's title," that space "ha[d] not been filled in with any title").

¶ 20 The parents point out that the verification page in which the applicable date should have been recorded refers to "this ___ day of May, 2020" and argue that any date in May 2020 would have preceded the date upon which counsel for HSA signed the termination motion, an event that occurred on 30 June 2020. In light of that fact, the parents contend that the director had either "verified a [termination of parental rights] motion that was not yet in existence" or had, at best, "verified the motion at least [thirty] days before the motion was finalized and signed by the HSA attorney on 30 June 2020." We are loath, however, to assume, without more, that the factual scenario upon which the parents' arguments rest accurately reflects what happened in the period of time leading up to the filing of the termination motion. In our view, it is equally, if not more, likely that the person who prepared the verification simply failed to update that document to correspond with the date shown upon the signature page associated with the termination motion and we are unwilling, for that reason, to infer from what might well have been a clerical oversight or some similar omission by the notary a finding that the director swore to the accuracy of a non-existent or inchoate pleading[7] in light of the well-established presumption of regularity that applies to a trial court's decision to exercise its jurisdiction, *see In re L.T.*, 374 N.C. at 569, and the presumption of regularity afforded to notarial acts pursuant to N.C.G.S. § 10B-99(a).

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7. We note that the termination of parental rights motion at issue in this case does not allege the occurrence of any event that happened subsequent to the May 2020 time period shown on the verification page. Assuming, without in any way deciding, that a verification that purports to address events occurring after the date upon which that verification was signed would be legally deficient and that the director signed the verification at issue in this case in May 2020, there is nothing in the record that suggests the existence of any impropriety on the part of either the director or the notary that might suffice to defeat the presumption of regularity created by N.C.G.S. § 10B-99(a) arising from the presence of "May, 2020" on the verification page attached to the termination motion.

¶ 21 The significant date for purposes of a termination proceeding is the date upon which the motion or petition was filed rather than the date upon which the petition or motion was signed or verified. *See* N.C.G.S. § 7B-1111(a)(2)–(5), (7) (2019); *see also In re K.H.*, 375 N.C. 610, 613 (2020) (stating that "the twelve-month period [applicable to the ground for termination enunciated in N.C.G.S. § 7B-1111(a)(2)] 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"); *id.* at 616 (stating that "[t]he motion to terminate respondent's parental rights was filed on 8 August 2018," so that "the relevant six-month period [under N.C.G.S. § 7B-1111(a)(3) for the purpose of] determin[ing] whether respondent was able to pay a reasonable portion of the cost of [the juvenile's] care but failed to do so was from 8 February 2018 to 8 August 2018"). As a result, we are unable to conclude that either N.C.G.S. § 1A-1, Rule 11(b), or N.C.G.S. § 1-148 requires that the verification of a termination of parental rights petition or motion occur contemporaneously with or subsequent to the signing of any such pleading. *Cf. Boyd v. Boyd*, 61 N.C. App. 334, 336 (1983) (requiring a complaint for divorce to be verified prior to filing).

¶ 22 "[G]iven the magnitude of the interests at stake in juvenile cases . . ., the General Assembly's requirement of a verified petition is a reasonable method of assuring that our courts exercise their power only when an identifiable government actor 'vouches' for the validity of the allegations in such a freighted action." *In re T.R.P.*, 360 N.C. at 592. A careful review of the record and the applicable law satisfies us that the director's verification of the contents of the termination motion that was filed in this case satisfied the concerns that underlie the verification requirement enunciated in N.C.G.S. § 7B-1104 despite the notary's failure to record the date upon which the verification was made. For that reason, we hold that the termination motion at issue in this case substantially complied with the verification requirement enunciated in N.C.G.S. § 7B-1104 and sufficed to give the trial court subject matter jurisdiction to terminate the parents' parental rights in Corinne. In view of the fact that neither parent has advanced any challenge to the merits of the trial court's termination order, we affirm the trial court's order terminating the parents' parental rights in Corinne.[8]

AFFIRMED.

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8. After the filing of the parent's briefs, HSA filed a motion to amend the record on appeal to include affidavits executed by the director and the notary on 27 April 2021. In her affidavit, the director attests to having verified the termination motion before the

IN RE J.I.T.

[379 N.C. 421, 2021-NCSC-151]

IN THE MATTER OF J.I.T.

No. 333A21

Filed 17 December 2021

Termination of Parental Rights—no-merit brief—willful abandonment—willful failure to pay child support

The trial court's order terminating a father's parental rights to his son on the grounds of willful abandonment and willful failure to pay child support was affirmed where his counsel filed a no-merit brief and the termination order was supported by clear, cogent, and convincing evidence and based upon proper legal grounds.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from an order entered on 18 March 2021 by Judge Ellen Shelley in District Court, Rutherford County. This matter was calendared for argument in the Supreme Court on 6 December 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.

W. Martin Jarrad, for petitioner-mother.

Edward Eldred, for respondent-appellant.

BERGER, Justice.

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notary on 23 June 2020. Similarly, the notary asserted that she was working and available to notarize the director's signature on 23 June 2020; that her signature and notary stamp appear on the verification page associated with the termination motion and "indicat[e] that [she] notarized [the director's] signature on the document"; and that she had "inadvertently left out the date [o]n which [she] notarized [the director's] signature on [the] verification page for the Motion to Terminate Parental Rights[.]" As the parents have observed in opposing the allowance of the amendment motion, these affidavits were not contained in the record developed before the trial court as required by N.C. R. App. P. 9(b)(5)(b). In addition, the amendment motion does not allege that the notary has amended the verification to include the date upon which the director swore to the contents of the termination motion. *Cf. Lawson v. Lawson*, 321 N.C. 274, 275, 278 (1987) (upholding the parties' separation agreement in light of the fact that the notary had amended the notarial certificate to add his notarial seal and acknowledgment "some two years after the document had been signed"). In light of our decision to affirm the trial court's termination order on the grounds discussed above, however, we dismiss HSA's amendment motion as moot.

¶ 1 Respondent, the father of J.I.T. (Joe),[1] appeals from the trial court's order terminating his parental rights. Respondent's counsel filed a no-merit brief pursuant to Rule 3.1(e) of the North Carolina Rules of Appellate Procedure. After review, we conclude the purported issues addressed by counsel in support of the appeal are meritless and therefore affirm the trial court's order.

¶ 2 Joe was born on April 22, 2012. Joe's mother filed a petition to terminate respondent's parental rights on June 1, 2020, alleging as grounds for termination that respondent willfully abandoned Joe and willfully failed to pay costs of his care and maintenance. A hearing on the petition to terminate parental rights was held on March 8, 2021. Respondent failed to appear at the hearing. Respondent's counsel moved to continue the hearing, which the trial court denied.

¶ 3 Based upon the evidence presented at the hearing, the trial court made the following findings of fact:

> 6. The Respondent had sporadic contact with the minor child prior to the ending of the relationship between the Petitioner and the Respondent when the minor child was seven months old. Since that time, the only contact the Respondent had with the minor child consisted of the Respondent attending the minor child's second birthday and spending approximately and [sic] hour with the minor child and the Petitioner at a park when the minor child was two years old. Since that time, and prior to the filing of the petition in this matter, the Respondent has been in the presence of the minor child in public settings, once even passing by the minor child and the Petitioner on the same aisle at Wal Mart [sic], and during none of these times in a public setting did the Respondent ever make any attempt at communication with the minor child or even acknowledge him. The Respondent has never established a parent-child relationship with the minor child, or any emotional bond.
>
> 7. At the time of the filing of this action, the Respondent had willfully abandoned the juvenile for

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

> at least six consecutive months immediately preceding the filing of this petition.
>
> 8. The Respondent was ordered to pay for the support of the minor child in Rutherford County file number 13 CVD 222. For a period of one year or more next preceding the filing of the Petition in this matter, the Respondent has willfully failed without justification to pay for the care, support, and education of the minor child as required by the above-referenced child support order. Specifically, as of the date of this order, the last child support payment made by the Respondent for the support of the minor child was in the amount of $18.29 on March 13, 2019.
>
> 9. The Respondent father has willfully abandoned the minor child for at least six consecutive months immediately preceding the filing of this action.
>
> 10. Pursuant to N.C. Gen. Stat. §§ 7B-1111(4), and (7), the foregoing facts support and justify the termination of Respondent's parental rights.

The trial court concluded that termination was in Joe's best interests. Respondent appeals.

¶ 4 Respondent's appellate counsel states that he has reviewed the record and discussed the case with the Office of the Parent Defender. Counsel could not identify a meritorious issue for appeal, and he subsequently filed a no-merit brief on respondent's behalf under Rule 3.1(e) of the Rules of Appellate Procedure.

¶ 5 Counsel for respondent identified three issues that could arguably support an appeal here. Counsel states that the trial court's finding of willful abandonment was not supported by the evidence. Counsel acknowledges, however, that the issue lacks merit because the independent finding of willful failure to pay child support is evidence which supports a finding justifying termination of parental rights. Second, counsel also asserts that another issue on appeal could be that the trial court abused its discretion when it denied counsel's motion to continue. Regarding this issue, counsel acknowledges, however, that respondent failed to preserve any argument related to lack of notice and the denial of the motion to continue. Finally, counsel states that respondent may have an argument related to ineffective assistance of counsel, but that,

in his opinion, this issue likewise lacks merit. Counsel concedes that respondent "cannot show a probability of a different result given [the] testimony concerning the status of [respondent]'s child support payments."

¶ 6 Counsel has advised respondent and provided him with the documents necessary to pursue his appeal. Respondent was appropriately notified of his right to file pro se written arguments on his own behalf pursuant to Rule 3.1(e) and he has failed to file a brief or any additional documents with this Court.

¶ 7 This Court conducts an independent review of issues identified by respondent's counsel in a no-merit brief filed under Rule 3.1(e). *In re L.E.M.*, 372 N.C. 396, 402, 831 S.E.2d 341, 345 (2019). We have carefully reviewed the issues identified by counsel in the no-merit brief in light of the entire record. We are satisfied that the trial court's order terminating respondent's parental rights was supported by clear, cogent, and convincing evidence and based upon proper legal grounds. Accordingly, we affirm the trial court's order terminating respondent's parental rights.

AFFIRMED.

IN THE MATTER OF K.A.M.A.

No. 55A21

Filed 17 December 2021

Termination of Parental Rights—best interests of the child—statutory factors—consideration of relative placement—no conflict in evidence

The trial court did not abuse its discretion by concluding that termination of a father's parental rights to his son were in the son's best interests, after finding the existence of three grounds for termination, where the court's findings addressing the statutory factors in N.C.G.S. § 7B-1110(a) were supported by evidence and there was no conflicting evidence about a relative placement with the maternal grandmother—which had previously been considered and rejected by the trial court—that would require written findings on that issue.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from an order entered on 5 October 2020 by Judge Kimberly Gasperson-Justice in District Court, Henderson County. This matter was calendared for argument in

the Supreme Court on 6 December 2021 but determined on the record and briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

Susan F. Davis for petitioner-appellee Henderson County Department of Social Services.

Patricia M. Adcroft for appellee Guardian ad Litem.

David A. Perez for respondent-appellant father.

NEWBY, Chief Justice.

¶ 1 Respondent-father appeals from the trial court's order terminating his parental rights to K.A.M.A. (Kenneth).[1] After careful review, we affirm.

¶ 2 Kenneth was born on 16 February 2018 in Henderson County, North Carolina. At birth, Kenneth tested positive for cocaine, benzodiazepines, and methamphetamines. Kenneth's mother admitted to drug use during her pregnancy and tested positive at Kenneth's birth for benzodiazepines, cocaine, methamphetamines, and tetrahydrocannabinol (THC). The next day, the Henderson County Department of Social Services (DSS) received a report regarding Kenneth.[2] After Kenneth was released from the hospital, he lived with a safety resource family. On several dates following Kenneth's birth, respondent tested positive for cocaine and THC. DSS recommended respondent participate in substance abuse treatment, which respondent began but did not complete.

¶ 3 On 21 May 2018, Kenneth was placed with his maternal grandmother, who then supervised the parents' contact with Kenneth. Over Memorial Day weekend that year, the parents fought at the maternal grandmother's home. At one point during the altercation, respondent was holding Kenneth in his arms. Eventually, respondent pushed Kenneth's mother on the bed, poked her in the forehead aggressively, and grabbed her by the shirt. The maternal grandmother then asked respondent to leave the home.

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

2. Though Kenneth was born in Henderson County, the Buncombe County Department of Social Services completed the initial family assessment and began in home services due to a conflict of interest at Henderson County DSS. On 1 May 2018, after the conflict of interest was resolved, the case was transferred back to Henderson County DSS.

¶ 4 DSS filed a juvenile petition on 8 June 2018 based on these events. The petition alleged Kenneth was a neglected juvenile due to his parents' issues with substance abuse, domestic violence, mental health, and housing instability. The parties then consented to a juvenile adjudication order. In that order, entered on 5 July 2018, the trial court determined that Kenneth was a neglected juvenile based on the allegations in the juvenile petition. The trial court granted custody of Kenneth to DSS, placed Kenneth with his maternal grandmother, and stated that DSS "shall explore [the maternal grandmother] as a visitation supervisor." On 16 August 2018, the trial court entered an adjudication order and a disposition order reaffirming the findings of fact and conclusions of law contained in the consent order. The trial court authorized Kenneth's continued placement with the maternal grandmother because "priority for release to such person [is] required." The trial court also ordered a minimum of one hour of weekly supervised visitation and set forth case plan requirements for the parents to achieve reunification.

¶ 5 By 9 October 2018, "conflict between the parents and [the maternal grandmother] necessitated [Kenneth]'s removal." DSS then placed Kenneth with foster parents. After the initial review and permanency-planning hearing on 1 November 2018, the trial court entered an order on 4 January 2019 detailing the parents' recent status. The trial court concluded the parents' progress was minimal and insufficient to remedy the conditions which led to Kenneth's removal. The trial court also considered Kenneth's release to a relative while DSS maintained custody. The trial court noted that it considered the maternal grandmother and respondent's relative as potential placements. Placement with respondent's relative, however, was inappropriate due to the relative's criminal and child protective services history. Thus, the trial court found that it was "unaware of any such relative willing and able to take responsibility for the juvenile." Nonetheless, it ordered that "DSS shall explore for placement any other relatives provided by the parents." The trial court set the primary plan for Kenneth as reunification with the parents and the secondary plan as adoption.

¶ 6 The trial court held a second review and permanency-planning hearing on 27 June 2019. In an order entered on 23 July 2019, the trial court reiterated the parents' case plan requirements and detailed their statuses. The trial court again stated that it considered Kenneth's release to a relative and that it was "unaware of any such relative willing and able to take responsibility for the juvenile." The primary plan remained reunification with the parents and the secondary plan remained adoption.

¶ 7 The trial court held a review and permanency-planning hearing on 21 November 2019 and 12 December 2019. In an order entered on 15 January 2020, the trial court again reiterated the parents' case plan requirements and detailed their progress, which the trial court found to be inconsistent. The trial court noted that respondent did not comply with recommended substance abuse treatment, either missed drug screens or screened positive for drugs, missed scheduled visitations with Kenneth, remained unemployed, and did not have appropriate housing. Additionally, the trial court noted that a domestic violence incident occurred between Kenneth's mother and respondent which resulted in charges against respondent for felony assault by strangulation, second-degree kidnapping, and misdemeanor assault on a female. The trial court again considered Kenneth's release to a relative but specifically "decline[d] to place [Kenneth] with the maternal grandmother." Upon the recommendations of DSS and the guardian ad litem, the trial court changed the primary permanent plan for Kenneth to termination of the parents' rights followed by adoption. The trial court changed the secondary plan to reunification.

¶ 8 On 18 February 2020, DSS filed a motion to terminate the parents' rights to Kenneth on the grounds of neglect, willful failure to make reasonable progress, and willful failure to pay a reasonable portion of the juvenile's cost of care. *See* N.C.G.S. § 7B-1111(a)(1)–(3) (2019). Before the motion was heard, Kenneth's maternal grandmother sent a letter to the trial court detailing her experience with DSS and asking the trial court to place Kenneth with her again. After several continuances, the motion was heard on 10 September 2020. On 5 October 2020, the trial court entered an order determining that grounds existed to terminate the parents' rights pursuant to N.C.G.S. § 7B-1111(a)(1)–(3). The trial court further concluded that it was in Kenneth's best interests that the parents' rights be terminated. Accordingly, the trial court terminated both parents' rights. Respondent appeals.[3]

¶ 9 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). Respondent does not challenge the grounds for termination adjudicated by the trial court under N.C.G.S. § 7B-1111(a). Rather, respondent argues the trial court erred by concluding that terminating his parental rights was in Kenneth's best interests.

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3. Kenneth's mother did not appeal from the trial court's order terminating her parental rights and thus is not a party to this appeal.

¶ 10 "A trial court's determination concerning whether termination of parental rights would be in a juvenile's best interests 'is reviewed solely for abuse of discretion.' " *In re S.D.C.*, 373 N.C. 285, 290, 837 S.E.2d 854, 858 (2020) (quoting *In re A.U.D.*, 373 N.C. 3, 6, 832 S.E.2d 698, 700 (2019)). "Under this standard, we defer to the trial court's decision unless it is 'manifestly unsupported by reason or one so arbitrary that it could not have been the result of a reasoned decision.' " *In re A.K.O.*, 375 N.C. 698, 701, 850 S.E.2d 891, 894 (2020) (quoting *In re Z.A.M.*, 374 N.C. 88, 100, 839 S.E.2d 792, 800 (2020)). When determining whether termination of a parent's rights is in a child's best interests,

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

N.C.G.S. § 7B-1110(a). This Court is "bound by all uncontested dispositional findings." *In re E.F.*, 375 N.C. 88, 91, 846 S.E.2d 630, 632 (2020) (citing *In re Z.L.W.*, 372 N.C. 432, 437, 831 S.E.2d 62, 65 (2019)).

¶ 11 During the dispositional stage, the trial court found the following:

> 1. The age of the juvenile is two (2) years.
>
> 2. As to the likelihood of the juvenile's adoption, the Court finds as follows: It is very likely that this juvenile will be adopted. The juvenile is healthy and is in a foster care setting where the foster family is wanting to adopt the juvenile.

> 3. This Court has previously adopted a permanency plan for this juvenile of adoption, and termination of the parental rights as ordered herein will aid in the accomplishment of this plan.
>
> . . . .
>
> 5. As to the bond between the juvenile and [respondent], the Court finds as follows: Due to the lack of visits, no bond [exists] between [respondent] and the juvenile.
>
> 6. As to the relationship between the juvenile and the prospective adoptive parent, the Court finds as follows: The bond between the juvenile and the prospective adoptive parents are like that of a loving child and the child's parents. The juvenile calls the prospective adoptive parents mama and papa.

¶ 12 Respondent does not challenge these dispositional findings. Thus, they are binding on appeal. *In re A.K.O.*, 375 N.C. at 702, 850 S.E.2d at 894 ("Dispositional findings not challenged by respondents are binding on appeal.").

¶ 13 Nonetheless, respondent argues the trial court erred by failing to make required findings pursuant to N.C.G.S. § 7B-1110(a). Respondent contends the maternal grandmother's letter addressing "a violation of a court order and removal of the child from [her care] due to conflict with the parents" created a conflict in the evidence. Thus, respondent contends the trial court was required to make written findings regarding whether Kenneth's maternal grandmother was an appropriate relative placement.

¶ 14 "Although the trial court must 'consider' each of the statutory factors, we have construed subsection (a) [of N.C.G.S. § 7B-1110] to require written findings only as to those factors for which there is conflicting evidence." *In re E.F.*, 375 N.C. at 91, 846 S.E.2d at 633 (citation omitted) (citing *In re A.R.A.*, 373 N.C. 190, 199, 835 S.E.2d 417, 424 (2019)).

> Although the trial court is not expressly directed to consider the availability of a relative placement in the course of deciding a termination of parental rights proceeding, it 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, with the extent to which it is appropriate to do so in any particular proceeding being dependent upon the extent to which the record contains evidence tending to show whether such a relative placement is, in fact, available.

In re S.D.C., 373 N.C. at 290, 837 S.E.2d at 858 (citation omitted). When a party does not introduce evidence regarding a potential relative placement at the disposition stage, the trial court is not required to consider the relative placement. *See In re E.F.*, 375 N.C. at 94, 846 S.E.2d at 634 ("Respondent, however, made no reference to [the relative] or any other alternative placement for the children at the disposition stage . . . . Absent additional evidence regarding [the relative]'s willingness or ability to provide permanence for respondent's children, the trial court cannot be said to have erred . . . .").

¶ 15 Here there was no conflict in the evidence before the trial court that would require findings of fact regarding whether Kenneth's maternal grandmother was an appropriate relative placement. The only testimony before the trial court during the adjudication and disposition stages was by Susan Beasley, the DSS social worker assigned to Kenneth's case. Ms. Beasley did not mention a relative placement. Further, the maternal grandmother did mail a letter to the trial court expressing her desire to have Kenneth placed with her and this letter was included in the record. She did not, however, attend or testify at the termination of parental rights hearing, nor was her letter discussed at the hearing. Moreover, respondent's attorney did not discuss a relative placement during the termination hearing. Rather, the evidence showed the trial court previously considered and rejected the maternal grandmother as a relative placement. Kenneth was removed from the maternal grandmother's care because "conflict between the parents and [the maternal grandmother] necessitated [Kenneth]'s removal." Then in the final review order—which the trial court incorporated into its termination order—the trial court "decline[d] to place [Kenneth] with the maternal grandmother."

¶ 16 Thus, there was no conflict in the evidence regarding whether Kenneth's maternal grandmother was an appropriate relative placement. Rather, the evidence shows the trial court had previously considered this option and declined to place Kenneth with her. Because there was no conflict in the evidence, the trial court was not required to make findings of fact as to this issue. Moreover, the trial court's binding dispositional findings support its conclusion that termination was in Kenneth's best interests. These findings show that Kenneth was placed with a loving

foster family who wanted to adopt him. Due to respondent's failure to visit, Kenneth had no bond with respondent. Additionally, the trial court found that terminating respondent's parental rights would aid in the accomplishment of Kenneth's permanent plan of adoption by his foster parents, whom he called "mama" and "papa." Therefore, the trial court did not abuse its discretion in determining that termination of respondent's parental rights was in Kenneth's best interests. Thus, we affirm the trial court's order.

AFFIRMED.

IN THE MATTER OF L.M.M.

No. 9A21

Filed 17 December 2021

Termination of Parental Rights—grounds for termination—willful abandonment—evidentiary support

The trial court properly terminated a father's parental rights to his daughter based on willful abandonment (N.C.G.S. § 7B-1111(a)(7)) where the majority of the challenged findings of fact were supported by evidence or based on the trial court's proper role in assessing credibility that, during the determinative six-month period, although the father sent one card with a gift, he otherwise had no contact with his daughter or the relatives caring for her, took no steps to seek visitation or assert his legal rights, provided no financial support, and did not attempt to show love, care, and affection for his daughter. In turn, the findings supported the court's conclusion that the father's conduct constituted willful abandonment.

On writ of certiorari pursuant to N.C.G.S. § 7A-32(b) to review an order entered on 27 October 2020 by Judge John K. Greenlee in District Court, Gaston County. This matter was calendared for argument in the Supreme Court on 12 November 2021 but determined on the record and briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

Ashley A. Crowder for petitioner-appellees.

No brief for appellee Guardian ad Litem.

Richard Croutharmel for respondent-appellant father.

NEWBY, Chief Justice.

¶ 1 Respondent-father appeals from the trial court's order terminating his parental rights to L.M.M. (Lisa).[1] Because we hold the trial court did not err in concluding that grounds existed to terminate respondent's parental rights under N.C.G.S. § 7B-1111(a)(7), we affirm the trial court's order.

¶ 2 This case arises from a private termination action filed by petitioners, Mrs. and Mr. O., who are Lisa's maternal aunt and uncle. Lisa has been in petitioners' care since 7 July 2017 when Lisa's mother passed away and respondent was charged with her murder.

¶ 3 Respondent and Lisa's mother met when they both attended an inpatient rehabilitation facility for substance abuse. They were subsequently "kicked out" for failure to follow the rules. Respondent and the mother were married in 2015 and Lisa was born shortly thereafter. Respondent and the mother continued to engage in substance abuse after Lisa was born.

¶ 4 On 7 July 2017, police were dispatched to the family's residence when respondent called 911 after finding the mother not breathing. Petitioners learned of the mother's passing, and Mrs. O. drove to the residence. Mrs. O. asked respondent if she and Mr. O. could watch Lisa for the weekend, and respondent agreed. Three days later, petitioners filed a complaint for child custody in Mecklenburg County and obtained an ex parte emergency custody order on 11 July 2017. The order did not allow respondent visitation pending future court orders. On 19 July 2017, respondent was arrested and charged with first-degree murder for the mother's death. On 9 October 2017, the District Court, Mecklenburg County, entered a temporary custody order awarding petitioners custody of Lisa.

¶ 5 On 10 May 2018, respondent pled guilty to involuntary manslaughter and was sentenced to thirteen months of imprisonment. He was released from incarceration on or about 8 August 2018. Respondent did not have any contact with petitioners or Lisa during his incarceration. After his

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

release, between 16 October 2018 and 18 January 2019, respondent sent petitioners four money orders totaling $800.00.

¶ 6 Around October or November of 2018, respondent hired an attorney to assist him with the pending custody case in Mecklenburg County. On 7 November 2018, petitioners filed for and received another ex parte emergency custody order. Around December of 2018, respondent fired his attorney. Respondent did not thereafter hire another attorney to represent him in the custody proceeding.

¶ 7 On or about 9 November 2018, petitioners filed a petition in Stanly County to terminate respondent's parental rights to Lisa. On 3 September 2019, petitioners voluntarily dismissed the action and filed a new petition in Gaston County seeking to terminate respondent's parental rights, alleging the grounds of neglect, dependency, and willful abandonment. *See* N.C.G.S. § 7B-1111(a)(1), (6)–(7) (2019).

¶ 8 On 27 October 2020, the trial court entered an order concluding that grounds existed to terminate respondent's parental rights based upon neglect and willful abandonment. N.C.G.S. § 7B-1111(a)(1), (7). The court further concluded it was in Lisa's best interests that respondent's parental rights be terminated. Accordingly, the trial court terminated respondent's parental rights. Respondent seeks appellate review.[2]

¶ 9 On appeal respondent argues the trial court erred by concluding grounds existed to terminate his parental rights. A termination of parental rights proceeding consists of an adjudicatory stage and a dispositional stage. N.C.G.S. §§ 7B-1109, -1110 (2019); *In re Montgomery*, 311 N.C. 101, 110, 316 S.E.2d 246, 252 (1984). At the adjudicatory stage, the petitioner bears the burden of proving by "clear, cogent, and convincing evidence" the existence of one or more grounds for termination under subsection 7B-1111(a). N.C.G.S. § 7B-1109(f). If the petitioner meets his burden during the adjudicatory stage, "the court proceeds to the dispositional stage, at which the court must consider whether it is in the best interests of the juvenile to terminate parental rights." *In re D.L.W.*, 368 N.C. 835, 842, 788 S.E.2d 162, 167 (2016) (citing *In re Young*, 346 N.C. 244, 247, 485 S.E.2d 612, 614–15 (1997); N.C.G.S. § 7B-1110 (2015)).

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2. On 17 February 2021, petitioners filed a motion in this Court to dismiss respondent's appeal and two motions for sanctions on the ground that respondent's notice of appeal was not timely filed. On 10 March 2021, this Court denied petitioners' motion to dismiss. On 29 March 2021, acknowledging that his notice of appeal was untimely, respondent filed a petition for writ of certiorari seeking review of the order terminating his parental rights. This Court now allows respondent's petition for writ of certiorari.

¶ 10 Respondent only challenges the trial court's determination at the adjudicatory stage that grounds existed to terminate his parental rights.

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

In re K.N.K., 374 N.C. 50, 53, 839 S.E.2d 735, 737–38 (2020) (alteration in original).

I. Willful Abandonment

¶ 11 A trial court may terminate parental rights when "[t]he parent has willfully abandoned the juvenile for at least six consecutive months immediately preceding the filing of the petition or motion." N.C.G.S. § 7B-1111(a)(7). "Abandonment implies conduct on the part of the parent which manifests a willful determination to forego all parental duties and relinquish all parental claims to the child." *In re Young*, 346 N.C. at 251, 485 S.E.2d at 617 (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 Searle*, 82 N.C. App. at 276, 346 S.E.2d at 514. "[T]he '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)).

¶ 12 Petitioners filed the petition to terminate respondent's parental rights on 3 September 2019. Thus, the relevant six-month window for willful abandonment is 3 March 2019 to 3 September 2019.

¶ 13 Respondent challenges several of the trial court's findings of fact as unsupported by the evidence. We first address respondent's challenge to finding of fact 100. The trial court found:

> [Respondent] claims that he stopped sending money, cards and gifts because his probation officer told him that he could not have any contact with the victim's family. There is no court order or document that says this. In fact, [respondent] had been having "contact" through sending support to Petitioners for the benefit of the juvenile, and sending the Christmas gift items. The court does not find this credible as [respondent] had two attorneys at this time, his hired representation in the Mecklenburg County custody case and the appointed attorney in the Stanley [sic] County TPR matter.

Respondent argues this finding "is fallaciously reasoned because the absence of evidence is not evidence of absence," and the fact that there was no collateral evidence to support respondent's testimony does not "negate its veracity." He further argues that the finding impermissibly shifts the evidentiary burden to him. We disagree.

¶ 14 It is the trial court's responsibility "to pass upon the credibility of the witnesses and the weight to be given their testimony and the reasonable inferences to be drawn therefrom." *In re A.R.A.*, 373 N.C. 190, 196, 835 S.E.2d 417, 422 (2019) (quoting *In re D.L.W.*, 368 N.C. at 843, 788 S.E.2d at 167–68). Here the finding states that the trial court did not find respondent's testimony credible. Because the trial court is the proper fact-finding body to make credibility determinations, we reject respondent's argument. Additionally, the trial court did not improperly shift the burden to respondent. Rather, the court's finding demonstrates that respondent's testimony failed to rebut petitioners' clear, cogent, and convincing evidence that respondent willfully stopped sending money, cards, and gifts for Lisa. *In re A.C.*, 378 N.C. 377, 2021-NCSC-91, ¶ 30 (rejecting the argument that the trial court had inappropriately shifted the evidentiary burden to the respondent and concluding instead that the respondent failed to rebut the petitioner's clear, cogent, and convincing evidence).

¶ 15 Respondent also challenges findings of fact 82 and 112, in which the court found that there was no prohibition of contact between respondent and Lisa or petitioners after May 2018, and that respondent was not prohibited from contacting Lisa during the relevant six-month period "due to sickness, incarceration, or any other valid reason." Respondent

argues that his probation officer told him to stop sending things to petitioners in 2019, and that petitioners have not refuted this argument. As we reject respondent's challenges to finding of fact 100, we likewise reject his challenges to findings of fact 82 and 112 insofar as his arguments are based on the credibility of his testimony. There was no other evidence that respondent was prohibited from having contact with Lisa or petitioners during the relevant six-month period. Notably, the trial court did find that respondent's lack of contact from his arrest until his conviction in May 2018 was not willful because his attorney advised him not to have contact with the mother's family. Respondent's arguments are overruled.

¶ 16 Respondent next challenges the portion of finding of fact 83 that states he did not send any response to the letter Mrs. O. sent to him dated 29 July 2018, in which she told respondent she forgave him for killing her sister and that Lisa was being taken care of in a safe environment. Respondent argues that he sent a letter in response apologizing for everything that happened and stating that he wished to see Lisa. At the hearing, however, respondent testified that he did not send a response to the letter, stating that he "would have liked to . . . [b]ut [he] didn't." Additionally, Mrs. O. testified that respondent did not respond to her letter. Therefore, we reject respondent's challenge to this finding.

¶ 17 Respondent next challenges finding of fact 84. The trial court found that "[i]t is unclear as to what [respondent] knew about who legally had custody of the minor child while he was incarcerated. Who had legal custody, however, was not material to [respondent's] ability to see the juvenile." Respondent argues that it was "highly relevant" that the maternal relatives had legal custody of Lisa because he was ordered to have no contact with them. There is no evidence, however, that respondent was ordered not to have contact with the maternal relatives. The trial court found that respondent's attorney in the criminal case advised respondent not to have contact with the family while the criminal case was pending, and therefore his lack of contact from his arrest until his conviction in May 2018 was not willful. As stated above, the trial court did not find credible respondent's testimony that his probation officer told him not to have contact with the maternal relatives. The maternal grandmother and respondent testified that the custody order did not allow him any visitation, but there is no evidence he was prohibited from having contact. Therefore, we reject respondent's challenge to this finding.

¶ 18 Respondent challenges finding of fact 87 as unsupported by the evidence. The trial court found that respondent "did not open up the con-

versation about visitation in any way shape or form. He did not email, send a letter, call or use his family members to initiate a conversation." Respondent contends that he sent a letter to petitioners "indicating he would love to see Lisa." Respondent testified that he sent a letter to petitioners after he was released from prison in August of 2018. Mrs. O. testified that she believed she received a letter from respondent in September 2019. The trial court here properly recognized the relevant time period for determining whether respondent's conduct constituted willful abandonment as 3 March 2019 to 3 September 2019. Because respondent's testimony indicates that he sent the letter in August of 2018 after he was released from incarceration, the trial court could in its discretion determine that respondent did not engage in any conversation about visitation during the relevant period for evaluating willful abandonment. As such, we reject respondent's challenge.

¶ 19 Respondent next challenges findings of fact 95, 96, and 97. The trial court found that respondent "did not follow through with the legal route to obtain visitation" with Lisa as he did not take any further steps to pursue visitation after he fired his attorney around December of 2018. The court also found that respondent did not take any further steps outside of the legal process to seek visitation or contact Lisa after he fired his attorney in December of 2018. Respondent acknowledges that these findings are true but negates the trial court's conclusion that these actions were willful. Because respondent has not challenged the findings of fact for their lack of evidentiary support, they are deemed to be supported by the evidence and are binding on appeal. *See In re Z.L.W.*, 372 N.C. at 437, 831 S.E.2d at 65. Moreover, as stated above, the trial court did not find respondent's testimony on this subject to be credible. Therefore, respondent's argument is without merit.

¶ 20 Respondent next challenges findings of fact 98, 105, and 106, which state that he did not send any cards, gifts, or letters to Lisa after January 2019 and that all other actions by respondent were taken after the petition to terminate his parental rights was filed on 3 September 2019. Respondent argues that these findings conflict with the evidence as well as finding of fact 104, in which the trial court found that respondent sent a card with a note and some presents to petitioners for Lisa on 31 May 2019. We agree. Respondent testified that he sent a card and gift to Lisa in May 2019 and presented a receipt from the postal service dated 31 May 2019. Accordingly, we disregard findings of fact 98, 105, and 106 to the extent they indicate respondent did not send a card and gift on 31 May 2019. *See In re J.M.J.-J.*, 374 N.C. 553, 559, 843 S.E.2d 94, 101 (2020).

¶ 21 Respondent challenges finding of fact 99 in which the trial court found that respondent "has not sent, or attempted to send, any further money or financial support to Petitioners, in support of [the] juvenile or otherwise, since February 1, 2019." Respondent's own testimony supports the trial court's finding. Respondent testified that he did not send any money or support payments to petitioners after 1 February 2019. Therefore, respondent's challenge is overruled.

¶ 22 Respondent next challenges finding of fact 101 which states that he "did not make any attempts to show his love, affection, or care for [Lisa] since January 2019." Respondent argues that evidence from both parties and unchallenged finding of fact 104 demonstrate that he sent cards and gifts to Lisa after 1 February 2019, which he contends showed his love for her. Respondent asserts that Mrs. O. testified she received two cards from respondent in 2020 and a letter in September 2019. Besides the card and gift respondent sent in May of 2019, which the trial court acknowledged in finding of fact 104, respondent's other cards and the letter, as previously addressed, fall outside the six-month determinative period preceding the filing of the termination petition on 3 September 2019. Thus, the trial court did not err, and respondent's challenge is overruled.

¶ 23 Respondent similarly challenges finding of fact 115, which seems to encompass various findings above, including that respondent failed to make a serious or sincere effort to be in the child's life since 1 February 2019. In this finding, the trial court recognized the card and gift respondent sent to the child in May of 2019, but concluded that this one action without more is insufficient effort. For the reasons stated above addressing respondent's inaction in several aspects, we reject respondent's challenge to this finding.

¶ 24 Respondent next challenges findings of fact 108, 109, and 113. In finding of fact 108, the trial court found that due to the improperly filed termination petition in Stanly County, respondent had an additional eight months of time to make an effort to show his parental concern and care for Lisa. The trial court found in finding of fact 109 that after respondent was put on notice that petitioners wished to terminate his parental rights in the Stanly County termination case, he "took no action to try to assert his visitation rights with the minor child or to maintain or reestablish a relationship with the minor child aside from sending Christmas gifts and making four child support payments." The court found in finding of fact 113 that respondent did not assert his rights and obtain visitation in the custody action in order to show that he was trying to maintain or reestablish a relationship with Lisa. Respondent argues that he hired an attorney to assist him in the Mecklenburg County

custody case and relied on that attorney until he fired her in December 2018. Respondent's involvement in the Mecklenburg County custody case was outside the relevant six-month period. Moreover, it is clear that the filing of the Stanly County termination petition put respondent on notice of petitioners' intentions. Additionally, his argument ignores the fact that he took no further action after he fired his attorney in the custody case. Therefore, we reject respondent's argument.

¶ 25 Respondent next challenges findings of fact 120, 121, and 123. The trial court found that respondent "has done close to nothing in this case," that his actions since his release from incarceration "were very sporadic and inconsistent," and that his "actions to maintain or reestablish a relationship with the minor child were woefully inadequate." Respondent argues that he used three different attorneys to fight for his visitation and parental rights to Lisa and that at least one of the attorneys had represented him since November of 2018. Respondent's argument, however, ignores that he had almost no contact with Lisa or petitioners since Lisa was last in his care. Respondent last saw and spoke to Lisa in July 2017; he only sent one card and gift in the six months preceding the filing of the termination petition; he sent additional gifts in December 2019, early 2020, and April 2020, after the termination petition was filed; he did not send any financial support after February 2019; and although he obtained an attorney in the custody action, he did nothing else in the matter after firing his attorney in December 2018. This evidence supports the trial court's findings. We reject respondent's challenges to findings of fact 126 and 127 for the same reasons.

¶ 26 Finally, respondent challenges findings of fact 124, 125, and 129. The trial court found that respondent's actions demonstrated willful and intentional conduct which was evidence of his purpose to forego all parental duties, that there was clear, cogent, and convincing evidence that respondent's conduct constituted willful abandonment of Lisa, and that grounds existed to terminate his parental rights under N.C.G.S. § 7B-1111(a)(7). Because these findings are more accurately assessed as conclusions of law, we address those conclusions below.[3]

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3. Respondent also challenges findings of fact 117 and 118 which ultimately relate to respondent's actions and omissions constituting neglect. We decline, however, to review these findings as they relate to the trial court's adjudication of neglect under N.C.G.S. § 7B-1111(a)(1) and are not necessary to support the trial court's determination that grounds existed to terminate respondent's parental rights under N.C.G.S. § 7B-1111(a)(7). *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."). Additionally, we decline to review respondent's challenges to findings of fact 107, 114, and 116 for the same reason.

¶ 27 Respondent next contends that the evidence and the trial court's findings of fact do not support its conclusion that he willfully abandoned Lisa. The trial court's findings of fact demonstrate that except for respondent's one "card with a note, and some presents" to petitioners for Lisa in May 2019, he made no other attempt to contact petitioners or to reestablish a relationship with Lisa during the relevant six-month period, from 3 March 2019 to 3 September 2019. The trial court found that during the six months immediately preceding the filing of the termination petition, respondent made no attempts "to otherwise contact or communicate with the minor child," did not call to inquire into Lisa's well-being, did not provide any financial support to Lisa, did not file any legal motions or filings to assert or establish his visitation rights, and did not make any attempts to show his love, care, or affection for Lisa. The court also found that respondent knew petitioners' contact information and had not been prohibited from contacting Lisa or petitioners during the relevant six-month period. Though respondent testified that he stopped sending money, cards, and gifts by February 2019 because his probation officer told him he could not have any contact with the mother's family, the trial court did not find this testimony credible.

¶ 28 The trial court's findings of fact demonstrate that respondent willfully withheld his love, care, and affection from Lisa during the relevant time period. Therefore, we hold the trial court did not err in concluding that respondent's conduct constituted willful abandonment and that grounds existed to terminate his parental rights under N.C.G.S. § 7B-1111(a)(7).

II. Neglect

¶ 29 Respondent also argues that the trial court erred in terminating his rights under N.C.G.S. § 7B-1111(a)(1). Because the trial court properly terminated respondent's parental rights based upon N.C.G.S. § 7B-1111(a)(7), 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 found by 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) ("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 N.B.

[379 N.C. 441, 2021-NCSC-154]

IN THE MATTER OF N.B.

No. 378A20

Filed 17 December 2021

1. Termination of Parental Rights—best interests of the child—parent-child bond—sufficiency of findings

The trial court did not abuse its discretion in concluding that termination of a mother's parental rights was in her minor daughter's best interests where the court reasonably determined that the mother and the child lacked a strong, healthy bond. The evidence showed that the daughter had no contact with her mother in the five months leading up to the termination hearing, suffered from severe emotional and behavioral issues that worsened during prior visits with her mother, expressed more concern over her mother's animals than in seeing her mother, described having a parental attitude toward her mother, and would require extensive therapy to work through her past trauma in order to resume visits with the mother.

2. Termination of Parental Rights—best interests of the child—weighing of statutory factors—parent-child bond—alternatives to termination

The trial court did not abuse its discretion in concluding that termination of a mother's parental rights was in her minor daughter's best interests where, contrary to the mother's argument, the court was not required to delay the termination hearing—which the court appropriately fast tracked after finding aggravated circumstances existed under N.C.G.S. § 7B-901(c)(1)(b) and (e)—so respondent could try to improve the tenuous bond with her child. Furthermore, the court properly considered each dispositional factor under N.C.G.S. § 7B-1110(a) in making its best interests determination, and the record evidence did not support continued visitation between the mother and her child or any other dispositional alternatives to termination of parental rights.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from orders entered on 5 May 2020 by Judge Hal Harrison in District Court, Madison County. This matter was calendared in the Supreme Court on 12 November 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 N.B.

[379 N.C. 441, 2021-NCSC-154]

Law Offices of Jamie A. Stokes, PLLC, by Jamie A. Stokes, for petitioner-appellee Madison County Department of Social Services.

Sophie Goodman for appellee Guardian ad Litem.

Peter Wood for respondent-appellant mother.

EARLS, Justice.

¶ 1 Respondent, the mother of the juvenile N.B. (Nancy),[1] appeals from the trial court's order terminating her parental rights. She argues that the trial court abused its discretion by concluding that termination was in Nancy's best interests. In particular, respondent points to evidence in the record that she had a bond with her child and challenges the trial court's findings to the contrary. However, the trial court's findings were supported by the evidence. Further, in making its determination that termination of respondent's parental rights was in Nancy's best interests, the trial court considered the applicable statutory criteria and made written findings concerning the relevant factors. The court's ultimate decision is supported by reason and not an abuse of discretion. As a result, we affirm the trial court's order.

I. Background

¶ 2 On 17 June 2019, Madison County Department of Social Services (DSS) filed a petition alleging that Nancy, who was seven years old at the time, was a neglected juvenile. DSS alleged it had received four reports between February and June 2019, three of which followed Nancy's disclosure to educators that she felt unsafe in her home due to abuse by respondent's boyfriend and respondent's substance abuse and self-harm. Nancy also disclosed that she had thought about suicide and had a plan for accomplishing it. DSS discovered that one of respondent's boyfriends, Todd, had an extensive criminal history, and DSS established a safety plan with respondent to prevent Todd from having contact with Nancy. Respondent violated this safety plan numerous times and continued to have contact with Todd, even though he had stated he wanted to "kill children," and respondent believed he was a danger to Nancy. Nancy further disclosed that respondent had instructed her to lie to DSS. DSS obtained nonsecure custody of Nancy the same day the petition was filed and placed her in foster care.

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

¶ 3 On 1 July 2019, DSS filed an amended petition alleging that Nancy was a neglected and dependent juvenile. The amended petition detailed respondent's extensive history with DSS, beginning when Nancy's half-siblings were removed from respondent's care in February 2009 due to domestic violence and substance abuse. DSS became involved with Nancy at her birth in April 2012 after she tested positive for marijuana and respondent tested positive for benzodiazepines. In addition, the petition alleged respondent had been arrested and charged with multiple drug offenses on 15 June 2019. She submitted to a drug screen, which was positive for oxycodone and opiates, and she admitted to methamphetamine use several days prior. DSS obtained a hair follicle test for Nancy, which revealed dangerously high levels of methamphetamine and amphetamines. The petition also alleged that Nancy's father was deceased, that respondent lacked the ability to care for Nancy on her own, and that respondent had no appropriate alternative childcare arrangement.

¶ 4 Following a hearing on 1 July 2019, the trial court adjudicated Nancy to be a neglected and dependent juvenile. As an interim disposition, the court required respondent to produce two consecutive negative drug screens before exercising visitation with Nancy.

¶ 5 The trial court held a combined disposition and permanency-planning hearing on 12 August 2019. In its resulting order, the court found that seventeen reports were made to DSS since Nancy's birth and that Nancy had "been surrounded by domestic violence, drug use, and instability her whole life." Respondent admitted to having methamphetamine in her possession when DSS took custody of Nancy, and Nancy's hair follicle test was positive for methamphetamine in her system. Respondent acknowledged she had previously witnessed Nancy hallucinating. The court further found that respondent had started attending substance abuse classes, though the court also noted that this was the third time she had done so. Respondent had not visited with Nancy since the adjudication as she failed to produce two negative drug screens; she instead tested positive three times.

¶ 6 The trial court found that aggravated circumstances existed pursuant to N.C.G.S. § 7B-901(c)(1)(b) and (e) (2019) and relieved DSS from making efforts toward reunification. The court determined a permanent plan of adoption with a concurrent plan of guardianship was in Nancy's best interests. As a necessary precondition of visitation, respondent was required to produce negative drug screens for six consecutive weeks; if she complied with this precondition, respondent would be permitted visitation, provided visitation was also recommended by Nancy's therapist. Respondent did not appeal the adjudication and disposition orders.

¶ 7 By the December 2019 permanency-planning hearing, respondent had made some progress on her case plan. She produced six negative drug screens. Based on this progress, she requested visitation with Nancy. However, Nancy's therapist recommended against allowing visitation, and the trial court refused respondent's request. The trial court maintained Nancy's permanent plan as "adoption concurrent with guardianship."

¶ 8 On 2 December 2019, DSS filed a petition to terminate respondent's parental rights on the grounds of abuse, neglect, and dependency. *See* N.C.G.S. § 7B-1111(a)(1)–(2) (2019). Following a hearing, the court entered an order on 5 May 2020 that found the grounds as alleged in the petition and determined it to be in Nancy's best interests to terminate respondent's parental rights. Respondent appeals.

II. Best-interests determination

¶ 9 The termination of parental rights proceeds in two stages. First, the trial court adjudicates the existence of any alleged grounds for termination under N.C.G.S. § 7B-1111 (2019). *See* N.C.G.S. § 7B-1109 (2019). The petitioner must prove by clear and convincing evidence that one or more grounds for termination exist. *In re A.U.D.*, 373 N.C. 3, 5–6 (2019). If the trial court determines that at least one ground has been established, the case proceeds to the dispositional stage, where the court "determine[s] whether terminating the parent's rights is in the juvenile's best interest." N.C.G.S. § 7B-1110(a) (2019).

¶ 10 Here, the trial court adjudicated grounds to terminate respondent's parental rights on the basis of abuse and neglect under N.C.G.S. § 7B-1111(a)(1) and dependency under N.C.G.S. § 7B-1111(a)(6). Respondent concedes that the trial court "properly found grounds to terminate [her] parental rights." Accordingly, our review of the termination order is limited to determining whether the trial court properly concluded that termination of respondent's parental rights was in Nancy's best interests.

¶ 11 Under N.C.G.S. § 7B-1110, when the trial court determines whether termination of parental rights is in a juvenile's best interests, the court

> shall consider the following criteria and make written findings regarding the following that are relevant:
>
> (1) The age of the juvenile.
>
> (2) The likelihood of adoption of the juvenile.

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

N.C.G.S. § 7B-1110(a) (2019). The court's dispositional findings are binding on appeal if supported by the record evidence. *In re K.N.K.*, 374 N.C. 50, 57 (2020). By statute, "[t]he court may consider any evidence, including hearsay evidence as defined in [N.C.]G.S. 8C-1, Rule 801, that the court finds to be relevant, reliable, and necessary to determine the best interests of the juvenile." N.C.G.S. § 7B-1110(a). The trial court's ultimate determination regarding the child's best interests is reviewed for abuse of discretion and will be reversed only if it 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).

A. Challenges to the trial court's findings of fact

¶ 12 **[1]** Respondent first challenges dispositional findings of fact 44 and 45, which state:

> 44. The minor child does not have a strong bond with the respondent mother. They have not visited since June of 2019 due to prior orders requiring the respondent mother to provide clean drug screens and due to the recommendations of Dr. Huneycutt. At this time, future interaction between the juvenile and the respondent mother could trigger the juvenile, and the juvenile would require significant safety and stability measures before any such contact should occur.
>
> 45. While the juvenile has asked when she will see the respondent mother, she has not requested to see the respondent mother and most of her inquiries regarding the respondent mother indicate that she has established a parentified role with the respondent mother. The minor child primarily inquires about her animals when asking about the respondent mother.

The record contains ample evidence supporting both findings. Nancy began therapeutic services in August 2019, and her psychologist, Dr. Dominique Huneycutt, noted that she presented with a history of "significant emotional and behavioral difficulties," including diagnoses of post-traumatic stress disorder, oppositional defiant disorder, and attention deficit hyperactivity disorder. Nancy had previously engaged in self-harming behavior, exhibited physical and verbal aggression, and acknowledged prior suicidal ideation and planning.

¶ 13 Respondent attended visitations with Nancy for a short period of time after Nancy was removed from respondent's care in June 2019, but respondent was denied visitation following the initial adjudication hearing due to her inability to produce two consecutive negative drug screens. Nancy's behavior worsened during the time respondent had visitations with her. Nancy was reportedly "on edge" on the days when she would visit with respondent, to the point that she pulled her hair out. She also exhibited behavioral problems in her foster home, including excessive cursing, hitting, screaming, biting, and defiance, for approximately two days following a visit. Nancy also assumed a parental role towards respondent, attempting to moderate her disclosures to DSS in order to protect respondent and requesting DSS to check on respondent because she "needed to make sure [respondent] was okay." However, Nancy never indicated to her social worker a desire to see respondent. Dr. Huneycutt recommended visitation with respondent not resume until Nancy was able to safely process her trauma.

¶ 14 At the termination hearing, Dr. Huneycutt reiterated that Nancy was "a seriously, emotionally disturbed child, [with] severe behaviors and safety risks," and "any additional environment[al] chaos or substance exposure and damage would further set her back and exacerbate conditions." Dr. Huneycutt advised the court that Nancy would need extensive support and stability, including intensive therapeutic supports; future evaluations; high levels of consistency, structure, safety, and responsiveness; intensive safety precautions; possible medical-neurological interventions; structured activities; peer skills; social interaction skills; safety skills; very high level of services with skilled professionals; and "a very stable environment for a very long time." Dr. Huneycutt acknowledged Nancy did occasionally say she missed respondent and that she wanted to go back to her mother, but as she further explained:

> [m]ost commonly [Nancy's] statements will—she asks about her animals, and she makes statements like, "I need to see my mother." And when you explore it, she's worried about her mother. She's worried about

> whether she's okay. . . . And she doesn't bring her mother up a lot. She brings up her biological father. She brings up [respondent's boyfriends]. She talks about her animals. But she's, "I'm the warrior. I killed the bear. I need to be with my mother." And she's describing protective roles. Her play reflects protective roles. So she does—and yes, she talks about her mom.

Thus, evidence in the record showed that Nancy had not had any contact with respondent since June 2019, that Nancy had not asked the social worker to see respondent, that Nancy would have to work through her past trauma before she could resume visits with respondent, and that Nancy discussed her feelings towards respondent during therapy in a protective or parental role and in the context of her animals. Based on this evidence, the trial court reasonably determined that Nancy and respondent did not have a strong or healthy bond. *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). Findings of fact 44 and 45 are supported by relevant and reliable evidence.

B. Challenges to the trial court's best-interests determination

¶ 15 **[2]** Respondent also challenges findings of fact 46 and 48, which state:

> 46. Given the juvenile's diagnoses and Dr. Huneycutt's opinion that she is a seriously emotionally disturbed child, the juvenile is in high need of stability and permanence and it is not in the best interest of the juvenile to further postpone her permanence.
>
> . . . .
>
> 48. In light of the findings above, it is in the best interest of the juvenile [Nancy] that the [c]ourt terminate the parental rights of the respondent mother . . . to said juvenile.

These findings are not factual in nature but instead address the ultimate question of Nancy's best interests. We thus consider respondent's challenges to them as such. *See In re A.S.T.*, 375 N.C. 547, 555 (2020) ("Although the trial court labeled these conclusions of law as findings of fact, findings of fact which are essentially conclusions of law will be treated as such on appeal." (cleaned up)). Respondent relatedly challenges the trial court's conclusion of law 7, which also reflects its

ultimate determination that termination of respondent's parental rights was in Nancy's best interests.

1. The trial court's consideration of respondent's bond with Nancy

¶ 16 Respondent first argues that the trial court abused its discretion because the court failed to consider her tenuous bond with Nancy in the proper context. She argues that her lack of opportunity to visit with Nancy, which she attributes to the trial court having "fast tracked the case, moving full speed ahead from the initial underlying petition to termination in eight months," prevented the court from having the time needed to adequately assess their relationship. Respondent asserts that "[n]ot enough time had passed to evaluate whether the trial court should have terminated parental rights," and that with additional time she would have been able to meet the necessary criteria to resume her visits with Nancy and strengthen the bond between them.

¶ 17 Initially, we note that the trial court acted in accordance with the Juvenile Code throughout this case. The "fast track[ing]" that respondent refers to occurred because the trial court determined in its initial disposition and permanency-planning order that the case fit within the aggravated circumstances of N.C.G.S. § 7B-901(c)(1)(b) and (c)(1)(e). Based on this determination, the court relieved DSS from making any further efforts toward reunification, as permitted by that statute. The order specifically found that respondent "has committed, encouraged, and allowed the continuation of chronic physical or emotional abuse of the juvenile, and chronic and toxic exposure to controlled substances that causes the impairment of the juvenile." Respondent did not appeal the trial court's order, and she is therefore bound by its findings and conclusions. *See In re A.S.M.R.*, 375 N.C. 539, 544 (2020).

¶ 18 Respondent argues that this case is analogous to various other termination cases, all of which addressed whether there were grounds for termination in the first place and not whether termination was in the child's best interest. She relies on *In re Young*, 346 N.C. 244, 252 (1997), in which this Court held that there was insufficient evidence that the parent willfully abandoned her child when she was prevented from seeing the child; *In re Shermer*, 156 N.C. App. 281, 288 (2003), in which the Court of Appeals held that the parent was not given adequate time to make progress on the conditions which led to his child's removal after the parent was released from prison; *In re N.D.A.*, 373 N.C. 71, 78–79 (2019), in which this Court vacated and remanded a termination order in part because the trial court's findings failed to resolve whether the

parent's actions and omissions which constituted abandonment of his child were willful; and *In re I.R.L.*, 263 N.C. App. 481, 483 (2019), in which the Court of Appeals vacated and remanded a termination order with insufficient findings regarding willfulness when the parent was subject to a domestic violence protective order that forbid contact with the child's mother.

¶ 19 These cases turned on the question of whether there were sufficient evidence and findings of fact with respect to parental fault to justify the trial court's conclusion that grounds existed to terminate a parent's parental rights. Here, respondent does not dispute that the trial court properly adjudicated multiple grounds for termination. None of the precedents respondent invokes stand for the proposition that, having concluded that grounds exist which permit termination of parental rights, the trial court must nevertheless delay its best-interests determination.

¶ 20 The focus at the dispositional stage of a termination hearing is whether termination is in the best interests of the child. *See* N.C.G.S. § 7B-1110(a).

> [A]lthough parents have a constitutionally protected interest in the care and custody of their children and should not be unnecessarily or inappropriately separated from their children, "the best interests of the juvenile are of paramount consideration by the court and . . . when it is not in the juvenile's best interest to be returned home, the juvenile will be placed in a safe, permanent home within a reasonable amount of time." N.C.G.S. § 7B-100(5).

In re A.U.D., 373 N.C. 3, 11–12 (2019).

¶ 21 Respondent does not cite any evidence in the record suggesting Nancy's best interests would have been served by delaying the termination hearing. Dr. Hunneycutt testified that, at the time the termination hearing occurred, any interaction with respondent "could be triggering for [Nancy]," and that before respondent's visitation with Nancy could resume "a lot of things . . . would have to happen." Among the many things that "would have to happen," Nancy "would need to be in a stable placement, need to be stable at school, and we would at least need to have fairly good safety for her in order to not overwhelm her." There was no evidence presented by respondent or by any other party regarding how long it might take before respondent and Nancy made sufficient progress such that visitation could resume or regarding how long

it might further take to allow respondent sufficient visitation to improve her bond with Nancy.

¶ 22 We also note that respondent's proposed delay relates to only one of the best interests factors: the parent-child bond. Even if respondent's bond with Nancy was strong and positive, "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).

¶ 23 Ultimately, the trial court was presented with relevant and reliable evidence regarding the bond between respondent and Nancy as it existed at the time of the termination hearing, and it properly made findings based on that evidence. Of course, the trial court possessed the discretion to conclude, based upon its assessment of the relevant dispositional factors, that it was in Nancy's best interests not to terminate respondent's parental rights even after concluding that multiple grounds for termination existed. But respondent's argument that as a matter of law she was entitled to a delay in order to potentially improve her bond with Nancy is not supported by case law, by the evidence presented at the termination hearing, or by the Juvenile Code. The trial court did not err by moving forward with its best-interests determination after it concluded that grounds existed to terminate respondent's rights.

2. The trial court's weighing of the dispositional factors

¶ 24 The trial court's order reflects that it considered all the required statutory criteria when it decided that termination of respondent's parental rights would be in Nancy's best interests. In addition to the findings already discussed, the court made uncontested findings that termination of respondent's parental rights would assist "in achieving permanency for [Nancy] and would eliminate [the] barrier to implementing" the permanent plan of adoption, which also supports the finding that Nancy was "in high need of stability and permanence." The court also found that Nancy was in a pre-adoptive placement and had a good relationship with her foster family. As in similar cases upheld by this Court, "the trial court's findings in this case show that it considered the dispositional factors in N.C.G.S. § 7B-1110(a) and performed a reasoned analysis weighing those factors." *In re Z.A.M.*, 374 N.C. 88, 101 (2020). We thus have no basis to reweigh these factors. *See In re A.U.D.*, 373 N.C. at 12 ("[T]his Court lacks the authority to reweigh the evidence that was before the trial court.").

3. The trial court's failure to consider other dispositional alternatives

¶ 25 Lastly, respondent argues that "the trial court abused [its] discretion by not recognizing that continued visitation was still in the best interests of Nancy." Respondent contends the court should have considered other dispositional alternatives instead of termination to provide an avenue by which Nancy could maintain a relationship with her mother.

¶ 26 We have previously observed that

> this Court has rejected arguments that the trial court commits error at the dispositional stage of a termination of parental rights proceeding by failing to explicitly consider non-termination-related dispositional alternatives, such as awarding custody of or guardianship over the child to the foster family, by reiterating that "the paramount consideration must always be the best interests of the child."

In re N.K., 375 N.C. 805, 820 (2020) (quoting *In re J.J.B.*, 374 N.C. 787, 795 (2020)). Here, there was no evidence presented at the dispositional hearing that an alternative disposition was available or preferable to the termination of respondent's parental rights, and the evidence that was presented did not establish that Nancy's best interests would be served by maintaining a relationship with respondent. Instead, as stated above, the evidence indicated that contact with respondent impeded Nancy's progress and resulted in increased negative behaviors. The trial court found that Nancy will require "intense intervention," including "high levels of consistency; structure and safety; . . . a stable environment; and a high level of care for a very long time," which was best accommodated through the termination of respondent's parental rights. This determination was neither manifestly unsupported by reason nor so arbitrary that it could not have been the result of a reasoned decision.

III. Conclusion

¶ 27 The trial court did not abuse its discretion in concluding that termination of respondent's parental rights was in Nancy's best interests. Accordingly, we affirm the trial court's order terminating respondent's parental rights.

AFFIRMED.

IN RE R.G.L.

[379 N.C. 452, 2021-NCSC-155]

IN THE MATTER OF R.G.L.

No. 99A21

Filed 17 December 2021

Termination of Parental Rights—grounds for termination—neglect—best interests—sufficiency of findings

The findings of fact in an order terminating a father's parental rights to his son contained sufficient differences from the petition allegations to demonstrate that the trial court conducted an independent evaluation of the evidence. Although certain findings were not supported by the evidence and were therefore disregarded on appeal, the remainder of the findings were supported by evidence that the son was neglected and that the father's failure to correct the conditions which led to the son's removal indicated a likelihood of future neglect. The trial court properly terminated the father's rights based on neglect after conducting a best interests analysis in accordance with the factors contained in N.C.G.S. § 7B-1110(a).

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from order entered on 23 November 2020 by Judge Benjamin S. Hunter in District Court, Person County. This matter was calendared for argument in the Supreme Court on 13 December 2021 but determined on the record and briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

Thomas L. Fitzgerald for petitioner-appellee Person County Department of Social Services; and Matthew D. Wunsche for appellee Guardian ad Litem.

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

EARLS, Justice.

¶ 1 Respondent appeals from the trial court's order terminating his parental rights in the minor child "Robert."[1] We affirm.

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

I. Background

¶ 2 On 29 August 2018, the Person County Department of Social Services (DSS) filed a petition alleging that three-year-old Robert was neglected. The juvenile petition stated that a child protective services (CPS) report was filed on 14 May 2018 alleging improper supervision, injurious environment, and substance abuse after Robert wandered away from the house while respondent was sleeping and a neighbor called 911. Respondent and Robert's mother completed requested drug screens on 15 May 2018. Respondent's screens were positive for amphetamines and oxycodone, which he was prescribed, and oxymorphone. He admitted to running out of medication sooner than expected because his use exceeded the prescribed amount. The mother's screens were positive for amphetamines, oxycodone, oxapam, oxymorphone, and marijuana metabolite; moreover, she admitted to using marijuana, Percocet, Adderall, and Valium. The CPS report was substantiated and transferred to in-home services on 27 June 2018.

¶ 3 The juvenile petition further alleged that DSS's efforts to engage the family and ensure Robert's safety were unsuccessful, and that a second CPS report was filed on 27 August 2018 for physical injury after the mother was charged with driving while impaired (DWI) on 19 July 2018 while Robert was in the vehicle. The mother admitted that the DWI charge was the result of her taking suboxone before driving. On 28 August 2018, DSS completed a home visit and found the premises to be in disarray. When the family was unable to identify an alternate safety provider, DSS filed the juvenile petition and obtained nonsecure custody of Robert.

¶ 4 Following a hearing on the juvenile petition on 11 September 2018, the trial court entered an order on 25 September 2018 adjudicating Robert to be a neglected juvenile. The trial court found that the conditions in the home as alleged in the petition led to or contributed to the adjudication. The court ordered that Robert remain in DSS custody and that DSS develop and implement a visitation plan providing for at least one hour of weekly supervised visitation between Robert and his parents. The court further ordered both parents to submit to random drug screens within two hours of requests to do so and to keep DSS informed of any change of address.

¶ 5 The matter came on for an initial review hearing on 17 December 2018. In the order entered following the hearing, the trial court found that the parents attended an initial child and family team (CFT) meeting to develop their respective case plans on 27 September 2018. Respondent's needs were identified to include employment, parenting skills, substance

use, mental health, medical care, and housing. The court further found that respondent was no longer employed as of 23 November 2018; that he completed a mental health assessment in August 2018 that recommended outpatient therapy and a psychiatric evaluation for possible medication management, but he was a "no[-]show" for psychiatric evaluations in September and December 2018; and that the location of the parents' residence was unknown. The court identified the barriers to reunification as the needs identified in the case plan and found that DSS had made recommendations focused on the needs of the parents to assist the parents in their stated goal of reunification. The court ordered DSS to retain custody of Robert and to maintain a visitation plan allowing the parents at least one hour of weekly supervised visitation and ordered the parents to comply with their case plans, follow recommendations of treatment providers, and submit to random drug screens within two hours of requests.

¶ 6 Following a 26 August 2019 permanency-planning hearing, the trial court entered an order setting the permanent plan for Robert as reunification with a concurrent plan of adoption. The court found that the parents had obtained employment and had made a down payment on a trailer in June 2019. The court noted the parents were working second and third shifts and had not developed a viable plan for childcare, and they did not have drivers' licenses and could not legally transport Robert. The parents' new trailer was found to be clean, neat, and modern, and to have ample space. The court additionally found that respondent attended weekly visitations but was consistently late, fell asleep during most visits, and was not always engaged with Robert during the visits; that respondent had "finally relented" after several months of requests that he seek medical care for sleep apnea, but no report of results had been made; and that the parents reported having had "excellent rapport" with Robert's foster parents and they were "able to eat lunch with [Robert] sometimes and engage him at the church where the foster parents attend." The court ordered DSS to continue the plan of at least one hour of weekly supervised visitation with additional visitation as arranged with the foster parents and ordered the parents to develop and present transportation and childcare plans to DSS.

¶ 7 The matter came back on for a permanency-planning hearing on 2 December 2019. The trial court found that the parents were struggling to achieve the needed goals. The findings show that both parents had lost their jobs, that respondent reported new employment that had not been verified, and that the parents had not presented suitable transportation or childcare plans to DSS. Respondent attributed his inability to stay awake to his sleep apnea, but he had not sought the requested medi-

cal care to address the issue despite DSS's referral to a neurologist for a sleep study. The court also found that individuals who resided with the parents when Robert was removed from the parents' care were still living with the parents, and that DSS was not able to enter the home during the most recent home visit because the parents were asleep and someone else answered the door. The trial court changed the permanent plan for Robert to adoption with a concurrent plan of reunification and reduced the parents' visitation to biweekly supervised visits.

¶ 8 On 5 February 2020, DSS filed a motion to terminate the parents' parental rights in Robert based on grounds of neglect and willful failure to make reasonable progress to correct the conditions that led to Robert's removal from the home. *See* N.C.G.S. § 7B-1111(a)(1), (2) (2019). Respondent filed an answer opposing termination on 12 May 2020.

¶ 9 Before the termination hearing occurred, the matter came back on for two additional permanency planning hearings on 6 July 2020 and 5 October 2020. The updated findings from the 6 July 2020 hearing were unfavorable to the parents. The trial court found that both parents reported unemployment. The court also found that the parents had acquired rental housing different from the trailer they were previously living in; that individuals with extensive criminal and child protective services histories were residing with the parents; and that DSS was advised that the parents "are under eviction status" because of their failure to pay rent since March 2020. The court reduced the parents' visitation to at least one hour of supervised visitation per month. Following the 5 October 2020 hearing, the court found that the parents resided in separate locations, but their accommodations were not stable; the parents reported unemployment; neither parent had visited Robert recently; and neither parent was compliant with the terms of their respective case plans.

¶ 10 The termination motion was heard on 9 November 2020. In an order entered on 23 November 2020, the trial court determined that grounds existed to terminate the parents' parental rights pursuant to N.C.G.S. § 7B-1111(a)(1) and (2) and that termination of the parents' parental rights was in Robert's best interests. Accordingly, the trial court terminated the parents' parental rights in Robert. Respondent appeals.[2]

II. Analysis

¶ 11 Termination of parental rights proceedings are conducted in two stages, an adjudicatory stage and a dispositional stage. N.C.G.S. §§ 7B-1109, -1110 (2019).

2. Robert's mother is not a party to this appeal.

> In the initial adjudicat[ory] stage, the trial court must determine whether grounds exist pursuant to N.C.G.S. § 7B-1111 to terminate parental rights. If it determines that one or more grounds listed in section 7B-1111 are present, the court proceeds to the dispositional stage, at which the court must consider whether it is in the best interests of the juvenile to terminate parental rights.

In re D.L.W., 368 N.C. 835, 842 (2016) (cleaned up). In his appeal, respondent challenges the trial court's determinations that grounds existed to terminate his parental rights in Robert at the adjudicatory stage and that termination was in Robert's best interests at the dispositional stage.

A. Adjudication

¶ 12 At the adjudicatory stage, the petitioner bears the burden of proving the existence of one or more grounds for termination under N.C.G.S. § 7B-1111(a) by "clear, cogent, and convincing evidence." N.C.G.S. § 7B-1109(e), (f) (2019). We review a trial court's adjudication of the existence of grounds to terminate parental rights "to determine whether the findings are supported by clear, cogent and convincing evidence and the findings support the conclusions of law." *In re E.H.P.*, 372 N.C. 388, 392 (2019) (quoting *In re Montgomery*, 311 N.C. 101, 111 (1984)). "A trial court's finding of fact that is supported by clear, cogent, and convincing evidence is deemed conclusive even if the record contains evidence that would support a contrary finding." *In re B.O.A.*, 372 N.C. 372, 379 (2019) (citing *In re Moore*, 306 N.C. 394, 403–04 (1982)). Unchallenged findings are deemed to be supported by the evidence and are binding on appeal. *In re Z.L.W.*, 372 N.C. 432, 437 (2019) (citing *Koufman v. Koufman*, 330 N.C. 93, 97 (1991)). "The trial court's conclusions of law are reviewable de novo on appeal." *In re C.B.C.*, 373 N.C. 16, 19 (2019) (citing *In re S.N.*, 194 N.C. App. 142, 146 (2008), *aff'd per curiam*, 363 N.C. 368 (2009)).

1. Findings of fact

¶ 13 In contesting the trial court's adjudication of grounds for termination, respondent raises challenges to the trial court's findings of fact. He first contends that the trial court failed to issue proper and sufficient findings of fact. Respondent argues that "[m]any" of the trial court's findings are "verbatim recitations from the allegations in the termination motion" and that most of the findings are "conclusory" and not sufficiently detailed to permit appellate review. We disagree.

¶ 14 As we have previously explained:

> Our Juvenile Code places a duty on the trial court as the adjudicator of the evidence. It mandates that the court shall take evidence, find the facts, and shall adjudicate the existence or nonexistence of any of the circumstances set forth in G.S. 7B-1111 which authorize the termination of parental rights of the respondent. Section 1A-1, Rule 52(a)(1) of the North Carolina General Statutes provides in pertinent part: In all actions tried upon the facts without a jury the court shall find the facts specially and state separately its conclusions of law. This Court has held: While Rule 52(a) does not require a recitation of the evidentiary and subsidiary facts required to prove the ultimate facts, it does require *specific findings* of the ultimate facts established by the evidence, admissions and stipulations which are determinative of the questions involved in the action and essential to support the conclusions of law reached.

In re T.N.H., 372 N.C. 403, 407–08 (2019) (cleaned up).

¶ 15 In the instant case, the trial court determined that grounds existed to terminate respondent's parental rights to Robert pursuant to N.C.G.S. § 7B-1111(a)(1) and (2) as follows:

> 41. . . . [T]he child is a neglected juvenile and there is a probability of neglect will continue for the forseeable [sic] future pursuant to the statute because the [respondent-]father has not addressed the issues that brought the child into care;
>
> . . . .
>
> 43. The [r]espondent[-]father has left his child in foster care for in excess of twelve months without showing to the satisfaction of the [c]ourt that reasonable progress under the circumstances has been made in correcting those conditions which led to the removal of the juvenile . . . .

In support of its determination that the statutory grounds existed to terminate respondent's parental rights, the court made the following findings:

> 13. The parents failed to properly supervise their child and custody was granted to Person County DSS

on September 11, 2018; the parents[‘] excessive and continued usage of controlled substances contributed to their lack of proper care and supervision of the child;

14. On September 11, 2018, Person County DSS was granted custody of this child, and after the parents lost custody, DSS offered services to them to work towards recovering custody of their child;

. . . .

23. The father has not availed himself of any services of DSS social workers to potentially take custody of his minor child;

24. The father has not fully utilized the services offered by DSS;

25. The father has not been willing to work with the DSS social workers to reunify himself with his child;

26. Visitation was offered weekly to the father;

27. That the father’s contact with the minor child has been limited to visitations for more than two years;

28. That the father has not provided regular care for his minor child for in excess of two years;

29. The father has not consistently taken steps to become clean and sober;

30. The father has not consistently taken steps to become and remain employed;

31. That the father has not provided any personal care or emotional support for this child during the entire period that the child has been in foster care;

32. That the parents have not attempted to create a bond between themselves and [Robert] since the child came into foster care;

33. DSS entered into a case plan with the parents, showing steps necessary for them to recover custody of their child;

> 34. The foster care social worker offered services to the [r]espondent parents to achieve such steps, as well as the goal of reunification;
>
> . . . .
>
> 36. The [r]espondent[-]father declined services as late as December 2, 2019;
>
> 37. That the [r]espondent parents have left this child in foster care for in excess of twenty-five (25) months without showing to the satisfaction of the [c]ourt that reasonable progress under the circumstances has been made in correcting those conditions which led to the removal of the juvenile . . . ;
>
> 38. That the actions of each of the [r]espondent parents are willful;
>
> 39. That the willfulness of each of the [r]espondent parents continues at this time.

¶ 16 Although the findings closely track the allegations in the termination motion, there are differences between the findings and the allegations, such as the lengths of time and distinctions between parents, that show the trial court did not merely copy the allegations from the termination motion. The modifications indicate the trial court independently reviewed and judged the evidence and issued findings based thereon. Moreover, the findings clearly set forth the trial court's reasoning for its adjudication of grounds to terminate respondent's parental rights based on his failure to engage in services offered by DSS, which resulted in the issues leading to Robert's removal and adjudication going uncorrected. We reject respondent's arguments that the trial court failed to issue proper and specific findings to allow for meaningful appellate review.

¶ 17 In addition to his general challenges to the findings, respondent challenges specific findings as not supported by the evidence.

¶ 18 Respondent first challenges finding of fact 13, which states that "[t]he parents failed to properly supervise their child" and "the parents[']excessive and continued usage of controlled substances contributed to their lack of proper care and supervision of the child." Respondent contends the finding is not supported by clear and convincing evidence to the extent it indicates he was responsible in any way for Robert's removal and adjudication. Relying on a finding in the first review order that "[Robert] was initially removed due to the actions of his mother," a finding

which was subsequently repeated in succeeding permanency-planning orders, respondent places the blame for Robert's removal solely on the mother. However, record evidence supports the trial court's finding that both parents contributed to Robert's removal and subsequent adjudication. The DSS social worker testified at the termination hearing about DSS's intervention with the family in May 2018 when DSS received a CPS report alleging improper supervision, injurious environment, and substance abuse after three-year-old Robert wandered from the home alone while respondent was asleep. The social worker's testimony indicated substance abuse concerns for both parents. DSS substantiated the report and began offering in-home services in June 2018, but efforts to engage the family to ensure Robert's safety were unsuccessful. Respondent acknowledges the social worker's testimony but discounts it on grounds that the record does not indicate the social worker was involved in Robert's removal, and that the social worker testified she could not remember if she attended the adjudication hearing. Nonetheless, the social worker testified that she had followed the case "[s]ince August of 2018," and the 25 September 2018 adjudication and disposition order was also introduced into evidence at the termination hearing without objection. In that order, the court found the "activities of the parents and/or conditions in the home of the parents [that] led to or contributed to the adjudication, and led to the [c]ourt's decision to remove custody from the parents," included: a CPS report that was accepted for improper supervision, injurious environment, and substance abuse on 14 May 2018 after Robert left the house while respondent was sleeping and a neighbor called 911; respondent's admission that household members had a history of cocaine use; respondent's positive test for prescribed and unprescribed controlled substances on 15 May 2018 and his admission to use exceeding the prescribed amount of his medications; and, after a second CPS report was accepted on 27 August 2018 following the mother's being charged with a DWI while Robert was in the car, a DSS home visit on 28 August 2018 which found the home to be in disarray. The record evidence supports finding of fact 13.

¶ 19 Respondent also challenges the trial court's findings that he did not participate in services offered by DSS. Specifically, he challenges finding of fact 34, that the social worker offered services to help him achieve the goals of his case plan, and findings of fact 23 through 25, that he did not avail himself of the services offered and was unwilling to work with DSS. He also challenges the trial court's more specific findings in finding of fact 29 that he did not consistently take steps to become clean and sober and in finding of fact 30 that he did not consistently take steps to

become and remain employed, and that he declined services as late as 2 December 2019 as stated in finding of fact 36.[3]

¶ 20 In unchallenged finding of fact 33, the trial court found that "DSS entered into a case plan with the parents, showing steps necessary for them to recover custody of their child." A report on the case plan and the parents' compliance and progress throughout the case was admitted into evidence at the termination hearing without objection, and the social worker offered testimony about the case plan and the parents' progress. The evidence shows the case plan included categories specifying steps the parents should take to address housing, employment, substance abuse, emotional and mental health, and parenting skills, with an additional requirement that respondent follow up with medical care for sleep issues. Respondent acknowledges DSS offered some services, but he contends that the reunification services were not significant, that there were few details in the evidence about the services offered and his ability to participate in the services, and that DSS made minimal efforts towards reunification. He asserts finding of fact 34 is not supported by the evidence. We are unpersuaded by respondent's arguments.

¶ 21 We first note that respondent has not specifically challenged finding of fact 14, which also found that "DSS offered services to [the parents] to work towards recovering custody of their child." This finding is therefore binding on appeal. *See In re Z.L.W.*, 372 N.C. at 437. Nonetheless, a review of the evidence shows that the case plan was developed in September 2018 and that DSS: (1) initially made referrals for comprehensive substance abuse treatment and a "Parents As Teachers" (PAT) program to address parenting skills; (2) requested random drug screens; and (3) established supervised visits between the parents and Robert. The case plan progress report indicates that DSS later provided the parents with a housing list to assist in their housing search. The evidence further shows that DSS staff met with the parents approximately every three months to review the case plan and to address additional concerns with the parents, which included their need for counseling, changes to their work schedules, and a plan of care for Robert. The social worker testified that she worked with the parents and local daycares to try to ameliorate problems with the parents' work schedules which impeded their ability to provide all necessary care for Robert, but no resolution was achieved. The evidence also indicates that after respondent did not

3. Respondent identifies the challenged finding as finding of fact 35; however, finding of fact 35 concerns the mother's choosing to decline services. Finding of fact 36 addresses respondent's choosing to decline services.

address his continued sleep issues at a medical appointment, the social worker contacted the respondent's doctor to get a neurology referral for a sleep study. The record evidence supports finding of fact 34 that services were offered to the respondent.

¶ 22 As to findings of fact 23 through 25 regarding respondent's engagement with services and DSS, respondent argues he was willing to work towards reunification and did work towards reunification. He emphasizes evidence of his efforts early in the case but also acknowledges evidence of his waning participation later on. Nevertheless, he contends the evidence does not support "the broad, conclusory finding that [he] would not work with DSS." Respondent accurately recounts the evidence. Notably, the social worker testified that both parents got off to a good start and made great progress in 2019, but that things took a turn for the worse between October and December of 2019.

¶ 23 Evidence was presented that respondent completed mental health and substance abuse assessments, which recommended individual therapy, group therapy, and a psychiatric appointment for possible medication management. In the case plan progress report for December 2018, DSS reported that respondent was scheduled to begin group therapy, have a psychiatric evaluation, and start the PAT program. By March 2019, DSS reported respondent was employed and would be working full-time in April; in addition, he was looking for housing, attending medication management, and visiting with Robert, although issues with tardiness for visits were reported. Respondent was directed to follow up with individual therapy. By June 2019, the parents had made a down payment on a place to live and were to move in by the end of the month, and DSS reported no recent concerns with substance abuse. The case plan progress report indicated respondent was participating in medication management and the PAT program. Respondent's progress appeared to continue through September 2019, but DSS reported the parents were consistently late for visits and respondent failed to disclose his continued sleep issues to his doctor. The social worker testified that she completed a home visit and determined the parents' trailer was appropriate and had space for Robert, but that the parents lost the trailer by the end of 2019. DSS reported that by December 2019, the parents were not involved in substance abuse treatment or services for emotional and mental health, were no longer in the PAT program, and were consistently late for visits, and respondent had not followed up on his medical issues.

¶ 24 The record shows that the primary permanent plan for Robert was changed to adoption in December 2019. Since that time, DSS reported missed visits and respondent's failure to engage at visits. Evidence

showed that the parents were no-shows for a requested drug screen on 3 June 2020 and that DSS reported no contact with the parents in the periods between DSS's reviews of the case plan in March, June, and September 2020. The social worker testified respondent cancelled his first neurology appointment but later reported that he had a video appointment; however, the social worker had been unable to verify this information. The social worker also testified regarding the circumstances as of the last permanency planning hearing in October 2020, approximately one month before the termination hearing. She stated the parents made minimal progress during the review period. She testified the parents had not established a residence for Robert to return to and had last reported to be living apart. She also testified that unemployment was reported in October 2020, and the parents had not been consistent with visitation at DSS. A visitation log introduced into evidence showed that the parents did not respond to DSS's attempts to schedule visits in July and August 2020. The social worker was unaware of further substance abuse treatment or emotional and mental health treatment by respondent in the months leading up to the termination hearing because he had not reported any treatment in the past year. She testified the parents had not been keeping in regular contact with DSS, explaining that "sometimes their voicemail is not set up and you can't leave a message," or "[w]e may leave a message and may not hear back from them." The social worker testified that the needs and problems that existed at the initiation of the case still existed for respondent.

¶ 25 Based on the above, we agree with respondent that the evidence does not support finding of fact 23 that he "has not availed himself of any services." We thus disregard that finding. *See In re L.H.*, 378 N.C. 625, 2021-NCSC-110, ¶ 14 (citing *In re J.M.*, 373 N.C. 352, 358 (2020) (disregarding factual findings not supported by the evidence)). But the evidence of respondent's waning engagement and progress since late 2019 and his lack of contact with DSS throughout 2020 supports findings of fact 24 and 25 that respondent "has not fully utilized the services offered" and "has not been willing to work with the DSS social workers."

¶ 26 In regards to the trial court's more specific findings, respondent contends that the trial court's finding of fact 29 that he has not consistently taken steps to become clean and sober is "mostly irrelevant and not supported" because he was prescribed medication for ADHD and his positive drug screens for amphetamines were thus not indicative of substance abuse, and because his positive screens for unprescribed opioids and marijuana occurred more than two years before the termination hearing. However, as detailed above, the record evidence indicates

concerns with respondent's use of controlled substances, including his excessive use of prescribed medications, that contributed to Robert's removal and adjudication as a neglected juvenile. Substance abuse was recognized as a concern from the initiation of the case and was addressed in respondent's case plan. Although the evidence shows respondent initially participated in some treatment for medication management, the evidence was that he had not reported any treatment in the year preceding the termination hearing and was a "no-show" for the most recent requested drug screen. Finding of fact 29 is supported by the record evidence.

¶ 27 Respondent also challenges finding of fact 36 that he "declined services as late as December 2, 2019."[4] This date corresponds with the December 2019 permanency-planning hearing, after which the trial court changed the primary permanent plan for Robert to adoption. Evidence presented at the termination hearing indicated that respondent was not in substance abuse treatment or participating in services for emotional and mental health issues in December 2019, and that he had not followed up with his medical issues. Respondent also did not attend DSS's quarterly case plan update as he had done on prior occasions. This evidence shows respondent was not engaged in his case plan in December 2019; however, it does not show that respondent refused any specific offer of services in December 2019. To the extent the trial court found respondent "declined" services in December 2019, we agree with respondent that the finding is not supported by the evidence and thus disregard the finding. *See In re L.H.*, ¶ 14.

¶ 28 Lastly, respondent challenges the portions of findings of fact 32 and 55 stating that "the parents have not attempted to create a bond between themselves and [Robert] since [Robert] came into foster care" and "[Robert] has absolutely no bond at all between himself and his parents."[5] We agree with respondent that the findings are not supported by the evidence. The evidence tended to show that DSS facilitated visits to maintain the bond between Robert and the parents. Although concerns were reported regarding the parents' repeated tardiness for visits and re-

4. Respondent identifies the challenged finding as finding of fact 35; however, finding of fact 35 concerns the mother's choosing to decline services. Finding of fact 36 addresses respondent's choosing to decline services.

5. Finding of fact 55 appears to be included among the findings made by the trial court to support its best-interests determination in the dispositional stage. Thus, it is binding if supported by competent evidence. *See In re C.B.*, 375 N.C. 556, 560 (2020) ("We review the trial court's dispositional findings of fact to determine whether they are supported by competent evidence." (quoting *In re J.J.B.*, 374 N.C. 787, 793 (2020))).

spondent's lack of engagement and tendency to fall asleep during visits, the evidence was that the parents consistently attended weekly visits in 2018 and 2019 and attended monthly visits in January and February 2020 before in-person visitation was suspended for several months because of the COVID-19 pandemic. Evidence was presented that the parents attended one additional visit with Robert at DSS in June 2020 but then failed to respond to attempts to schedule visits in July and August 2020. In addition to visits at DSS, the social worker testified that the parents had a relationship with the foster parents, which allowed them to have "visit[s] outside of the agency" and to participate in telephone and video calls with Robert. The social worker was unsure how many visits had taken place outside DSS's supervision, but she explained that the parents would see the foster parents and Robert when the parents attended church pre-pandemic, and the parents would communicate with the foster parents about Robert. The social worker testified that the parents have consistently visited with Robert through the foster family, noting that she was aware that the parents visited with Robert and the foster parents the week before the termination hearing to celebrate Robert's birthday. Furthermore, although there is no testimony specifically concerning the bond between respondent and Robert, contrary to finding of fact 55 that there was "absolutely no bond at all between [Robert] and his parents," the social worker testified a bond existed "between the child and mom." We hold the evidence does not support the challenged portions of findings of fact 32 and 55. Therefore, we disregard those challenged portions. *See In re L.H.*, ¶ 14.

¶ 29 Having reviewed respondent's challenges to the trial court's findings of fact, we next consider the trial court's adjudication of grounds for termination.

2. Neglect

¶ 30 A trial court may terminate parental rights for neglect if it concludes the parent has neglected the juvenile within the meaning of N.C.G.S. § 7B-101. N.C.G.S. § 7B-1111(a)(1). A neglected juvenile is defined, in pertinent part, as a juvenile "whose parent, guardian, custodian, or caretaker does not provide proper care, supervision, or discipline . . . or who 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 L.H., ¶ 10 (quoting *In re R.L.D.*, 375 N.C. 838, 841 (2020) (cleaned up)); *see also In re Ballard*, 311 N.C. 708, 715 (1984) ("[E]vidence 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. The 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."). This Court has held 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 (2020) (quoting *In re M.J.S.M.*, 257 N.C. App. 633, 637 (2018)).

¶ 31 Here the trial court determined in finding of fact 41 that grounds existed to terminate respondent's parental rights pursuant to N.C.G.S. § 7B-1111(a)(1) "as the child is a neglected juvenile and there is a probability of [sic] neglect will continue for the forseeable [sic] future . . . because the father has not addressed the issues that brought the child into care." The trial court additionally concluded that respondent had neglected Robert, and that the neglect was likely to continue in the future.

¶ 32 Respondent argues that the evidence and the findings of fact do not support the trial court's determination that there was a likelihood of repetition of neglect. His argument is largely based on his assertion that he was not responsible for Robert's removal and prior adjudication as a neglected juvenile, which we have rejected, and his challenges to the findings of fact.

¶ 33 The record evidence and the trial court's findings which are supported by the evidence in this case establish that Robert was removed from the home and adjudicated neglected based on both parents' failure to properly supervise and provide proper care to Robert, which was related to the parents' abuse of controlled substances. DSS developed a case plan with respondent that identified matters he needed to address to regain custody of Robert, including issues related substance abuse, employment, parenting skills, mental health, housing, and medical care for sleep problems, and DSS offered services to respondent. However, respondent only partially cooperated with services and with DSS. As

a result, the conditions that existed when Robert was removed from the home and contributed to Robert's adjudication as a neglected juvenile continued to exist at the time of the termination hearing. We hold that the evidence and the findings that respondent failed to correct the issues that contributed to Robert's prior adjudication as a neglected juvenile support the trial court's determination that there was a likelihood of repetition of neglect. Accordingly, the trial court did not err in adjudicating neglect as a ground for termination of respondent's parental rights pursuant to N.C.G.S. § 7B-1111(a)(1).

¶ 34 Because "an adjudication of any single ground in N.C.G.S. § 7B-1111(a) is sufficient to support a termination of parental right," *In re E.H.P.*, 372 N.C. at 395 (citing *In re Moore*, 306 N.C. at 404), we need not address respondent's challenge to the trial court's adjudication of grounds for termination pursuant to N.C.G.S. § 7B-1111(a)(2).

B. Disposition

¶ 35 If the trial court determines that at least one ground exists to terminate parental rights under N.C.G.S. § 7B-1111(a), "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 (first citing *In re Young*, 346 N.C. 244, 247 (1997); and then citing N.C.G.S. § 7B-1110). In determining whether termination of parental rights is in the juvenile's best interests,

> the court shall consider the following criteria and make written findings regarding the following that are relevant:
>
> (1) The age of the juvenile.
>
> (2) The likelihood of adoption of the juvenile.
>
> (3) Whether the termination of parental rights will aid in the accomplishment of the permanent plan for the juvenile.
>
> (4) The bond between the juvenile and the parent.
>
> (5) The quality of the relationship between the juvenile and the proposed adoptive parent, guardian, custodian, or other permanent placement.
>
> (6) Any relevant consideration.

N.C.G.S. § 7B-1110(a) (2019).

¶ 36 "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) (citing *In re D.L.W.* 368 N.C. at 842). "[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) (quoting *State v. Hennis*, 323 N.C. 279, 285 (1988)).

¶ 37 In this case, the trial court issued findings regarding each of the relevant criteria. The court found that at the time of the termination proceeding, Robert was five years old and had been in foster care for twenty-five months; that the likelihood of Robert's adoption was great, as Robert's foster parents planned to file an adoption proceeding as soon as he is legally free for adoption; that the permanent plan for Robert was adoption, and termination of parental rights was the last impediment in the accomplishment of the permanent plan; that any bond between Robert and respondent was not significant;[6] that the foster parents were very involved with Robert, and the bond between Robert and the foster parents was very strong; and that the foster parents had sufficient means to care for Robert. Respondent does not challenge any of these findings, and these findings are thus binding on appeal. *See In re A.K.O.*, 375 N.C. 698, 702 (2020) ("Dispositional findings not challenged by respondents are binding on appeal." (citing *In re Z.L.W.*, 372 N.C. at 437)).

¶ 38 Respondent instead contends the trial court abused its discretion in making its best-interests determination because the court "misapprehended two key points of law." Neither argument directly addresses the trial court's written findings or its consideration of the findings in support of its best-interests determination.

¶ 39 Respondent first argues the trial court erred when it set adoption as a concurrent permanent plan for Robert in the 3 February 2020 order from the 2 December 2019 permanency-planning hearing. Respondent directs this Court's attention to the trial court's finding in the permanency-planning review order that "[g]uardianship would not be an appropriate plan, as there are no identified relatives to fill that need," and he argues the trial court misapprehended the law because it is not necessary that a guardian be a relative. *See* N.C.G.S. § 7B-600(b) (2019) (contemplating the "appointment of a relative or other suitable person as guardian"). Respondent contends guardianship would have been the "ideal situation" in this case.

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6. We do not consider the challenged portion of finding of fact 55 that there is absolutely no bond between Robert and the parents because we have determined that portion of the finding is not supported by the evidence.

¶ 40 Although respondent notes that there was no right of appeal from the order changing Robert's permanent plan, *see* N.C.G.S. § 7B-1001(a1) (2019), he argues the issue is properly before this Court pursuant to N.C.G.S. § 1-278 because the trial court had to consider Robert's permanent plan in finding that termination of parental rights would aid in accomplishing the permanent plan. *See* N.C.G.S. § 1-278 (2019) ("Upon an appeal from a judgment, the court may review any intermediate order involving the merits and necessarily affecting the judgment."). But the courts have long required a timely objection when review of an intermediate order is later sought pursuant to N.C.G.S. § 1-278. *See Tinajero v. Balfour Beatty Infrastructure, Inc.*, 233 N.C. App. 748, 757 (2014) (citing *Brooks v. Wal-Mart Stores, Inc.*, 139 N.C. App. 637, 641–42 (2000)). The record in this case contains no indication that respondent previously objected to, or contested, the trial court's exclusion of guardianship as a permanent plan for Robert based on any alleged misapprehension of the law. The challenged finding was initially made months before the termination hearing, and similar findings were repeated in subsequent permanency-planning orders. Therefore, we do not consider respondent's collateral attack on the permanency-planning order.

¶ 41 Moreover, we note that this Court has rejected arguments regarding the consideration of dispositional alternatives at this stage of a termination proceeding. *See In re Z.L.W.*, 372 N.C. at 438 (rejecting a parent's argument that the trial court should have considered dispositional alternatives, such as granting guardianship or custody to the foster family, in order to leave a legal avenue for the children to maintain a relationship with the parent). Although the trial court may consider alternative dispositions, *see In re S.D.C.*, 373 N.C. 285, 290 (2020) (explaining that the trial court "may treat the availability of a relative placement as a 'relevant consideration' [under N.C.G.S. § 7B-1110(a)(6)] in determining whether termination of a parent's parental rights is in the child's best interests"), it is not required to do so.

> While the stated policy of the Juvenile Code is to prevent the unnecessary or inappropriate separation of juveniles from their parents, 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.

In re Z.L.W., 372 N.C. at 438 (cleaned up). Accordingly, when it is clear from the termination order that the trial court considered the relevant

dispositional criteria, made proper findings, and made a reasoned determination that termination of parental rights was in the juvenile's best interest, as the trial court did in the instant case, an appellate court should not second-guess the trial court's best-interests determination.

¶ 42 Lastly, respondent argues the trial court misapprehended the legal effect of termination of parental rights when it stated

> Furthermore, I'm going to make a finding that this termination serves a dual purpose of looking after the best interest of the minor child by being in a more stable environment while, at the same time, allowing him to keep contact with his biological parents, which is not something that we see every day.

Because "[a]n order terminating the parental rights completely and permanently terminates all rights and obligations of the parent to the juvenile and of the juvenile to the parent arising from the parental relationship," N.C.G.S. § 7B-1112 (2019), respondent contends the court's statement amounts to a misapprehension of the law and an abuse of discretion in the best-interests determination.

¶ 43 Despite the trial court's statement at the termination hearing, the court made no such finding in the termination order. As detailed above, the trial court made findings on the relevant criteria in N.C.G.S. § 7B-1110(a) in support of its determination that termination of parental rights was in Robert's best interests. Additionally, we do not believe the court's statement amounts to a misapprehension of the law. There was no indication that the trial court misunderstood the legal effect of termination of parental rights. The court's statement instead specifically acknowledges the unique circumstances in this case, in which the foster father, who was also the prospective adoptive father, testified to the family's openness to facilitating an ongoing connection between Robert and his biological parents, unless it was unsafe to do so. We understand the court's statement to be that termination of parental rights was in Robert's best interests, but that termination in this case did not necessarily foreclose the possibility that Robert would keep in contact with his biological parents given the foster parents' values. Accordingly, we reject respondent's argument that the trial court misapprehended the legal effect of terminating his parental rights.

¶ 44 A review of the termination order shows that the trial court considered the relevant dispositional criteria in N.C.G.S. § 7B-1110(a) and made a reasoned determination based on those criteria that termination of respondent's parental rights in Robert was in Robert's best interests.

Because the trial court did not abuse its discretion, we uphold the trial court's best-interests determination.

III. Conclusion

¶ 45 The trial court did not err in adjudicating neglect as a ground for termination pursuant to N.C.G.S. § 7B-1111(a)(1) and did not abuse its discretion in determining that termination of respondent's parental rights was in Robert's best interests. Therefore, we affirm the trial court's termination order.

AFFIRMED.

IN THE MATTER OF S.G.S.

No. 169A21

Filed 17 December 2021

Termination of Parental Rights—no-merit brief—multiple grounds for termination

The trial court's order terminating a mother's parental rights to her daughter on the grounds of neglect and failure to make reasonable progress was affirmed where her counsel filed a no-merit brief and the termination order was supported by clear, cogent, and convincing evidence and based upon proper legal grounds.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from orders entered on 29 February 2021 by Judge J. Calvin Chandler in District Court, Brunswick County. This matter was calendared for argument in the Supreme Court on 12 November 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.

Jane R. Thompson for petitioner-appellee Brunswick County Department of Social Services.

Brian C. Bernhardt for appellee guardian ad litem.

Sydney Batch for respondent-appellant mother.

PER CURIAM.

¶ 1 Respondent-mother Sally C. has had a lengthy history of substance abuse. On 6 June 2009, S.G.S.[1] was born to respondent-mother and the father, Sean S.[2] After receiving a report that Sarah, who was nearly two years old, had been seen walking around a parking lot without proper supervision at a time when respondent-mother appeared to be under the influence of an impairing substance, the Brunswick County Department of Social Services filed a petition on 21 March 2011 alleging that Sarah was a neglected and dependent juvenile and obtained the entry of an order placing Sarah in nonsecure custody. On 19 April 2011, respondent-mother consented to the entry of an adjudication order signed by Judge Sherry Dew Tyler in which Sarah was found to be a neglected juvenile on the basis of respondent-mother's substance abuse. In a separate dispositional order, Judge Tyler ordered respondent-mother to comply with her case plan, which required respondent-mother to obtain a substance abuse assessment and comply with all resulting recommendations, attend all substance abuse-related appointments and therapy sessions, participate in random drug screens, and take no medications that had not been prescribed for her. As a result of the fact that respondent-mother had actively attempted to satisfy the requirements of her case plan, Sarah was returned to respondent-mother's physical custody on 14 June 2011. On or about 27 September 2011, Judge Tyler signed an order returning Sarah to respondent-mother's legal custody as well.

¶ 2 On 10 June 2012, respondent-mother was charged with driving while subject to an impairing substance and driving while license revoked. Following a home visit conducted by two social workers on 19 June 2012, during which Sarah was outside the residence without proper supervision, respondent-mother was impaired, and respondent-mother admitted that she had sold her prescription medications in exchange for care for Sarah, DSS filed a second petition alleging that Sarah was a neglected and dependent juvenile and obtained the entry of an order placing Sarah in nonsecure custody. After respondent-mother acknowledged that she was unable to provide proper care for Sarah or identify anyone who could provide such care, Judge Tyler entered orders on 13 August 2012 finding Sarah to be a neglected juvenile and ordering respondent-mother to comply with the provisions of her case plan,

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1. S.G.S. will be referred to throughout the remainder of this opinion as Sarah, which is a pseudonym used for ease of reading and to protect the juvenile's privacy.

2. Although the father was involved in the proceedings that led to the entry of the challenged termination orders, our opinion focuses upon the situation with respect to respondent-mother given that she is the only one of Sarah's parents who has challenged the lawfulness of the trial court's termination orders on appeal to this Court.

which required respondent-mother to enter into a long-term in-patient substance abuse treatment facility, attend all substance abuse-related appointments and therapy sessions while awaiting admission to a long-term treatment facility, participate in random drug screens, refrain from taking any medications in the absence of a prescription, attend parenting classes and demonstrate the ability to use the skills that she had learned in those classes, and visit with Sarah.

¶ 3 Although respondent-mother refused to enter in-patient substance abuse treatment, she did agree to an alternative treatment proposal and was subsequently ordered to complete intensive outpatient substance abuse treatment. In an order entered on 15 December 2012 following a review hearing held on 27 November 2012, Judge Tyler authorized Sarah's trial placement in respondent-mother's home. On 17 April 2013, Judge Tyler authorized Sarah's return to respondent-mother's custody.

¶ 4 On 13 January 2014, DSS filed yet another petition alleging that Sarah was a neglected and dependent juvenile and obtained the entry of an order taking Sarah into nonsecure custody, with the filing of this petition having been precipitated by respondent-mother's 9 January 2014 arrest for possessing heroin, misdemeanor possession of controlled substances, driving while impaired, resisting a public officer, misdemeanor child abuse, and possession of drug paraphernalia. On 26 March 2014, Judge Tyler (now Prince) entered an adjudication order finding that Sarah was a neglected and dependent juvenile based upon respondent-mother's ongoing substance abuse problems. In a separate dispositional order entered on the same day, Judge Prince ordered respondent-mother to work with DSS to develop an appropriate case plan, with the plan to which respondent-mother eventually agreed having required her to enter in-patient substance abuse treatment, attend substance abuse group meetings until she actually entered in-patient treatment, attend all recommended substance abuse-related appointments and therapy sessions following her discharge from in-patient treatment, participate in random drug screens, refrain from taking any medications other than those that had been prescribed for her, attend parenting classes and demonstrate the ability to use the skills that she had learned in those classes, visit with Sarah and attend the child's medical and school-related appointments, provide financial support for Sarah, and seek employment following her release from in-patient treatment. After respondent-mother tested positive for the presence of drugs in April and May 2014, had been asked to leave the in-patient treatment facility, and was incarcerated during the months between August and December 2014, Judge Prince authorized DSS to cease making further efforts to reunify Sarah with

respondent-mother and directed DSS to begin a trial home placement during which Sarah would live with her father.

¶ 5 In April 2015, respondent-mother was released from incarceration and the father relapsed. On 20 May 2015, DSS filed a fourth juvenile petition in which it alleged that Sarah was a neglected and dependent juvenile in light of the fact that the father had left his employment and was having difficulties with substance abuse. On or about 26 June 2015, Judge W. Fred Gore entered an order changing the permanent plan for Sarah to one of guardianship or adoption and authorizing DSS to cease attempting to reunify Sarah with the father and prohibiting either parent from visiting with Sarah. Subsequently, DSS learned that respondent-mother had relapsed.

¶ 6 After realizing that she was pregnant, respondent-mother entered a one-year residential substance abuse treatment program for pregnant women on 16 September 2015. In the meantime, Sarah was admitted to Holly Hill Hospital with a diagnosis of post-traumatic stress disorder, reactive attachment disorder, and alienation-deficit/hyperactivity disorder. On 4 February 2016, respondent-mother relinquished her parental rights in Sarah in favor of respondent-mother's brother. However, given that respondent-mother's brother was unable to adopt Sarah, Judge Gore made respondent-mother's brother Sarah's guardian on 2 September 2016.

¶ 7 At some point after 2 September 2016, respondent-mother regained physical custody of Sarah in violation of the guardianship order, at which point Sarah began missing school and respondent-mother refused to work with the personnel at Sarah's school. In the aftermath of an incident in which respondent-mother was found in an unresponsive condition by Sarah's speech therapist, DSS filed a fifth petition alleging that Sarah was a neglected and dependent juvenile and obtained the entry of an order taking Sarah into nonsecure custody. After a hearing held on 9 July 2019, Judge Gore entered an order on or about 31 July 2019 finding that Sarah was a neglected and dependent juvenile and terminating the brother's guardianship. Although respondent-mother entered into yet another case plan, pursuant to which she was obligated to address her substance abuse difficulties, emotional and mental health problems, deficient parenting skills, and housing and employment-related issues, on 13 May 2019, her participation in substance abuse treatment became "stagnant" and the frequency of the treatment that she needed did not diminish. As a result, Judge Gore entered an order on 18 December 2019 changing the permanent plan for Sarah to a primary plan of adoption and a secondary plan of guardianship and authorizing DSS to cease making any effort to reunify Sarah with either parent. In the same month, respondent-mother was incarcerated yet again.

¶ 8 On or about 15 July 2020, DSS filed a petition alleging that respondent-mother's parental rights in Sarah were subject to termination on the basis of neglect, N.C.G.S. § 7B-1111(a)(1) (2019), and failure to make reasonable progress toward correcting the conditions that had led to Sarah's removal from the family home, N.C.G.S. § 7B-1111(a)(2),[3] and that the termination of respondent-mother's parental rights would be in Sarah's best interests.[4] The issues raised by the termination petition came on for hearing before the trial court at the 28 and 29 January 2021 sessions of District Court, Brunswick County. At the time of the termination hearing, respondent-mother remained incarcerated. On 29 February 2021, the trial court entered an adjudication order finding that respondent-mother's parental rights in Sarah were subject to termination on the basis of neglect, N.C.G.S. § 7B-1111(a)(1), and failure to make reasonable progress toward correcting the conditions that had led to Sarah's removal from the family home, N.C.G.S. § 7B-1111(a)(2). On the same date, the trial court entered a dispositional order concluding that the termination of respondent-mother's parental rights would be in Sarah's best interests and terminating respondent-mother's parental rights in Sarah.[5] Respondent-mother noted an appeal to the Court of Appeals from the trial court's termination order.[6]

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3. Although DSS asserted that Sarah was a dependent juvenile as defined in N.C.G.S. § 7B-101(9), it did not expressly allege that respondent-mother's parental rights in Sarah were subject to termination on the basis of dependency, N.C.G.S. § 7B-1111(a)(6) (2019).

4. In spite of the fact that the petition correctly listed Sarah's name in the caption and although a copy of Sarah's birth certificate was attached to the termination petition, DSS alleged in Paragraph 3 of the termination petition that the name of the child at issue in this case was S.K.L. After recognizing this error, the parties executed a pre-hearing stipulation in which, among other things, they consented to an amendment to Paragraph No. 3 of the termination petition to correctly state Sarah's name.

5. In addition, the trial court terminated the father's parental rights in Sarah. In view of the fact that the father has not sought appellate review of the trial court's termination orders by this Court, we will refrain from discussing the provisions of the trial court's termination orders as they relate to the father any further in this opinion.

6. Although respondent-mother's notice of appeal, which indicated that her appeal had been taken to the Court of Appeals rather than this Court, was defective, neither DSS nor the guardian ad litem has sought the dismissal of respondent-mother's appeal or lodged any other challenge to the Court's jurisdiction over this case. As a result, we elect, in the exercise of our discretion, to treat the record on appeal as a petition seeking the issuance of a writ of certiorari and to allow that petition, *Anderson v. Hollifield*, 345 N.C. 480, 482 (1997) (holding that "an appellate court [has] the authority to review the merits of an appeal by certiorari even if the party has failed to file notice of appeal in a timely manner"), in order to reach the merits of respondent-mother's challenge to the trial court's termination orders.

¶ 9 Respondent-mother's appellate counsel has filed a no-merit brief on her client's behalf. In that brief, respondent-mother's appellate counsel identified a number of issues that could potentially provide a basis for challenging the lawfulness of the trial court's termination order, including whether the trial court had erred by determining that respondent-mother's parental rights in Sarah were subject to termination on the basis of neglect pursuant to N.C.G.S. § 7B-1111(a)(1) and whether the trial court abused its discretion in determining that the termination of respondent-mother's parental rights would be in Sarah's best interests. Ultimately, however, the respondent-mother's appellate counsel concluded that there was no non-frivolous basis for challenging the lawfulness of the trial court's determination that respondent-mother's parental rights in Sarah were subject to termination on the basis of neglect, N.C.G.S. § 7B-1111(a)(1),[7] and that, since the trial court's termination orders contained findings of fact that were supported by the record evidence relating to the relevant dispositional factors delineated in N.C.G.S. § 7B-1110(a) and since the trial court's findings of fact provided adequate support for its dispositional decision,[8] there was no non-frivolous basis for challenging the lawfulness of the trial court's decision that the termination of respondent-mother's parental rights would be in Sarah's best interests. Although respondent-mother's appellate counsel communicated with respondent-mother for the purpose of

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7. Among other things, appellate counsel for respondent-mother noted that, while respondent-mother had experienced brief periods of sobriety and had plans to maintain sobriety and obtain employment, she remained incarcerated at the time of the termination hearing; had not successfully completed a number of court-ordered services, including substance abuse treatment; had regularly failed to submit to random drug screens and did not take her medications as prescribed; and had failed to show that she could provide proper care for Sarah despite completing parenting classes and having had the child returned, either legally or physically, to her custody on three different occasions.

8. In concluding that the trial court did not abuse its discretion in concluding that the termination of respondent-mother's parental rights would be in Sarah's best interests, appellate counsel for respondent-mother pointed out that Sarah was two years old at the time that she had been initially removed from her parents' custody; that she had been in respondent-mother's custody on three different occasions after her initial removal from the family home; that Sarah had experienced eleven placements; that her mental health had deteriorated to the point that she had been diagnosed with post-traumatic stress disorder and reactive attachment disorder and had been committed to a mental health facility on one occasion; that, even though Sarah was not in a pre-adoptive placement at the time of the termination hearing, DSS believed that an adoptive home could be found for Sarah; that Sarah wanted to be adopted if she could not return to respondent-mother's care; that, as a result of her incarceration, respondent-mother had not visited with Sarah for months as of the date of the termination hearing; and that respondent-mother had only visited Sarah sporadically before entering custody.

advising respondent-mother that she had a right to file pro se written arguments for the Court's consideration and provided respondent-mother with the materials necessary to make such a filing, respondent-mother failed to submit any written arguments to the Court. Both DSS and the guardian ad litem filed briefs expressing agreement with the conclusion reached by respondent-mother's appellate counsel that the record did not disclose the existence of any arguably meritorious basis for challenging the lawfulness of the trial court's termination orders 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-mother's appellate counsel in this case in light of the record and the applicable law, we are satisfied that the findings of fact contained in the trial court's termination orders have ample record support and that the trial court did not err in the course of determining that respondent-mother's parental rights in Sarah were subject to termination and that the termination of respondent-mother's parental rights would be in Sarah's best interests. As a result, we affirm the trial court's orders terminating respondent-mother's parental rights in Sarah.

AFFIRMED.

IN RE S.J.

[379 N.C. 478, 2021-NCSC-157]

IN THE MATTER OF S.J., V.J., L.J., R.J., C.J.

No. 275A21

Filed 17 December 2021

Termination of Parental Rights—no-merit brief—multiple grounds for termination

The trial court's order terminating a father's parental rights to his five children on the grounds of neglect, failure to make reasonable progress, and failure to pay a reasonable portion of the cost of caring for the children was affirmed where his counsel filed a no-merit brief and the termination order was supported by clear, cogent, and convincing evidence and based upon proper legal grounds.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from an order entered on 21 April 2021 by Judge Angelica C. McIntyre in District Court, Robeson County. This matter was calendared for argument in the Supreme Court on 12 November 2021 but determined on the record and briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

Sydney Batch for respondent-appellant father.

J. Edward Yeager, Jr. for petitioner-appellee Robeson County Department of Social Services.

Carrie A. Hanger for appellee guardian ad litem.

EARLS, Justice.

¶ 1 Respondent appeals from an order entered on 21 April 2021 by the District Court, Robeson County, terminating his parental rights in his minor children "Sarah," "Victor," "Leo," "Ryder," and "Colby."[1] After careful review, we affirm.

¶ 2 Respondent become involved with the Robeson County Department of Social Services (DSS) due to reports that he was violent with the children's mother in June 2012. In April 2014, he was arrested following a

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

high-speed car chase. Two of respondent's children were in the vehicle when he was apprehended, and respondent had been "drinking all day." After conducting a hearing on 21 January 2015, the trial court entered an order adjudicating the children to be neglected juveniles based on both parents' substance abuse issues and allegations of domestic violence. The children were eventually returned to their mother's custody. After a hearing on 6 February 2019, the children were again adjudicated to be neglected, again based on substance abuse issues and allegations of domestic violence involving both parents.

¶ 3 Respondent entered into a case plan. Initially, he made significant progress, and in June 2019, the children were returned to the care of respondent and their mother on a trial basis. However, in September, the placement was disrupted after DSS received a referral alleging ongoing substance abuse and domestic violence issues involving both parents. On 21 May 2020, DSS filed a petition to terminate both parents' parental rights.

¶ 4 The trial court conducted a hearing on DSS's termination petition on 18 February 2021. Respondent was not present. At the conclusion of the hearing, the trial court entered an order concluding that grounds existed to terminate respondent's parental rights on the grounds of neglect, N.C.G.S. § 7B-1111(a)(1), willful failure to make reasonable progress to correct the conditions which led to the juveniles' removal, N.C.G.S. § 7B-1111(a)(2), and willful failure to pay a reasonable portion of the cost of caring for the juveniles, N.C.G.S. § 7B-1111(a)(3). The court further concluded that it was in the best interests of all five juveniles to terminate respondent's parental rights. After the order terminating parental rights was entered, respondent timely filed a notice of appeal.[2]

¶ 5 On appeal, counsel for respondent filed a no-merit brief on her client's behalf under Rule 3.1(e) of the North Carolina Rules of Appellate Procedure. Counsel advised respondent 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 has not submitted written arguments to this Court.

¶ 6 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). In this case, respondent's counsel represented that

2. The trial court also terminated the parental rights of the juveniles' mother and an unknown father. Neither the juveniles' mother nor the unknown father timely filed a notice of appeal of the termination order, and thus they are not parties to this appeal.

after thoroughly reviewing the record, she had determined that "there is no issue of merit on which to base an argument for relief and that this appeal would be frivolous."

¶ 7 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, -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 is tasked with determining whether termination of parental rights is in the best interests of the juvenile. *See, e.g.*, *In re E.S.*, 378 N.C. 8, 2021-NCSC-72, ¶ 11. "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 R.L.D.*, 375 N.C. 838, 840 (2020) (cleaned up). "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).

¶ 8 With regard to the trial court's adjudicatory order, counsel for respondent acknowledges that competent evidence supports the trial court's findings of fact and that these findings of fact support the trial court's conclusion of law that respondent neglected the juveniles within the meaning of N.C.G.S. § 7B-1111(a)(1). A petitioner may establish that grounds exist to terminate a respondent-parent's parental rights on the grounds of neglect in one of two ways. First, if the respondent-parent maintained custody of the juvenile until near to the time that termination proceedings were initiated, the petitioner must prove that the respondent-parent was neglecting the juvenile as that term is defined in N.C.G.S. § 7B-101(15). *See In re R.L.D.*, 375 N.C. 838, n.3 (2020). Second, if the juvenile "has not been in the custody of the parent for a significant period of time prior to the termination hearing," the petitioner must "make[ ] a showing of past neglect and a likelihood of future neglect by the parent." *In re N.D.A.*, 373 N.C. 71, 80 (2019) (cleaned up).

¶ 9 Here, the trial court order established that all five juveniles had previously been adjudicated to be neglected juveniles. In the years following this adjudication, respondent was again arrested for driving while intoxicated with his children in the vehicle. In 2018 alone, he was charged with driving while intoxicated on four occasions. Respondent was provided the opportunity to care for his children during a "trial home placement" by order of the trial court on 27 June 2019. However, on 11 September 2019 DSS received a referral alleging ongoing substance abuse and domestic violence issues involving both parents. Respondent admitted to DSS that he was still smoking marijuana. He subsequently tested

positive for marijuana and gabapentin, an anticonvulsant prescription medication. This evidence supports the trial court's finding that there existed "a high likelihood that the neglect would continue" if the children were returned to respondent's care. The trial court's findings regarding past neglect and the likelihood of future neglect are sufficient to support its conclusion that grounds existed to terminate respondent's parental rights on the basis of neglect.

¶ 10 "Because only one ground is needed to support termination," *In re A.L.*, 378 N.C. 396, 2021-NCSC-92, ¶ 15, we turn to our review of the trial court's dispositional findings and conclusions. At the dispositional stage of a termination proceeding, the trial court is tasked with deciding "whether terminating the parent's rights is in the juvenile's best interest." N.C.G.S. § 7B-1110. Subsection 7B-1110 further provides that the trial court

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

Id.

¶ 11 With regard to the trial court's dispositional order, counsel for respondent acknowledges that the trial court addressed the criteria set forth in N.C.G.S. § 7B-1110 and that, based on the trial court's factual findings which are supported by evidence in the record, the trial court did not abuse its discretion in concluding that it was in the juveniles' best interests to terminate respondent's parental rights. Here, the trial court found that all five children were residing in appropriate placements where they were bonded to their caretakers, that the likelihood the children would be adopted was "extremely high," that there was "no bond" between the children and respondent, and that termination of re-

spondent's parental rights would "help achieve the permanent plan [of adoption] for the minor children." As counsel for respondent acknowledges, these findings are supported by the record and address the criteria provided under N.C.G.S. § 7B-1110. Accordingly, we conclude that "the trial court's decision on this matter was not so manifestly unsupported by reason as to constitute an abuse of discretion." *In re E.S.*, 378 N.C. 8, 2021-NCSC-72, ¶ 24.

¶ 12 Having considered the entire record and the issues identified in the no-merit brief, we affirm the trial court's order terminating respondent's parental rights.

AFFIRMED.

IN THE MATTER OF T.I.S., E.J.S., K.J.S.

No. 320A21

Filed 17 December 2021

Termination of Parental Rights—no-merit brief—multiple grounds for termination

The termination of a mother's parental rights to her three children on multiple grounds was affirmed where her counsel filed a no-merit brief, the trial court's order was supported by clear, cogent, and convincing evidence, and the termination order was based on proper legal grounds.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from an order entered on 10 May 2021 by Judge Nathaniel M. Knust in District Court, Cabarrus County. This matter was calendared for argument in the Supreme Court on 6 December 2021 but determined on the record and briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

Hartsell & Williams, PA, by E. Garrison White, for petitioner-appellee Cabarrus County Department of Human Services.

Manning, Fulton & Skinner, P.A., by Michael S. Harrell, for appellee Guardian ad Litem.

IN RE T.I.S.

[379 N.C. 482, 2021-NCSC-158]

Richard Croutharmel for respondent-appellant mother.

NEWBY, Chief Justice.

¶ 1 Respondent-mother appeals from the trial court's order terminating her parental rights to T.I.S. (Timmy), E.J.S. (Eddie), and K.J.S. (Kenny).[1] Counsel for respondent has filed a no-merit brief under Rule 3.1(e) of the North Carolina Rules of Appellate Procedure. We conclude that the issues identified by counsel in respondent's brief as arguably supporting the appeal are meritless and therefore affirm the trial court's order.

¶ 2 This case arises from a termination action filed by Cabarrus County Department of Human Services (DHS). Timmy, Eddie, and Kenny were born on 25 March 2011, 23 August 2014, and 20 October 2019, respectively. Eddie's father was deceased at the time of the termination hearing; the fathers of Timmy and Kenny are unknown. On 23 May 2019, DHS obtained nonsecure custody of Timmy and Eddie and filed juvenile petitions alleging they were neglected and dependent juveniles. The petitions alleged that respondent continually tested positive for a variety of different drugs, that Timmy was routinely late or absent from school, and that Eddie's teeth had severe decay and appeared to be broken off. Timmy, Eddie, and their older brother[2] were adjudicated neglected and dependent juveniles on 2 October 2019. When Kenny was born several weeks later, he tested positive for methadone and opiates. DHS then filed a juvenile petition alleging that Kenny was a neglected juvenile. Kenny was adjudicated a neglected juvenile on 21 February 2020 and placed in DHS custody.

¶ 3 Respondent's reunification case plan included a substance abuse assessment, signing releases for DHS to access her service provider records, random drug screens, a psychological parenting evaluation, obtaining and maintaining housing and income sufficient for herself and the children, and maintaining contact with DHS. Respondent completed a substance abuse assessment on 21 January 2020, which recommended that she attend a forty-hour program with individual counseling. After attending only one session, respondent was discharged from the program for missing several consecutive sessions. Respondent later tested positive for morphine, methadone, and tramadol. Respondent contin-

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

2. The older brother is not a part of this appeal.

ued to live with her father in the home from which the children were removed, failed to secure steady employment, and stopped participating in meetings with DHS after March 2020.

¶ 4 On 4 November 2020, DHS filed motions to terminate respondent's parental rights to Timmy, Eddie, and Kenny. Following a termination hearing on 18 March 2021, the trial court entered an order on 10 May 2021 in which it concluded grounds existed to terminate respondent's parental rights on the grounds of neglect, willfully leaving the juveniles in foster care or placement outside the home without correcting the conditions which led to their removal, willfully failing to pay a reasonable portion of the costs of care for the juveniles, dependency, and willful abandonment. N.C.G.S. §§ 7B-1111(a)(1), (2), (3), (6), (7) (2019). The trial court further concluded it was in the juveniles' best interests that respondent's parental rights be terminated. Accordingly, the trial court terminated respondent's parental rights to Timmy, Eddie, and Kenny.

¶ 5 Counsel for respondent filed a no-merit brief on his client's behalf under Rule 3.1(e) of the Rules of Appellate Procedure. Counsel identified two issues that could arguably support an appeal but also explained why he believed these issues lack merit. Specifically, counsel argues respondent has made some efforts to improve her situation for the children's benefit but concedes that he can muster no non frivolous argument for refuting the trial court's adjudication on the ground of N.C.G.S. § 7B-1111(a)(2). Counsel also states that he cannot argue in good faith that the trial court abused its discretion in finding termination of respondent's parental rights to be in the children's best interests. Counsel has advised respondent of her right to file pro se written arguments on her own behalf and provided her with the documents necessary to do so. Respondent has not submitted written arguments to this Court.

¶ 6 We carefully and independently review issues identified by counsel in a no merit brief filed under Rule 3.1(e) in light of the entire record. *In re L.E.M.*, 372 N.C. 396, 402, 831 S.E.2d 341, 345 (2019). After conducting this review, we are satisfied the trial court's 10 May 2021 order is supported by clear, cogent, and convincing evidence and based on proper legal grounds. Accordingly, we affirm the trial court's order terminating respondent's parental rights.

AFFIRMED.

IN RE Z.J.M.

[379 N.C. 485, 2021-NCSC-159]

IN THE MATTER OF Z.J.M.

No. 162A21

Filed 17 December 2021

Termination of Parental Rights—no-merit brief—failure to legitimate

The termination of a father's parental rights to his son on the grounds of failure to legitimate was affirmed where his counsel filed a no-merit brief and the termination order was supported by clear, cogent, and convincing evidence and based upon proper legal grounds.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from an order entered on 24 March 2021 by Judge V.A. Davidian III in District Court, Wake County. This matter was calendared for argument in the Supreme Court on 12 November 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 Amazing Grace Adoptions.

Mary McCullers Reece for respondent-appellant father.

NEWBY, Chief Justice.

¶ 1 Respondent-father appeals from the trial court's order terminating his parental rights to Z.J.M. (Zeke).[1] Counsel for respondent filed a no-merit brief under Rule 3.1(e) of the North Carolina Rules of Appellate Procedure. We conclude that the issues identified by counsel in respondent's brief as arguably supporting the appeal are meritless and therefore affirm the trial court's order.

¶ 2 This case arises from a private termination action filed by petitioner, Amazing Grace Adoptions. In the spring of 2019, respondent and Zeke's mother were in a relationship. In April 2019, the mother called respondent and told him she was pregnant, though respondent did not believe

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

her. Respondent came to the mother's residence where she showed him the positive pregnancy test. Respondent then left the mother's residence with the pregnancy test. Afterward, respondent and the mother ended their relationship; they were never married. Respondent did not appear again until the day Zeke was born, failing to take any action during the pregnancy or assist the mother with expenses for prenatal care.

¶ 3 On 10 December 2019, the day of Zeke's birth, a friend of the mother called respondent and told him the mother was in labor. Respondent came to the hospital and spent several hours there. Though respondent held Zeke and requested to sign the birth certificate, he did not sign anything at that time. Respondent then left the hospital and was unable to return. On 11 December 2019, the mother surrendered custody to petitioner and executed a relinquishment of her parental rights pursuant to N.C.G.S. § 48-3-701 (2019). Zeke was placed with his adoptive family on 19 December 2019 when he was nine days old. In the meantime, respondent and the mother exchanged text messages from the time Zeke was born until January 2020. Though respondent inquired about Zeke, he did not provide any support other than paying $150 for the mother's car repair in late December 2019.

¶ 4 On 15 January 2020, petitioner filed a petition to terminate respondent's parental rights. Though respondent filed an action seeking custody of the minor child on 19 January 2020, he did not file a petition to legitimate the child. At the termination hearing, petitioner submitted into evidence an affidavit from the North Carolina Department of Health and Human Services stating that no affidavit of paternity had been received. The mother also testified that she never received paperwork concerning a legitimation of paternity action nor any financial support from respondent. Respondent's paternity has not been determined judicially or by scientific means.

¶ 5 Based on all the evidence, the trial court found respondent did not establish paternity under any of the five prongs in N.C.G.S. § 7B-1111(a)(5) (2019). Thus, the trial court concluded that a ground for termination of respondent's parental rights existed under N.C.G.S. § 7B-1111(a)(5). The trial court also concluded it was in Zeke's best interests to terminate respondent's parental rights. Accordingly, the trial court terminated respondent's parental rights.

¶ 6 Counsel for respondent filed a no-merit brief on her client's behalf under Rule 3.1(e) of the Rules of Appellate Procedure, identifying issues that could arguably support an appeal but also stating why these issues lacked merit. Counsel noted that the mother "was not forth-

coming about her plan to put the child up for adoption." Because the requirements in N.C.G.S. § 7B-1111(a)(5) are "bright line requirements," however, counsel concluded the trial court's order complied with the statute. *See A Child's Hope, LLC v. Doe*, 178 N.C. App. 96, 104, 630 S.E.2d 673, 678 (2006) (citing *In re Byrd*, 354 N.C. 188, 194, 552 S.E.2d 142, 146 (2001)) (stating that N.C.G.S. § 7B-1111(a)(5) "necessarily establish[es] bright line requirements"). Moreover, though the mother made respondent's access to Zeke more difficult, counsel concluded the trial court likely did not err in determining that termination of respondent's parental rights was in Zeke's best interests. Finally, counsel advised respondent of his right to file pro se written arguments on his own behalf and provided him with the documents necessary to do so. Respondent has not submitted written arguments to this Court.

¶ 7 We carefully and independently review issues identified by counsel in a no-merit brief filed under Rule 3.1(e) in light of the entire record. *In re L.E.M.*, 372 N.C. 396, 402, 831 S.E.2d 341, 345 (2019). After conducting this review, we are satisfied the trial court's 24 March 2021 order is supported by clear, cogent, and convincing evidence and based on proper legal grounds. Accordingly, we affirm the trial court's order terminating respondent's parental rights.

AFFIRMED.

McMILLAN v. BLUE RIDGE COS., INC.

[379 N.C. 488, 2021-NCSC-160]

ELIZABETH McMILLAN AND TIFFANY SCOTT
v.
BLUE RIDGE COMPANIES, INC., BLUE RIDGE PROPERTY MANAGEMENT, LLC, BRC CROSS CREEK, LLC D/B/A LEGACY AT CROSS CREEK, AND FAYETTEVILLE CROSS CREEK, LLC D/B/A LEGACY AT CROSS CREEK, INC.

No. 492A20

Filed 17 December 2021

1. Class Actions—class certification—common injury—North Carolina Debt Collection Act—apartment tenants threatened with collection letters

In a class action lawsuit where former tenants of defendant's residential apartments alleged violations of the North Carolina Debt Collection Act (NCDCA), the trial court did not abuse its discretion in certifying a class of tenants to whom defendant had sent letters threatening to collect eviction and complaint-filing fees before having filed a summary ejectment complaint. The court properly defined the class as tenants who were "sent" letters rather than those who "received" them, because the injury that the letters allegedly caused did not result from individual tenants' subjective reactions to them, but rather from a common, statutory "informational injury" stemming from defendant's alleged violations of the NCDCA. Further, any damages could be shown by a class-wide theory of generalized injury where defendant used uniform procedures—including the same collection letter template—to contact the tenants.

2. Class Actions—class certification—common issues—North Carolina Debt Collection Act—apartment tenants threatened with eviction and complaint-filing fees

In a class action lawsuit brought by former tenants of defendant's residential apartments alleging violations of the North Carolina Residential Rental Agreements Act and the North Carolina Debt Collection Act, where defendant sent letters to defaulting tenants threatening to collect eviction and complaint-filing fees before having filed a summary ejectment complaint, the trial court did not abuse its discretion in certifying two classes (tenants who paid eviction fees and tenants who paid complaint-filing fees) where the court's findings of fact, though short, adequately described how defendant's procedures for sending the letters and assessing the fees were uniform for all the tenants and, therefore, supported the court's conclusion that common issues of fact or law predominated over any individual issues.

3. Class Actions—as superior form of adjudication—abuse of discretion analysis

In a class action lawsuit brought by former tenants of defendant's residential apartments alleging violations of the North Carolina Residential Rental Agreements Act and the North Carolina Debt Collection Act (NCDCA), where defendant sent letters to defaulting tenants threatening to collect eviction and complaint-filing fees before having filed a summary ejectment complaint, the trial court did not abuse its discretion in determining that a class action was superior to other adjudication methods. The court properly determined that statutory damages could be measured using objective, class-wide criteria (based on the tenants' common deprivation of rights under the NCDCA), and the court reasonably found that class members could be identified by administrative means. Further, any differences in statutory damages or attorneys' fees between the class members would not be "inextricably tied" to the alleged class-wide injury and, therefore, would not render the class action form inapt.

Appeal pursuant to N.C.G.S. § 7A-27(a)(4) from an order granting plaintiffs' motion for class certification entered on 11 June 2020 by Judge Rebecca Holt in the Superior Court in Cumberland County. Heard in the Supreme Court on 30 August 2021.

Milberg Coleman Bryson Phillips Grossman, PLLC, by Scott C. Harris and Patrick M. Wallace; and Edward H. Maginnis and Karl S. Gwaltney, for plaintiff-appellees.

Cranfill Sumner, LLP, by Steven A. Bader and Richard T. Boyette, for defendant-appellant Blue Ridge Property Management, LLC.

HUDSON, Justice.

¶ 1 In this case we consider whether the trial court erred by granting plaintiffs' motion to certify three classes for a class action lawsuit. Plaintiffs Elizabeth McMillan and Tiffany Scott are former tenants of residential apartments in Fayetteville, North Carolina, owned and managed by defendant Blue Ridge Property Management, LLC (Blue Ridge). Plaintiffs brought a class action lawsuit against the defendants alleging violations of N.C.G.S. § 42-46 (North Carolina Residential Rental Agreements Act, or NCRRAA) and N.C.G.S. § 75-50 *et seq.* (North Carolina

Debt Collection Act, or NCDCA). Specifically, they moved the trial court to certify three classes of certain fellow tenants: the "Collection Letter Class," the "Eviction Fee Class," and the "Complaint-Filing Fee Class." On 11 June 2020, the trial court granted plaintiffs' motion to certify all three classes. On 10 July 2020, Blue Ridge appealed the class certification order directly to this Court under N.C.G.S. § 7A-27(a)(4). Because we conclude that the trial court did not abuse its discretion, we affirm and remand for further proceedings.

I. Factual and Procedural Background

¶ 2 The NCRRAA, in relevant part, authorizes landlords to assess certain fees against defaulting tenants "only if . . . the landlord filed and served a complaint for summary ejectment and/or money owed, the tenant cured the default or claim, and the landlord dismissed the complaint prior to judgment." N.C.G.S. § 42-46(e) (2021). The NCDCA, in relevant part, broadly prohibits debt collectors from engaging in certain unauthorized practices, such as "[f]alsely representing the character, extent, or amount of a debt against a consumer or of its status in any legal proceeding" or "[f]alsely representing that an existing obligation of the consumer may be increased by the addition of [certain] fees." N.C.G.S. § 75-54(4), (6) (2021). Here, plaintiffs allege that Blue Ridge violated these Acts by unduly threatening (via collection letter) and assessing eviction fees and complaint-filing fees against tenants behind on rent before summary ejection complaints had been filed and before summary ejectment proceedings were complete. The merits of these substantive allegations are not at issue here. "In determining the propriety of a class action, the question is not whether the plaintiff or plaintiffs have stated a cause of action or will prevail on the merits, but rather whether the requirements of Rule 23 are met." *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 178 (1974) (cleaned up). The only question before the Court at this stage is whether the classes were properly certified, not whether the plaintiffs' claims will succeed. *See id.* at 177–78.

¶ 3 On 16 July 2018, plaintiffs filed a complaint as a putative class action against Blue Ridge and several related entities. Later, plaintiffs voluntarily dismissed the related entities from the suit pursuant to Rule 41(a)(1) of the North Carolina Rules of Civil Procedure. Initially, plaintiffs alleged six claims for relief: (1) violation of N.C.G.S. § 42-46 (NCRRAA) (on behalf of all classes); (2) violation of N.C.G.S. § 42-46 (NCRRAA) (on behalf of the Complaint-Filing Fee Class); (3) violation of N.C.G.S. § 75-50 *et seq.* (NCDCA) (on behalf of all classes); (4) violation of N.C.G.S. § 75-1.1 *et seq.* (North Carolina Unfair and Deceptive Trade Practices Act, or UDTPA) (on behalf

of all classes); (5) a petition for an injunction pursuant to N.C.G.S. § 1-485 *et seq.* (on behalf of the Complaint-Filing Fee Class); and (6) petition for declaratory judgment pursuant to N.C.G.S. § 1-253 (on behalf of all classes). On 26 November 2018, Blue Ridge filed its answer, denying liability.

¶ 4 On 8 March 2019, Chief Justice Beasley designated this matter as exceptional pursuant to Rule 2.1 of the General Rules of Practice for the Superior and District Courts, and assigned the matter to Judge Rebecca Holt.

¶ 5 On 15 May 2019, plaintiff Elizabeth McMillan filed a partial motion for judgment on the pleadings. On 20 May 2019, Blue Ridge filed a motion to dismiss plaintiffs' suit pursuant to N.C. R. Civ. P. 12(b)(6). On 18 November 2019, the trial court denied in part and granted in part the motion. In part, the court ruled that the collection of eviction fees and complaint-filing fees violated the NCRRAA, but denied the motion as to Blue Ridge's liability for sending collection letters under the NCDCA, leaving the matter to be tried. Also on 18 November 2019, the trial court denied in part and granted in part Blue Ridge's motion to dismiss. Specifically, the court dismissed claims four and five (UDTPA violation on behalf of all classes and the petition for an injunction on behalf of the Complaint-Filing Fee Class) but left the remaining four claims intact.

¶ 6 On 5 December 2019, Blue Ridge filed a motion for partial summary judgment. On 6 December 2019, plaintiffs filed a motion for partial summary judgment. That same day, plaintiffs filed a motion for class certification. On 11 June 2020, the court denied in part and granted in part plaintiffs' motion for partial summary judgment. Specifically, the court ruled that Blue Ridge violated the NCRRAA and the NCDCA when it assessed eviction fees and complaint-filing fees against plaintiffs, and that the collection letters likewise violated the NCDCA. However, the court found that genuine issues of material fact remain as to whether the collection letters proximately caused actual injury to plaintiffs. Accordingly, the court denied plaintiffs' motion for summary judgment on this issue.

II. Standard of Review

¶ 7 This Court reviews a trial court's class certification order for abuse of discretion. *Fisher v. Flue-Cured Tobacco Coop. Stabilization Corp.*, 369 N.C. 202, 209 (2016). "[T]he test for abuse of discretion is whether a decision is manifestly unsupported by reason, or so arbitrary that it could not have been the result of a reasoned decision." *Frost v. Mazda Motor of Am., Inc.*, 353 N.C. 188, 199 (2000) (cleaned up). Within this

general standard, when addressing a class certification order, this Court has recognized that conclusions of law are reviewed de novo, and findings of fact are considered binding if supported by competent evidence. *Fisher*, 369 N.C. at 209.

III. Analysis

¶ 8 Rule 23 of the North Carolina Rules of Civil Procedure authorizes class action lawsuits. Specifically, Rule 23 establishes that "[i]f persons constituting a class are so numerous as to make it impracticable to bring them all before the court, such of them, one or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued." N.C.G.S. § 1A-1, Rule 23(a) (2019). "The party seeking to bring a class action under Rule 23(a) has the burden of showing that [certain] prerequisites to utilizing the class action procedure are present." *Crow v. Citicorp Acceptance Co.*, 319 N.C. 274, 282 (1987) (footnote omitted).

¶ 9 These prerequisites are well established. *See, e.g.*, *Faulkenbury v. Tchrs.' & State Emps.' Ret. Sys.*, 345 N.C. 683, 697 (1997) (repeating the prerequisites for class certification established by *Crow*, 319 N.C. at 282–83); *Beroth Oil Co. v. N.C. Dep't of Transp.*, 367 N.C. 333, 336–37 (2014) (same); *Fisher*, 369 N.C. at 209 (same). As an initial matter, the class representatives must demonstrate the existence of a class. *Crow*, 319 N.C. at 277. "A proper class exists 'when the named and unnamed members each have an interest in either the same issue of law or of fact, and that issue predominates over issues affecting only individual class members.' " *Fisher*, 369 N.C. at 209 (quoting *Crow*, 319 N.C. at 280).

¶ 10 In addition to this threshold requirement, "the class representatives must show: (1) that they will fairly and adequately represent the interests of all members of the class; (2) that they have no conflict of interest with the class members; (3) that they have a genuine personal interest, not a mere technical interest, in the outcome of the case; (4) that they will adequately represent members outside the state; (5) that class members are so numerous that it is impractical to bring them all before the court; and (6) that adequate notice is given to all class members." *Id.* (cleaned up) (quoting *Faulkenbury*, 345 N.C. at 697).

¶ 11 Once a party seeking class certification meets these requirements, "it is left to the trial court's discretion whether a class action is superior to other available methods for the adjudication of the controversy." *Id.* (cleaned up).

> Class actions should be permitted where they are likely to serve useful purposes such as preventing a

> multiplicity of suits or inconsistent results. The usefulness of the class action device must be balanced, however, against inefficiency or other drawbacks. . . . [T]he trial court has broad discretion in this regard and is not limited to consideration of matters expressly set forth in Rule 23 or in [existing caselaw].

Crow, 319 N.C. at 284. Accordingly, "the touchstone for appellate review of a Rule 23 order . . . is to honor the 'broad discretion' allowed the trial court in all matters pertaining to class certification." *Frost*, 353 N.C. at 198.

¶ 12 Here, the trial court defined three classes as follows:

> ***The Collection Letter Class***: All tenants of Blue Ridge's Apartments in North Carolina who (a) at any point within the four (4) year period preceding the filing of Plaintiffs' Complaint through June 25, 2018 (b) resided in one of the apartments managed by Blue Ridge in North Carolina (c) were sent the Second Collection Letter that (d) threatened to charge Eviction Fees when such amounts could not be claimed by Blue Ridge.
>
> ***Eviction Fee Class***: All tenants of Blue Ridge's Apartments in North Carolina who (a) at any point within the four (4) year period preceding the filing of Plaintiffs' Complaint through June 25, 2018 (b) resided in one of the apartments managed by Blue Ridge in North Carolina (c) were charged and (d) actually paid Eviction Fees prior to a North Carolina court awarding such Eviction Fees to Blue Ridge.
>
> ***The Complaint-Filing Fee Class***: All tenants of Blue Ridge's Apartments in North Carolina who (a) at any point within the four (4) year period preceding the filing of Plaintiff's Complaint through June 25, 2018 (b) resided in one of the apartments managed by Blue Ridge in North Carolina (c) were charged a Complaint-Filing Fee before a complaint in summary ejectment was filed and served and paid it.

¶ 13 In support of its order certifying these classes, the trial court made the following findings of fact:

11. Blue Ridge provides property management services to owners of residential apartment complexes in North Carolina. Blue Ridge's property management services include the implementation of its General Collection Guidelines which require, among other things, that its on-site employees "must treat everyone consistently and that "[a]ll residents in the same situation must be treated the same."

12. On or after the 11th of the month, Blue Ridge employees send tenants who are delinquent with their rent a letter stating that continued nonpayment will result in "legal action" and that "[i]f legal action is necessary, any expenses we incur will be charged to your account" (Second Collection Letter"). The "expenses identified in the Second Collection Letter are the same as Eviction Fees.

13. According to a stipulation signed by the parties, "Defendant Blue Ridge had a general policy to send templated written communications to the tenant. These written communications were known as the 'Notice to pay – 2nd Notice' and 'Notice to Pay – Final Notice.' " The stipulation also agreed that "the text of any Notice to Pay – 2nd Notice . . . that were generated for particular tenants is substantively similar . . ."

14. If a tenant remains delinquent, Blue Ridge would start the eviction process. The eviction process included a summary ejectment action being filed against the delinquent tenant. Blue Ridge would also charge Eviction Fees to a delinquent tenant's ledger. In some, but not all instances, Blue Ridge employees also charged tenants with an additional Complaint-Filing Fee equaling 5% of the tenants' monthly rent. At times, Blue Ridge posted the Complaint-Filing Fee to a tenant's ledger before a summary ejectment complaint was filed and served.

15. Blue Ridge considers that tenants owe the amounts set forth on their ledgers.

16. Plaintiffs McMillan and Scott were residents at a Blue Ridge-managed property, Legacy at Cross

> Creek Apartments in Fayetteville, North Carolina. Plaintiffs McMillan and Scott received Second Collection Letters and were charged with and paid Eviction Fees and Complaint-Filing Fees.

¶ 14 Blue Ridge points to three alleged errors in the trial court's class certification order: (1) error in certifying the Collection Letter Class; (2) error in certifying the Eviction Fee Class and the Complaint-Filing Fee Class; and (3) error in the superiority determination. For the foregoing reasons, we see no merit to any of these challenges.

A. Collection Letter Class

¶ 15 **[1]** We must first determine whether the trial court erred in certifying the Collection Letter Class. Blue Ridge contends that the trial court erred in certifying this class for three reasons: (1) class qualification focuses on whether the class members were "sent" a collection letter, rather than whether they "received" the letter; (2) class certification is improper when liability depends on how a class member reacted to the letter; and (3) actual and statutory damages available to the class cannot be shown by a class-wide theory of generalized proof. We address each argument in turn.

¶ 16 First, Blue Ridge argues that the trial court erred in defining the Collection Letter Class as those tenants who were "sent" the collection letter, as opposed to those who "received" the collection letter. This distinction is significant, Blue Ridge argues, because any alleged common injury proximately caused by the collection letter would first depend on whether the tenant actually received the letter.

¶ 17 We disagree. The trial court acted within its broad discretion in inferring that for the purpose of certifying this class, a letter sent was a letter received. *See Parnell-Martin Supply Co. v. High Point Motor Lodge, Inc.*, 277 N.C. 312, 320–21, (1970) (holding that a stipulation that a notice letter was sent established prima facie that the notice was received). Ample evidence supports this inference. For instance: Blue Ridge has admitted that the collection letters were indeed sent; Blue Ridge has not identified any evidence tending to rebut the corresponding inference that the letters were received; Blue Ridge stipulated that "the number of individuals who *received* the [collection letters] are so numerous as to make it impracticable to bring them all before the Court" (emphasis added); and the trial court found that the named plaintiffs had, in fact, "received" collection letters. This inference of receipt is further strengthened by the testimony of a Blue Ridge employee and witness that collection letters

were not delivered by mail, but by direct email or hand-delivery to each tenant's door. Accordingly, for the purpose of our review, drawing this inference from the uncontroverted testimony and stipulations was well within the broad discretion of the trial court.

¶ 18 Second, Blue Ridge argues that the Collection Letter Class certification is improper because liability depends not only on whether each class member *received* the letter, but also on how each class member *reacted* to the letter. For instance, Blue Ridge argues, if a collection letter recipient did not read the letter, did not understand the letter, or was in such an unfortunate financial position that he or she could not adjust their financial decisions based on the letter, then the letter would not proximately cause an injury, thus undermining the commonality of the class.

¶ 19 Third and relatedly, Blue Ridge asserts that the Collection Letter Class certification was erroneous because actual and statutory damages available to the class cannot be shown by a class-wide theory of generalized proof, as required for class certification. Based on the subjective reaction argument noted above, Blue Ridge argues that any actual damages suffered by class members because of a collection letter are unique to each member, and therefore not susceptible to a class-wide theory of generalized proof. Likewise, Blue Ridge contends that the statutory damages sought by plaintiffs under the NCDCA are not susceptible to a class-wide theory of generalized proof because the amount will vary based on the nature and extent of each class member's injury, and the court lacks objective criteria with which to calculate such damages. Accordingly, Blue Ridge argues that class certification here is improper.

¶ 20 These arguments mischaracterize the true nature of the alleged injury here, which is not grounded in an individualized subjective reaction and injury, but in a class-wide deprivation of statutory rights under the NCRRAA and NCDCA. As this Court recently noted in *Comm. to Elect Dan Forest v. Emps Pol. Action Comm.*:

> [O]ur courts have recognized the broad authority of the legislature to create causes of action, such as 'citizen-suits' and 'private attorney general actions,' even where personal, factual injury did not previously exist, in order to vindicate the public interest. In such cases, the relevant questions are only whether the plaintiff has shown a relevant statute confers a cause of action and whether the plaintiff satisfies the requirements to bring a claim under the statute. . . . The existence of the legal right is enough.

376 N.C. 558, 2021-NCSC-6, ¶ 71. Later, in his concurring opinion, Chief Justice Newby specifically noted the NCDCA as an example of a statute that "provid[es] for specified statutory damages without requiring the plaintiff to prove actual injury." *Id.* ¶ 96 (Newby, C.J., concurring).

¶ 21 Plaintiffs here allege precisely the type of injury contemplated by this Court in *Forest* above: one that depends not on individualized harm, but on an informational injury and a deprivation of statutory rights. *Id.* ¶ 71; *see* N.C.G.S. § 75-56(b) (2021) ("Any debt collector who fails to comply with any provision of this Article with respect to any person is liable to such person in a private action . . . ."). As a result, the collection letters need not have caused each class member a personal, factual injury based on his or her subjective reaction to it, but only an informational injury based on alleged misrepresentations and misleading information contained in the letters, in violation of the statute.

¶ 22 Similarly, regarding damages, although different members of the class could indeed end up with different damages based on individual circumstances, these differences do not undermine the availability of a class-wide theory of generalized liability. Here, Blue Ridge stipulated that it "had a general policy to send templated written communications" to its tenants in forms "substantially similar" to the ones produced for this litigation. These admittedly uniform procedures pertained to the collection letters, eviction fees, and complaint-filing fees at issue here. At this preliminary stage where the only question regards the appropriateness of class certification, not the merits of plaintiffs' claims or extent of plaintiffs' damages, the uniformity of Blue Ridge's procedures establishes a sufficiently generalized theory of alleged injury. Accordingly, the trial court acted within its broad discretion in finding that "common issues of fact and law are both central for all class members and are susceptible to class-wide proof."

¶ 23 Therefore, we conclude that the trial court did not abuse its discretion in certifying the Collection Letter Class.

B. Eviction Fee Class and Complaint-Filing Fee Class

¶ 24 **[2]** We must next determine whether the trial court erred in certifying the Eviction Fee Class and Complaint-Filing Fee Class, as defined above. Blue Ridge argues that findings of fact numbered 11 through 16 (quoted above) are insufficient to support the trial court's subsequent legal conclusions that "common issues of fact and law predominate over any individual issues" and that "[t]he common issues of fact and law are both central for all class members and are susceptible to class-wide proof."

Further, Blue Ridge argues that the inadequacy of these findings prevents this Court from engaging in meaningful appellate review.

¶ 25 For support, Blue Ridge points to *Nobles v. First Carolina Commc'ns, Inc.*, 108 N.C. App. 127 (1992), and *Elam v. William Douglas Mgmt., Inc.*, No. COA14-1377, 2015 WL 2374524 (N.C. Ct. App. May 19, 2015) (unpublished). In *Nobles*, the trial court summarily denied the plaintiffs' class certification motion without "specify[ing] which elements were lacking and [with] no other findings." 108 N.C. App. at 132. The Court of Appeals subsequently deemed the trial court's findings "inadequate to enable [the Court of Appeals] to determine whether the [trial] court's decision was based on competent evidence." *Id.* at 132–33. In *Elam*, the trial court provided five relatively succinct findings of fact regarding the inferiority of a class action in comparison to alternative methods of adjudication, and thus denied plaintiffs' motion for class certification. 2015 WL 2374524 at *2. On appeal, the Court of Appeals found these findings of fact sufficient. *Id.* at *5.

¶ 26 Here, Blue Ridge asserts that—similarly to *Nobles* and in contrast to *Elam*—the trial court did not make sufficiently detailed findings of fact. Blue Ridge notes that the trial court's class certification order included only six relatively cursory findings of fact (quoted above) detailing Blue Ridge's uniform procedures for sending defaulting tenants collection letters and assessing eviction fees and complaint-filing fees. These findings, Blue Ridge argues, are insufficiently detailed to support the trial court's subsequent conclusions of law regarding the existence of the three classes and to allow this Court the opportunity for meaningful appellate review.

¶ 27 We agree the trial court's findings of fact are relatively succinct; but succinct does not necessarily mean inadequate. The trial court's findings of fact plainly describe Blue Ridge's procedures at issue, note the uniformity of their application, and establish that they were deployed on plaintiffs. Notably, Blue Ridge does not challenge the factual findings, and the subsequent conclusions of law are specifically tailored to reflect the practices described. Comparatively, these findings of fact are more extensive than those found inadequate in *Nobles*, and are far more comparable to—and perhaps even *more* detailed than—those found adequate in *Elam*.[1] While there is no bright line establishing a minimum number of factual findings or a minimum level of detail that will be deemed ade-

1. Notably, *Elam* is an unpublished decision which does not constitute controlling legal authority.

quate, we cannot conclude that the facts here are insufficient to support the trial court's subsequent legal determinations that "common issues of fact and law predominate over any individual issues" and that "[t]he common issues of fact and law are both central for all class members and are susceptible to class-wide proof." For the same reasons, we cannot find that the trial court's findings of fact are so deficient as to preclude this Court from engaging in meaningful appellate review.

¶ 28 In fact, the trial court's succinctness here acts to *support* class certification rather than to undermine it; that is, because Blue Ridge's procedures regarding the collection letters, eviction fees, and complaint-filing fees were admittedly uniform for all defaulting tenants, more detailed, tenant-specific factual findings are rendered unnecessary. Indeed, as noted within the trial court's findings of fact, Blue Ridge's own General Collection Guidelines require, among other things, that its employees "must treat everyone consistently" and that "[a]ll residents in the same situation must be treated the same." The trial court's findings of fact reflect this consistency.

¶ 29 Accordingly, we hold that the trial court did not abuse its discretion in certifying the Eviction Fee Class and the Complaint-Filing Fee Class.

C. Superiority Determination

¶ 30 **[3]** We must last determine whether the trial court erred in its determination that a class action is superior to other available methods of adjudication.

¶ 31 As noted above, after a party seeking class certification satisfies the prerequisites, the trial court must determine, in its discretion, "whether a class action is superior to other available methods for the adjudication of th[e] controversy….' " *Crow*, 319 N.C. at 284.

> Class actions should be permitted where they are likely to serve useful purposes such as preventing a multiplicity of suits or inconsistent results. The usefulness of the class action device must be balanced, however, against inefficiency or other drawbacks. . . . [T]he trial court has broad discretion in this regard and is not limited to consideration of matters expressly set forth in Rule 23 or in [existing caselaw].

Id. Accordingly, superiority determinations are reviewed for abuse of discretion. *See Fisher*, 369 N.C. at 209.

¶ 32 Here, the trial court stated the following:

> 28. The Court finds that here a class action is superior to all other available methods of adjudicating the controversy. There are relatively few evidentiary issues for the Court to decide and that, once decided, can be applied to the classes. If this action were not allowed to proceed as a class action, the same legal issues could be relitigated in potentially hundreds of individual cases in different courts throughout North Carolina, which could lead to inconsistent decisions. The benefits of litigating this case as a class action overrides any drawbacks. Statutory damages in this case can be determined using objective criteria that is applicable class-wide, and the issues identified by Blue Ridge concerning ascertaining class members' identities can be determined administratively. Further, potential statutory damages are not out of proportion to the harm caused. Lastly, Plaintiffs affirmed at the hearing that they are not seeking emotional distress damages or punitive damages.

¶ 33 Blue Ridge challenges three conclusions within this determination: (1) that statutory damages can be measured using objective, class-wide criteria; (2) that identifying class members can be done through administrative means; and (3) that class certification is preferrable when, as here, plaintiffs seek both statutory damages and attorneys' fees. We again see no error, and address each in turn below.

¶ 34 First, the trial court did not abuse its discretion in determining that statutory damages can be measured using objective, class-wide criteria. As noted above, when a statute creates a cause of action independent from a personal, factual, injury, "the relevant questions are only whether the plaintiff has shown a relevant statute confers a cause of action and whether the plaintiff satisfies the requirements to bring a claim under the statute." *Comm. To Elect Dan Forest*, 2021-NCSC-6, ¶ 72. The NCDCA is one such statute. *See id.* ¶ 96 (Newby, C.J., concurring). Accordingly, statutory damages here could be determined based on the generalized theory of alleged class-wide informational injuries and deprivation of statutory rights under the NCDCA.

¶ 35 Second, we cannot agree that the trial court acted unreasonably in concluding that the identification of class members could be completed administratively and did not pose a significant impediment to class certification. Notably, class-member identification is only one of many fac-

tors that a trial court may consider within a superiority determination. *See Crow*, 319 N.C. at 284 ("[T]he trial court has broad discretion in this regard and is not limited to consideration of matters expressly set forth in Rule 23 or in [existing caselaw].").

¶ 36 Here, based on the record before the trial court, the court had competent evidence that Blue Ridge produced ledgers of tenants that specifically identified those who were charged and paid eviction fees. Further, administrative class-member identification is supported by the precision with which the classes are defined (including use of the applicable date ranges and whether tenants were charged or "actually paid" the applicable fees) and the admitted uniformity with which Blue Ridge administered the letters and fees at issue. Although the trial court did not specify a method for class-member identification in its findings of fact, this does not amount to an abuse of discretion when it had competent evidence on which to base its conclusion that class-member identification could indeed be completed administratively.

¶ 37 Third, we are not persuaded by Blue Ridge's claim that the trial court erred in its superiority determination because class certification is not preferred when, as here, the classes seek both statutory damages and attorneys' fees. While statutory damages and attorneys' fees are among the many factors that a trial court may consider within a class action superiority determination, neither dispositively renders a certain cause of action per se unsuitable for class certification. *See Beroth Oil Co.*, 367 N.C. at 344 ("We generally agree that differences in the amount of damages will not preclude class certification so long as the [common] issue predominates") (cleaned up). Instead, the question is whether the calculation of damages is "not merely a collateral issue," but is so "inextricably tied" to the common, class-wide issue that it "is determinative of the [common] issue itself." *Id.* In such cases, differing statutory damages or attorneys' fees between class members may render the class action form inapt. *See id.*

¶ 38 Here, however, there is no indication, and Blue Ridge presents no argument, that differences in damages and fees are so inextricably tied to the alleged class-wide injury under the NCRRAA and NCDCA as to render the class action form inferior to other methods of adjudication. In fact, the trial court's superiority determination includes numerous findings to the contrary, including that there were "relatively few evidentiary issues"; that class certification would avoid "the same legal issues [being] relitigated in potentially hundreds of individual cases in different courts throughout North Carolina, which could lead to inconsistent decisions"; and that "[t]he benefits of litigating this case as a class action

overrides any drawbacks." Accordingly, the trial court did not abuse its broad discretion in certifying the classes here despite potential collateral differences in damages and fees.

IV. Conclusion

¶ 39 A trial court enjoys broad discretion in class certification, and honoring that discretion is the "touchstone" of appellate review of class certification orders. Here, we hold that the trial court did not abuse its discretion in certifying the Collection Letter Class, Eviction Fee Class, and Complaint-Filing Fee Class for a class action lawsuit. Accordingly, we affirm the trial court's class certification order and remand for further proceedings not inconsistent with this opinion.

AFFIRMED.

NORTH CAROLINA FARM BUREAU MUTUAL INSURANCE COMPANY, INC.
v.
WILLIAM THOMAS DANA, JR., INDIVIDUALLY AND AS ADMINISTRATOR OF THE ESTATE OF PAMELA MARGUERITE DANA

No. 374PA19

Filed 17 December 2021

Motor Vehicles—insurance—underinsured motorist coverage—multiple claimants—limits of liability

Where an automobile accident caused by a drunk driver killed a woman and injured her husband, the total amount of underinsured motorist coverage available under the deceased woman's policy for her estate and her husband was limited by the per-accident limit, and the total amount of coverage available to each individual claimant was limited by the per-person limit. The Court of Appeals erred in applying *N.C. Farm Bureau Mut. Ins. Co., Inc. v. Gurley*, 139 N.C. App. 178 (2000), such that the individual claimants would have received payments exceeding the policy's per-person limits.

Justice EARLS concurring.

Justice BERGER concurring.

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

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 267 N.C. App. 42 (2019), affirming an order entered on 2 August 2018 by Judge Eric C. Morgan in Superior Court, Forsyth County. Heard in the Supreme Court on 19 May 2021.

William F. Lipscomb for plaintiff-appellant.

C. Douglas Maynard, Jr., for defendant-appellee.

Bailey & Dixon, L.L.P., by J.T. Crook, Philip A. Collins, and David S. Coats, for North Carolina Association of Defense Attorneys, amicus curiae.

ERVIN, Justice.

¶ 1 The issue before us in this case involves the amount of underinsured motorist coverage that should be distributed to defendant William Thomas Dana, Jr., individually and as administrator of the estate of Pamela Marguerite Dana, from the policy of automobile liability insurance that Ms. Dana had purchased from plaintiff North Carolina Farm Bureau Mutual Insurance Company, Inc., for the purpose of compensating them for the injuries that they sustained in an accident that resulted from the negligence of Matthew Bronson. After careful consideration of the record in light of the applicable law, we conclude that the Court of Appeals erred by affirming an order entered by the trial court granting summary judgment in favor of the Danas and against Farm Bureau on 2 August 2018 in reliance upon its prior decision in *N.C. Farm Bureau Mut. Ins. Co., Inc. v. Gurley*, 139 N.C. App. 178 (2000); that its decision in favor of the Danas should be reversed; and that this case should be remanded to the Court of Appeals for further remand to Superior Court, Forsyth County, for the entry of a judgment consistent with the principles enunciated in this opinion.

¶ 2 On 3 February 2016, Mr. Bronson, who was intoxicated, was driving in a southbound direction on Old Salisbury Road in Winston-Salem when the vehicle that he was operating entered the northbound lane and collided with a vehicle owned by Ms. Dana, resulting in serious injuries to Ms. Dana and Mr. Dana, who was a passenger in Ms. Dana's vehicle. The injuries that Ms. Dana sustained ultimately proved fatal. Jessica Jones,

a passenger in Mr. Bronson's vehicle, was also killed in the accident. A vehicle owned and operated by Joshua Ryan Jeffries was damaged in the accident as well.

¶ 3 At the time of the accident, Mr. Bronson's vehicle was covered by a policy of automobile insurance that had been issued by Integon National Insurance Company which provided bodily injury liability coverage with limits of up to $50,000 per person and $100,000 per accident. Subject to approval by the Superior Court, Integon proposed to apportion the full amount of the available per accident coverage as follows:

William Dana	$32,000
Estate of Pamela Dana	$43,750
Estate of Jessica Jones	$23,500
Joshua Jeffries	$750
Total	$100,000

¶ 4 At the time of the accident, Ms. Dana was insured under a policy of automobile liability insurance issued by Farm Bureau that included underinsured motorist coverage with limits of $100,000 per person and $300,000 per accident. In response to a claim submitted by Ms. Dana's estate, Farm Bureau offered to pay the full per-person limit to both Mr. Dana and the Estate, less the amount that had been received from Integon's liability coverage, resulting in the following distribution:

William Dana	$100,000 per-person underinsured limit
	-$32,000 Integon coverage
	$68,000 total underinsured payment
Estate of Pamela Dana	$100,000 per-person underinsured limit
	-$43,750 Integon coverage
	$56,250 total underinsured payment

¶ 5 In response, Mr. Dana argued that he and the Estate were entitled to the full amount of per-accident underinsured motorist coverage set out in the policy, less the amount of liability coverage that had been

provided by Integon and the amount that had already been offered by Farm Bureau. As a result, Farm Bureau would be obligated to pay a total of $124,250 to the Danas under its own proposal, while it would be obligated to provide a total of $200,000 in underinsured motorist coverage to the Danas under the proposal that they submitted, which consisted of the $300,000 per-accident limit provided under the Farm Bureau policy less the $100,000 in liability coverage provided by Integon. As a result, the Danas claimed to be entitled to an additional $75,750 in underinsured motorist coverage over and above the amount that Farm Bureau had already tendered to them.

¶ 6 On 7 August 2017, Farm Bureau filed a complaint seeking a declaratory judgment concerning the amount of underinsured motorist coverage that it was required to provide to the Danas. After both parties filed competing motions for summary judgment, the trial court entered an order granting summary judgment in favor of the Danas on 2 August 2018. Farm Bureau noted an appeal from the trial court's order to the Court of Appeals.

¶ 7 In affirming the trial court's order, the Court of Appeals began by noting that it had, in *Gurley*, "established a straightforward analysis to determine in what amount, if any, [underinsured motorist] coverage is available, given both the insurance policy in question and our [underinsured motorist] statute." *N.C. Farm Bureau Mut. Ins. Co.*, 42, 44 (2019) (citing *Gurley*, 139 N.C. App. at 180). The Court of Appeals noted that, in "decid[ing] how much coverage the insured party or parties are entitled to, we must consider '(1) the number of claimants seeking coverage under the [underinsured motorist] policy; and (2) whether the negligent driver's liability policy was exhausted pursuant to a per-person or per-accident cap.' " *Id.* (quoting *Gurley*, 139 N.C. App. at 181). More specifically, the Court of Appeals noted that it had held in *Gurley* that

> [W]hen more than one claimant is seeking [underinsured motorist] coverage, as is the case here, how the liability policy was exhausted will determine the applicable [underinsured motorist] limit. In particular, when the negligent driver's liability policy was exhausted pursuant to the per-person cap, the [underinsured motorist] policy's per-person cap will be the applicable limit. However, when the liability policy was exhausted pursuant to the per-accident cap, the applicable [underinsured motorist] limit will be the [underinsured motorist] policy's per-accident cap.

Id. (quoting *Gurley*, 139 N.C. App. at 181). In view of the fact that the parties had stipulated that the Danas were entitled to collect some amount of underinsured motorist coverage and the fact that "the negligent driver's liability coverage was exhausted pursuant to the per-accident cap," the Court of Appeals held that "*Gurley* mandates [that] the [Danas] are collectively entitled to receive coverage pursuant to the per-accident cap of $300,000." *Id.* As a result, the Court of Appeals affirmed the trial court's order. This Court granted Farm Bureau's petition for discretionary review of the Court of Appeals' decision.

¶ 8 Summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C.G.S. § 1A-1, Rule 56(c) (2019).

> Our standard of review of an appeal from summary judgment is de novo; such judgment is appropriate only when the record shows that there is no genuine issue of material fact and that any party is entitled to judgment as a matter of law. When considering a motion for summary judgment, the trial judge must view the presented evidence in the light most favorable to the nonmoving party. If the movant demonstrates the absence of a genuine issue of material fact, the burden shifts to the nonmovant to present specific facts which establish the presence of a genuine factual dispute for trial. Nevertheless, if there is any question as to the weight of evidence summary judgment should be denied.

In re Will of Jones, 362 N.C. 569, 573–74 (2008) (cleaned up). In light of the parties' agreement that the present record does not reveal the existence of any material issue of disputed fact, the only issue that remains for our resolution in this case is whether one party or the other is entitled to the entry of judgment in its favor as a matter of law.

¶ 9 The North Carolina Motor Vehicle Safety and Financial Responsibility Act was enacted to ensure that every motor vehicle operator in North Carolina has "proof of ability to be able to respond in damages for liability [ ] on account of accidents . . . arising out of the ownership, maintenance or use of a motor vehicle." N.C.G.S. § 20-279.1(11) (2019). For that reason, the Financial Responsibility Act prohibits the registration of any vehicle in North Carolina unless the owner maintains "proof of

financial responsibility" in the form of a policy of liability insurance, with such policies being required to conform to the requirements of N.C.G.S. § 20-309(b) and to enable the owner to pay damages in the amount of $30,000 "because of bodily injury to or death of one person in any one accident, and, subject to said limit for one person, in the amount of" $60,000 "because of bodily injury to or death of two or more persons in any one accident." N.C.G.S. § 20-279.1(11). The Financial Responsibility Act's requirement that "each automobile owner [must] carry a minimum amount of liability insurance providing coverage for the named insured as well as any other person using the automobile with the express or implied permission of the named insured" is written into every policy of automobile insurance that is subject to the Financial Responsibility Act as a matter of law. *Integon Indem. Corp. v. Universal Underwriters Ins. Co.*, 342 N.C. 166, 167 (1995) (citing N.C.G.S. § 20-279.21(b)(2)). *Nationwide Mut. Ins. Co. v. Chantos*, 293 N.C. 431, 441 (1977).

¶ 10 According to N.C.G.S. § 20-279.21(b)(2), a policy of automobile liability insurance must protect the named insured or a permissive user

> against loss from the liability imposed by law for damages arising out of the ownership, maintenance or use of such motor vehicle or motor vehicles with the [United States] . . . subject to limits exclusive of interest and costs, with respect to each motor vehicle as follows: [$30,000] because of bodily injury to or death of one person in any one accident and, subject to said limit for one person, [$60,000] because of bodily injury or death to two or more persons in any one accident, and [$25,000] because of injury to or destruction of property of others in any one accident.

Although the manner in which the limitation of liability provisions of N.C.G.S. § 20-279.21(b)(2) is intended to operate is relatively clear, this case involves underinsured motorist, rather than liability, coverage.

¶ 11 The underinsured motorist coverage that is made available pursuant to N.C.G.S. § 20-279.21(b)(4) applies "when, by reason of payment of judgment or settlement, all liability bonds or insurance policies providing coverage for bodily injury caused by the ownership, maintenance, or use of the underinsured vehicle have been exhausted." N.C.G.S. § 20-279.21(b)(4); *see also Lunsford v. Mills*, 367 N.C. 618, 626 (2014) (stating that N.C.G.S. § 20-279.21 "was passed to address circumstances where the tortfeasor has insurance, but his coverage is in an amount insufficient to compensate the injured party for his full damages")

(cleaned up). In order to determine whether an injured party's underinsured motorist coverage applies in accordance with the Financial Responsibility Act, a reviewing court must begin by ascertaining whether the tortfeasor's vehicle was an "uninsured highway vehicle" and whether the tortfeasor's liability policy has been exhausted. N.C.G.S. § 20-279.21(b)(4). In this case, the parties agree that Mr. Bronson's vehicle is an "underinsured highway vehicle" given that the sum of his limits of liability, which consisted of coverage in a per-person amount of $50,000 and a per-accident amount of $100,000, was less than the limits of underinsured motorist coverage applicable to Ms. Dana's vehicle, which consisted of per-person coverage of $100,000 and per-accident coverage of $300,000, and that Mr. Bronson's liability was exhausted by Integon's proposed distribution of the $100,000 in per-accident coverage among the various claimants. Thus, since the underinsured motorist coverage available with respect to Ms. Dana's vehicle applies, the next step in the required analysis is to calculate the amount of coverage that is available to the Danas under the Farm Bureau policy.

¶ 12 As we have already noted, the statutory provisions governing underinsured motorist coverage are contained in N.C.G.S. § 20-279.21(b)(4) which is, to say the absolute least, a lengthy and complicated statutory subsection that contains a considerable amount of language that seems to bear upon the proper resolution of the issue that is before us in this case. Among other things, N.C.G.S. § 20-279.21(b)(4) provides that "[t]he limits of such underinsured motorist bodily injury coverage shall be equal to the highest limits of bodily injury coverage for any one vehicle insured under the policy," subject to certain maximum limitations that are not relevant in this instance. In addition, N.C.G.S. § 20-279.21(b)(4) provides that "the limits [of underinsured motorist coverage] shall be equal to the limits of uninsured motorist bodily injury coverage"; that an "underinsured highway vehicle" is one in which "the sum of the limits of liability under all" applicable coverage "is less than the applicable limits of underinsured motorist coverage for the vehicle involved in the accident" or "the total amount actually paid to that person . . . is less than the applicable limits of underinsured motorists coverage for the vehicle involved in the accident"; and that a "highway vehicle" is not an "underinsured motor 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." Furthermore, N.C.G.S. § 20-279.21(b)(4) provides that exhaustion of the available liability coverage occurs when either "the limits of liability per claim have been paid upon the claim" or, "by reason of multiple claims, the aggregate per occurrence limit of liability has been paid."

¶ 13 In addition to these references to the issue of the limitation of liability contained in those portions of the relevant statutory provision defining when a vehicle is an "uninsured highway vehicle," N.C.G.S. § 20-279.21(b)(4) states that "the limit of underinsured motorist coverage applicable to any claim is determined to be the difference between the amount paid to the claimant under the exhausted liability policy or policies and the limit of underinsured motorist coverage applicable to the motor vehicle involved in the accident" and that, in the event that the "claimant is an insured under the underinsured motorist coverage on separate or additional policies, the limit of underinsured motorist coverage applicable to the claimant is the difference between the amount paid to the claimant under the exhausted liability policy or policies and the total limits of the claimant's underinsured motorist coverages as determined by combining the highest limit available under each policy," with "[t]he underinsured motorist limits applicable to any one motor vehicle under a policy [to not] be combined with or added to the limits applicable to any other motor vehicle under that policy."

¶ 14 The repeated references to the issue of the limitation of liability contained in N.C.G.S. § 202-79.21(b)(4) prevent us from concluding that the relevant statutory language does not speak to the issue that is before us in this case. In light of the fact that the expressions "limit of liability" and "limits of liability" appear repeatedly in N.C.G.S. § 20-279.21(b)(4), it is difficult for us to conclude that these expressions have no meaning, a result that, if adopted by the Court, would allow insurers to have a significant degree of flexibility in drafting policies as they see fit.[1] Such an outcome is inconsistent with the consumer protection considerations that motivated the enactment of N.C.G.S. § 20-279.21. As a result, since the relevant statutory language is not silent, the determinative issue for purposes of this case is how the statutory references to the limitation of liability found in N.C.G.S. § 20-279.21(b)(4) should be construed.

¶ 15 As we have already suggested, the specific statutory language concerning the limitation of liability contained in N.C.G.S. § 20-279.21(b)(2), which clearly contemplates both a per-person and a per-accident limit of liability and makes the per-accident limit subject to the per-person limit, is not directly incorporated into the relevant provisions of N.C.G.S. § 20-279.21(b)(4). On the other hand, N.C.G.S. § 20-279.21(b)(4) clearly

1. Although numerous other statutory provisions that grant significant regulatory authority to the Commissioner of Insurance, none of them govern the manner in which the amount of underinsured motorist coverage is to be disbursed, a fact that reduces the likelihood that the General Assembly intended to remain silent with respect to the issue that is before us in this case.

refers to both a "limit" and "limits" of liability. Although the absence of a direct incorporation of the concept of per-person and per-accident limits of liability as set out in N.C.G.S. § 20-279.21(b)(2) into the relevant portions of N.C.G.S. § 20-279.21(b)(4) and the use of both singular and plural language in N.C.G.S. § 20-279.21(b)(4) prevents us from concluding that the relevant statutory language is clear and unambiguous, such a determination is only the first step that must be taken in order to resolve the specific issue that is before us in this case.

¶ 16 "Legislative intent controls the meaning of a statute." *Brown v. Flowe*, 349 N.C. 520, 522 (1998) (quoting *Shelton v. Morehead Mem'l Hosp.*, 318 N.C. 76, 81 (1986)).

> The intent of the General Assembly may be found first from the plain language of the statute, then from legislative history, "the spirit of the act and what the act seeks to accomplish." If the language of the 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."

Lenox, Inc. v. Tolson, 353 N.C. 659, 664 (2001) (citation omitted) (quoting *Polaroid Corp. v. Offerman*, 349 N.C. 290, 297 (1998)). Courts should give effect to the words actually used in a statute and should neither delete words that are used nor insert words that are not used into the relevant statutory language during the statutory construction process. *Lunsford v. Mills*, 367 N.C. 618, 623 (2014). "[U]ndefined words are accorded their plain meaning so long as it is reasonable to do so." *Polaroid v. Offerman*, 349 N.C. 290, 297 (1998), *abrogated on other grounds by Lenox, Inc. v. Tolson*, 353 N.C. 659 (2001). Finally, statutes should be construed so that the resulting construction "harmonizes with the underlying reason and purpose of the statute." *Electric Supply Co. v. Swain Elec. Co.*, 328 N.C. 651, 656 (1991). "The purpose of this State's compulsory motor vehicle insurance laws, of which the underinsured motorist provisions are a part, was and is the protection of innocent victims who may be injured by financially irresponsible motorists," *Proctor v. N.C. Farm Bureau Mut. Ins. Co.*, 324 N.C. 221, 224 (1989), so that, in the event that the statutory language in which the Financial Responsibility Act is couched is ambiguous, the statute "will be liberally construed so that the [statute's] beneficial purpose is accomplished." *Moore v. Hartford Fire Ins. Co. Grp.*, 270 N.C. 532, 535 (1967).

¶ 17 The terms "limit of liability" and "limits of liability," while not statutorily defined, do have well-understood meanings in insurance-related

contexts, with there being no reason that we can see for departing from those well-recognized meanings in this case. In addition, we are not persuaded, in light of the complexity of the language in which N.C.G.S. § 20-279.21(b)(4) is couched, that too much emphasis should be placed upon the General Assembly's use of the singular, rather than the plural, in attempting to construe the relevant statutory language. Our construction of the relevant provisions of N.C.G.S. § 20-279.21(b)(4) will be undertaken in light of these two fundamental premises.

¶ 18 A careful reading of the relevant portions of N.C.G.S. § 20-279.21(b)(4) satisfies us that the references to "limit," stated in the singular, occur in instances in which the General Assembly is referring to a single limit rather than to a collection of limits, such as the per-person and per-accident limits of liability that appear to be standard in most automobile liability insurance policies. Although one could argue that this language means that there is one, and only one, limit of liability that should be deemed applicable to any particular claim for all purposes, it seems to us that the relevant expression is equally, if not more, consistent with an interpretation of the relevant statutory language that assumes that the relevant limit of liability has already been determined on the basis of other considerations rather than as compelling the conclusion that any particular limit of liability should be deemed controlling for all relevant purposes. As a result, an examination of the literal statutory language suggests to us that the relevant provisions in N.C.G.S. § 20-279.21(b)(4) tend to incorporate, at least by implication, the traditional use of both per-person and per-accident liability limits that insurers, policyholders, and policy makers are all familiar with and that are explicitly stated in N.C.G.S. § 20-279.21(b)(2) rather than requiring the use of a "one size fits all" rule focusing upon a single limit that is applicable in all situations.

¶ 19 In addition, the references to both per-person and per-accident liability limits in the underinsured motorist context does not seem to us to be foreclosed by the relevant statutory language. The use of the singular "limit" in the sentence with which the second paragraph of N.C.G.S. § 20-279.21(b)(4) begins strikes us as a pretty slender reed upon which to base a conclusion that the per-person and per-accident limits of liability may not both be applicable in determining the amount to be paid to any particular claimant (as compared to determining whether a particular vehicle is an "underinsured highway vehicle" or as to whether the amounts paid to all claimants, considered in their entirety, are subject to the per-person or the per-accident limit). We are unable to discern any reason why the General Assembly would have intended to preclude the use of both per-person and per-accident liability limitations in

determining the maximum amount of underinsured motorist coverage that is available for payment to any individual claimant and believe that the most reasonable reading of the relevant statutory language provides for a common sense resolution of the dispute that is before us in this case, which is that, in cases involving multiple claimants, the total amount of underinsured motorist coverage available to those claimants (considering both the available liability coverage and the available underinsured motorist coverage) is limited by the per-accident limit and that the total amount of coverage available to any individual claimant is constrained by the per-person limit.

¶ 20 Although the purpose of N.C.G.S.§ 20-279.21 is, of course, to provide protection for innocent victims of motor vehicle negligence, that fact does not inevitably require that one interpret the relevant statutory language to produce the maximum possible recovery for persons injured as a result of motor vehicle negligence regardless of any other consideration. Instead, the usual rules of statutory construction govern the interpretation of N.C.G.S. § 20-279.21(b)(4), subject to the caveat that the relevant statutory language should be construed to produce the greatest possible protection for the innocent victims of negligent conduct permitted by a reasonable interpretation of the relevant statutory language. In the absence of something in the relevant statutory language that otherwise compels such a result, we are unable to conclude that the General Assembly intended N.C.G.S. § 20-279.21(b)(4) to be applied in a manner that fails to take into account the existence of multiple limits of liability and places an injured party in a more favorable position than he or she would have occupied had the tortfeasor been fully insured. In light of the fact that the relevant statutory language can be construed in such a manner as to avoid such a result, this case is appropriately resolved in such a manner as to make the total amount of underinsured coverage payments received by the claimants subject to per-accident limit of liability while limiting the amount received by any individual claimant by the per-person liability limit.

¶ 21 In reaching this conclusion, we do not believe that we are limited, in construing N.C.G.S. § 20-279.21(b)(4), to the options of making the per-person limit controlling for all purposes, to make the per-accident limit controlling for all purposes, to adopt the *Gurley* rule, or to treat the relevant statutory language as silent. Although a number of analytical approaches could conceivably be available to resolve the problem that this case presents for our consideration, it does not seem to us that treating the relevant statutory provision as silent can be squared with the numerous references to limits of liability that appear in N.C.G.S.

§ 20-279.21(b)(4), which must, as we have already noted, be construed as meaning something.[2] In addition, we see no reason for concluding that the question that is before us in this case must be resolved by using either the per-person or per-accident limits to the exclusion of the other in light of either the relevant statutory language or the traditional understanding of the manner in which issues relating to limits of liability should be resolved. Instead, a hybrid approach of the type that we have set out above seems to us to be most reflective of likely legislative and shareholder expectations as to the amount of coverage that should be available to any particular claimant.

¶ 22 Admittedly, the decision of the Court of Appeals in *Gurley*, upon which the Court of Appeals and the Danas have relied in this case, has been on the books for almost two decades without having been disturbed by the General Assembly. In ordinary circumstances, we would be inclined to give the General Assembly's acquiescence in that decision near-controlling effect. However, we cannot agree that the canon of legislative acquiescence, *Young v. Woodell*, 343 N.C. 459, 462–63 (1996) (stating that "[t]he failure of the legislature to amend a statute which has been interpreted by a court is some evidence that the legislature approves of the court's interpretation), should be deemed controlling in this instance given that the Court of Appeals described the rule that it adopted in *Gurley* as having the effect of avoiding an "interpret[ation] of the statute that . . . would result in defendants receiving more compensation than if [the tortfeasor] had been either fully insured or uninsured altogether." *Gurley*, 139 N.C. App. at 182. In view of the fact that applying the rule adopted in *Gurley* to the facts in this case would have exactly the effect that the rule in question was explicitly intended to avoid, it is difficult for us to afford any weight in the interpretive process to the General Assembly's failure to modify the relevant provisions of N.C.G.S. § 20-279.21(b)(4) to account for the likelihood that *Gurley* would be applied in a mechanical manner to produce a result that *Gurley* itself appears to have been intended to avoid.

¶ 23 Thus, for all of these reasons, we conclude that the Court of Appeals' decision in this case should be reversed. Although the principle enunciated in *Gurley* may well produce results that cohere with the likely legislative intent in many instances, the facts of this case demonstrate that its

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2. Admittedly, N.C.G.S. § 20-279.21(b)(4) does not directly and explicitly address the issue that is before us in this case. However, a statutory provision does not have to explicitly and directly address a particular issue in order for it to have a particular meaning. *In re Ernst & Young, LLP*, 363 N.C. 612, 616 (2009) (stating that, even if "the statute is ambiguous or unclear, we must interpret the statute to give effect to the legislative intent").

application can, in some instances, result in the payment of an amount that exceeds the per-person limit in cases involving multiple claimants. However, the relevant statutory language most readily supports the use of an approach that determines the amount to be paid to any particular claimant by treating the per-accident amount of underinsured motorist coverage as the total sum that is available to all of the claimants entitled to a share of the available underinsured motorist coverage, subject to the caveat that the amount of underinsured motorist coverage that is available to any individual claimant is limited to the per-person amount. As a result, the decision of the Court of Appeals is reversed and this case is remanded to Superior Court, Forsyth County, for the entry of a judgment declaring that the total amount of underinsured coverage made available to the Danas collectively is to be set at the per-accident limit, with no individual claimant to receive more than the per-person limit.

REVERSED AND REMANDED.

Justice EARLS concurring.

¶ 24 I join fully in the majority's well-reasoned examination of N.C.G.S. § 20-279.21(b)(4) and in the conclusion that the provision incorporates "the traditional use of both per person and per accident liability limits that insurers, policyholders, and policy makers are all familiar with and that are explicitly stated in N.C.G.S. § 20-279.21(b)(2) rather than requiring the use of a particular limit of liability in any particular case." Further, I agree with the majority that although the FRA must be construed in light of the General Assembly's clear intent to protect innocent victims of automobile accidents from financial ruin, we must determine the meaning of N.C.G.S. § 20-279.21(b)(4) by applying our longstanding principles of statutory interpretation. Application of these principles in this case requires us to reverse the decision below. I write separately only to provide further explanation as to why I believe the effect of this Court's decision is to overrule a settled precedent of the Court of Appeals, *N.C. Farm Bureau Mut. Ins. Co. v. Gurley*, 139 N.C. App. 178 (2000), and why I believe doing so is justified, notwithstanding the parties' potential reliance interests which are implicated in departing from the rule endorsed in that case.

¶ 25 The rule as stated in *Gurley* was that when an insured seeks UIM benefits from his or her insurer after an accident caused by a negligent driver, the insured's UIM benefits will be paid out up to the limit utilized by the negligent driver's primary liability insurer. If the negligent driver's primary liability insurer pays out on a per-person basis, the insured's

UIM provider pays out on a per-person basis; if the negligent driver's primary liability insurer pays out on a per-accident basis, the insured's UIM provider pays out on a per-accident basis. *Gurley*, 139 N.C. App. at 181. Thus, if the *Gurley* rule were applied in this case, the Danas would be entitled to collect up to the per-accident limit provided under their UIM policy, because Mr. Bronson's insurer paid out on a per-accident basis. As a result, the Danas would receive payments in excess of the per-person limit contained in their own UIM policy.

¶ 26 As the majority correctly notes, this result plainly contravenes the purpose of the *Gurley* rule, which was crafted to avoid "giv[ing] defendants a windfall simply because they were involved in an accident with an underinsured motorist, as opposed to an insured or uninsured motorist." 139 N.C. App. at 182–83. The approach the majority adopts instead subjects the Dana's UIM claim to the per person coverage limit contained in their UIM policy, whether or not Mr. Bronson's primary liability insurer pays out by applying the per-person or per-accident limit. Thus, even though it may be correct that "the principle enunciated in *Gurley* may well produce results that cohere with the likely legislative intent in many instances," we should not hide from the fact that the legal rule *Gurley* announced has been supplanted.

¶ 27 Of course, this Court "is not bound by precedents established by the Court of Appeals." *N. Nat. Life Ins. Co. v. Lacy J. Miller Mach. Co., Inc.*, 311 N.C. 62, 76 (1984). Regardless of what the Court of Appeals held in *Gurley*, *Gurley* does not control our disposition of the appeal presently before us. Our role when reviewing a matter "after a determination by the Court of Appeals . . . is to determine whether there is error of law[.]" N.C. R. App. P. 16. When tasked with discerning the meaning of a North Carolina statute, even one which has previously been interpreted by the Court of Appeals, we approach the task with fresh eyes, adopting the reasoning deployed and outcome reached by our colleagues below only to the extent we find their reasoning persuasive and their outcome correct.

¶ 28 Nevertheless, this Court should explain why we are overruling a lower court decision, rather than simply invoking our authority to do so. Although "[o]nly this Court may authoritatively construe the Constitution and laws of North Carolina with finality," *Lea Co. v. N.C. Bd. of Transp.*, 308 N.C. 603, 610 (1983), most legal questions are ably resolved in the first instance by the Court of Appeals. In many areas of the law, and given the way cases come to this Court, it may be a long time before this Court has cause to weigh in on the precise issue addressed in a decision below. During this intervening period after the Court of Appeals

has decided an issue but before this Court has taken it up, the Court of Appeals' interpretation of a state law controls, and parties reasonably order their affairs in accordance with the Court of Appeals' disposition of the issue.

¶ 29 In my view, such circumstances are present in this case. More than twenty years ago, the Court of Appeals was confronted with the question now before us and concluded that "the applicable UIM limit under [N.C.G.S.] § 20–279.21(b)(4) will depend on two factors: (1) the number of claimants seeking coverage under the UIM policy; and (2) whether the negligent driver's liability policy was exhausted pursuant to a per-person or per-accident cap." *Gurley*, 139 N.C. App. at 181. For the reasons incisively described by the majority, I believe the legal rule *Gurley* articulated is inconsistent with the applicable statutes and should be overruled. Still, I am cognizant of the potential unfairness which arises when we disturb an interpretation of a statutory provision that has governed for two decades, especially when the statutory provision being interpreted is, by law, necessarily incorporated into every contract for automobile insurance executed in this state. *N.C. Farm Bureau Mut. Ins. Co., Inc. v. Lunsford*, 378 N.C. 181, 2021-NCSC-83, ¶ 19 ("[A]ll automobile accident insurance policies executed in North Carolina necessarily incorporate North Carolina's FRA.").

¶ 30 "[L]aws which subsist at the time and place of the making of a contract . . . enter into and form a part of it, as if they were expressly referred to or incorporated in its terms." *N.C. Ass'n of Educators, Inc. v. State*, 368 N.C. 777, 789 (2016). This includes interpretations of statutory provisions pronounced by the Court of Appeals which are not inconsistent with any decision of this Court. *Cf.*, *Lynch v. Universal Life Church*, 775 F.2d 576, 580 (4th Cir. 1985) ("The North Carolina Court of Appeals is a court of statewide jurisdiction, and its decisions are binding on state trial courts in the absence of a conflicting decision by the North Carolina Supreme Court."). When Farm Bureau and Ms. Dana entered into a contract for automobile insurance, the terms of their contract necessarily incorporated N.C.G.S. § 20-279.21(b)(4), which until today meant what the Court of Appeals said it meant in *Gurley*.

¶ 31 These reliance interests alone do not displace our "duty . . . to declare what the law is." *S. Ry. Co. v. Cherokee Cty.*, 177 N.C. 86, 88 (1919). But I do believe that these reliance interests justify us treating the Court of Appeals' decision, and the rationale behind it, as weighty. When tasked with examining a decision of the Court of Appeals interpreting a North Carolina statutory provision which was decided a substantial period of time in the past and which is not in tension with any decision

of this Court interpreting the same provision, I would accord that decision something akin to the respect we accord a prior precedent of this Court under the doctrine of stare decisis.

¶ 32 Under the doctrine of stare decisis, we adhere to prior decisions of this Court "both out of respect for the opinions of our predecessors and because it promotes stability in the law and uniformity in its application." *Wiles v. Construction Co.*, 295 N.C. 81, 85 (1978). When considering whether or not to depart from prior precedent, I reiterate my view that we should start with the factors articulated by the United States Supreme Court, which include "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." *State v. Hilton*, 378 N.C. 692, 2021-NCSC-115, ¶ 78 (Earls, J., dissenting) (alterations in the original) (quoting *Janus v. Am. Fed'n of State, Cnty., & Mun. Emps.*, Council 31, 138 S. Ct. 2448, 2478–79 (2018)).

¶ 33 Applying these factors to the present case, I would conclude that, notwithstanding any potential reliance interests, the rule articulated in *Gurley* should be displaced. I agree with the majority that the parties would have had cause to doubt that *Gurley* could sustain the outcome which resulted in the proceedings below, given the clear intent animating the Court of Appeals' decision in that case. Regardless, whatever reliance interests may have existed are outweighed by the unmistakable fact that the *Gurley* rule is irreconcilable with the text, structure, and purpose of the FRA generally and N.C.G.S. § 20-279.21(b)(4) specifically, as the majority has persuasively explained. Therefore, I agree with the majority that the Court of Appeals' decision in this case should be reversed. As a consequence, the interpretation of N.C.G.S. § 20-279.21(b)(4) offered in *Gurley* is no longer governing law and is no longer incorporated into automobile insurance contracts executed in this state.

Justice BERGER concurring.

¶ 34 On appeal to this Court, Farm Bureau argues that the Court of Appeals erred when it affirmed the trial court's determination that Mr. Dana and the Estate must be paid pursuant to the per accident limit in the parties' UIM agreement. I agree with the majority that the trial court erred when it granted summary judgment in favor of Mr. Dana and the Estate, and the Court of Appeals erred when it affirmed the trial court's decision.

¶ 35 I disagree with the majority about the reason why the claims in this case are governed by the per person limitations. The majority concedes that the North Carolina Motor Vehicle Safety and Financial Responsibility Act (FRA) only "seems" to apply here. In my opinion, the FRA does not address the particular question at issue in this case. Because the issue here is not addressed by the FRA, but is specifically addressed by terms of the insurance policy at issue, the terms of the policy must control. Therefore, I concur only in the result reached by the majority.

¶ 36 The FRA was enacted to ensure that every motor vehicle in the State has "proof of ability to respond in damages for liability[ ] on account of accidents . . . arising out of the ownership, maintenance or use of a motor vehicle[.]" N.C.G.S. § 20-279.1(11) (2019). The FRA prohibits the registration of any automobile in North Carolina unless the owner maintains "proof of financial responsibility" in the form of a liability insurance policy. Policies must conform with the requirements of N.C.G.S. § 20-309(b), and demonstrate the owner's ability to pay damages in the amount of

> ($30,000) because of bodily injury to or death of one person in any one accident, and, *subject to said limit for one person*, in the amount of . . . ($60,000) because of bodily injury to or death of two or more persons in any one accident[.]

N.C.G.S. § 20-279.1(11) (2019) (emphasis added). In other words, if the operator of a motor vehicle causes an accident, the owner's liability policy must be able to provide at least $30,000 in damages to each person and at least $60,000 per accident.

¶ 37 The requirement of the FRA that "each automobile owner [is] to carry a minimum amount of liability insurance providing coverage for the named insured as well as any other person using the automobile with the express or implied permission of the named insured" is written into every automobile policy subject to the FRA as a matter of law. *Integon Indem. Corp. v. Universal Underwriters Ins. Co.*, 342 N.C. 166, 168, 463 S.E.2d 389, 390–91 (1995) (citing N.C.G.S. § 20-279.21(b)(2)); *Nationwide Mut. Ins. Co. v. Chantos*, 293 N.C. 431, 441, 238 S.E.2d 597, 604 (1977)). Pursuant to N.C.G.S. § 20-279.21(b)(2), general liability coverage must insure the vehicle's owner or permitted operator

> against loss from the liability imposed by law for damages arising out of the ownership, maintenance or use of such motor vehicle or motor vehicles within the [U.S.] . . . subject to limits exclusive of interest and

> costs, with respect to each such motor vehicle, as follows: [$30,000] because of bodily injury to or death of one person in any one accident and, *subject to said limit for one person*, [$60,000] because of bodily injury to or death of two or more persons in any one accident, and [$25,000] because of injury to or destruction of property of others in any one accident[.]

N.C.G.S. § 20-279.21(b)(2) (emphasis added).

¶ 38 Farm Bureau correctly contends that the "subject to said limit for one person" language in N.C.G.S. § 20-279.21(b)(2) prohibits an injured individual from recovering more than the per person limit for general liability claims. This is true because recovery of two or more individuals in any one accident is limited to "said limit for any one person" under the plain language of the statute. *See* N.C.G.S. § 20-279.21(b)(2) ($60,000 is available "because of bodily injury to or death of two or more persons[.]"). The "subject to" language of N.C.G.S. § 20-279.21(b)(2) is superfluous under any other reading of the statute.[1]

¶ 39 However, the case before us does not concern the applicable limits of Ms. Dana's general liability insurance. Rather, this case deals with her UIM policy. UIM coverage under N.C.G.S. § 20-279.21(b)(4) applies "when, by reason of payment of judgment or settlement, all liability bonds or insurance policies providing coverage for bodily injury caused by the ownership, maintenance, or use of the underinsured highway vehicle have been exhausted." N.C.G.S. § 20-279.21(b)(4). *See also Lunsford v. Mills*, 367 N.C. 618, 626, 766 S.E.2d 297, 303 (2014) ("Section 20-279.21 was passed to address circumstances where the tortfeasor has insurance, but his or her coverage is in an amount insufficient to compensate the injured party for his or her full damages." (cleaned up)).

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1. When construing similarly worded statutes, other jurisdictions have held that if recovery is not limited by the per person limit, then the per accident limit would be the only limit applicable, regardless of the number of injured parties. *See Farm Bureau Mut. Ins. Co. v. Buckallew*, 246 Mich. App. 607, 618, 633 N.W.2d 473, 479 (2001) (holding that two claimants were limited to the "per person" limit because of "explicit policy language making the per occurrence limit 'subject to' the per person limit"); *American Family Mut. Ins. Co. v. Gardner*, 957 S.W. 2d 367, 369 (Mo. Ct. App. 1997) (limiting recoveries of multiple claimants to the $100,000 "per person" limit because the $300,000 per occurrence limit was "subject to" the "per person" limit); *Livingston v. Farmers Ins. Co. of Washington*, 79 Wash. App. 72, 79, 900 P.2d 575, 578 (1995) (holding that, where the $300,000 per accident UIM limit was "subject to" the per person limit, the "policies unambiguously limit[ed]" the two claimants' recovery to $100,000 per person); *Nationwide Mut. Ins. Co. v. Devlin*, 11 Cal. App. 4th 81, 86, 13 Cal. Rptr. 2d 795, 798 (1992) (limiting the two claimants' recovery to the $100,000 per person limit because the $300,000 per accident limit was "subject to" the per person limit).

Here, because Mr. Bronson's exhausted general liability insurance was insufficient to fully compensate Mr. Dana and the Estate, both submitted claims under Ms. Dana's UIM policy.

¶ 40 To determine whether an injured party's UIM coverage applies under the FRA, we must consider whether (1) the tortfeasor's automobile was an "underinsured highway vehicle" and (2) the tortfeasor's liability policy was exhausted. N.C.G.S. § 20-279.21(b)(4). If UIM coverage is triggered, then the amount of coverage must be calculated by determining "the difference between the amount paid to the claimant under the exhausted liability policy or policies and the limit of underinsured motorist coverage applicable to the motor vehicle involved in the accident." *Id.*

¶ 41 An underinsured highway vehicle is "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." N.C.G.S. § 20-279.21(b)(4). Here, the tortfeasor's automobile qualifies as an "underinsured highway vehicle" because the sum of Mr. Bronson's limits of liability ($50,000 per person and $100,000 per accident) was less than the applicable limits of UIM coverage for Ms. Dana's vehicle ($100,000 per person and $300,000 per accident). Further, the tortfeasor's liability policy was exhausted by Integon's proposal to apportion the entire $100,000 per accident limit amongst the injured parties. Accordingly, Ms. Dana's UIM coverage applies, and we must calculate the amount available under Ms. Dana's UIM coverage. The question is whether the amount of coverage is governed by the FRA or the insurance policy.

¶ 42 "[W]hen 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, 462 S.E.2d 650 (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, 152 S.E.2d 436, 440 (1967); *N.C. Farm Bureau Mut. Ins. Co., Inc. v. Lunsford*, 2021-NCSC-83, ¶ 37, 378 N.C. 181, 196, 861 S.E.2d 705, 716 (2021) (Barringer, J., dissenting).

¶ 43 The majority concedes the FRA does not specifically address this situation. Thus, we should follow our precedent. When the FRA language does not address a specific situation, we look to that of the policy. "Language in a policy of insurance is the determining factor in resolving

coverage questions unless that language is in conflict with applicable statutory provisions governing such coverage." *Lanning v. Allstate Ins. Co.*, 332 N.C. 309, 312, 420 S.E.2d 180, 182 (1992). As the majority acknowledges, the plain language of N.C.G.S. § 20-279.21(b)(4) does not address whether the UIM per accident limit is subject to the UIM per person limit. There is, therefore, no conflict, and we must turn to the language of Ms. Dana's UIM policy to determine whether the UIM per accident limit is subject to the UIM per person limit. *See Lanning*, 332 N.C. at 312, 420 S.E.2d at 182 (stating that where the policy language does not conflict with the FRA, the "[l]anguage in a policy of insurance is the determining factor in resolving coverage questions[.]").

¶ 44 N.C.G.S. § 20-279.21(b)(4) makes multiple references to per person and per accident limits. However, the UIM subdivision does not contain the same "subject to . . . [per person] limit" language of N.C.G.S. § 20-279.21(b)(2). N.C.G.S. § 20-279.21(b)(4) provides, in relevant part, that UIM coverage is to be used "only with a policy that is written at limits that exceed those prescribed by subdivision (2) of this subsection . . . [t]he limits of such [UIM] coverage shall be equal to the highest limits of bodily injury liability coverage . . . the limits shall not exceed . . . ($1,000,000) *per person* and . . . ($1,000,000) *per accident*[.]" N.C.G.S. § 20-279.21(b)(4) (emphasis added). Notably, N.C.G.S. § 20-279.21(b)(4) provides that the limit of UIM coverage is "the difference between the amount paid to the claimant under the exhausted liability policy . . . and the limit of [UIM] coverage *applicable* to the motor vehicle[.]" N.C.G.S. § 20-279.21(b)(4) (emphasis added).

¶ 45 Accordingly, because N.C.G.S. § 20-279.21(b)(4) does not address whether the UIM per accident limit is subject to the UIM per person limit, there is no conflict, and we must turn to the language of Ms. Dana's UIM policy to determine whether the UIM per accident limit is subject to the UIM per person limit. *See Lanning*, 332 N.C. at 312, 420 S.E.2d at 182 (stating that where the policy language does not conflict with the FRA, the "[l]anguage in a policy of insurance is the determining factor in resolving coverage questions[.]").

¶ 46 In interpreting the language of an insurance policy, we "must enforce the policy as written." *Nationwide Mut. Ins. Co. v. Mabe*, 342 N.C. 482, 492, 467 S.E.2d 34, 40 (1996). In addition, "[o]ur interpretation of an insurance policy is based on the fundamental principle that the plain language of the policy controls." *N.C. Farm Bureau Mut. Ins. Co., Inc. v. Martin*, 376 N.C. 280, 286, 851 S.E.2d 891, 895 (2020). "[I]f a policy is not ambiguous, then the court must enforce the policy as written and may not remake the policy under the guise of interpreting an ambigu-

ous provision." *Mabe*, 342 N.C. at 492, 467 S.E.2d at 40. However, if the language of the policy is ambiguous, then "the doubts will be resolved against the insurance company and in favor of the policyholder." *Woods v. Nationwide Mut. Ins. Co.*, 295 N.C. 500, 506, 246 S.E.2d 773, 777 (1978); *see also Lanning*, 332 N.C. at 316–17, 420 S.E.2d at 184 (concluding that where the FRA neither required nor prohibited intrapolicy stacking, policy language that was "clear, and capable of but one reasonable interpretation" controlled the outcome).

¶ 47 Here, the relevant portion of the UIM provision in Ms. Dana's policy provides:

> Subject to [the] limit for each person, the limit of bodily injury liability shown in the Declarations for each accident for [UIM] Coverage is our maximum limit of liability for all damages for bodily injury resulting from any one accident.

¶ 48 The language of the UIM policy is "clear, and capable of but one reasonable interpretation[.]" *Lanning*, 332 N.C. at 317, 420 S.E.2d at 184. The policy plainly states that the UIM per accident limit was subject to the UIM per person limit, and that the proper amount of UIM coverage available was subject to the per person limit. Thus, the amount of UIM coverage available to Mr. and Ms. Dana for their injuries was subject to the per person limit. Because the policy language is clear, and because our courts may not "rewrite the contract or impose liabilities on the parties not bargained for[,]" *Woods*, 295 N.C. at 506, 246 S.E.2d at 777, the $100,000 person limit applies, reduced by the recovery under the tortfeasor's policy. Thus, under Ms. Dana's UIM policy, William T. Dana is entitled to $68,000 and the Estate of Pamela M. Dana is entitled to $56,250.[2]

¶ 49 The majority dismisses looking to the policy language by waiving the false flag that our analysis "would allow insurers to have a significant degree of flexibility in drafting policies as they see fit." The reality is that the insurance industry is heavily regulated in this state, insurance policies are virtually uniform, and policies must be approved by the Insurance Commission. *See* N.C.G.S. § 58-2-53 (2019) ("Whenever

2. Both William T. Dana and the Estate of Pamela M. Dana are entitled to the UIM policy's per person limit of $100,000, less the amount of Integon's liability coverage ($32,000 for William T. Dana and $43,750 for the estate of Pamela M. Dana). *See* N.C.G.S. § 20-279.21 (b)(4) ("In any event, the limit of underinsured motorist coverage applicable to any claim is determined to be the difference between the amount paid to the claimant under the exhausted liability policy or policies and the limit of underinsured motorist coverage applicable to the motor vehicle involved in the accident.").

any provision of this Chapter requires a person to file rates, forms, classification plans, plans of operation, the Safe Driver Incentive Plan, or any other item with the Commissioner or Department for approval, the approval or disapproval of the filing is an agency decision[.]"). *See also* N.C.G.S. § 58-5-95 ("Deposits subject to approval and control of Commissioner"); N.C.G.S. § 58-7-60 ("Approval as a domestic insurer"); N.C.G.S. § 58-10-347 ("Provisional approval for a license"); N.C.G.S. § 58-35-45 ("Filing and approval of forms and service charges"); N.C.G.S. § 58-36-20 ("Disapproval; hearing order; adjustment of premium, review of filing"); N.C.G.S. § 58-40-45 ("Disapproval of rates; interim use of rates"); N.C.G.S. § 58-45-30 ("Directors to submit plan of operation to Commission; review and approval; amendments; appeal from Commissioner to superior court"); N.C.G.S. § 58-47-65 ("Licensing; qualification for approval"); N.C.G.S. § 58-47-175 ("Approval of advertising"); N.C.G.S. § 58-50-85 ("Approval of independent review organizations"); N.C.G.S. § 58-50-125 ("Health care plans; formation; approval; offerings"); N.C.G.S. § 58-50-131 ("Premium rates for health benefit plans; approval authority; hearing"); N.C.G.S. § 58-51-85 ("Group or blanket accident and health insurance; approval of forms and filing of rates"); N.C.G.S. § 58-51-95 ("Approval by Commissioner of forms, classification and rates; hearing; exceptions"); N.C.G.S. § 58-52-15 ("Forms and rate manuals subject to § 58-51-1; disapproval of rates"); N.C.G.S. § 58-56-21 ("Approval of advertising"); N.C.G.S. § 58-57-30 ("Forms to be filed with Commissioner; approval or disapproval by Commissioner"); N.C.G.S. § 58-58-220 ("Approval of viatical settlement contracts and disclosure statements"); N.C.G.S. § 58-65-132 ("Review and approval of conversion plan; new corporation"); N.C.G.S. § 58-72-50 ("Approval, acknowledgment and custody of bonds"); N.C.G.S. § 58-91-50 ("Product filing and approval").

¶ 50 Because the trial court erred when it granted summary judgment to Mr. Dana and the Estate, and the Court of Appeals erred when it affirmed the trial court's decision, I concur in the result reached by the majority.

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

REYNOLDS AM. INC. v. THIRD MOTION EQUITIES MASTER FUND LTD.

[379 N.C. 524, 2021-NCSC-162]

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., BLUE MOUNTAIN 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, DEFENDANT-APPELLANTS

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., CANYON-SL VALUE FUND, L.P., PERMAL CANYON IO LTD., CANYON VALUE REALIZATION MAC 18 LTD., DEFENDANT-APPELLEES

No. 368A20

Filed 17 December 2021

1. Corporations—merger—judicial appraisal—fair value of shares—discretionary determination

In a judicial appraisal of the value of dissenting shareholders' shares in a tobacco company—initiated as the result of a merger with a larger international conglomerate—the N.C. Business Court did not abuse its discretion when it determined that the negotiated deal price constituted fair value as of the transaction date pursuant to N.C.G.S. § 55-13-01(5). The court's consideration of the deal price as evidence of fair value was proper where there was objective indicia that the deal was done at arms length, and was only part of the court's thorough analysis, which included other customary and current valuation concepts and techniques as allowed by statute. Further, the court properly exercised its discretion in evidentiary matters when it took into account the tobacco company's evidence regarding an expert's adjusted unaffected stock price analysis, but not the dissenters' discounted cash flow analysis, which the court determined was unreliable.

2. Corporations—merger—judicial appraisal—fair value of shares—additional interest payments

The Supreme Court rejected an argument by the dissenting shareholders in a merger transaction—who had initiated a judicial appraisal before the N.C. Business Court to determine whether they

had been paid fair value for their shares—that they were entitled to additional interest payments pursuant to N.C.G.S. § 55-13-30(e). A fair reading of that provision necessarily included the definition of "interest" contained in N.C.G.S. § 55-13-01(6), and the dissenters' interpretation would have led to an absurd result.

Appeal pursuant to N.C.G.S. § 7A-27(a)(2) from a final judgment entered on 27 April 2020 by Chief Business Court Judge Louis A. Bledsoe III in Superior Court, Forsyth 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 31 August 2021.

Donald H. Tucker Jr., *Christopher B. Capel*, *Clifton L. Brinson*, *and Gary A. Bornstein*, *pro hac vice*, *for plaintiff-appellee Reynolds American Inc.*

Brooks, *Pierce*, *McLendon*, *Humphrey & Leonard LLP*, *by Jessica Thaller-Moran and Jennifer K. Van Zant; and Rolnick Kramer Sadighi LLP*, *by Lawrence M. Rolnick*, *pro hac vice*, *Sheila A. Sadighi*, *pro hac vice*, *and Jennifer A. Randolph*, *pro hac vice*, *for defendant-appellants Mason Capital Master Fund*, *L.P.*, *Blue Mountain Credit Alternatives Master Fund L.P.*, *BlueMountain Foinaven Master Fund L.P.*, *BlueMountain Guadalupe Peak Fund L.P.*, *BlueMountain Summit Trading L.P.*, *and BlueMountain Montenvers Master Fund SCA SICAV-SIF.*

George F. Sanderson III, *Kevin G. Abrams*, *and J. Peter Shindel Jr. for defendant-appellants Third Motion Equities Master Fund Ltd*, *Magnetar Capital Master Fund*, *Ltd*, *Spectrum Opportunities Master Fund Ltd*, *Magnetar Fundamental Strategies Master Fund Ltd*, *and Magnetar MSW Master Fund Ltd.*

Kieran J. Shanahan, *Brandon S. Neuman*, *and Christopher S. Battles for defendant-appellant Barry W. Blank Trust.*

No brief for defendant-appellees.

EARLS, Justice.

¶ 1 This case requires us to interpret and apply N.C.G.S. §§ 55-13-01 et seq. to decide whether the Business Court properly determined the "fair value" of shares held by shareholders in a tobacco company, Reynolds

American Inc. (RAI), who sought judicial appraisal after RAI was acquired by the international tobacco conglomerate British American Tobacco (BAT). The Business Court determined that the $59.64 per share plus interest RAI paid these shareholders (the dissenters) after they notified RAI of their intent to seek judicial appraisal "equals or exceeds the fair value of RAI shares as of the date of the Merger and that RAI is therefore entitled to a judgment that no further payments to [the dissenters] are required." *Reynolds Am. Inc. v. Third Motion Equities Master Fund Ltd.*, 2020 NCBC 35, 2020 WL 2029621 (N.C. Super. Ct. 2020). On appeal, the dissenters challenge the Business Court's judgment on various grounds. For the most part, the dissenters' challenges relate to their central assertion that the Business Court failed to determine the fair value of their shares using "customary and current valuation concepts and techniques" as required under N.C.G.S. § 55-13-01(5). Instead, in the dissenters' view, the Business Court "simply deferred to the value of the merger consideration negotiated by BAT in January 2017 and concluded it was a 'fair price.' "

¶ 2 The dissenters' characterization of the analysis performed by the Business Court is inconsistent with any fair reading of the challenged judgment. Rather than "defer[ ] entirely to the deal price struck with an insider in the transaction at issue," the Business Court appropriately considered the deal price as one indicator of the fair value of the dissenters' shares after finding that given the circumstances of this particular transaction, the deal price reliably reflected fair value. In addition, the Business Court properly utilized numerous other "customary and current valuation concepts and techniques" in order to determine the fair value of the dissenters' shares. The dissenters' other challenges to the Business Court's judgment are also without merit. Accordingly, we affirm.

I. The merger and North Carolina's appraisal statutes

¶ 3 On 16 January 2017, BAT entered into an agreement to purchase North Carolina-based RAI. Prior to the agreement, BAT owned approximately 42% of RAI's shares and controlled several seats on its Board of Directors. However, the merger agreement was negotiated by BAT and a "Transaction Committee" comprised of non-BAT-affiliated RAI board members. The merger consideration included 0.5260 shares of BAT plus $29.44 in cash. On the date of the merger agreement, this consideration was worth $59.64 per RAI share. The transaction ultimately closed on 25 July 2017. On this date, the merger consideration was worth $65.87 per RAI share. The transaction was "overwhelmingly approved" by a majority of RAI's outstanding shares, including ninety-nine percent of the

non-BAT-owned shares which were voted in the merger. *Reynolds Am. Inc.*, 2020 WL 2029621, at *34. This transaction is at the heart of the present case.

¶ 4 In North Carolina, an individual or entity owning shares in a corporation is entitled to seek judicial appraisal to determine the fair value of their shares after certain corporate actions. N.C.G.S. § 55-13-02 (2019). To initiate the appraisal process, a shareholder must (1) "[d]eliver to the corporation, before the vote [on the transaction] is taken, written notice of the shareholder's intent to demand payment if the proposed action is effectuated"; and (2) "[n]ot vote, or cause or permit to be voted, any shares of any class or series in favor of the proposed action." N.C.G.S. § 55-13-21(a)(1)–(2) (2019). Next, the corporation "must deliver a written appraisal notice and form . . . to all shareholders who" meet these requirements. N.C.G.S. § 55-13-22(a) (2019). Provided that the shareholder does not "vote for or consent to the transaction," N.C.G.S. § 55-13-22(b)(1) (2019), the corporation is then obligated to pay the shareholder "the amount the corporation estimates to be the fair value of their shares, plus interest," N.C.G.S. § 55-13-25(a) (2019). A shareholder who believes the corporation has not paid fair value must notify the corporation, at which point the corporation must either accede to the shareholder's estimate of fair value or file a complaint against the shareholder to initiate an appraisal proceeding within sixty days. N.C.G.S. §§ 55-13-28(a), 55-13-30(a) (2019).

¶ 5 During an appraisal proceeding, the trial court is tasked with determining the "fair value" of the dissenting shareholder's shares. N.C.G.S. § 55-13-01(5) (2019). Subsection 55-13-01(5) defines "fair value" as

> [t]he value of the corporation's shares (i) immediately before the effectuation of the corporate action as to which the shareholder asserts appraisal rights, excluding any appreciation or depreciation in anticipation of the corporate action unless exclusion would be inequitable, (ii) using customary and current valuation concepts and techniques generally employed for similar business in the context of the transaction requiring appraisal, and (iii) without discounting for lack of marketability or minority status except, if appropriate, for amendments to the articles pursuant to [N.C.]G.S. 55-13-02(a)(5).

Id. In this case, after BAT acquired RAI, a group of dissenting shareholders who believed that the agreed-upon deal price significantly

undervalued RAI refused to tender their shares at closing. They sent RAI a signed appraisal form in September 2017. Subsequently, RAI paid the dissenters "the amount the corporation estimates to be the fair value of their shares," $59.64, "plus interest." N.C.G.S. §§ 55-13-22, 55-13-25(a). The dissenters refused to accept this offer and conveyed their belief that the fair value of their shares was between $81.21 and $94.33 per share.

¶ 6 On 29 November 2017, RAI filed a complaint for judicial appraisal pursuant to N.C.G.S. § 55-13-30. After a lengthy trial, post-trial briefing, and post-trial oral argument, the Business Court entered a judgment containing voluminous findings of fact in support of its conclusion that "the fair value of RAI stock as of the Transaction Date was no more than the deal price of $59.64 per share" and establishing that "[n]o further sums are due from RAI to [the dissenters] for payment of [the dissenters'] shares." *Reynolds Am. Inc.*, 2020 WL 2029621, at *71–72. The dissenters appealed directly to this Court pursuant to N.C.G.S. § 7A-27(a).

¶ 7 This Court has not previously considered an appeal from a Business Court judgment determining the fair value of a dissenting shareholder's shares pursuant to N.C.G.S. §§ 55-13-01 et seq. However, many of the issues raised by the parties have been thoroughly litigated in other jurisdictions, especially in Delaware. Both parties cite extensively to Delaware law in their arguments to this Court, as did the Business Court in its judgment. North Carolina's appraisal statutes do not exactly mirror Delaware's statutes, and regardless, cases decided in a sister jurisdiction are not binding on this Court. *See*, *e.g.*, *Wachovia Bank & Tr. Co. v. S. Ry. Co.*, 209 N.C. 304, 308 (1936) ("[D]ecisions of other jurisdictions are persuasive, but not binding on us.") Still, given the well-developed body of law arising from the numerous appraisal cases decided in Delaware, we borrow freely from these cases to the extent we find their reasoning to be persuasive and applicable to the facts here. *See*, *e.g.*, *Corwin v. Brit. Am. Tobacco PLC*, 371 N.C. 605, 613 (2018) (relying on Delaware caselaw to resolve a legal issue arising in a shareholder suit).

II. Standard of review

¶ 8 North Carolina's appraisal statutes vest the Business Court with significant discretion to decide how best to determine the fair value of a corporation's shares given the circumstances of a challenged transaction. The General Assembly chose not to prescribe any specific methodology the court must utilize in an appraisal proceeding. Rather, the General Assembly has provided only that a court must determine fair value "using customary and current valuation concepts and techniques generally employed for similar business[es] in the context of the trans-

action requiring appraisal." N.C.G.S. § 55-13-01(5). By implication, it is left to the Business Court in the first instance to determine which valuation concepts and techniques should be utilized to ascertain the fair value of a dissenting shareholder's shares and the weight to accord the results of any particular concept or technique it selects. We therefore review the Business Court's choice to utilize or disregard a proposed valuation concept or technique, and its decision to accord a selected concept or technique substantial or limited probative weight, solely for abuse of discretion.

¶ 9 In other respects, our standard of review is identical to the standard of review we utilize in considering an appeal from any judgment entered after a non-jury trial.[1] "When the trial court conducts a trial without a jury, the trial court's findings of fact have the force and effect of a jury verdict and are conclusive on appeal if there is competent evidence to support them, even though the evidence could be viewed as supporting a different finding." *In re Skinner*, 370 N.C. 126, 139 (2017) (cleaned up). A trial court's unchallenged findings of fact are "presumed to be supported by competent evidence and [are] binding on appeal." *Koufman v. Koufman*, 330 N.C. 93, 97 (1991). "Findings not supported by competent evidence are not conclusive and will be set aside on appeal." *Penland v. Bird Coal Co.*, 246 N.C. 26, 30 (1957). By contrast, "[c]onclusions of law drawn by the trial court from its findings of fact are reviewable *de novo* on appeal." *Carolina Power & Light Co. v. City of Asheville*, 358 N.C. 512, 517 (2004).

¶ 10 We proceed by examining the dissenters' claims in three ways. First, to the extent the dissenters argue that the Business Court should have utilized a method for determining fair value it did not rely upon or vice versa, or that the Business Court accorded too much or too little weight to the results of any particular analysis presented at trial, we review for abuse of discretion. We will not disturb the Business Court's judgment unless the dissenters "show[ ] that its [decision] was manifestly unsupported by reason and could not have been the result of a reasoned decision." *State v. McGrady*, 368 N.C. 880, 893 (2016) (quoting *State v. Riddick*, 315 N.C. 749, 756 (1986)); *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 . . . ."). Second, to the extent the dissenters

1. Notably, both parties agree that the standard of review this Court utilizes when addressing appeals of judgments entered after a bench trial in other, non-appraisal contexts should be utilized here. Neither party proposes that a different standard of review should apply when reviewing a Business Court judgment determining the fair value of a corporation's shares.

dispute the Business Court's factual findings, we review those findings to determine if they are supported by substantial evidence.[2] Any findings supported by substantial evidence are binding, even if there is contrary evidence in the record. *See N.C. Farm Bureau Mut. Ins. Co. v. Cully's Motorcross Park, Inc.*, 366 N.C. 505, 512 (2013). Third, to the extent the dissenters argue that the Business Court either failed to adhere to the requirements of North Carolina's appraisal statute or otherwise misapplied relevant law in valuing the dissenters' shares, we review de novo.

III. The dissenters' challenges to the Business Court's fair value determination

¶ 11 **[1]** As the Supreme Court of Delaware has explained, "[i]n a statutory appraisal proceeding, both sides have the burden of proving their respective valuation positions." *Brigade Leveraged Cap. Structures Fund Ltd. v. Stillwater Mining Co.*, 240 A.3d 3, 17 (Del. 2020) (quoting *M.G. Bancorp., Inc. v. Le Beau*, 737 A.2d 513, 520 (Del. 1999)). Thus, in an appraisal proceeding, each side presents evidence to support their contention as to what represents the fair value of the dissenting shareholders' shares, and the Business Court determines the fair value of the shares on the basis of the evidence presented.

¶ 12 On appeal in this case, the dissenters' central claim is that the Business Court did not determine the fair value of their shares "using customary and current valuation concepts and techniques." N.C.G.S. § 55-13-01(5). Instead, the dissenters repeatedly assert that the Business Court ignored this statutory requirement and instead "simply defer[red] to [the] deal price negotiated by" BAT and RAI. In the alternative, the dissenters contend that even if it may generally be permissible to consider the deal price in an appraisal proceeding, the Business Court erred in utilizing the deal price in this case because the deal was executed without "a robust market check."

A. The Business Court determined the fair value of the dissenters' shares in accordance with the requirements of N.C.G.S. § 55-13-01(5).

¶ 13 The dissenters' argument that the Business Court deferred to the deal price as conclusively establishing fair value is inconsistent with a

2. The dissenters do not expressly state they are challenging any specific findings of fact entered by the Business Court. However, many of the arguments they advance do encompass challenges to findings of fact addressing the utilization of or weight given to valuation concepts or techniques entered by the Business Court in support of its ultimate determination of the fair value of the dissenters' shares.

careful reading of the Business Court's comprehensive judgment. It is correct that the Business Court examined the deal price and found it illustrative of the fair value of the dissenters' shares. But the Business Court in no way suggested that reflexive deference to the deal price would have satisfied its obligation to determine the fair value of the dissenters' shares "using customary and current valuation concepts and techniques," N.C.G.S. § 55-13-01(5), or that a court must consider the deal price in every appraisal proceeding. Instead, the Business Court conducted a thorough analysis and concluded that "under the circumstances present here, . . . the resulting deal price is reliable evidence of RAI's fair value." *Reynolds Am. Inc.*, 2020 WL 2029621, at *64. This approach represents an appropriate exercise of the Business Court's discretion to select valuation methodologies under N.C.G.S. § 55-13-01(5).

¶ 14 Further, the Business Court plainly utilized many other "customary and current valuation concepts and techniques" in addition to considering the deal price when determining fair value. The deal price was not the only input the Business Court considered. For example, the Business Court also examined RAI's "competitive positioning and relationship with BAT in the time leading up to the Merger," *id.* at *14, the tobacco industry's regulatory dynamics, *id.* at *12, an adjusted unaffected share price analysis, *id.* at *19, "[c]ontemporaneous research analyst commentary," *id.* at *20, valuations produced during the transaction process, *id.* at *33, an analysis of comparable precedent transactions, *id.* at *40, a comparative company analysis, *id.* at *68, and other factors. The Business Court's decision to credit the deal price was informed by the results of these other methods of valuing RAI's shares, which confirmed that the deal price was indicative of fair value. *See*, *e.g.*, *id.* at *68 ("[T]he DCF analyses performed by [RAI's] Financial Advisors were reliable and constitute persuasive evidence that the fair value of RAI's shares as of the Transaction Date was at or below the deal price of $59.64 per share."). Rather than choose to value the dissenters' shares at no more than the deal price of $59.64 per share *because* that was the deal price, the Business Court utilized a range of acceptable valuation concepts and techniques to arrive at the conclusion that the deal price reflected fair value.

¶ 15 Courts in other jurisdictions, including Delaware, have routinely considered the deal price as evidence of fair value when warranted by the circumstances of a particular transaction. *See*, *e.g.*, *Brigade Leveraged Cap. Structures Fund Ltd.*, 240 A.3d at 9 (concluding that the trial court did not abuse its discretion when it "relied on the deal price as the most reliable indicator of [the corporation's] fair value"). Here,

the Business Court conducted an analysis using various "customary and current valuation concepts and techniques" including but not limited to consideration of the deal price. Accordingly, the dissenters' argument that the Business Court failed to determine the fair value of their shares in a manner comporting with the legal requirements of N.C.G.S. § 55-13-01(5) is without merit.

B. It was not an abuse of discretion for the Business Court to consider the deal price as indicative of the fair value of the dissenters' shares.

¶ 16 In the alternative, the dissenters argue that the Business Court should have accorded the deal price no probative weight in its appraisal given the circumstances surrounding BAT's merger with RAI. According to the dissenters, because the merger was negotiated after "a large inside stockholder ma[d]e an offer and refuse[d] to allow a market check of the price, deal price *cannot* be relied upon as evidence of fair value."

¶ 17 The deal price is only probative in an appraisal proceeding if there exist reasons to believe the deal price reflects fair value. *Cf. DFC Glob. Corp. v. Muirfield Value Partners, L.P.*, 172 A.3d 346, 349 (Del. 2017) ("[T]here is no presumption in favor of the deal price . . . ."). We agree with the dissenters that when the directors of a corporation being sold have completed a market check,[3] there is typically reason to believe that the deal price reflects fair value. However, we disagree with the dissenters that a court necessarily abuses its discretion when it credits the deal price resulting from a transaction during which a formal market check was not completed.

¶ 18 The reason the completion of a market check prior to completion of a transaction supports a court's decision to credit the deal price in an appraisal proceeding is that a market check is one way of assuring that a proposed deal price reflects the corporation's fair value. Nevertheless, in the absence of a market check, a court is not compelled to disregard the deal price entirely. We agree with Delaware courts which have declined to identify "minimum requirements for . . . sale processes to meet before the deal price can be considered as a persuasive indicator of fair value." *In re Appraisal of Columbia Pipeline Grp., Inc.*, No. 12736-VCL, 2019 WL 3778370, at *42 (Del. Ch. Aug. 12, 2019). Absent a market check, a court still retains the discretion to determine whether other "indicia of

3. A market check is "an "investigation typically conducted by an investment banking firm . . . as part of a process to determine whether a proposed price for the target . . . is fair." *Market Check*, *Glossary of Stock Market Terms*, NASDAQ, https://www.nasdaq.com/glossary/m/market-check (last visited Dec. 7, 2021).

reliability" exist which give the court reason to trust that the deal price reflects fair value. *In re Panera Bread Co.*, No. 2017-0593-MTZ, 2020 WL 506684, at *19 (Del. Ch. Jan. 31, 2020). These "indicia of reliability" may include, but are not limited to, "negotiations at arm's-length; board deliberations without any conflicts of interest; buyer due diligence and receipt of confidential information about the company's value . . . seller extraction of multiple price increases . . . [and] the absence of post-signing bidders." *Id.* (cleaned up).

¶ 19 In this case, the Business Court specifically found the presence of "numerous objective indicia of a robust deal process that led to a deal price that reliably reflected RAI's fair value." *Reynolds Am. Inc.*, 2020 WL 2029621, at *61. This ultimate finding is supported by additional findings concerning the negotiations leading up to the transaction, including the Business Court's finding that the merger was negotiated at arms-length by a committee of independent board members who "twice rejected BAT's merger offers without countering" and "seriously considered strategic alternatives to a merger with BAT." *Id.* Other relevant findings addressed the contemporaneous reactions to the deal of various participants in the transaction and of neutral, external observers who universally assessed the deal price to be fair. *See*, *e.g.*, *id.* at *43 (finding that "Mason Capital's letter to the Transaction Committee" reflecting its belief that RAI was worth $54.44 per share "is persuasive evidence of [this dissenting shareholder's] pre-litigation views of RAI's value"). These findings are amply supported by the record. In light of these findings, we conclude that the Business Court did not abuse its discretion in considering the deal price.

¶ 20 We reach this conclusion notwithstanding the facts that BAT was a minority stakeholder in RAI prior to the merger and that it had publicly announced it was opposed to alternative transactions. These facts are certainly relevant when a court assesses "the persuasiveness of the deal price" in an appraisal proceeding, an assessment which always depends upon "the reliability of the sale process that generated it." *In re Stillwater Mining Co.*, No. 2017-0385-JTL, 2019 WL 3943851, at *21 (Del. Ch. Aug. 21, 2019). However, in this case, the Business Court determined that the facts which enhanced the "persuasiveness" of the deal price "outweigh[ed] weaknesses in the sale process." *In re Panera Bread Co.*, 2020 WL 506684, at *19. Given the Business Court's factual findings addressing the circumstances surrounding the transaction, we do not believe this determination was "manifestly unsupported by reason." *Riddick*, 315 N.C. at 756. Accordingly, we hold that the Business Court did not err in considering the deal price evidence of RAI's fair value.

C. The Business Court did not err in disregarding the results of the dissenters' made-for-litigation discounted cash flow analysis.

¶ 21 Next, the dissenters challenge the Business Court's refusal to adopt the valuation proposed by their expert, Dr. Mark Zmijewski, resulting from a discounted cash flow (DCF) analysis he prepared in advance of trial. The dissenters challenge the Business Court's decision to disregard Dr. Zmijewski's DCF analysis in two ways. First, the dissenters argue that "[d]espite the uniform agreement that it is the most widely accepted valuation technique," the Business Court failed to base its fair value determination on the results of *any* DCF analysis in violation of the requirements of North Carolina's appraisal statutes. Second, the dissenters argue that the Business Court erred in disregarding Dr. Zmijewski's DCF analysis *specifically* and instead choosing to credit the results of analyses conducted by RAI's financial advisors during the deal process. The dissenters contend that only Dr. Zmijewski's DCF analysis was based on reasonable inputs. We reject the dissenters' claims.

1. The appraisal statutes did not compel the Business Court to utilize a DCF analysis to determine fair value.

¶ 22 The dissenters' first argument that a court fails to comport with the requirements of N.C.G.S. § 55-13-01(5) if it does not base its fair value determination on the results of a DCF analysis is inconsistent with the text and purpose of this provision of the appraisal statutes. As the Business Court noted, "[a] DCF analysis is an accepted valuation methodology." *Reynolds Am. Inc.*, 2020 WL 2029621, at *66 (citing *In re Appraisal of Columbia Pipeline Grp., Inc.*, 2019 WL 3778370, at *50). As such, a DCF analysis may often be one of the "customary and current valuation concepts and techniques" a court utilizes when determining the fair value of a corporation's shares during an appraisal proceeding. *Cf. Pinson v. Campbell-Taggart, Inc.*, No. CIV.A. 7499, 1989 WL 17438, at *8 n.11 (Del. Ch. Feb. 28, 1989) ("[T]he discounted cash flow method is widely accepted in the financial community as a legitimate valuation technique. . . . [T]he validity of that technique *qua* valuation methodology is no longer open to question."). Nevertheless, while a court may choose to rely upon a DCF analysis to determine fair value, nothing in North Carolina's appraisal statutes demands that the Business Court do so in every case. A court does not inevitably violate N.C.G.S. § 55-13-01(5) if it chooses to rely upon other "customary and current valuation concepts and techniques" instead of or in addition to a DCF analysis to determine fair value.

2. The Business Court did not abuse its discretion in assessing Dr. Zmijewski's DCF analysis to be unreliable.

¶ 23 In the alternative, the dissenters contend that the Business Court abused its discretion in choosing to credit the results of the contemporaneous analyses performed by RAI's financial advisors during the deal process rather than Dr. Zmijewski's DCF analysis. On this issue, the Business Court found that

> [b]ased on the admissible evidence of record . . . Dissenters' valuation of $92.17 is an extreme outlier. It implies a $50 billion mispricing of RAI's shares . . . . [It] is starkly inconsistent with all other evidence of value including the market evidence, contemporaneous DCFs, and various sanity checks that Dissenters' experts agree are a typical part of the valuation process.

Reynolds Am. Inc., 2020 WL 2029621, at *54. According to the dissenters, the Business Court's choice to disregard the results of Dr. Zmijewski's DCF analysis was manifestly unreasonable because his was the only analysis which incorporated a set of ten-year financial projections RAI created and presented at an internal strategic planning meeting.

¶ 24 Although the parties agree that a DCF analysis is a universally accepted method for valuing a company, it is sensitive and its "result . . . depends critically on its inputs." *Merlin Partners LP v. AutoInfo, Inc.*, No. 8509-VCN, 2015 WL 2069417, at *17 (Del. Ch. Apr. 30, 2015). Depending on how the analyst's financial model is constructed, small changes to its inputs can produce dramatic swings in the resulting valuation. *See id.* ("For example, small changes to the assumed cost of capital can dramatically impact the result."). Thus, a court is well within its discretion to reject the valuation which results from a DCF analysis if the court assesses its underlying inputs to be unreliable. *Cf. Dell, Inc. v. Magnetar Glob. Event Driven Master Fund Ltd*, 177 A.3d 1, 37 (Del. 2017) (finding the deal price more persuasive than the results of a DCF analysis "given the obvious lack of credibility of the petitioners' DCF model—as well as legitimate questions about the reliability of the projections upon which all of the various DCF analyses are based"). Indeed, the fact that the results of a DCF analysis are extremely sensitive to minor variations in the value of a single input may itself be reason to doubt its results. *Cf. In re Panera Bread Co.*, 2020 WL 506684, at *41 (concluding that a particular DCF analysis was "fatal[ly] unreliab[le]" because adjusting one input produced "wild swings in value").

¶ 25 Here, the primary reason the Business Court rejected Dr. Zmijewski's DCF analysis was because it was extremely sensitive to changes to the value of a single input, and the court doubted that Dr. Zmijewski's choice as to where to fix the value of this input was reasonable. The Business Court explained that the discrepancy between Dr. Zmijewski's valuation and the financial advisors' valuation resulted almost entirely from Dr. Zmijewski's choice to assume a "substantially higher" perpetuity growth rate (PGR) than the advisors. *Reynolds Am. Inc.*, 2020 WL 2029621, at *50. The reason Dr. Zmijewski's PGR was "substantially higher" than the advisors' PGR was that it was based on a set of internal RAI projections showing steady short-term growth continuing consistently for ten years, whereas the financial advisors' projections were based on "a long-term view of the prospects of the Company and the industry rather than the specifics of a few nearer-term years." *Id.* at *49. The Business Court found, and the dissenters do not dispute, that "the vast majority of Zmijewski's valuation is dependent on the PGR that was used." *Id.* at *51. Given the sensitivity of Dr. Zmijewski's valuation to his choice of PGR, the Business Court made the reasonable choice to closely examine this input.

¶ 26 The Business Court found Dr. Zmijewski's choice of a PGR to be "unreasonable and unreliable." *Id.* at *51. According to the Business Court, Dr. Zmijewski's selection of a PGR was based on another expert's analysis which

> ignores . . . the substantial evidence showing that these ten-year projections were not intended to create a probability-weighted value of future cash flows, disregarded significant assumptions and sensitivities that could dramatically impact RAI's business, and were largely extrapolations of current industry trends and dynamics without substantial change.

Id. Although the dissenters repeatedly attack the Business Court's characterization of the ten-year projections, we cannot say that the court's findings addressing the purpose and utility of the projections are unreasonable. The Business Court expressly found that the ten-year projections were not intended to—and did not in fact—reflect RAI's view of the most likely trajectory of its future cash flows, and were instead useful only for strategic planning purposes because the projections made no effort to account for possible long-term structural threats to RAI's business. *Id.* at *25. The Business Court also found that "[t]estimony from the [financial advisors] . . . indicates that it was typical when performing valuation work to receive and use five-year projections from management." *Id.* at *28. These findings are supported by the record and

support the Business Court's decision not to credit the results of Dr. Zmijewski's DCF analysis.

¶ 27 It is also appropriate for courts to be skeptical of the results of DCF analyses that are wildly out of step with "alternative valuation methodologies [used] as a 'sanity check' to test the reasonableness of conclusions based on a particular methodology." *In re Adelphia Commc'ns Corp.*, 512 B.R. 447, 474 (S.D.N.Y. 2014). The Business Court found, and the dissenters do not dispute, that the valuation resulting from Dr. Zmijewski's DCF analysis "far exceeds any other evidence of value in the record and suggests that RAI's management, RAI's Board, RAI's Financial Advisors, RAI's shareholders, stock market analysts, and the market itself mispriced RAI by as much as $50 billion." *Reynolds Am. Inc.*, 2020 WL 2029621, at *35. This would appear to reflect, as the Business Court described, "the largest mispricing ever identified in an appraisal case in North Carolina, Delaware, or elsewhere, by far." *Id.* at *54. Although a court might appropriately choose to credit the outlier results of a DCF analysis when there are reasons to distrust other proposed valuation methodologies, such a dramatic divergence as exhibited here—attributable almost entirely to the modeler's choice of value on a single input—reasonably gave the Business Court cause to doubt the reliability of Dr. Zmijewski's analysis.

¶ 28 A court generally possesses the discretion to choose to accord little probative weight to the results of a particular DCF analysis if there are legitimate justifications for that choice. Further, a court possesses the discretion to "have greater confidence in market indicators and less confidence in divergent expert determinations," especially when there is "a persuasive market-based metric" such as "the deal price that resulted from a reliable sale process." *In re Stillwater Mining Co.*, No. 2017-0385-JTL, 2019 WL 3943851, at *61. In this case, given the Business Court's findings regarding the unsuitability of RAI's ten-year projections as inputs to a DCF analysis, the comparative reliability of other market-based methodologies, and the vast divergence between the result of the dissenters' made-for-litigation DCF analysis and the deal price along with other contemporaneous indicia of fair value, we have no trouble concluding that the Business Court did not abuse its discretion in choosing not to credit the results of Dr. Zmijewski's DCF analysis.

D. The Business Court did not err in choosing to credit the results of RAI's adjusted unaffected stock price analysis.

¶ 29 Next, the dissenters challenge the Business Court's reliance on testimony from RAI's expert witness, Professor Paul Gompers. Professor

Gompers presented the results of an adjusted unaffected stock price analysis he conducted which estimated that had the merger with BAT not been announced, the value of a share of RAI on the date the transaction closed would have been between $53.78 and $55.33. The Business Court found Professor Gompers's analysis to be "persuasive evidence that suggests that the deal price is consistent with, and Dissenters' proposed valuation is inconsistent with, RAI's fair value on the Transaction Date." *Reynolds Am. Inc.*, 2020 WL 2029621, at *38.

¶ 30 In a judicial appraisal proceeding, the court is tasked with determining the value of the shares of the corporation subject to the proceeding "immediately before the effectuation of the corporate action as to which the shareholder asserts appraisal rights, excluding any appreciation or depreciation in anticipation of the corporate action unless exclusion would be inequitable." N.C.G.S. § 55-13-01(5). Public disclosure of a possible impending acquisition can, on its own, drive up the price of the target corporation's shares. *Cf. Elliott Assocs., L.P. v. Covance, Inc.*, No. 00 Civ. 4115 (SAS), 2000 WL 1752848, at *1 (S.D.N.Y. Nov. 28, 2000) (unpublished) ("When two companies announce a merger, their stock prices generally tend to follow a predictable pattern. Normally, the share price of the target will increase following the announcement of a plan to merge, while the acquiror's share price usually declines."). Thus, a court which chooses to consider the market price of the target corporation's shares when assessing fair value may choose to "adjust" the corporation's share price on the transaction date to excise the change in value which itself results from the announcement of the transaction.

¶ 31 In this case, the Business Court found that

> RAI's July 24, 2017 stock price is not a relevant proxy for fair value on the Transaction Date because after BAT's announcement of its October 20 Offer, RAI's stock price would have reflected the expected deal price, including expected synergies created by the Merger, and the market's view of the likelihood of the deal closing.

Reynolds Am. Inc., 2020 WL 2029621, at *37. To approximate how RAI's stock price would have evolved between the public disclosure of BAT's offer and the closing date, in a counterfactual universe where the public had no knowledge of any possible impending transaction, the Business Court turned to Professor Gompers. His analysis attempted to both exclude the effect on RAI's stock price of the investors' anticipation of the merger and account for the impact "other market industry

developments would likely have had on RAI's stock price between BAT's October 20 Offer and the closing of the Merger on July 25, 2017[.]" *Id.* at *38. Based upon Professor Gompers's analysis, which indexed RAI's stock price "to the performance of its closest competitor, Altria, and to the performance of the S&P 500 generally from October 20, 2016 through July 24, 2017," the Business Court determined that "while RAI's stock price may have appreciated to some degree in the time between the October 20 Offer and the Transaction Date, RAI's stock would still have traded 7% to 10% below the deal price as of July 24, 2017." *Id.*

¶ 32 The dissenters raise numerous arguments challenging the Business Court's reliance on Professor Gompers's adjusted unaffected stock price analysis. Collectively, these claims assert (1) that Professor Gompers's testimony was inadmissible, and (2) that even if the testimony was admissible, his analysis was unreliable. We address these challenges here and conclude they are meritless.

1. Professor Gompers's testimony regarding his adjusted unaffected stock price analysis was admissible.

¶ 33 We first address the dissenters' evidentiary claim that the Business Court erred in admitting Professor Gompers's testimony. The probative value of a stock price analysis in an appraisal proceeding is connected to the efficiency of the market for the corporation's shares. The probative value of any market price-based analysis is enhanced when the market for the corporation's shares is "semi-strong efficient, meaning that the market's digestion and assessment of all publicly available information concerning [the corporation being assessed] was quickly impounded into the Company's stock price." *Dell, Inc.*, 177 A.3d at 7. When the market is not semi-strong efficient, the corporation's stock price might not reliably reflect its fair value, and evidence regarding the corporation's stock price is likely to be less probative in an appraisal proceeding.

¶ 34 In this case, Professor Gompers did not independently determine that the market for RAI's stock was semi-strong efficient. Instead, Professor Gompers testified that in conducting his analysis, he adopted the conclusion of a different expert, Dr. Anil Shivdasani, who had conducted an analysis which supported his own opinion that the market for RAI shares was semi-strong efficient. Dr. Shivdasani did not testify at trial. According to the dissenters, RAI's failure to elicit testimony from Dr. Shivdasani rendered Professor Gompers's testimony regarding the adjusted unaffected stock price analysis inadmissible. They advance three theories in support of this contention.

a. The Business Court was not required to draw an inference against RAI based on its failure to call an expert witness.

¶ 35 The dissenters' first theory is that allowing Professor Gompers to present testimony based upon the opinion of a non-testifying expert violated the "missing witness rule." Where it has been recognized, the missing witness rule allows the factfinder to draw an inference regarding a disputed factual issue that is adverse to a party who "fail[s] to call an available witness with peculiar knowledge of the fact to be established." *Yarborough v. Hughes*, 139 N.C. 199, 209 (1905). Dissenters argue that because RAI failed to call Dr. Shivdasani at trial, it was error for the Business Court not to infer that the market for RAI's shares was not semi-strong efficient.

¶ 36 This Court has not formally adopted the missing witness rule. Regardless, even assuming that the missing witness rule is recognized in North Carolina, the dissenters' argument entirely ignores the flexible nature of the rule. Even calling the missing witness rule a "rule" is somewhat of a misnomer. As the Court of Appeals correctly explained in the spoliation of evidence context, these kind of "rules" are really permissible inferences. Under appropriate circumstances, the factfinder "*may* draw an inference from the intentional spoliation of evidence that the destroyed evidence would have been unfavorable to the party that destroyed it." *McLain v. Taco Bell Corp.*, 137 N.C. App. 179, 183 (2000) (emphasis added) (quoting *Beers v. Bayliner Marine Corp.*, 236 Conn. 769, 775 (1996)). Nothing compels the factfinder to ultimately draw the requested inference. *Cf. Katkish v. Dist. of Columbia*, 763 A.2d 703, 706 (D.C. 2000) ("Even when the inference is permissible, the finder of fact is free to draw the inference, or not.").

¶ 37 In this case, the Business Court explained that "in the exercise of its discretion," it would "den[y] Dissenters' request for an adverse inference arising from Shivdasani's failure to testify." The reasons the Business Court provided to support its refusal to draw an adverse inference amply justify its decision. After RAI failed to call Dr. Shivdasani, the dissenters possessed the right to introduce Dr. Shivdasani's deposition testimony as substantive evidence at trial. *See* N.C.G.S. § 1A-1, Rule 32(a)(4) (2019) ("The deposition of a witness, whether or not a party, may be used by any party for any purpose if . . . the witness is an expert witness whose testimony has been procured by videotape as provided for under Rule 30(b)(4)."). They chose not to exercise this right. As the dissenters themselves acknowledge, Dr. Shivdasani's "expert report . . . opined that the economic evidence was consistent with RAI stock trading in a semi-strong efficient market." Although the dissenters

also contend that the "event study" upon which Dr. Shivdasani's opinion was based "demonstrated that RAI's market was *inefficient*," if that were correct, nothing prevented them from questioning Dr. Shivdasani about this discrepancy during his deposition and introducing that testimony as substantive evidence at trial. Deposition testimony is certainly not the same as live witness testimony, but the dissenters' choice not to exercise their procedural right to introduce Dr. Shivdasani's testimony supports the Business Court's assessment that the substance of his testimony would not have bolstered the dissenters' argument.

¶ 38 Further, Dr. Shivdasani did not possess any factual information he alone could testify to which was otherwise unavailable to the dissenters, given the nature of the questions he was tasked with answering and the availability of pretrial discovery of expert-witness reports. Nothing prevented the dissenters from introducing evidence at trial that the market for RAI's shares was not semi-strong efficient. As the Supreme Court of New Jersey has explained,

> an expert is unlikely to be in exclusive possession of factual evidence that would justify an adverse inference charge. . . . Rarely will an expert be in a position to reveal previously undisclosed factual information, for the first time, on the stand at trial. . . . [I]t is the unusual setting in which a party's decision not to call an expert witness will be prompted by the party's fear that the expert will reveal unfavorable facts that would otherwise not be disclosed.

Washington v. Perez, 219 N.J. 338, 361–62, 98 A.3d 1140, 1153–54 (2014). Therefore, the Business Court did not err by choosing not to draw an adverse inference against RAI based upon RAI's failure to call Dr. Shivdasani to testify.

b. Direct expert-witness testimony was not required to prove that the market for RAI's shares was semi-strong efficient.

¶ 39 In the alternative, the dissenters assert that the predicate question of whether a market is semi-strong efficient can only be answered by direct expert-witness testimony. The Business Court found, and RAI does not dispute, that "RAI did not offer expert testimony to establish that the market for RAI's stock was semi-strong form efficient." *Reynolds Am. Inc.*, 2020 WL 2029621, at *36 n.37. However, the court concluded "that expert testimony on market efficiency is not necessary to the Court's determination in light of the undisputed evidence of record establishing that the market for RAI's shares was semi-strong efficient at

the time of the Merger." *Id.* The dissenters argue that in the absence of expert-witness testimony, the Business Court was not at liberty to conclude that the market for RAI's shares was semi-strong efficient and that, by extension, the court could neither admit nor credit Professor Gompers's testimony regarding his adjusted unaffected stock price analysis.

¶ 40 We decline to adopt a bright-line rule which would prohibit a court from finding that the market for a corporation's shares is semi-strong efficient in the absence of direct expert-witness testimony. Although direct expert-witness testimony may bolster a party's argument that a market is semi-strong efficient, market efficiency is "not [an] all-or-nothing concept[ ]," and the "operative question" in an appraisal proceeding is whether a given market is "efficient enough . . . to warrant considering the trading price as a valuation indicator when determining fair value." *In re Stillwater Mining Co.*, No. 2017-0385-JTL, 2019 WL 3943851, at *52. As the Supreme Court of Delaware has explained,

> [a] market is more likely efficient, or semi-strong efficient, if it has many stockholders; no controlling stockholder; highly active trading; and if information about the company is widely available and easily disseminated to the market. In such circumstances, a company's stock price reflects the judgments of many stockholders about the company's future prospects, based on public filings, industry information, and research conducted by equity analysts. In these circumstances, a mass of investors quickly digests all publicly available information about a company, and in trading the company's stock, recalibrates its price to reflect the market's adjusted, consensus valuation of the company.

Dell, Inc., 177 A.3d at 25 (cleaned up). A court which receives competent evidence addressing these and other relevant factors may find that a market is semi-strong efficient with or without direct expert-witness testimony.[4] While that evidence may include an expert's opinion that the market is efficient, an expert's opinion is not strictly necessary. *See*,

4. To be sure, expert testimony may help the Business Court knowledgeably examine these factors. *In re Stillwater Mining Co.*, No. 2017-0385-JTL, 2019 WL 3943851, at *50 (Del. Ch. Aug. 21, 2019) (explaining that the "the guidance of experts trained in" economics and corporate finance can help "law-trained judges" navigate "the thicket of market efficiency"). Nevertheless, we conclude that a party need not present expert testimony specifically conveying that expert's ultimate opinion regarding market efficiency if the party has presented sufficient evidence regarding the relevant factors to allow the trial court to make its own efficiency determination.

e.g., *In re Appraisal of Solera Holdings, Inc.*, No. 12080-CB, 2018 WL 3625644, at *24 (Del. Ch. July 30, 2018) (determining that "the record supports the conclusion that the market for [the company's] stock was efficient and well-functioning" based on the company's market capitalization, weekly trading volume, bid-ask spread, short-interest ratio, amount of analyst coverage, and price responsiveness to public release of information about the company). Accordingly, we reject the dissenters' argument that the Business Court's admission of and reliance on Professor Gompers's adjusted unaffected stock price analysis was erroneous because market efficiency was not directly established via direct expert-witness testimony.

c. Professor Gompers's testimony was not otherwise inadmissible.

¶ 41 Additionally, the dissenters contend that Professor Gompers's testimony was inadmissible because he impermissibly vouched for the results of analyses conducted by RAI's financial advisors. At trial, Professor Gompers testified that he had examined the analyses performed by RAI's financial advisors in conducting his own analysis of the value of RAI's shares. He explained that, in his view, it was appropriate to use five-year projections in performing a DCF analysis, as the financial advisors had. By contrast, he explained that he had significant reservations about the inputs Dr. Zmijewski relied on in conducting his DCF analysis.

¶ 42 The crux of the dissenters' argument is that Professor Gompers did not perform an independent analysis which formed the basis of his opinion as to the fair value of RAI or the reliability of the various inputs utilized in other valuation analyses. By extension, the dissenters argue that his testimony regarding the financial advisors' analyses did nothing more than "parrot" their opinions and "vouch" for their credibility.

¶ 43 In general, an expert witness is not permitted to convey an opinion regarding another witness's credibility, as credibility determinations are left to the factfinder. *See*, *e.g.*, *State v. Warden*, 376 N.C. 503, 507 (2020) ("[I]t is typically improper for a party to seek to have the witnesses vouch for the veracity of another witness." (cleaned up)). However, an expert is permitted to offer an opinion based upon materials that would otherwise be inadmissible as evidence, provided that the materials are "of a type reasonably relied upon by experts in the particular field." N.C.G.S. § 8C-1, Rule 703 (2019). An expert is permitted to testify regarding how and why he or she adopted certain assumptions contained in those materials—and disregarded others—when conducting his or her own independent analysis, provided that the expert has "form[ed]

his [or her] own opinions by applying his [or her] extensive experience and a reliable methodology to the inadmissible materials." *United States v. Mejia*, 545 F.3d 179, 197 (2d Cir. 2008) (cleaned up).

¶ 44 In this case, Professor Gompers explained how and why his independent analysis of the value of RAI bolstered his assessment of "the validity and reasonableness of the Financial Advisors' inputs, analyses, and valuations." *Reynolds Am. Inc.*, 2020 WL 2029621, at *74. As the Business Court explained, Professor Gompers "performed his own detailed, independent analyses using customary valuation techniques and relying on his training and expertise as a financial economist." *Id.* Professor Gompers then testified that the results of his analysis "all line[d] up a lot" with the financial advisors' analyses, and with every other attempt to value RAI's shares except for the results of the analysis performed by Dr. Zmijewski, which were, in Professor Gompers's estimation, "way off." For example, Professor Gompers testified that based on the "comparable companies" and "precedent transaction" analyses he conducted, he would have had "serious concern[s] about the assumptions" he was making if he had performed a DCF analysis which produced a valuation of RAI's shares similar to the result of Dr. Zmijewski's analysis. This made Professor Gompers more confident in the assumptions underpinning the financial advisors' analyses and less confident in the assumptions underpinning Dr. Zmijewski's DCF analysis.

¶ 45 The dissenters' argument that this testimony was improper again implies that the only "customary and current valuation concept[ ] and technique[ ]" permitted under N.C.G.S. § 55-13-01(5) is a DCF analysis. While a DCF analysis is one widely accepted method of valuing a company, it is not the only one. Professor Gompers testified that he "read every single analyst report around the deal, around the merger, for both RAI and for BAT" because reviewing these kinds of contemporaneous reports was something that financial economists "absolutely" do whenever they attempt to assess the value of a company. He also testified to the results of the valuation analyses he performed using other "customary and current valuation concepts and techniques," N.C.G.S. § 55-13-01(5), including his "own comparable company and precedent transaction analys[e]s." Professor Gompers did not testify that he believed the financial advisors' valuation was reasonable and Dr. Zmijewski's was unreasonable because he believed the advisors were more credible than Dr. Zmijewski. Instead, he utilized his expertise as a financial economist to value RAI and, in the process, examined the various assumptions underpinning different attempts to value RAI which he incorporated into his own independent analysis. He ultimately "g[ave] his *own* opinion" as

to the value of RAI's shares, rather than serving as a "mouthpiece" for the financial advisors. *Malletier v. Dooney & Bourke, Inc.*, 525 F. Supp. 2d 558, 664–66 (S.D.N.Y. 2007). Accordingly, the Business Court did not err in admitting Professor Gompers's testimony.[5]

2. The Business Court did not abuse its discretion in choosing to credit Professor Gompers's adjusted unaffected stock price analysis.

¶ 46 The dissenters' next set of arguments challenge the Business Court's decision to rely upon Professor Gompers's adjusted unaffected stock price analysis. The Business Court found that

> [e]xperts for both sides . . . agreed that the market for most publicly traded stocks on most days is close to semi-strong form efficient, particularly stock for large companies like RAI. (Yilmaz Tr. 1967:7–13; Gompers Tr. 785:3–8.) Although both sides' experts agreed that the fact a company is widely traded on a national exchange does not mean it automatically trades in a semi-strong efficient market at any given point, (Gompers Tr. 833:23–834:6; Zmijewski Tr. 1320:17–1321:2), given the evidence introduced by RAI, which was not disputed by Dissenters, there is a sufficient factual record for the Court to determine that the market for RAI's stock was semi-strong form efficient:
>
> > a. Until the Merger, RAI was publicly traded in high volumes and with high liquidity on the NYSE, the largest stock exchange by market capitalization and monthly trading volume in the world. (JX0017.0003.)
> >
> > b. RAI was a very large company with a market capitalization of approximately $67.3 billion on October 20, 2016. (Gompers Tr. 777:25–778:10; PX0115.0181.)
> >
> > c. Information about RAI was both widely available and readily disseminated to the market. (de Gennaro Tr. 215:15–23 ("No indication that

5. For these reasons, we also reject the dissenters' argument that Professor Gompers's testimony impermissibly summarized factual evidence and provided a recitation of hearsay.

> the market wasn't absorbing news on a regular basis.").) For most public companies, "most of the relevant information is disclosed." (Wajnert Tr. 124:4–7.)
>
> d. RAI's historical stock price increased and decreased in relation to the release of new Company-specific information and market-wide trends. (Wajnert Tr. 59:10–60:4; de Gennaro Tr. 215:15–23.)
>
> e. RAI's stock was followed by 16 equity analysts, who frequently published research about the Company. (PX0063.0010, .0025; de Gennaro Tr. 187:18–188:8 (RAI was "a well-covered company . . . . A lot of analysts issued regular reports.").) These analysts were well-informed about RAI's business and the U.S. tobacco industry. (PX0063.0010, .0025; de Gennaro Tr. 187:18–188:8, 199:2–19.)
>
> f. RAI did not have a controlling shareholder at any time prior to the Merger. (JX0023.0080; Wajnert Tr. 63:18–64:18.)

Reynolds Am. Inc., 2020 WL 2029621, at *36. The dissenters do not directly challenge any of these underlying factual findings as unsupported by the evidence. Therefore, in examining the dissenters' legal arguments, these findings of fact are binding on appeal. *King v. Bryant*, 369 N.C. 451, 463 (2017). None of the dissenters' legal arguments on this issue are persuasive.

a. The Business Court considered appropriate factors in examining market efficiency.

¶ 47 First, the dissenters argue that the factors the Business Court identified as supporting its determination that the market for RAI's shares was semi-strong efficient—and which, by extension, supported its decision to credit Professor Gompers's adjusted unaffected stock price analysis in its fair value determination—were "not a reliable tool for identifying the type of market efficiency that matters in appraisal litigation." According to the dissenters, the Business Court "pointed to the so-called '*Cammer* Factors' as supporting market efficiency," even though the case those factors are drawn from, *Cammer v. Bloom*, 711 F. Supp. 1264 (D.N.J. 1989), involved "the 'fraud on the market' theory . . . in federal

securities fraud litigation," which "sheds no light whatsoever on what the 'true value' or 'fair value' of the stock is."

¶ 48 The dissenters are correct that the Business Court cited *Cammer* in explaining how courts in other jurisdictions "have identified numerous factual criteria to be considered in assessing whether the market for a particular security is efficient." *Reynolds Am. Inc.*, 2020 WL 2029621, at *74. However, the Business Court also relied upon other cases in which courts considered many of the same factors examined by the Business Court when assessing market efficiency for the purposes of conducting a judicial appraisal. *Id.* (citing *In re Appraisal of Jarden Corp.*, No. 12456-VCS, 2019 WL 3244085, at *27 (Del. Ch. July 19, 2019), and *In re Appraisal of Solera Holdings, Inc.*, No. 12080-CB, 2018 WL 3625644 (Del. Ch. July 30, 2018)). Delaware courts have expressly identified similar factors as relevant when determining market efficiency in appraisal proceedings. *See Dell, Inc.*, 177 A.3d at 7. And Delaware courts have explicitly relied upon the *Cammer* factors in this same context. *See In re Stillwater Mining Co.*, No. 2017-0385-JTL, 2019 WL 3943851, at *56 ("Absent any countervailing evidence, [the expert witness's] analysis of the *Cammer* . . . factors would support a finding that the trading market for [the corporation's] common stock had sufficient attributes to be regarded as informationally efficient."). We find these cases persuasive. Accordingly, the Business Court did not err when it examined these factors in assessing market efficiency.

b. The Business Court did not fail to account for the existence of any material nonpublic information; instead, it permissibly found that no material nonpublic information existed.

¶ 49 Second, the dissenters argue that the Business Court failed to account for the existence of "material non-public information that BAT had and the investing public did not." A purchaser's possession of material nonpublic information could render the target corporation's stock price "unreliable" if there is "sufficient information asymmetry between the market and insiders." *Fir Tree Value Master Fund, LP v. Jarden Corp.*, 236 A.3d 313, 326 (Del. 2020). When this occurs, a corporation's stock price may not reflect the corporation's fair value because the market lacks pertinent information traders would likely have reacted to in the event this information had been publicly disclosed. In this case, the dissenters identify two sources of purportedly material nonpublic information which BAT possessed: (1) RAI's internal documents which projected "7[to]8% growth in years six through ten of its ten-year projections," and (2) the knowledge that "RAI management had been autho-

rized to purchase up to $2 billion of RAI stock on the public markets at prices up to $65 per share."

¶ 50 The Business Court specifically found that the information identified by the dissenters was not material.

> 203. Dissenters also sought to prove at trial that RAI's stock price was not a reliable indicator of fair value because of the existence of certain material nonpublic information that was not reflected in the stock price: (i) the Top-Side Adjustments to the October 2016 Projections provided to the Financial Advisors, (ii) the projected growth rates for years six through ten in the June 2016 LE, and (iii) the $65 share repurchase authorization ceiling. (*See* Defs.' Resp. Post-Trial Br. 22–24.) None of this nonpublic information warrants disregarding RAI's Unaffected Stock Price as evidence of value. Indeed, Dissenters' expert, Yilmaz, admitted that he did not have an opinion "one way or the other on whether the private information at the company, on balance, was more negative or more positive[.]" (Yilmaz Tr. 1959:1–12 ("Given that I have not done the work, I [can] not opine on that.").)
>
> 204. First, the Top-Side Adjustments amounted to an additional $1.4 billion in RAI's income before taxes, or roughly $300 million added to each year of the five-year projections. (DX240, at tab "top side adj," row 14; Price Tr. 989:18–990:16.) As of the record date of June 12, 2017, RAI had approximately 1.426 billion shares of common stock outstanding. (JX0023.0029.) Given RAI's immense size, public disclosure of this additional projected income would not likely have affected the stock price in a meaningful way, and it does not undermine the relevance of the Unaffected Stock Price as evidence of value. There is certainly no basis to find that this information could justify the massive premiums to RAI's Unaffected Stock Price for which Dissenters advocate. Further, some of the Top-Side Adjustments were based on public information that had not yet been incorporated into the October 2016 LE, such as changes to state tax laws and effects from positive stock market performance. (Price Tr. 957:22–958:6.)

> 205. Next, as discussed previously, the growth rates in years six through ten of the June 2016 LE were based largely on extrapolations of current volume and pricing trends in the industry, which were publicly available and therefore already likely to be reflected in RAI's stock price. (Gilchrist Tr. 375:2–24, 404:9–406:6, 529:12–25.)
>
> 206. Moreover, and also as previously discussed, RAI management credibly testified—and the documents relating to the ten-year projections confirmed—that the projections for these later years did not account for any of the various serious risks facing the Company. (DX0023.0002; Gilchrist Tr. 410:8–412:2.) In particular, they were not intended to be used to value RAI's shares but only in connection with certain limited planning objectives. The projected growth rates were not based on any underlying material, value-relevant information about specific business plans or other developments. They did not constitute the kind of information that, if disclosed, would have meaningfully affected the stock price, and they do not provide any reason to believe that the fair value of RAI materially deviated from the Unaffected Stock Price. Dissenters do not contest that RAI was not required to have disclosed these projections. (Yilmaz Tr. 1959:15–25.)
>
> 207. Finally, the authorization ceiling for the share repurchase approved by the Board is not material, value-relevant information because it was not a valuation of RAI. Rather, as discussed above, it was an internal corporate authorization for a purchasing program, which was intentionally set at a price that was higher than what RAI management ever expected it would need to spend. (Gilchrist Tr. 414:19–415:1.) Indeed, Zmijewski pointedly declined to testify that the authorization ceiling was value-relevant information even when prompted by counsel. (Zmijewski Tr. 1316:10–1317:3.)

Reynolds Am. Inc., 2020 WL 2029621, at *37. Once again, we are not entitled to disregard these findings if they are supported by competent evidence.

¶ 51 Here, the record evidence identified by the Business Court supports its finding that the six-to-ten-year projections were created to model one possible scenario for RAI's future which intentionally did not account for long-term structural risks to the business. The record evidence also supports its finding that the share purchase authorization did not reflect the Board of Directors' actual assessment of the value of RAI's shares. The Business Court did not abuse its discretion in concluding that materials which revealed little about how RAI valued its own business would not have caused the market to alter its assessment of RAI's value had the materials been publicly disclosed.

c. The Business Court did not fail to account for the timing of BAT's offer.

¶ 52 Third, the dissenters argue that Professor Gompers's adjusted unaffected stock price analysis did not reflect the fair value of their shares because the Business Court failed to account for "the timing of BAT's offer [which] appeared timed to take advantage of a 12% sell-off in the price of RAI stock that occurred immediately prior to the offer." This argument suffers from the same deficiency as the dissenters' previous argument in that it entirely ignores the Business Court's factual findings directly addressing this claim.

> 197. On October 20, 2016, RAI's common stock closed at $47.17 per share (the "Unaffected Stock Price"). (Corr. Stip'd Facts ¶ 13.) The evidence shows that this price did not represent a substantial deviation from the price at which RAI's stock was previously trading. RAI's 52-week trading average prior to BAT's initial offer was approximately $49.00. (PX0115.0258.) RAI's common stock hit its all-time high of $54.48 per share on July 5, 2016. (PX0115.0390.) In fact, RAI's share price had realized significant gains in the years leading up to BAT's initial offer. (PX0063.0039.)
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> 198. RAI's stock was trading "at a peak multiple in the marketplace" prior to BAT's October 20 offer. (Gilchrist Tr. 560:22–561:11.) Although RAI's share price had dropped at that time from its all-time high three months before, from the time the Lorillard Transaction closed in June 2015 until October 20, 2016, the volume weighted average price of RAI stock was $46.26—slightly below the Unaffected Stock Price. And trading data shows that the deal price was substantially above prior price levels[.]

Reynolds Am. Inc., 2020 WL 2029621, at *35. For the reasons stated above, we will not disturb the Business Court's findings on this issue. Therefore, we reject the dissenters' argument that Professor Gompers's adjusted unaffected stock price analysis was not reflective of fair value due to the timing of BAT's offer.

d. The Business Court did not err by failing to award the dissenters a control premium.

¶ 53 Fourth, the dissenters argue that Professor Gompers's adjusted unaffected share price analysis did not reflect the fair value of their shares because the analysis "did not reflect a control premium." "A control premium is an upward adjustment to the value of stock when the block of stock being valued enables the holder to control the corporation." Jay W. Eisenhofer & John L. Reed, *Valuation Litigation*, 22 Del. J. Corp. L. 37, 135 (1997). In contrast to a person or entity who owns only a minority stake in a corporation, a person or entity who obtains a controlling stake in a corporation "can elect directors, appoint management, declare and pay dividends, determine corporate policy, etc." *Id.* Thus, a share of a corporation is theoretically worth more to the purchaser when the share enables the purchaser to obtain a controlling stake in the corporation than it is to any individual minority shareholder, because the controlling stakeholder can "captur[e] synergies with the assets already owned by the new controller or by reducing agency costs through managing the company differently." Lawrence A. Hamermesh & Michael L. Wachter, *The Short and Puzzling Life of the "Implicit Minority Discount" in Delaware Appraisal Law*, 156 U. Pa. L. Rev. 1, 52 (2007).

¶ 54 The Business Court considered and rejected the dissenters' argument that it was required to award the dissenters a "control premium" to correct for the possibility that the price of RAI's publicly traded shares "implicitly contain[ed] a minority discount."[6] *Reynolds Am. Inc.*, 2020 WL 2029621, at *66. According to the Business Court, the dissenters' argument might "have some currency in closely-held corporations, [but] it has no application here in the public company setting . . . [because] 'not

6. A minority discount is, at least conceptually, the converse of a control premium: it is the valuation of a share held by a minority stakeholder at a lesser value than the stakeholder's pro rata share of the value of the total corporation because of the fact that the minority stakeholder cannot exercise control over the corporation. *See, e.g.*, Richard A. Booth, *Minority Discounts and Control Premiums in Appraisal Proceedings*, 57 Bus. Law. 127 (2001); *see also* Barry M. Wertheimer, *The Shareholders' Appraisal Remedy and How Courts Determine Fair Value*, 47 Duke L.J. 613, 641 n.136 (1998) ("The term 'minority discount' refers to a valuation of minority shares at less than their proportionate share of the value of the corporation as a whole, reflecting the minority shareholder's inability to exercise control over corporate decisionmaking.").

a single piece of financial or empirical scholarship affirms . . . that public company shares systematically trade at a substantial discount to the net present value of the corporation.' " *Id.* (quoting Hamermesh & Wachter at 5–6). In addition, the Business Court reasoned that the dissenters were not entitled to recoup a share of the premium which accrued to BAT upon obtaining a sole ownership of RAI for the following reasons:

> 299. The value attributable to a control premium is a subjective value on behalf of the acquirer; that is, it only reflects the value that the acquirer believes it can add. (Gompers Tr. 912:10–17 ("[S]omebody buys the assets because *they believe* that they're going to be better. They're going to be able to, you know, fire lazy managers and the like." (emphasis added)).) Because this value is unique to the particular acquirer—here, BAT—the "control premium represents the value only under the control of the [acquirer]." (Gompers Tr. 912:17–18.)
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> 300. As Yilmaz testified, a company's value is determined from the perspective of "an independent firm that is expected to go on as an independent entity[.]" (Yilmaz Tr. 1866:24–1867:7.) Yilmaz clarified: "Just to be sure we are all on the same page, this does not have any kind of minority discount or some kind of acquisition premium or control premium attached to it." (Yilmaz Tr. 1867:8–10.) Gompers agreed with Yilmaz: "So if what you're trying to value is the firm, the fair value of the firm, assuming no transaction, you should not gross it up by some control premium." (Gompers Tr. 911:7–9.)
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> 301. Thus, evidence relating to whether certain calculations in the record need to have a control premium added to them to be reflective of RAI's fair value is neither persuasive nor relevant in determining RAI's fair value here. (Wajnert Tr. 165:23–166:4, 167:10–17, 168:4–13; Gilchrist Tr. 551:1–17; Gompers Tr. 846:16–848:9, 854:24–855:3, 858:5–22, 901:19–902:16, 908:10–18; DX0277.0019–.0020; PX0115.0397–.0398; DX0277.0019–0020; PX0115.0397–0398; Constantino Tr. 1829:24–1830:3, 1830:10–24, 1848:16–18.)

Reynolds Am. Inc., 2020 WL 2029621, at *54.

¶ 55 The Business Court's explanation for rejecting the dissenters' control premium argument implicates two distinct questions. The first is primarily methodological. When a court credits a publicly held corporation's adjusted unaffected share price as an indicator of the fair value of that corporation in an appraisal proceeding, should the court presume that the share price reflects an implicit minority discount? The second is primarily legal. If a corporation's adjusted unaffected share price does reflect an implicit minority discount, must a court account for the discount by allocating some or all of the control premium which accrues to the controlling stakeholder to the dissenting shareholders?

¶ 56 The Business Court and the dissenters both answer these questions with a generalizable rule. The Business Court concluded that the price of publicly traded corporations categorically does not reflect an implicit minority discount. *Reynolds Am. Inc.*, 2020 WL 2029621, at *66. Further, the Business Court reasoned that even if publicly traded corporations do trade at a discount, dissenting shareholders are categorically not entitled to any share of the control premium accruing to a controlling stakeholder because the premium is created by the purchaser. *Id.* at *54. By contrast, the dissenters argue that "market-based valuation metrics adopted by the Business Court (trading price and adjusted trading price) reflect a minority discount that . . . must be accounted for" whenever a court appraises the value of shares held by a minority stakeholder. They argue that a court *must* award dissenting shareholders a pro rata share of the control premium because "[c]ontrol is inherent in the corporation and does not come into existence as a result of the transaction at issue."

¶ 57 We are not prepared to go so far as to establish a blanket rule on the record before us in this case. Instead, we hold that a court's decision to find that a particular market-based method of valuing a corporation does or does not reflect an implicit minority discount—and a court's separate decision to allow or reject a dissenting shareholder's claim to their pro rata portion of a control premium—should be based on the record before the court in each particular case.

¶ 58 Our decision not to impose a universal rule is in part a reflection of the unsettled nature of the law and scholarship on this issue. While courts have at times described the implicit minority discount as "inherent" in certain market-based valuation methodologies, *see e.g.*, *Lane v. Cancer Treatment Ctrs. of Am.*, *Inc.*, No. 12207-NC, 2004 WL 1752847, at *35 (Del. Ch. July 30, 2004) (unpublished) (explaining that comparative company analyses suffer from an "inherent minority discount"), the more recent cases suggest it is inappropriate to presume that market-based valuation metrics systematically misvalue corporations

that trade on an efficient market, *see, e.g.*, *In re Stillwater Mining Co.*, No. 2017-0385-JTL, 2019 WL 3943851, at *51 (explaining that "[f]or purposes of determining fair value in an appraisal proceeding . . . the trading price has a lot going for it" and citing to various articles critiquing the presumption that the shares of public corporations trade at an implicit minority discount). One recent decision acknowledged "a period when [the Delaware] court added a control premium to an appraisal valuation derived from a comparable company methodology to correct for the implicit minority discount that *was understood* to infect that method," implying by use of the past tense that the time for presuming the existence of an implicit minority discount and automatically adding a control premium has passed. *In re Appraisal of Regal Ent. Grp.*, No. 2018-0266-JTL, 2021 WL 1916364, at *51 (Del. Ch. May 13, 2021) (emphasis added) (unpublished). Read together, these cases suggest an unresolved tension between the presumption that efficient markets reliably reflect fair value and the presumption that even efficient markets inevitably undervalue the shares of publicly traded corporations. We believe this tension counsels against adopting a universal legal presumption that any given market-based valuation methodology does or does not reflect an implicit minority discount.

¶ 59 In addition, corporate law scholars are not uniformly in agreement that it is appropriate to assume all market-based methodologies necessarily undervalue the shares held by minority stakeholders. As the Business Court noted, two scholars have asserted that "not a single piece of financial or empirical scholarship affirms the core premise . . . that public company shares systematically trade at a substantial discount to the net present value of the corporation." *Id.* at 5. The authors of that article are not alone in their skepticism. *See also* Richard A. Booth, *Minority Discounts and Control Premiums in Appraisal Proceeding*s, 57 Bus. Law. 127, 128 (2001) ("[T]here is no basis for the assumption that market prices *routinely* build in a minority discount."); R. Scott Widen, *Delaware Law, Financial Theory and Investment Banking Valuation Practice*, 4 N.Y.U. J.L. & Bus. 579, 602 n.101 (2008) ("[T]he prices of publicly traded securities do not include a minority discount."); William J. Carney & Mark Heimendinger, *Appraising the Nonexistent: The Delaware Courts' Struggle with Control Premiums*, 152 U. Pa. L. Rev. 845, 863 (2003) (criticizing the Delaware courts' then-existing "operative assumption" that "all publicly traded shares reflect an implicit minority discount"). Although there are certainly countervailing opinions, there does not appear to be a consensus view.

¶ 60 In this case, we will not presume that the price of RAI's shares reflected an implicit minority discount in the absence of any evidence in

the record to support this assertion. As we have noted, "[i]n a statutory appraisal proceeding, both sides have the burden of proving their respective valuation positions." *Brigade Leveraged Cap. Structures Fund Ltd.*, 240 A.3d at 17 (quoting *M.G. Bancorp., Inc.*, 737 A.2d at 520). A dissenting shareholder seeking to challenge the reliability of a market-based valuation technique must present evidence from which the trial court could conclude that a particular market-based valuation methodology undervalues the corporation's shares. Because the existence and magnitude of any implicit minority discount—and the magnitude and availability to the dissenting shareholders of any control premium—depends on the nature of the transaction, corporation, and market at issue in any given appraisal proceeding, we reject the notion that a court necessarily commits legal error by failing to correct a market-based valuation methodology for an implicit minority discount or by failing to award the dissenting shareholders a control premium.

¶ 61 In this case, we disagree with the dissenters that the existence of an implicit minority discount is so self-evident as to warrant imposing a legal presumption in the absence of record evidence. *Cf. Kleinwort Benson Ltd. v. Silgan Corp.*, No. 11107, 1995 WL 376911, at *3 (Del. Ch. June 15, 1995) ("Petitioners cannot add a premium to the market price unless they prove that publicly traded shares include a minority discount.").[7] The dissenters have not identified any testimony or record evidence supporting their assertion that RAI's share price reflected an implicit minority discount. They have made no attempt to estimate the size of any such discount. We will not presume that which the dissenters have made no effort to prove. Accordingly, we conclude that the Business Court did not err in crediting Professor Gompers's adjusted unaffected stock price analysis without accounting for an implicit minority discount. Because the dissenters have not shown that any methodology the Business Court relied upon underestimated the fair value of their shares, we also conclude that the Business Court could not have erred in refusing to award the dissenters a pro rata share of any control premium obtained by BAT.

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7. Further, the fact that a corporation's market share price may reflect an implicit minority discount does not necessarily mean that a minority stakeholder is entitled to some or all of the control premium obtained by the purchaser. Accordingly, in a future case where a dissenting shareholder is able to prove that a valuation methodology undervalued their shares because the methodology reflected an implicit minority discount, the dissenting shareholder would also need to present evidence regarding the size of the discount and the corresponding amount the shareholder is entitled to under our appraisal statutes. *See DFC Glob. Corp. v. Muirfield Value Partners, L.P.*, 172 A.3d 346, 368 n.111 (Del. 2017) ("[I]n order to value a company as a going concern, synergies must be excluded.").

E. The Business Court determined the fair value of RAI's shares on the date the merger closed.

¶ 62 The dissenters' final challenge to the Business Court's fair value determination is their claim that the Business Court "fail[ed] to value RAI as of the Transaction Date," which the dissenters contend "is an error of law warranting reversal of the decision below." The Business Court determined that "the fair value of RAI *at the Merger closing on July 25, 2017* was no more than the deal price of $59.64." *Reynolds Am. Inc.*, 2020 WL 2029621, at *35 (emphasis added). In the dissenters' view, notwithstanding the Business Court's express (and repeated) attestations that it was valuing their shares as of the date the merger closed, the Business Court actually valued RAI's shares as of an earlier date.

¶ 63 All parties agree that N.C.G.S. § 55-13-01(5) required the Business Court to value the dissenters' shares as of the transaction date. After careful review, we conclude that the Business Court adhered to this requirement.

¶ 64 The dissenters' primary argument to the contrary rests on a faulty syllogism. According to the dissenters, if the Business Court determined that the fair value of RAI's shares was no more than the $59.64 per share that RAI paid upon receiving the notice of appraisal, and if $59.64 per share was the value of the merger consideration on the date BAT and RAI agreed to merge, then the Business Court necessarily valued the dissenters' shares as of the date BAT and RAI agreed to merge. But "fair value" as defined under N.C.G.S. § 55-13-01(5) is not the same as the best possible value the sellers could have extracted or the value the sellers were ultimately able to extract. The dissenters chose to avail themselves of the judicial appraisal process. There was no guarantee that the court would determine fair value to be equal to or greater than the actual deal price. Indeed, as the Business Court noted, "some analysts perceived BAT to be overpaying or at least purchasing at a time when RAI was trading at a relatively high multiple to its earnings." *Reynolds Am. Inc.*, 2020 WL 2029621, at *20. The fact that the Business Court determined the fair value of the dissenters' shares to be less than the deal price does not prove that the Business Court failed to assess fair value at the proper moment in time.

¶ 65 Additionally, the dissenters argue that the rise in value of the merger consideration—which was caused by growth in the price of BAT's shares—necessarily reflected an increase in "RAI's standalone value, including the increased likelihood of corporate tax reform and an accommodative regulatory climate for the US tobacco industry." "[I]n an

appraisal proceeding, the party seeking an adjustment to the deal price reflecting a valuation change between signing and closing bears the burden to identify that change and prove the amount to be adjusted." *Brigade Leveraged Cap. Structures Fund Ltd.*, 240 A.3d at 17. The dissenters bore the burden of proving both that there was value accretion after the merger agreement and that the growth in value was attributable to RAI, excluding value accretion in anticipation of the merger. After meeting that burden, the dissenters further needed to prove that the value accretion rendered the Business Court's determination of fair value too low.

¶ 66 Here, the Business Court relied upon Professor Gompers's adjusted unaffected stock price analysis, which specifically accounted for the possibility that "in the time between the October 20 Offer and the Transaction Date, events took place that may have affected RAI's standalone value and been reflected in RAI's stock price had BAT not made its October 20 Offer." *Reynolds Am. Inc.*, 2020 WL 2029621, at *38. Based on the results of that analysis, the Business Court determined that "while RAI's stock price may have appreciated to some degree in the time between the October 20 Offer and the Transaction Date, RAI's stock would still have traded 7% to 10% below the deal price as of July 24, 2017." *Id.* Thus, even after accounting for the likelihood that RAI's shares would have appreciated in the absence of the merger announcement, the Business Court—cross-checking the results of Professor Gompers's analysis with the results of numerous other analyses presented at trial—determined that the fair value of RAI's shares on the date of closing did not exceed the value of the merger consideration on the date of the merger agreement. Rather than commit legal error, the Business Court was appropriately "unconvinced by [the dissenters'] conclusory arguments for an adjustment to the deal price and declined to grant the adjustment because [they] failed to meet their burden of proof." *Brigade Leveraged Cap. Structures Fund Ltd.*, 240 A.3d at 17.

IV. The dissenters' claim that they are entitled to additional interest payments

¶ 67 **[2]** Finally, the dissenters contend that they are entitled to "interest . . . calculated on the total fair value amount, not any difference between that amount and the amount already paid." Put another way, the dissenters argue that North Carolina law "requires judgment to be calculated by starting with the adjudged fair value of RAI's shares, add[ing] interest at the legal rate through the date of judgment, and then subtract[ing] the amounts already paid." *Reynolds Am. Inc.*, 2020 WL 2029621, at *71. They argue they are entitled to interest payments on the amount the Business

Court assessed to be fair value accruing until the Business Court entered its final judgment, even if this Court affirms the Business Court's judgment that RAI initially paid fair value for the dissenters' shares.

¶ 68 In support of their argument, the dissenters point to N.C.G.S. § 55-13-30(e) (2019), which provides in relevant part that "[e]ach shareholder made a party to the proceeding is entitled to judgment . . . for the amount, if any, by which the court finds the fair value of the shareholder's shares, plus interest, exceeds the amount paid by the corporation to the shareholder for the shareholder's shares." Although this text could be read to support the dissenters' position, this language is not "clear and without ambiguity." *Diaz v. Div. of Soc. Servs.*, 360 N.C. 384, 387 (2006). What is clear from the text of N.C.G.S. § 55-13-30(e) is that a corporation must pay interest to shareholders who seek judicial appraisal. But the text does not definitely establish how interest should be calculated. Because the language is "ambiguous or susceptible to multiple meanings, we turn to the other sources to identify the General Assembly's intent." *N.C. Farm Bureau Mut. Ins. Co., Inc. v. Lunsford*, 378 N.C. 181, 2021-NCSC-83, ¶ 20.

¶ 69 Reading this statutory language in context, we agree with the Business Court that the dissenters' proposed interpretation of the statute would produce "a nonsensical result, one supported neither by the text of the statute nor the intent of the legislature." *Reynolds Am. Inc.*, 2020 WL 2029621, at *71. Another provision of the appraisal statutes defines interest as accruing "from the effective date of the corporate action until the date of payment, at the rate of interest on judgments in this State on the effective date of the corporate action." N.C.G.S. § 55-13-01(6). It is reasonable to presume that the legislature intended its definition of "interest" in N.C.G.S. § 55-13-01(6) to be incorporated into another provision of the appraisal statutes where the term is otherwise undefined. *See Pelham Realty Corp. v. Bd. of Transp.*, 303 N.C. 424, 434 (1981) ("It is within the power of the legislature to define a word used in a statute, and that statutory definition controls the interpretation of that statute." (citation omitted)).

¶ 70 Additionally, the obvious intent of the appraisal statutes is to ensure that every shareholder has an opportunity "to obtain payment of the fair value of that shareholder's shares" in circumstances where the General Assembly believes the nature of and circumstances attendant to a transaction risks depriving certain shareholders of fair value. N.C.G.S. § 55-13-02(a). The intent is to ensure that shareholders are made whole, not to give sophisticated entities another incentive to pursue "appraisal arbitrage." *In re Appraisal of Dell Inc.*, No. 9322-VCL, 2015 WL 4313206,

at *23 (Del. Ch. July 13, 2015); *see also* Booth at 156 ("[I]t is important that appraisal not be used as a way for holdout stockholders to second-guess the will of the rest of the minority stockholders."). Given this clear intent, the result of the dissenters' interpretation—which would require RAI to pay the dissenters more than $100 million in interest payments, even though it has been established that RAI initially paid the dissenters fair value—is absurd. *See Person v. Garrett*, 280 N.C. 163, 166 (1971) ("The language of the statute will be interpreted to avoid absurd consequences."). Accordingly, we reject the dissenters' proposed construction of these provisions.

V. Conclusion

¶ 71 "The task of placing a value after the fact on shares of stock previously exchanged involves inexact approximations and a great deal of imprecision." *Cont'l Water Co. v. United States*, No. 125-78, 1982 WL 11255, at *6 (Ct. Cl. 1982) (per curiam). The fair value of a corporation cannot be determined by mathematical proof. Instead, "[e]stimations, predictions, and inferences based on professional judgment and experience are key ingredients in any valuation." *Brown v. Brewer*, No. CV06-3731-GHK SHX, 2010 WL 2472182, at *27 (C.D. Cal. June 17, 2010) (unpublished).

¶ 72 In this case, the Business Court was presented with two radically different estimations of the fair value of shares of RAI held by a group of dissenting shareholders. To resolve this dispute, the Business Court utilized various "customary and current valuation concepts and techniques" to determine the fair value of the dissenters' shares, as was required under N.C.G.S. § 55-13-01(5). That there may exist some evidence in the record which detracts from the Business Court's ultimate determination of the fair value of the dissenters' shares is no cause to disturb its judgment. Instead, we agree with RAI that the Business Court determined the fair value of RAI shares in a manner which comported with the guidelines set forth in North Carolina's appraisal statutes. Accordingly, we affirm the Business Court's judgment in which it concluded that the dissenters were paid fair value for their shares.

AFFIRMED.

STATE v. KINSTON CHARTER ACAD.

[379 N.C. 560, 2021-NCSC-163]

STATE OF NORTH CAROLINA, EX REL. JOSHUA H. STEIN, ATTORNEY GENERAL
v.
KINSTON CHARTER ACADEMY, A NORTH CAROLINA NON-PROFIT CORPORATION; OZIE L. HALL, JR., INDIVIDUALLY AND AS CHIEF EXECUTIVE OFFICER OF KINSTON CHARTER ACADEMY; AND DEMYRA MCDONALD-HALL, INDIVIDUALLY AND AS BOARD CHAIR OF KINSTON CHARTER ACADEMY

No. 16PA20

Filed 17 December 2021

1. Immunity—sovereign—N.C. False Claims Act—charter school—not an available defense

In the State's lawsuit against a charter school and its CEO for violations of the N.C. False Claims Act, where the school received an overpayment of state funds based on its overestimate of student enrollment, the Supreme Court overturned the Court of Appeals' ruling that sovereign immunity protected the school from suit. Although the Charter School Act provides that a state-approved charter school "shall be a public school" within its local school administrative unit, the General Assembly did not categorize charter schools as state agencies or instrumentalities under the Act, but rather as independent entities run by private non-profit corporations. Further, based on the similarities between local school boards and the boards of directors of charter schools, the Court concluded that charter schools are entitled to, at most, governmental rather than sovereign immunity.

2. Schools and Education—charter school—receipt of excess state funds—N.C. False Claims Act—definition of "person"

In the State's lawsuit against a charter school and its CEO for violations of the N.C. False Claims Act, where the school received an overpayment of state funds based on its overestimate of student enrollment, the Supreme Court overturned the Court of Appeals' ruling that charter schools are not "persons" subject to liability under the Act. The statutory definition of "persons" includes "corporate" bodies, and therefore it necessarily encompasses charter schools because non-profit corporations operate them. Further, the classification of charter schools as "persons" is consistent with the legislature's intent to prevent misuse of public funds, and neither a sovereign immunity defense nor the "arm-of-the state" analysis for protecting state governments from liability under the Act are applicable to charter schools.

3. Fraud—charter school—receipt of excess state funds—N.C. False Claims Act—pleading—particularity—objective falsehood

The State adequately pled claims under the N.C. False Claims Act against a charter school and its CEO (defendants), pursuant to Civil Procedure Rule 9(b)'s particularity requirement, where its complaint alleged that the CEO reported an inflated student enrollment estimate to the Department of Public Instruction, the school received over $300,000 in excess state funds as a result of the allegedly false representation, and that the State was seeking to recoup this amount. Moreover, by alleging that defendants "knew or should have known" when they applied for state funds that they could not reach their reported enrollment estimate and that the school would probably close before the end of the year (due to financial struggles the State was unaware of), the State adequately pled that defendants had made an objective falsehood.

4. Immunity—public official—N.C. False Claims Act—CEO of charter school—motion to dismiss

In the State's lawsuit against a charter school and its CEO for violations of the N.C. False Claims Act, the trial court properly denied the CEO's motion to dismiss under Rule 12(b)(6) where the record contained insufficient information on whether public official immunity protected the CEO from suit and, even if the CEO was a public official who could claim such immunity, the State's complaint included sufficient allegations to preclude dismissal, including that the CEO knowingly made "false or fraudulent statements in connection with receiving state funds."

On discretionary review pursuant to N.C.G.S. § 7A-31(a) from a unanimous decision of the Court of Appeals, 268 N.C. App. 531 (2019), reversing, in part, and affirming, in part, orders entered by Judge A. Graham Shirley in the Superior Court, Wake County, on 23 March 2018 denying dismissal motions filed by defendants Kinston Charter Academy and Ozie L. Hall, Jr. Heard in the Supreme Court on 31 August 2021.

Attorney General Joshua H. Stein, by Assistant Attorney General Matthew L. Liles, Sr.; Senior Deputy Attorney General Kevin D. Anderson; and Special Deputy Attorney General Daniel P. Mosteller, for the State-appellant.

Ragsdale Liggett PLLC by Amie C. Sivon, Mary M. Webb, and Edward E. Coleman, III, and Demyra McDonald-Hall for defendant-appellant Kinston Charter Academy.

Ozie L. Hall, Jr., pro se defendant-appellant.

Stam Law Firm, PLLC, by R. Daniel Gibson and Paul Stam for amicus Pinnacle Classical Academy.

Womble, Bond Dickinson (US) LLP by Matthew F. Tilley for amicus N.C. Coalition for Charter Schools, amicus curiae.

ERVIN, Justice.

¶ 1 The issues before us in this case involve the extent to which the non-profit corporations that operate charter schools are (1) agencies of the State entitled to sovereign immunity and (2) subject to claims brought pursuant to the North Carolina False Claims Act; whether (3) the State adequately pled claims under the False Claims Act against the non-profit corporation and a corporate officer; and (4) whether a corporate officer of such a non-profit corporation is entitled to public official immunity. After a careful review of the relevant legal authorities in light of the facts disclosed by the record, we conclude that North Carolina charter schools are not state agencies and are, for that reason, precluded from asserting a defense of sovereign immunity; that North Carolina charter schools are "persons" as defined in N.C.G.S. § 1-607 (2019); that the State properly pled claims against the Academy and Mr. Hall for purposes of the False Claims Act; and that the trial court did not err by denying Mr. Hall's request that the State's complaint be dismissed on the basis of public official immunity. As a result, the decision of the Court of Appeals in this case is affirmed, in part, and reversed, in part, with this case being remanded to the Court of Appeals for further remand to the Superior Court, Wake County, for further proceedings not inconsistent with this opinion.

I. Factual and Procedural History

A. Substantive Factual Background

¶ 2 The Academy is a nonprofit corporation organized and existing under North Carolina law that began operating a charter school in 2004.[1]

1. In light of the fact that this case is before us on appeal from an interlocutory order addressing motions to dismiss for failure to state a claim for which relief can be granted

The Academy served students from kindergarten through eighth grade and provided transportation for students residing in Lenoir, Pitt, and Greene counties. Mr. Hall served as Kinston Charter Academy's Chief Executive Officer. As Chief Executive Officer, Mr. Hall provided both financial and academic leadership for the Academy. Mr. Hall's wife, Demyra McDonald-Hall, began serving as the Chair of the Academy's Board of Directors in 2007.

¶ 3 The Academy experienced financial difficulties from the date upon which it began operation and would, in all probability, have closed in 2007 except for the fact that five of the eight members of the Board of Directors took out personal loans for the purpose of ensuring the Academy's continued operation. The Department of Public Instruction, which has the responsibility for overseeing North Carolina public schools, cited the Academy on at least six occasions between 2008 and 2013 for having deficit fund balances. For example, the Department placed the Academy on "Financial Probationary Status" on 5 June 2008 given the existence of a deficit fund balance that totaled over $300,000. Similarly, the Department placed the Academy on the highest level of "Financial Disciplinary Status" on 24 March 2010. In the final full year during which the Academy operated, Mr. Hall's daughter, who did not have a degree in education and who had never previously worked at a school, was hired as the Academy's "academic officer" at an annual salary of $40,000 in place of an associate principal who had more than twenty years' experience working in public education. On 5 June 2013, the Department placed the Academy on "Governance Cautionary Status" in light of the fact that the Academy, after withholding funds from its employees' paychecks, had failed to submit the amounts associated with premiums for those employees' health insurance plans to the State Treasurer.

¶ 4 In an effort to obtain sufficient funds to pay its outstanding obligations, the Academy obtained two short-term loans in the spring and early summer of 2013. On 31 May 2013, the Academy obtained a $100,000 short-term loan that included a $15,000 origination fee that was to be subtracted from the loan amount and a $15,000 broker's fee. On 21 June 2013, the Academy obtained a second $100,000 short-term loan that also

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pursuant to N.C.G.S. § 1A-1, Rule 12(b), we have presented the facts as stated in plaintiff's complaint, including the information contained in the exhibits attached to that complaint. *See Est. of Long v. Fowler*, 378 N.C. 138, 2021-NCSC-81, ¶ 5 (stating that this Court "accept[ed] the allegations in the complaint as true" given that the case was before this Court "on the trial court's order granting a motion to dismiss pursuant to [N.C.G.S. § 1A-1,] Rules 12(b)(1), 12(b)(2), and 12(b)(6) of the North Carolina Rules of Civil Procedure") (citing *Corwin v. British Am. Tobacco PLC*, 371 N.C. 605, 611 (2018).

included a $15,000 origination fee to be deducted from the loan amount and a separate $15,000 broker's fee. Having guaranteed repayment of both loans, Mr. Hall was personally liable to the lenders in connection with each of these obligations.

¶ 5 On 21 January 2013, the Academy reported to the Department that it projected having an average daily membership of 310 students, with this figure representing an estimate of the number of students that the Academy would enroll during the following academic year that was used for the purpose of establishing the amount of funding that the Academy was entitled to receive from the State. On 26 April 2013, the Academy provided the Department with a revised average projected daily membership of 366 students. More specifically, Mr. Hall told a representative of the Department during a 26 April 2013 phone call that, even though he had "not physically been on the [Academy] campus much and that the person [that he had] left in charge was incompetent," the Academy's projected enrollment for the 2013–14 school year would increase to 366 students, with this revised estimate representing an increase of 92 students over the actual enrollment for the previous year (despite three years of declining enrollment) and being the maximum estimate of student attendance that the Academy was entitled to claim without seeking and obtaining prior approval from the State Board of Education. According to a later examination by the State Auditor, there was "no evidence supporting an estimated student attendance increase."

¶ 6 In July of 2013, the Academy received funds from the local school board, with these funds having been used to pay off loans that had been taken out in connection with the previous academic year and to pay off contributions to the State Health Plan that the Academy had failed to make during that same period of time. On 29 July 2013, Mr. Hall sent a letter to the Department stating that the Academy's employees had been informed that the payments associated with their health insurance premiums and retirement contributions had been delayed, that the Academy was attempting to refinance the indebtedness associated with its facilities in order to obtain the funds needed to continue to operate the Academy, and that, in the event that he was unable to complete the refinancing process, he would recommend that the Board of Directors close the Academy.

¶ 7 On 6 August 2013, the Academy received over $600,000 from the State for use during the 2013-14 school year. This amount had been calculated based upon an average daily membership of 366 students and was intended to last until October 2013, when the Academy would receive its next scheduled allotment. On the same day, the Academy paid Mr.

Hall $5,000 for "unused vacation time." On 12 August 2013, the Academy paid $2,500 to Mr. Hall's daughter for a "website redesign" that was never implemented. On 16 August 2013, the Academy paid Ms. McDonald-Hall over $1,000 as an advance against her "unused annual leave." On the same day, the Department sent a letter to Mr. Hall for the purpose of informing the Academy that the Department intended to recommend the revocation of the Academy's charter in light of its persistent failure to comply with applicable financial requirements and its failure to pay employee benefits. On 22 August 2013, the Academy made another payment of $1,500 to Mr. Hall for "unused annual leave." On 23 August 2013, Mr. Hall sent an e-mail to a Department official stating that he had recommended to the Board that the Academy "close the school and surrender the charter to the State Board of Education."

¶ 8 At the time that the Academy opened on 26 August 2013, it had enrolled only 189 students for the 2013–14 academic year, an amount that was 177 students less than the estimate that the Academy had submitted to the Department in the spring. In spite of Mr. Hall's 23 August 2013 e-mail, the Board discussed, over the course of the ensuing week, the implementation of a "corrective action plan" that involved a change in the Academy's management structure and was intended to keep the Academy open. On 4 September 2013, after the Department rejected requests made by Mr. Hall and Ms. McDonald-Hall for additional time within which the Academy would be allowed to implement a corrective action plan, the Academy relinquished its charter to the State. Two days later, on the ninth day of the academic year, the Academy closed.

¶ 9 On 10 September 2013, Department officials informed Mr. Hall and Ms. McDonald-Hall during a contentious meeting that the Academy would need to repay the funds that had been allotted to the Academy based upon the over-estimate of its student enrollment numbers. Mr. Hall refused to grant the Department officials access to the Academy's records and later complained that the Department was attempting to conduct an "illegal search and seizure" of those records. On 12 September 2013, the Board held a meeting during which it approved the payments that had been made to Mr. Hall and Ms. McDonald-Hall relating to "unused annual leave" and the purchase of a new laptop computer to replace Mr. Hall's personal computer.

¶ 10 On 28 January 2015, the Office of the State Auditor released the findings that it had made as the result of an investigation into the Academy's failure. The Auditor found that the Academy had "overstated enrollment," that it had "employed defendants Hall and McDonald-Hall's unqualified relatives at a cost to the school [of] $92,500 in the final year,"

and that "defendants Hall and McDonald-Hall accepted over $11,000 in questionable payments despite owing more than $370,000 in payroll obligations" to the Academy's employees. The State did not recoup any funds from the Academy after it closed.

B. Procedural History

¶ 11 On 26 April 2016, the State filed a complaint against the Academy; Mr. Hall, both individually and as the Academy's Chief Executive Officer; and Ms. McDonald-Hall, both individually and as the Chair of the Academy's Board. In its complaint, the State alleged that the defendants had "violated the North Carolina False Claims Act by making false or fraudulent statements" in order to receive money from the State, with these statements having included the Academy's projected enrollment of 366 students, "a number that defendants knew or should have known they would not achieve"; the Academy's "claim for state educational funds for the 2013–14 school year when defendants knew or should have known that [the Academy] would not survive the year"; and the Academy's "false claim for state funds to be used for a non-profit educational purpose that were instead used to benefit defendants." Secondly, the State alleged that defendants had violated various duties imposed upon them by the statutory provisions governing the operation of non-profit corporations by "[m]aking unreasonable distributions to directors and officers"; by "[f]ailing to discharge their duties to the corporation in good faith[,] with ordinary care[,] and [in] a manner in the best interest of the corporation"; by "[f]ailing to comply with the conflict of interest requirements"; and by "[f]ailing to comply with [the statute] in disposing of all or substantially all of [the Academy]'s assets." The State also alleged that Mr. Hall and Ms. McDonald-Hall had violated other relevant statutory provisions by failing to discharge their duties "in good faith," "with the care an ordinarily prudent person in a like position would exercise under similar circumstances," and "in a manner [that they] reasonably believe[d] to be in the best interests of the corporation." Finally, the State alleged that defendants had violated the North Carolina Unfair and Deceptive Trade Practices Act, N.C.G.S. § 75-1.1 (2019), by "convincing prospective students to enroll for the 2013-14 school year despite knowing that it was unlikely [that the Academy] would make it through the year" and by misleading and deceiving consumers.

¶ 12 On 26 May 2017, Mr. Hall filed a motion to dismiss the claims that the State had lodged against him in his individual capacity pursuant to N.C.G.S. § 1A-1, Rules 12(b)(1) and 12(b)(6). On 30 June 2017, Ms. McDonald-Hall made a filing in which she requested that all of the claims that had been lodged against her and against the Academy be dismissed.

On 17 August 2017, the trial court entered an order denying Mr. Hall's motion for dismissal of the False Claims Act claim that had been brought against him in his individual capacity while granting his motion to dismiss the claims that the State had lodged against him pursuant to the statutes governing the operation of non-profit corporations and N.C.G.S. § 75-1.1 and allowing Ms. McDonald-Hall's motion to dismiss all of the claims that the State had asserted against her in her individual capacity.

¶ 13 On 13 February 2018, Mr. Hall filed another motion in which he sought to have the State's False Claims Act claim dismissed pursuant to N.C.G.S. § 1A-1, Rule 12(b)(1). On 9 March 2018, the "[c]orporate [d]efendants," a group that consisted of the Academy and Ms. McDonald-Hall and Mr. Hall, acting in their official capacities, filed a motion to dismiss the State's remaining claims pursuant to N.C.G.S. § 1A-1, Rules 12(b)(1), 12(b)(3), and 12(b)(6). On 23 March 2018, the trial court entered an order denying Mr. Hall's motion to dismiss the False Claims Act claim that had been lodged against him in his individual capacity and a separate order denying the motion to dismiss the False Claims Act claim that had been lodged against the Academy while granting the motion to dismiss the claims that the State had asserted against the Academy pursuant to the statutory provisions governing the operation of non-profit corporations and N.C.G.S. § 75-1.1 and all of the claims that the State had asserted against Mr. Hall and Ms. McDonald-Hall in their official capacities. Mr. Hall and the Academy noted appeals to the Court of Appeals from the trial court's orders.

¶ 14 In seeking relief from the trial court's order before the Court of Appeals, the Academy argued that the trial court had erred by denying its motion to dismiss the False Claims Act claim that had been asserted against it given that the Academy was protected from liability under the False Claims Act by the doctrine of sovereign immunity. In addition, the Academy argued that the State had failed to plead its False Claims Act claim with the requisite "particularity" and that the "[a]lleged [f]alse [s]tatement," which involved the estimate of the number of students that the Academy would enroll for the 2013–14 academic year, was "an [a]uthorized [p]rojection for the [f]uture, [n]ot [p]ossible of [b]eing [f]alse at the [t]ime [i]t [w]as [m]ade." Similarly, Mr. Hall sought relief from the trial court's order before the Court of Appeals on the grounds that an "enrollment goal of 366 students" was permitted by law and could not, for that reason, be a "false or fraudulent claim." In addition, Mr. Hall argued that the State's False Claims Act claim was barred by the separation of powers clause of the North Carolina Constitution and "the doctrine of governmental/public official immunity."

¶ 15 In a unanimous published opinion, the Court of Appeals reversed the trial court's order denying the Academy's motion to dismiss the State's False Claims Act claim on the grounds that the Academy was entitled to sovereign immunity and that it did not qualify as a "person" for purposes of the False Claims Act. *State v. Kinston Charter Acad.*, 268 N.C. App. 531, 536 (2019). In reaching this result, the Court of Appeals began by reasoning that, since N.C.G.S. § 115C-238.29E(a) (2013), which was subsequently recodified as N.C.G.S § 115C-218.15 (2019), provided that a "charter school that is approved by the State shall be a public school within the local school administrative unit in which it is located," all charter schools were public schools. *Kinston*, 268 N.C. App. at 537. In addition, the Court of Appeals held that "[c]harter schools, as public schools in the State of North Carolina, exercise the power of the State and are an extension of the State itself" and, "as an extension of the sovereign," "are entitled to exercise the State's sovereign immunity" and that the Academy's "presumption of immunity" from liability pursuant to the False Claims Act could "only be overcome by an affirmative showing that the General Assembly intended to waive sovereign immunity for all public schools," a showing that the State had failed to make. *Id.* at 538–39.

¶ 16 The Court of Appeals went on to hold that, "assuming, *arguendo*, that charter schools [we]re not categorically entitled to claim sovereign immunity from the" False Claims Act, the Academy could not be the subject of a claim brought pursuant to the False Claims Act given that the Academy functioned as an "arm of the state" for purpose of federal Eleventh Amendment analysis and was not, for that reason, a "person" for purposes of the False Claims Act. *Id.* at 539–40. After acknowledging that the False Claims Act should be interpreted "so as to be consistent with the federal False Claims Act," citing N.C.G.S. § 1-616(c), the Court of Appeals stated that "federal courts employ the Eleventh Amendment arm-of-the-state analysis in determining whether an entity is a 'person' under the" federal False Claims Act, with the required analysis focusing upon:

> (1) whether any judgment against the entity as defendant will be paid by the State or whether any recovery by the entity as plaintiff will inure to the benefit of the State;
>
> (2) the degree of autonomy exercised by the entity, including such circumstances as who appoints the entity's directors or officers, who funds the entity,

> and whether the State retains a veto over the entity's actions;
>
> (3) whether the entity is involved with state concerns as distinct from non-state concerns, including local concerns; and
>
> (4) how the entity is treated under state law, such as whether the entity's relationship with the State is sufficiently close to make the entity an arm of the State.

Kinston, 268 N.C. App. at 540 (citing *United States ex rel. Oberg v. Ky. Higher Educ. Student Loan Corp.*, 681 F.3d 575, 580 (4th Cir. 2012)).

¶ 17 In addressing the first of these factors, the Court of Appeals noted that a charter school's board of directors is required to obtain liability insurance under N.C.G.S. § 115C-218.20. *Id.* at 541. The Court of Appeals went on to explain that, prior to 1997, N.C.G.S. § 115C-238.29F(c), which has been recodified as N.C.G.S. § 115C-218.20 (2019), did not mention the immunity of charter schools, but that language added by the 1997 amendment provides that "[a]ny sovereign immunity of the charter school . . . is waived to the extent of indemnification by insurance," with this amendment constituting an acknowledgment that charter schools did "enjoy the State's sovereign immunity" while "waiv[ing] charter school immunity to the extent of indemnification by insurance." *Kinston*, 268 N.C. App. at 542. As a result, the Court of Appeals held that civil liability under the False Claims Act did not "attach[ ] to charter schools themselves, beyond the extent of indemnification by insurance, absent waiver." *Id.*

¶ 18 As far as the second factor in the required analysis is concerned, the Court of Appeals recognized that a charter school has a high degree of autonomy from the State in matters relating to the manner in which the school is operated and issues relating to budgets, management, and curriculum. On the other hand, however, the Court of Appeals acknowledged that the charter school's authority is "limited by regulatory and reporting requirements" imposed by the State, so that its "autonomy only extends as far as [it complies] with its Board-approved charter and oversight by [the Department of Public Instruction]." *Id.* at 543.

¶ 19 In addressing the third factor, the Court of Appeals determined that the North Carolina Constitution "makes the State solely responsible for ensuring 'the right of every child in North Carolina to receive a sound basic education.' " *Id.* at 544 (quoting *Silver v. Halifax Cnty. Bd. of Comm'rs*, 371 N.C. 855, 856 (2018)). After reiterating its earlier

determination that charter schools were public schools pursuant to N.C.G.S. § 115C-238.29E(a) (2013), subsequently recodified as N.C.G.S § 115C-218.15 (2019), and that public schools "directly exercise the power of the State," *Kinston*, 268 N.C. App. at 544 (quoting *Bridges v. City of Charlotte*, 221 N.C. 472, 478 (1942)), and after "considering and balancing all of the applicable factors of the arm-of-the-state inquiry," the Court of Appeals concluded that "charter schools [we]re not 'persons' for purposes of the" False Claims Act and that the trial court had erred by denying the Academy's motion to dismiss the False Claims Act claim that the State had asserted against it. *Id.*

¶ 20 Next, the Court of Appeals rejected Mr. Hall's contention that the trial court had erred by refusing to dismiss the False Claims Act claim that had been lodged against him in his individual capacity on the grounds that he was entitled to public official immunity. *Id.* at 545. After noting that a public official "may be entitled to assert immunity even as to claims against [him] in his individual capacity," the Court of Appeals acknowledged that such immunity was "not limitless" and that a public official could be held liable for actions that were "corrupt, malicious, or outside the scope of his duties." *Id.* (citing *Smith v. Hefner*, 235 N.C. 1, 7 (1952)). As a result, the Court of Appeals held that, "at this early stage of the proceedings, viewing the material allegations of the State's complaint as admitted for purposes of [Mr.] Hall's motion to dismiss, [Mr.] Hall has not yet raised sufficient evidence of his entitlement to public official immunity to defeat the State's claim" and affirmed the trial court's denial of Mr. Hall's motion to dismiss the False Claims Act claim that the State had asserted against him. *Id.* at 546. This Court granted petitions for discretionary review filed by the State and conditional petitions for discretionary review filed by the Academy and Mr. Hall, all of which sought review of different aspects of the Court of Appeals' decision.

II. Analysis

A. Standard of Review

¶ 21 "North Carolina has a well-established common law doctrine of sovereign immunity which prevents a claim for relief against the State except where the State has consented or waived its immunity." *Harwood v. Johnson*, 326 N.C. 231, 238 (1990) (quoting *Electric Co. v. Turner*, 275 N.C. 493 (1969)). Sovereign immunity applies to "state agenc[ies] created for the performance of essentially governmental functions" which are generally shielded from civil liability in the absence of a statutorily-based waiver. *Id.*

¶ 22 The doctrine of governmental immunity, which resembles that of sovereign immunity, renders local governments such as counties and municipal corporations "immune from suit for the negligence of [their] employees in the exercise of governmental functions absent waiver of immunity." *Meyer v. Walls*, 347 N.C. 97, 104 (1997) (quoting *State ex rel. Hayes v. Billings*, 240 N.C. 78, 80 (1954)). Although "[t]he State's sovereign immunity applies to both its governmental and proprietary functions," the "more limited governmental immunity covers only the acts of a municipality or a municipal corporation committed pursuant to its governmental functions." *Evans v. Hous. Auth. of City of Raleigh*, 359 N.C. 50, 53 (2004) (quoting *Guthrie v. N.C. State Ports Auth.*, 307 N.C. 522, 533 (1983)). In other words, while governmental immunity protects units of local government from suit for "acts committed in [their] governmental capacity," if the entity in question "undertakes functions beyond its governmental and police powers and engages in business in order to render a public service for the benefit of the community for a profit, it becomes subject to liability for contract and in tort as in case of private corporations." *Id.* (quoting *Town of Grimesland v. City of Washington*, 234 N.C. 117, 123 (1951)) (cleaned up). As a result, while a unit of local government may be entitled to governmental immunity "in tort and contract for acts undertaken by its agents and employees in the exercise of its governmental functions," such entities do not enjoy the full protections of sovereign immunity which the State and its agencies enjoy. *Id.* A state agency may assert sovereign immunity, or a municipal corporation may assert governmental immunity, as a complete defense to a civil lawsuit at the pleading stage. *See Guthrie v. N.C. State Ports Auth.*, 307 N.C. 522, 527 (1983).

¶ 23 As a general proposition, interlocutory orders are not immediately appealable unless the order in question affects a substantial right. N.C.G.S. § 7A-27(b)(3)(a) (2019). Although an order denying a dismissal motion predicated upon the doctrine of sovereign immunity is interlocutory in nature, such an order is immediately appealable "because it represents a substantial right." *Craig v. New Hanover Cnty. Bd. of Educ.*, 363 N.C. 334, 338 (2009). This Court reviews a trial court's decision to grant or deny a motion to dismiss based upon the doctrine of sovereign immunity using a de novo standard of review. *See White v. Trew*, 366 N.C. 360, 362–63 (2013) (reviewing an appeal from a trial court order denying "a motion to dismiss that raises sovereign immunity as grounds for dismissal" utilizing a de novo standard of review).

¶ 24 Similarly, this Court reviews issues involving the construction of statutes using a de novo standard of review. *Wilkie v. City of Boiling*

Spring Lakes, 370 N.C. 540, 547 (2018) (quoting *In re Ernst & Young, LLP*, 363 N.C. 612, 616 (2009)). "It is well settled that where the language of a statute is clear and unambiguous, there is no room for judicial construction and the courts must construe the statute using its plain meaning." *In re Est. of Lunsford*, 359 N.C. 382, 391–92 (2005) (quoting *Burgess v. Your House of Raleigh, Inc.*, 326 N.C. 205, 209 (1990)) (cleaned up).

¶ 25 Finally, in determining whether a trial court correctly decided whether to dismiss a complaint for failure to state a claim for relief pursuant to N.C.G.S. § 1A-1, Rule 12(b)(6), this Court examines "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." *Bridges v. Parrish*, 366 N.C. 539, 541 (2013) (quoting *Coley v. State*, 360 N.C. 493, 494–95 (2006)). In conducting the required analysis, "the allegations of the complaint must be viewed as admitted, and on that basis the court must determine as a matter of law whether the allegations state a claim for which relief may be granted." *Davis v. Hulsing Enterprises, LLC*, 370 N.C. 455, 457 (2018) (quoting *Stanback v. Stanback*, 297 N.C. 181, 185 (1979)). N.C.G.S. § 1A-1, "Rule 12(b)(6), generally precludes dismissal except in those instances where the face of the complaint discloses some insurmountable bar to recovery." *Newberne v. Dep't of Crime Control & Pub. Safety*, 359 N.C. 782, 784 (2005) (quoting *Energy Investors Fund, L.P. v. Metric Constructors, Inc.*, 351 N.C. 331, 337 (2000)) (cleaned up).[2] We will now evaluate the issues that have been presented for our consideration using the applicable standards of review.

B. Liability of Kinston Charter Academy

1. Sovereign Immunity

¶ 26 **[1]** In seeking to persuade us to reverse the Court of Appeals' decision in this case, the State begins by contending that the Court of Appeals erred by deciding that charter schools were entitled to the protections afforded by the doctrine of sovereign immunity. In the State's view, the Charter School Act, which is contained in Chapter 115C of the North Carolina General Statutes, demonstrates that charter schools are private, rather than public, institutions. In addition, the State cites our

2. Although a number of the motions that underlie the issues that are before us in this case were lodged pursuant to N.C.G.S. § 1A-1, Rule 12(b)(1) in addition to N.C.G.S. § 1A-1, Rule 12(b)(6), the standard of review for such motions is the same as the standard for motions lodged pursuant to N.C.G.S. § 1A-1, Rule 12(b)(6), given that the only factual materials presented for the trial court's consideration were those contained in the complaint. *Estate of Long*, 2021-NCSC-81, ¶ 15.

decision in *Turner v. Gastonia City Board of Education*, 250 N.C. 456, 463 (1959), for the proposition that local school boards in North Carolina are not considered "departments, institutions, [or] agencies of the State" and that local school boards operate with a significant degree of autonomy. Furthermore, the State argues that *Turner* distinguishes between the State Board of Education, which is an agency of the State, and local school boards, which serve "purely local functions." *Id.* According to the State, since charter schools enjoy an even greater level of autonomy from State control than is the case with local school boards and are "purely local" in character, charter schools are not entitled to the protections of the doctrine of sovereign immunity.

¶ 27 The State also contends that any judgment entered against the Academy in this case would not be collectable from the State given that the State is not liable for any acts or omissions of a charter school, N.C.G.S. § 115C-218.20(b); that the debt incurred by a charter school does not "constitute an indebtedness of the State or its political subdivisions," N.C.G.S. § 115C-218.105; and that the State seeks to recoup money that it had previously allocated to the Academy in this litigation. In the State's view, the fact that a judgment against a charter school would not be collectable from the State treasury weighs heavily against a finding that a charter school like the Academy is entitled to sovereign immunity. *See Smith v. State*, 289 N.C. 303, 321 (1976) (holding that the State of North Carolina was not entitled to assert sovereign immunity as a defense in a contract action given that the State typically "keep[s] its part of the bargain" after entering into a valid contract and that the Court's holding would not "have a significant impact upon the State treasury or substantially affect official conduct").

¶ 28 Similarly, the State contends that relevant provisions of the Charter School Act demonstrate that the General Assembly did not intend for charter schools to be categorized as state agencies, with this contention resting upon the statutory requirement that charter schools "operate independently of existing schools" and that charter schools be "operated by [ ] private nonprofit corporation[s]." N.C.G.S. §§ 115C-218(a), 115C-218.15(b). In addition, the State points to the contrast between the language contained in the Charter School Act and that contained in the legislation creating the State Ports Authority, which this Court has determined to be a state agency entitled to assert the defense of sovereign immunity, *see Guthrie*, 307 N.C. at 528 (1983), with the latter having provided that the State Ports Authority was "created as an instrumentality of the State of North Carolina," that the Authority was a "division of the Department of Commerce," and that the Authority provided a means

by which "the State of North Carolina may engage in promoting, developing, constructing, equipping, maintaining and operating the harbors and seaports within the State," *id.* at 527–28 (citing N.C.G.S. §§ 143B–453, 431(2)(*l*) (1981)), while the former contained no such language.

¶ 29 Finally, the State contends that the Academy is not entitled to rely upon a defense of sovereign immunity in response to an action brought by the State given that the immunity of a lesser sovereign, such as a county, local school board, or charter school, must yield to the greater sovereignty of the State. *See State Highway Comm'n. v. Greensboro City Bd. of Educ.*, 265 N.C. 35, 39–40 (1965) (holding that the State Highway Commission, which was a "State agency or instrumentality," was entitled to use the State's power of eminent domain to take property belonging to a local school board); *see also N.C. DOT v. Cnty. of Durham*, 181 N.C. App. 346, 349 (2007) (reasoning that, "[b]ecause the counties derive their sovereign immunity and all other powers and authority from the State" "the counties' sovereign immunity cannot be superior to that of the State"). As a result, for all of these reasons, the State urges us to reverse the Court of Appeals' determination that the Academy was entitled to rely upon a defense of sovereign immunity in response to the claim that the State had asserted against it pursuant to the False Claims Act.

¶ 30 In seeking to persuade us to affirm the Court of Appeals' decision with respect to the sovereign immunity issue, the Academy claims that it is a part of the North Carolina school system rather than a unit of local government. In addition, the Academy emphasizes the provisions of the Charter School Act which "show[ ] that [charter schools] are public schools" and which "discuss how a charter school may waive sovereign immunity"; the fact that the North Carolina Constitution "requires [that] the State provide education and [that] charter schools help fulfill this mandate"; and the fact that "charter schools function as part of the State" and are managed as such. The Academy argues that the existence of N.C.G.S. § 115C-218.20 (formerly section 115C-238.29F(c)), which provides that "[a]ny sovereign immunity of the charter school . . . is waived to the extent of indemnification by insurance," demonstrates the General Assembly's recognition that charter schools "are an extension of the sovereign and have sovereign immunity except to the extent it is waived" by statute. The Academy further notes that appellate courts in Texas and Georgia have recently found that charter schools are entitled to sovereign immunity under their respective state laws, *see El Paso Educ. Initiative, Inc. v. Amex Properties, LLC*, 602 S.W.3d 521, 530 (Tex. 2020); *see also Campbell v. Cirrus Educ., Inc.*, 355

Ga. App. 637, 641 (2020), and contends that the General Assembly has not provided for a waiver of sovereign immunity with respect to claims asserted under the False Claims Act, so that such a claim cannot be maintained against a charter school. *See Orange Cty. v. Heath*, 282 N.C. 292, 296 (1972) (holding that sovereign immunity cannot be "abrogated, abridged, or surrendered, except in deference to plain, positive legislative declarations to that effect").

¶ 31 The Academy argues that the relevant authorities provide no support for the State's claim that "lesser sovereigns" are not entitled to assert a defense of sovereign immunity in opposition to claims advanced by the State given that both the State and its agencies enjoy "absolute and unqualified" sovereign immunity, citing *Guthrie*, 307 N.C. at 534–35. As additional support for this contention, the Academy directs our attention to *N.C. Insurance Guaranty Ass'n v. Board of Trustees of Guilford Technical Community College*, 364 N.C. 102, 112 (2010), in which this Court held that the General Assembly had clearly waived sovereign immunity by making the Workers' Compensation Act applicable to claims brought by governmental employees. According to the Academy, the Court in *N. Carolina Ins. Guar. Ass'n* "necessarily found that sovereign immunity was otherwise available as a defense that could be waived" by the community college.

¶ 32 In assessing whether charter schools are state agencies entitled to assert a defense of sovereign immunity, we begin by examining the relevant provisions of the Charter School Act. In authorizing the creation of such schools, the General Assembly stated that they were intended to "provide opportunities for teachers, parents, pupils, and community members to establish and maintain schools that operate independently of existing schools." N.C.G.S. § 115C-218(a). In addition, the General Assembly provided that,

> (a) A charter school that is approved by the State shall be a public school within the local school administrative unit in which it is located. All charter schools shall be accountable to the State Board for ensuring compliance with applicable laws and the provisions of their charters.
>
> (b) A charter school shall be operated by a private nonprofit corporation that shall have received federal tax-exempt status no later than 24 months following final approval of the application. The board of directors of the charter schools shall adopt a conflict of

> interest and anti-nepotism policy that includes, at a minimum, the following:
>
> > (1) The requirements of Chapter 55A of the General Statutes related to conflicts of interest.
>
> . . .
>
> (d) The board of directors of the charter school shall decide matters related to the operation of the school, including budgeting, curriculum, and operating procedures.

N.C.G.S. § 115C-218.15. The General Assembly has prohibited charter schools from charging tuition, N.C.G.S. § 115C-218.50, and has provided that they be primarily funded by the State and local school boards, which allocate funds to charter schools on a per-pupil basis. More specifically, for each child attending a charter school, the State must distribute "[a]n amount equal to the average per pupil allocation for average daily membership from the local school administrative unit allotments in which the charter school is located," while the relevant local school board must distribute "an amount equal to the per pupil share of the local current expense fund of the local school administrative unit" to the charter school. N.C.G.S. § 115C-218.105. In the event that a charter school increases its enrollment by twenty percent or less from one academic year to the next, that increase is not considered a "material revision" subject to approval by the State Board of Education. N.C.G.S. § 115C-218.7. If the school's enrollment increases by a figure that is greater than twenty percent, the charter school must obtain a charter amendment authorizing such an increase from the State Board of Education. *Id.*

¶ 33 As this Court has previously stated, the General Assembly's decision to explicitly categorize an entity as an agency of the State "carries great weight." *Guthrie*, 307 N.C. at 528. The General Assembly has not, for whatever reason, chosen to categorize charter schools as state agencies or instrumentalities and has, instead, classified charter schools as entities that "operate independently of existing schools" that are run by "private non-profit corporations." As a result, given that statutory language must be construed in accordance with its clear and unambiguous meaning, we hold that the General Assembly did not intend for charter schools to be deemed to be agencies or instrumentalities of the State.

¶ 34 Although the Academy and the Court of Appeals place considerable reliance upon the 1997 amendment to the Charter School Act address-

ing the extent to which charter schools may be held to be civilly liable in the course of concluding that charter schools are entitled to assert a defense of sovereign immunity, we do not find that argument persuasive. According to the relevant statutory language:

> (a) The board of directors of a charter school may sue and be sued. The State Board of Education shall adopt rules to establish reasonable amounts and types of liability insurance that the board of directors shall be required by the charter to obtain. The board of directors shall obtain at least the amount of and types of insurance required by these rules to be included in the charter. Any sovereign immunity of the charter school, of the organization that operates the charter school, or its members, officers, or directors, or of the employees of the charter school or the organization that operates the charter school, is waived to the extent of indemnification by insurance.
>
> (b) No civil liability shall attach to the State Board of Education, the Superintendent of Public Instruction, or to any of their members or employees, individually or collectively, for any acts or omissions of the charter school.

N.C.G.S. § 115C-218.20 (2019). Although the Academy and the Court of Appeals contend that the statutory references to "[a]ny sovereign immunity of the charter school" effectively grants sovereign immunity to such institutions, we are unable to read the relevant statutory language in that fashion. Instead, when read literally, N.C.G.S. § 115C-218.20(a) simply states that, to the extent that sovereign immunity is otherwise available to charter schools, any such immunity is waived to the extent that the school purchases liability insurance. For that reason, the extent to which the school is, in fact, entitled to rely upon a defense of sovereign immunity must be determined on the basis of an analysis of other legal authorities rather than on the basis of the provisions of N.C.G.S. § 155C-218.20(a). Our construction of N.C.G.S. § 115C-218.20(a) to this effect is bolstered by the language of N.C.G.S. § 115C-218.20(b), which is obviously intended to ensure that the Superintendent of Public Instruction, the State Board of Education, and their agents cannot be held liable for the acts or omissions of a charter school, with such a provision being unnecessary in the event that charter schools were afforded the benefits of sovereign immunity.

¶ 35 In addition, we agree with the State's contention that charter schools are local rather than statewide in character and that such locally oriented entities are typically protected by governmental, rather than sovereign, immunity. In *Turner v. Gastonia City Board of Education*, 250 N.C. 456, this Court examined the viability of a claim asserted by the plaintiff stemming from an injury that allegedly resulted from the negligent operation of a lawnmower by an employee of the Gastonia City Board of Education, with the question before the Court in that case being whether the plaintiff was entitled to recover compensatory damages from the local board of education, the State Board of Education, or both, and whether any such claim had to be heard before the Industrial Commission, which has exclusive jurisdiction over claims brought against the State pursuant to the State Tort Claims Act. *Id.* at 460. In distinguishing between a local school board and the State Board of Education, this Court held that the State Board of Education, but not local school boards, could be held liable under the State Tort Claims Act on the theory that

> [t]he General Assembly created the State Board of Education and fixed its duties. It is an agency of the State with statewide application. The General Assembly likewise created the county and city boards and fixed their duties which are altogether local. The Tort Claims Act, applicable to the State Board of Education and to the State departments and agencies, does not include local units such as county and city boards of education.

Id. at 462–63. At that point, the Court addressed the issue of whether an employee of a local school board was an employee of the State, so that the State could be held liable for negligent conduct on the part of such an employee under the State Tort Claims Act. *Id.* at 463. In answering this question in the negative, this Court stated that:

> [i]n no sense may we consider the Gastonia City Board of Education in the same category as the State Board of Education . . . . The Gastonia City Board of Education does not meet the classification. County and city boards of education serve very important, though purely local functions. The State contributes to the school fund, but the local boards select and hire the teachers, other employees and operating personnel. The local boards run the schools.

Id. As a result, in determining that local school boards had a "purely local" character and were not agencies or instrumentalities of the State, this Court held that the plaintiff was not entitled to maintain a claim against either defendant given that local school boards were protected by the doctrine of governmental immunity and an employee of a local school board was not an employee of the State.

¶ 36 This Court's conclusion in *Turner* that local school boards were not state agencies or instrumentalities was echoed by the decision of the United States Court of Appeals for the Fourth Circuit in *Cash v. Granville County Board of Education*, 242 F.3d 219, 221 (4th Cir. 2001). In *Cash*, the Fourth Circuit held that, since the Granville County Board of Education was "more like a county than an arm of the State," *id.* at 221, it was not entitled to rely upon the doctrine of sovereign immunity, reasoning that, even though state agencies and state instrumentalities are protected by the State's sovereign immunity for Eleventh Amendment purposes, any such immunity "does not extend to counties and similar municipal corporations . . . even if the counties and municipalities exercise a slice of State power," *id.* at 222 (cleaned up). As a result, both this Court and the Fourth Circuit have recognized that local school boards are not entitled to claim sovereign, as compared to governmental, immunity.

¶ 37 As we understand the applicable statutory provisions, the board of directors of a charter school serves much the same function as a local school board, in that both entities are responsible for the immediate supervision of the schools subject to their control. Admittedly, while local school boards control the school system in a particular geographic area, charter schools are not subject to any such specific statutorily grounded geographic constraint. On the other hand, most charter schools are subject to a de facto geographic limitation in that, as a practical matter, they can only serve students that are able to travel to and from the school on a daily basis.[3] The State, on the other hand, has responsibility for establishing the overall policies, rules, and regulations applicable to both local school boards and charter school boards of directors. In other words, both local school boards and charter school boards of directors have much more hands-on responsibility for the operation of specific educational institutions than either the Department of Public Instruction or the State Board of Education. Thus, given the similarities between the functions performed by a local school board and the board of directors of a charter school and given that a local school board is entitled

3. For example, the Academy only served students from Lenoir, Pitt, and Greene counties.

to governmental, rather than sovereign, immunity, we conclude that the analogy between these two types of school governmental entities suggests that charter schools are entitled to, at most, assert a defense of governmental, rather than sovereign, immunity.[4] As a result, for all of these reasons, we conclude that the Court of Appeals erred by holding that charter schools are entitled to assert a defense of sovereign immunity in opposition to the False Claims Act claim that the State brought against the Academy.

2. Whether the Academy is a "person" under the False Claims Act

¶ 38 **[2]** In seeking to persuade us that the Court of Appeals erred by holding that the Academy was not a "person" for purposes of the False Claims Act, the State begins by noting that, while the False Claims Act does not contain a specific definition of a "person," a generally applicable statute provides that "[t]he word 'person' shall extend and be applied to bodies politic and corporate, as well as to individuals, unless the context clearly shows to the contrary." N.C.G.S. § 12-3(6) (2019). In the State's view, the definition of a "person" contained in N.C.G.S. § 12-3(6) is sufficiently broad to encompass corporate entities such as nonprofit corporations even if those entities perform public functions, as long as the entity in question is not entitled to rely upon a defense of sovereign immunity. In support of this assertion, the State directs our attention to *Jackson v. Housing Authority of High Point*, 316 N.C. 259, 264 (1986), in which we presumed that the General Assembly was aware of the manner in which a "person" was defined in N.C.G.S. § 12-3 at the time that it enacted N.C.G.S. § 28A-18-2, which creates a statutory cause of action for wrongful death, so that governmental entities such as municipal corporations constituted "persons" and were, for that reason, subject to liability for wrongful death.

¶ 39 In addition, the State contends that, when the False Claims Act is read consistently with the federal False Claims Act as required by N.C.G.S.

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4. The Academy did not clearly argue before either this Court or the Court of Appeals that it was immune from suit in this case on the basis of the doctrine of governmental immunity. Instead, both the Academy and the Court of Appeals focused their attention upon the issue of whether the Academy was entitled to assert a defense of sovereign immunity. Assuming, without in any way deciding, that the Academy would be entitled to rely on a defense of governmental immunity and that it had properly asserted such a defense in this case, any such contention would lack merit given that the governmental immunity available to local governmental entities must necessarily yield to the greater sovereignty of the State. *See Cnty. of Durham*, 181 N.C. App. at 349 (reasoning that, "[b]ecause the counties derive their sovereign immunity and all other powers and authority from the State . . . the counties' sovereign immunity cannot be superior to that of the State").

§ 1-616(c), local governments and, by extension charter schools, are subject to liability under the Act. *See Cook Cnty v. United States ex rel. Chandler*, 538 U.S. 119, 122 (2003) (holding that municipal corporations qualify as "persons" for purposes of 31 U.S.C. § 3729, the federal False Claims Act). In addition, the State cites *United States ex rel. Oberg v. Ky. Higher Educ. Student Loan Corp.*, 681 F.3d 575, 579–80 (4th Cir. 2012), in which the Fourth Circuit held that the determination of whether an entity is considered a "person" under the federal False Claims Act hinges upon the extent to which the entity in question is "truly subject to sufficient state control to render [that entity] a part of the state," with the federal courts being required to utilize Eleventh Amendment "arm-of-the-state" analysis in order to make that determination.

¶ 40 The State contends that, in this case, there is no need for the use of "arm-of-the-state" analysis given that the use of such a method is not necessary to "determine the scope of sovereign immunity in state court," with this issue being, "instead[,] controlled by state law." In the alternative, however, the State contends that, even if "arm-of-the-state" analysis should be used in instances like this one, the Academy would still be a "person" capable of being sued under the False Claims Act given that the State is not liable for civil judgments entered against charter schools, charter schools operate with significant autonomy from the State, the operation of a charter school implicates purely local concerns, and the relevant statutory provisions establish that charter schools are not agencies or instrumentalities of state government.

¶ 41 In seeking to have us affirm the Court of Appeals' determination that charter schools are not "persons" subject to liability pursuant to the False Claims Act, the Academy begins by suggesting that, as a state agency, it is protected by the doctrine of sovereign immunity. In addition, the Academy asserts that a charter school is not a "person" for purposes of the False Claims Act in light of the failure of the False Claims Act to define "person" and the fact that the False Claims Act gives no indication that it was intended to authorize the filing of actions against state agencies, public schools, or charter schools. In the same vein, the Academy contends that treating charter schools as "persons" for purposes of the False Claims Act would conflict with the Act's "spirit, intent, or purpose" given that the availability of qui tam actions, in which between fifteen and twenty-five percent of the resulting recovery would be paid to a private citizen who initiated such an action, would have the effect of "taking funds designated for educational purposes and giving them to a private citizen." According to the Academy, the Court of Appeals correctly utilized "arm-of-the-state" analysis in determining that

charter schools were not subject to liability under the False Claims Act given that the False Claims Act is supposed to be construed consistently with the equivalent federal statutory provisions.

¶ 42 We begin our analysis of this issue by noting that the rules for statutory construction delineated in N.C.G.S. § 12-3 "shall be observed" "[i]n the construction of all statutes" "unless such construction would be inconsistent with the manifest intent of the General Assembly or repugnant to the context of the same statute." In view of the fact that a non-profit corporation of the type that is statutorily required to operate a charter school is clearly a "corporate" body, a charter school is necessarily encompassed within the statutory definition of "person" set out in N.C.G.S. § 12-3(6). As a result, as was the case in *Jackson*, the literal language of N.C.G.S. § 12-3(6) indicates that a charter school is a "person" subject to liability for purposes of the False Claims Act unless that result would be "inconsistent with the manifest intent of the General Assembly" or "repugnant to the context of the same statute."

¶ 43 We see no reason why utilizing a definition of "person" consistent with that set out in N.C.G.S. § 12-3(6) would be inconsistent with the General Assembly's intent in enacting the False Claims Act or repugnant to the remaining provisions contained in that legislation. The obvious purpose of the False Claims Act is to ensure that public funds are spent in the manner for which they were intended instead of being misappropriated, misspent, or misused. In view of the fact that a nonprofit corporation is perfectly capable of using public funds in a manner that is inconsistent with the prohibitions set out in N.C.G.S. § 1-607(a), the use of a definition of "person" that sweeps in such entities would not be in any way inconsistent with the purposes that the General Assembly sought to achieve by enacting the False Claims Act. Thus, the use of a definition of a "person" that includes a charter school for purposes of the False Claims Act seems perfectly consistent with the legislative intent as expressed in N.C.G.S. § 12-3(6).

¶ 44 In addition, none of the arguments that have been advanced by the Academy in opposition to the use of the definition of a "person" set out in N.C.G.S. § 12-3(b) have merit. As we have already demonstrated, a charter school is not entitled to invoke the doctrine of sovereign immunity as a defense to an action brought pursuant to the False Claims Act. In the same vein, given that "arm-of-the-state" analysis is used for purposes of the federal False Claims Act to ensure compliance with the protections available to state governments under the Eleventh Amendment and since the same purpose is served by determining whether the entity against whom the action is sought to be brought is protected by

the doctrine of sovereign immunity as a matter of state law, the use of "arm-of-the state" analysis for purposes of determining whether a particular entity is a "person" for False Claims Act purposes would be an exercise in redundancy. Similarly, the fact that the False Claims Act does not contain a definition of a "person" is entitled to little weight in our analysis given that such a definition, which is applicable to all statutory provisions, appears in N.C.G.S. § 12-3(6). Finally, the qui tam provisions of the False Claims Act do not render the use of a definition of a "person" consistent with N.C.G.S. § 12-6(3) inappropriate on the theory that these provisions would divert some amount of what would otherwise be public money to private citizens, given that the use of qui tam actions is an essential portion of the mechanism that has been created for the purpose of ensuring compliance with the strictures of the False Claims Act and that the same argument would justify absolving any and all public entities from False Claims Act liability, a result that would risk significant misuse of public funds. As a result, for all of these reasons, we hold that the Court of Appeals erred by holding that the Academy was not a "person" for purposes of the False Claims Act.

3. Pleading Requirements under the False Claims Act

¶ 45 **[3]** In its conditional petition for discretionary review, the Academy sought and obtained authorization to address an additional issue that the Court of Appeals did not reach relating to the sufficiency of the State's complaint in stating a claim under the False Claims Act. According to the Academy, the State's complaint did not satisfy the requirements for pleading a False Claims Act claim given the State's failure to plead its claim with sufficient particularity or to plead the existence of an objective falsehood.

¶ 46 According to the Academy, the average daily membership estimate of 366 students that it reported for the 2013–14 school year was nothing more than a "projection" that the Academy was statutorily authorized to make rather than an objective falsehood. In support of this assertion, the Academy directs our attention to the decision by the United States Court of Appeals for the Fifth Circuit that "[a] prediction, or statement about the future, is essentially an expression of opinion" that cannot be deemed to be objectively false. *Presidio Enters., Inc. v. Warner Bros. Distrib. Corp.*, 784 F.2d 674, 680 (5th Cir. 1986). According to the Academy, "the alleged statement was legally authorized by statute and cannot be a false statement" given that the number of students specified in the allegedly false estimate "was within the twenty percent increase authorized" by N.C.G.S. § 115C-218.7. In the Academy's view, an estimate of increased enrollment that is within twenty percent of an existing

estimate simply cannot be "unreasonable and reckless" or false and that the estimate was within the statutory scope of the discretion that the charter school was statutorily authorized to exercise.

¶ 47 Finally, the Academy argues that the fact that defendants made efforts to increase student enrollment at the Academy and to keep the school viable suffices to "defeat" the State's "allegations that the claim made for 366 students was knowingly false at the time it was made" in light of the board's hope that the school would remain open. More specifically, the Academy claims that it "engage[d] in an advertising campaign, repair[ed] the HVAC, [bought] buses, and [sought] refinancing" in an attempt to remain open. In addition, the Academy argues that the State was fully aware of the Academy's financial situation at the time that the allegedly false estimate was made and contends that, "[i]f the government knows and approves of the particulars of a claim for payment before that claim is presented, the presenter cannot be said to have knowingly presented a fraudulent or false claim." *United States ex rel. Laird v. Lockheed Martin Eng'g & Sci. Servs. Co.*, 491 F.3d 254, 263 (5th Cir. 2007).

¶ 48 In response to the Academy's contentions, the State asserts that it satisfied the requirements for pleading a fraud-based claim set out in N.C.G.S. § 1A-1, Rule 9(b), by alleging the "time, place and contents" of the allegedly fraudulent claim. According to the State, it satisfied the applicable pleading requirements by stating that, in a phone call that Mr. Hall made to the Department on 26 April 2013, he falsely "increased the school's projected enrollment for the next year to 366 students"; by naming the "person making the representation" as Mr. Hall; and by describing "what was obtained as a result of the fraudulent acts or representations" as the "$344,340.44 in excess funds" that the State paid to the Academy as a result of the overstatement in the Academy's estimated enrollment. As a result, the State contends that its complaint adequately alleged a claim against the Academy pursuant to the False Claims Act.

¶ 49 According to the False Claims Act, any "person" who "[k]nowingly presents or causes to be presented a false or fraudulent claim for payment or approval" or who "[k]nowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim" shall be "liable to the State for three times the amount of damages that the State sustains because of the act of that person." N.C.G.S. §§ 1-607(a)(1), (2). N.C.G.S. § 1A-1, Rule 9(b) provides that, "[i]n all averments of fraud, duress or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." In order to satisfy the particularity requirement delineated in N.C.G.S. § 1A-1,

Rule 9(b), the plaintiff must allege the specific "time, place and content of the fraudulent representation, the identity of the person making the representation and what was obtained as a result of the fraudulent acts or representations." *Terry v. Terry*, 302 N.C. 77, 85 (1981).

¶ 50 In its complaint, the State alleged that, during a conversation with a Department official that occurred on 26 April 2013, Mr. Hall had "increased the school's projected enrollment for the next year to 366 students," with this number representing "an increase of 56 students from the 310 estimated enrollment that [the Academy] submitted with a draft budget three months earlier" and that the making of this statement resulted in a violation of the False Claims Act because it constituted

> a. making a claim for state educational funds based on a projected enrollment of 366 students — a number that defendants knew or should have known they would not achieve;
>
> b. making a claim for state educational funds for the 2013–14 school year when defendants knew or should have known that [the Academy] would not survive the year;
>
> c. making a false claim for state funds to be used for a non-profit educational purpose that were instead used to benefit defendants.

As a result, the State clearly satisfied the requirements of N.C.G.S. § 1A-1, Rule 9(b), by alleging that Mr. Hall stated in a phone call that occurred on 26 April 2013 that there would be 366 students enrolled at the Academy for the 2013–14 school year, that $344,340.44 in excess funds had been allotted to the Academy as a result of this allegedly false representation, and that the State was seeking to recoup this amount from defendants, a group that included the Academy. As a result, we hold that the State satisfied the requirements of N.C.G.S. § 1A-1, Rule 9(b), in pleading its False Claims Act claim against the Academy.

¶ 51 In addition, we reject the Academy's contention that the State failed to plead the making of an "objective falsehood" and that the State was on notice that the enrollment estimate upon which its False Claims Act claim relied might be lacking in substantive support. Although the Academy vigorously argues that a projected enrollment figure cannot be the sort of objective falsehood necessary to support liability under the False Claims Act and that the State should have known the nature and extent of the Academy's financial situation at the time that the Academy

submitted the enrollment estimate upon which the State's False Claims Act relies, we do not find either of these arguments to be persuasive.

¶ 52 As we read the applicable statutory provision, the estimate of a charter school's student enrollment, which determines how much money the charter school is entitled to receive from the State, must be a genuine, good-faith estimate of the number of students that the charter school anticipates serving rather than an arbitrary figure that the charter school is entitled to present to the Department regardless of its accuracy. A contrary interpretation of the relevant statutory language would authorize charter schools to requisition ever-greater amounts of money from the State regardless of their actual need for the amount of money in question. On the basis of similar logic, the Fourth Circuit has held that an estimate that that is devoid of any factual support is actionable under the federal False Claims Act. *Harrison v. Westinghouse Savannah River Co.*, 176 F.3d 776, 792 (4th Cir. 1999) (cleaned up) (stating that an "estimate carries with it an implied assertion, not only that the speaker knows no facts which would preclude such an opinion, but that he does know facts which justify it").

¶ 53 Similarly, while the State certainly knew that the Academy had long-standing financial difficulties and that the Academy's enrollment numbers had been declining, the State's complaint does not establish that the State had full knowledge of the Academy's situation at the time that Mr. Hall submitted an allegedly inflated student enrollment estimate to the Department. In fact, the complaint alleges that the Academy never informed the Department of the two short-term loans that the Academy took out in the late spring and early summer of 2013. Assuming, without in any way deciding, that knowledge of the falsity of the relevant representation might be sufficient to prevent a finding of liability for the making of that statement under the False Claims Act, any such argument would lack sufficient support given the record that is before us in this case.

¶ 54 The potential harm worked by the Academy's interpretation of the relevant statutory provisions is demonstrated by the allegations in the State's complaint, in which the Academy allegedly estimated that it would serve a far greater student population than it had any basis for believing would actually materialize, received more funds than it could actually use for the purpose of educating students in the upcoming academic year, and used the funds to make questionable payments that had the effect of benefitting school officials and their relatives. Had the Academy refrained from making such an unsupported estimate of student enrollment, the funds that it obtained and used to pay expenses associated with operations during earlier periods of time would have

been available for the education of North Carolina students rather than used for purposes that benefitted the Academy and school officials. As a result, for all of these reasons, we hold that the trial court did not err by denying the Academy's motion to dismiss the State's complaint for failure to state a claim under the False Claims Act.

C. Liability of Mr. Hall

¶ 55 **[4]** In seeking to persuade us to reverse the Court of Appeals' determination that the record failed to contain sufficient information to establish that he was entitled to invoke the protections of public official immunity, Mr. Hall begins by asserting that he is a public official because his position as "CEO/Principal" of the Academy was "created by delegation from the Constitution and Statutes as a matter of law," including Article IX, Section 2 of the North Carolina Constitution, which establishes a "general uniform system of free public schools," and N.C.G.S. § 115C-218.15, which provides that a "charter school that is approved by the State shall be a public school within the local school administrative unit in which it is located." In addition, Mr. Hall asserts that, as the Academy's "CEO/Principal," he had discretionary authority and exercised "a part of the sovereign power of the State." Finally, Mr. Hall contends that, since he is entitled to public official immunity, he is not a "person" subject to liability under the False Claims Act.

¶ 56 In response, the State contends that, in determining whether a person is entitled to public official immunity, reviewing courts must consider a number of factors, including "(1) whether the position was created by the constitution or statutes, and (2) whether the official exercises a portion of the sovereign power." *See Isenhour v. Hutto*, 350 N.C. 601, 610 (1999). In view of the fact that the duties of the Chief Executive Officer or principal of a charter school are not outlined in any statutory or constitutional provision, the State asserts that Mr. Hall is not a public officer entitled to the protection of public official immunity. Finally, the State asserts that, even if Mr. Hall was otherwise entitled to claim the benefits of the public official immunity doctrine, the knowing making of false statements is not the sort of activity for which an award of immunity would be appropriate.

¶ 57 As the Court of Appeals correctly recognized, "a public official, engaged in the performance of governmental duties involving the exercise of judgment and discretion, may not be held personally liable for mere negligence in respect thereto," *Isenhour v. Hutto*, 350 N.C. 601, 609–10 (1999), with such public official immunity having been recognized because "it would be difficult to find those who would accept public office

or engage in the administration of public affairs if they were to be held personally liable for acts or omissions involved in the exercise of discretion and sound judgment," *Miller v. Jones*, 224 N.C. 783, 787 (1945). However, public official immunity is not available to public employees, as compared to public officials, *id.* at 787, or relating to the actions of a public official that were "corrupt or malicious" or "outside of or beyond the scope of his duties," *Smith v. Hefner*, 235 N.C. 1, 7 (1952) (citations omitted). Assuming, without in any way deciding, that a "CEO/Principal" is a public official rather than a public employee and that such a person exercises discretionary authority, we agree with the Court of Appeals that, in light of the State's allegation that Mr. Hall knowingly made "false or fraudulent statements in connection with receiving state funds," the State's complaint contained sufficient allegations to preclude dismissal of the False Claims Act claim that it asserted against Mr. Hall. As a result, the Court of Appeals did not err by denying Mr. Hall's motion to dismiss the False Claims Act claim that the State sought to assert against him in his individual capacity.[5]

III. Conclusion

¶ 58 Thus, for the reasons set forth above, we hold that the Court of Appeals erred by concluding that charter schools were entitled to assert a defense of sovereign immunity and were not "persons" for purposes of the False Claims Act. In addition, we hold that the State adequately stated a claim for relief against the Academy and Mr. Hall under the False Claims Act. Finally, we hold that the Court of Appeals correctly held that Mr. Hall was not, at least on the basis of the present record,

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5. In addition to his assertion that he was entitled to the dismissal of the False Claims Act claim that the State had asserted against him on public official immunity grounds and his contention that, like the Academy, he could not be held liable based upon his estimate of the Academy's likely student enrollment based upon the State's failure to adequately plead its False Claims Act claim with sufficient particularity, which we reject for the reasons stated earlier in this opinion, Mr. Hall argues that the Attorney General lacked the authority to file suit against him on the State's behalf, that the State's claim was barred by the applicable statute of limitations, that the Attorney General's actions violated the separation of powers provision of the North Carolina Constitution, and that the State had failed to adequately allege a waiver of sovereign immunity. However, none of these additional arguments have any merit given that the Attorney General is specifically authorized to bring False Claims Act claims on behalf of the State by N.C.G.S. § 1-608(a), the State's complaint was filed within six years of the making of the allegedly false statements as authorized by N.C.G.S. § 1-615(a), the Attorney General was acting in accordance with specific legislative authorization at the time that he filed suit against Mr. Hall, and the State had no obligation to plead waiver of an immunity to which Mr. Hall was not entitled. As a result, we hold that none of the additional arguments that Mr. Hall has advanced have merit.

entitled to obtain the dismissal of the State's complaint on the basis of public official immunity and that Mr. Hall's other challenges to the trial court's order lack merit. As a result, the Court of Appeals' decision is affirmed, in part, and reversed, in part, and this case is remanded to the Court of Appeals for further remand to Superior Court, Wake County, for further proceedings not inconsistent with this opinion.

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

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

STATE OF NORTH CAROLINA
v.
DAVID WARREN TAYLOR

No. 156PA20

Filed 17 December 2021

1. Constitutional Law—First Amendment—anti-threat statute—true threat—both subjective and objective intent required

In a prosecution for threatening to seriously injure or kill a court officer (N.C.G.S. § 14-16.7(a)), based on defendant's social media statements criticizing a district attorney's decision not to charge the parents of a deceased child, the speech could be criminalized only if it constituted a true threat, which is not constitutionally protected under the First Amendment. In order to prove the existence of a true threat, the State needed to establish not only that the speech was objectively threatening but also that defendant subjectively intended to communicate a threatening message.

2. Constitutional Law—First Amendment—anti-threat statute—true threat—sufficiency of the evidence

In a prosecution for threatening to seriously injure or kill a court officer (N.C.G.S. § 14-16.7(a)), the State presented substantial evidence from which a jury could find that defendant's social media statements criticizing a district attorney's decision not to charge the parents of a deceased child constituted a true threat—a necessary element rendering the statements ineligible for First Amendment protection, and which requires proof of objective and subjective intent. Defendant used the word "death" multiple times,

wrote favorably of vigilante justice, and expressed a willingness to use firearms against members of the criminal justice system. Where factual questions remained for a jury to decide, the matter was remanded for a new trial.

Justice EARLS concurring in part and dissenting in part.

Appeal pursuant to N.C.G.S. § 7A-31 from a unanimous decision of the Court of Appeals, 270 N.C. App. 514, vacating the judgment entered 23 January 2018 by Judge Gary M. Gavenus in Superior Court, Macon County. Heard in the Supreme Court on 24 March 2021.

Joshua H. Stein, Attorney General, by Nicholas S. Brod, Assistant Solicitor General, and Ryan Y. Park, Solicitor General, for the State-appellant.

Glenn Gerding, Appellate Defender, by Aaron Thomas Johnson, Assistant Appellate Defender, for the defendant-appellee.

MORGAN, Justice.

¶ 1 On 24 August 2016, defendant David Warren Taylor posted a string of angry comments on his personal Facebook social media page. The messages conveyed defendant's forceful disagreement with a decision by the area's elected District Attorney, Ashley Welch, not to criminally prosecute the parents of a child after the youngster's death under unusual circumstances in Macon County. During the diatribe, defendant consumed an unspecified, but apparently significant, quantity of beer. Most of defendant's posts contained pointed, inflammatory, but essentially political critiques of District Attorney Welch and various aspects of the Macon County judicial system.[1]

¶ 2 Some of the posts contained troubling language. In one of them, defendant promised that District Attorney Welch "will be the first to go" when a purportedly impending "rebellion against our government" occurs. In another comment, defendant declared that "[i]f [District Attorney Welch] won't do anything, then the death to her as well." Defendant also made numerous references to the firearms that he owned and his willingness to use them against law enforcement officers if he were ever "raided."

1. For proper attribution, I recognize and appreciate the significant contribution which Justice Earls has made to the introductory overview, the "Background," and the "Analysis" segments of this opinion.

¶ 3 Within a couple of hours of publishing his final Facebook message, defendant reconsidered the wisdom of broadcasting his unadulterated opinions on social media, in what has been called "the modern public square." *Packingham v. North Carolina*, 137 S. Ct. 1730, 1737 (2017). However, before defendant could delete the rant from his Facebook page, one of his Facebook "friends"—a detective in the Macon County Sheriff's Office—became concerned that the messages harbored content more sinister than intemperate venting. The detective took screenshots of defendant's posted comments and sent them to District Attorney Welch and the Macon County Sheriff, who then contacted the North Carolina State Bureau of Investigation (SBI). The next day, SBI investigators interviewed defendant at his office. That afternoon, defendant was arrested and later indicted under N.C.G.S. § 14-16.7(a) for "knowingly and willfully" threatening to kill a court officer. N.C.G.S. § 14-16.7(a) (2019). Defendant was subsequently convicted of the charged offense. He received a suspended sentence of 24 months of supervised probation and a $1,000 fine. Defendant appealed, and the Court of Appeals concluded that his conviction violated the First Amendment. The State has appealed to this Court.

¶ 4 At its core, this case presents a single question: Does the Free Speech Clause of the First Amendment to the United States Constitution[2] protect defendant from being convicted solely for publishing the messages contained in his Facebook posts? We conclude that it does, and therefore determine that his messages are shielded by the First Amendment. Accordingly, while the Court of Appeals was correct to vacate defendant's conviction, there remain questions for a properly instructed jury, so we reverse and remand the matter for a new trial.

I. Background

A. The Facebook posts

¶ 5 Defendant and Welch were familiar with one another prior to the events which spawned this case. Defendant was a Macon County resident who supported Welch in her campaign for the elected office of District Attorney. Defendant worked in an office building which was close to the Macon County Courthouse where the two occasionally would see each other during work breaks. Defendant and Welch were friendly, even though their conversations often centered on "political" subjects.

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2. This pertinent portion of the First Amendment states: "Congress shall make no law . . . abridging the freedom of speech or of the press. . . ." U.S. Const. amend I.

¶ 6 Defendant's favorable view of District Attorney Welch changed on 24 August 2016 when he learned that she would not be pursuing criminal charges against the parents of a Macon County child who had died a few months earlier. Defendant's concerns were rooted in the tragic details of the child's death. According to the parents, the two-and-a-half-year-old boy had "some sniffles" when they tucked him in for a nap. When the parents returned, the youngster was not breathing. The parents claimed that they took their son directly to the hospital, but when they arrived at the emergency room, the child was already deceased and "incredibly decomposed." Welch was concerned that the child had been "killed or neglected," and consequently ordered an autopsy. To Welch's surprise, the parents' account was confirmed. The autopsy determined that the child's death and subsequent rapid physical decomposition did not result from any maltreatment or abuse. Lacking evidence of criminal conduct, Welch declined to press charges against the child's parents.

¶ 7 When defendant learned of District Attorney Welch's decision to refrain from indicting the parents, he was demonstrably skeptical. He described the representation that the child had "died of a virus" as "a load of "F**king shit." Defendant utilized the social media site Facebook as the primary vehicle by which to express his frustration. Defendant initiated a litany of comments on his assessment of the situation with the following Facebook entry:[3]

> [Defendant]: So I learned today that the couple Who brought their child Into that er whom had been dead to the point that the er room had to be closed off due to the smell of the dead child Will face no Charges. I regret the day I voted for the new DA with this outcome. This is totally sickening to know that a child, whether by Ashley Welch's decision or not is not granted this type of Protection in our court system. Im tired of standing back and seeing how our judicial system works. I voted for it to change and apparently it never will. With this people question why a rebellion against our government is coming? I hope those that are friends with her share my post because she will be the first to go, period and point made.

In response, a few of defendant's Facebook friends communicated their shared agreement with defendant's views. Defendant himself then resumed his commentary:

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3. Given the subject matter of this case and the relevance of defendant's exact posting, we have only minimally altered his quotes to ensure they are understandable.

> [Defendant]: Sick is not the word for it. This folks is how the government and the judicial system works, Now U wonder why I say if I am raided for whatever reason like the guy on smoke rise was. When the deputy ask me is it worth it. I would say with a Shotgun Pointed at him and a ar15 in the other arm was it worth to him? Who cares what happens to the person I meet at the door. I'm sure he won't. I would open every gun I have. I would rather be carried by six than judged by twelve. This folks is how politicians want u to believe is ok. Im tired of it. What I do Training wise from this point is ur fault. And yes I know I have friends on [Facebook] whom see this. I hope they do! Death to our so called judicial system since it only works for those that are guilty! U want me come and take me.

When one of his Facebook friends expressed surprise that these events could occur in Macon County, defendant responded, "This is how politics works. That's why my harsh words to her and any other that will Listen and share it To her [Facebook] page." Another member of defendant's Facebook network called for "vigilante justice," which was punctuated by markedly numerous exclamation marks. Defendant replied:

> If that what it takes[.] I will give them both the [mountain] justice they deserve. Regardless of what the law or courts say. I'm tired of this political bullshit. If our head prosecutor won't do anything then the death to her as well. Yea I said it. Now raid my house for communicating threats and see what they meet. After all those that flip Together swim together. Although this isn't a house or pond they want to fish in.

The author of the "vigilante justice" comment posted that he was "still waiting." Again, defendant responded:

> For what [ ]? [District Attorney Welch] to reply? She won't because she is being paid a 6 digit income standing Outside the courthouse smoking a cigarette. She won't try a case unless it gets her TV time. Typical politician. Notice that none of them has responded yet? Although I'm sure My house is being Monitored right about now! I really hope They are ready for what meet them at the front door. Something tells Me they aren't!

As other Facebook observers continued to "like" his posts and comment on them, defendant published four more messages:

> It can start at my house. Hell this has to start somewhere. If the courts won't do it as have been proven. Then yes it Is up to the people to administer justice! I'm always game to do so. They make new ammo everyday! Maybe you need to learn what being free is verse being a puppet of the government. If u did u would might actually be happy! I think we both know of someone who will like this Comment Or Like this post.
>
> I know people who said the er room had to be shut down because the smell of they dead kid stunk up the entire er room. Our DA and Police department chose not to press charges. Yea that's the facts. Welcome to America. The once great great nation.
>
> Don't get me started on this. The court system and Most importantly western nc justice system is useless. It's all about money to the courts than it Is about justice. It is time for old Time mtn justice! Yes [ ] I said it. Now let Them knock on my door.
>
> [ ] don't get me Started about The Tony Curtis killing. Of Course No charges will Be brought against him. He is what the county considers to be a upstanding citizen of the community. Typical politics at its best. What he did was no different to the killing On 411 north over a year ago. What was his name? Fouts?

¶ 8 On the following day of 25 August 2016, the Macon County Sheriff's Office, the Macon County Courthouse, and District Attorney Welch herself all took precautions to ensure her safety. Additional deputies were stationed within and around the courthouse. Welch stopped walking through the office building where defendant worked. Further, she asked a realtor who had posted a video tour of Welch's home to remove the video, fearing that it could reveal identifying information from which defendant could glean Welch's address.

¶ 9 Later in the same day, a Special Agent from the SBI went to defendant's workplace to interview defendant. During the meeting, defendant reiterated his complaint that "no charges were brought against the parents" of the child who died, which defendant described as "sickening." Defendant claimed that he did not mean to threaten or harm District

Attorney Welch and that he deleted the social media posts because "he was friends with someone on Facebook who was friends with the parents' children." He then apologized for any concern that his posts had raised and asked the SBI agent to tell Welch that defendant was sorry.

¶ 10 Shortly after the interview concluded, police arrested defendant at his place of employment. Defendant was subsequently indicted pursuant to N.C.G.S. § 14-16.7(a) for "knowingly and willfully mak[ing] a[ ] threat to inflict serious bodily injury upon or to kill a[ ] . . . court officer[.]"

B. The trial

¶ 11 Defendant's trial began in January 2018. After the State concluded the presentation of its case, defendant moved to dismiss the matter on First Amendment grounds. He argued that the State had not shown that he had communicated any "true threat" against District Attorney Welch, which he contended was a threshold requirement in order to obtain a criminal conviction under N.C.G.S. § 14-16.7(a), consistent with First Amendment protections. Defendant defined a true threat as "a statement in which the defendant means to communicate a serious intention of committing an act of unlawful violence against a particular person." The trial court denied defendant's dismissal motion. Defendant did not elect to present evidence on his own behalf. He renewed his motion to dismiss on First Amendment grounds at the close of all of the evidence, which the trial court again denied.

¶ 12 During the jury charge conference, defendant requested jury instructions which distinguished "political hyperbole" from "true threats," based on his contention that the First Amendment forbade his conviction in the event that the jury could not find that he had communicated a true threat. The State objected to the proposed instruction, as it asserted that the "proper venue" and time for defendant to raise any First Amendment arguments would be "if upon conviction to take that up on appeal." The State also argued that the First Amendment was irrelevant because N.C.G.S. § 14-16.7(a) reflected the General Assembly's determination that "making any threats towards . . . court officials . . . is unacceptable." In the State's view, defendant's proposed jury instructions would impermissibly "rewrite [N.C.G.S. § 14-16.7(a)] to comport with his interpretation of the First Amendment requirements." Instead, the State asked the trial court to instruct the jury in accordance with the language of the statute, proposing an instruction which contained the phrase that there was "no requirement of proof to show that the threat was made in a manner and under circumstances which would cause a reasonable person to believe it is likely to be carried out." The trial court

agreed with the State's stance and therefore instructed the jury that in order to convict defendant, the State only needed to prove that defendant "knowingly and willfully made a threat to kill the alleged victim."

¶ 13 The jury found defendant guilty of the charged offense. The trial court sentenced defendant to a term of incarceration of 6 to 17 months, which was suspended upon 24 months of supervised probation and payment of a fine of $1,000.00. Defendant appealed.

C. The Court of Appeals opinion

¶ 14 Upon defendant's appeal, the Court of Appeals panel unanimously agreed that the First Amendment required the State to prove that defendant communicated a true threat. *State v. Taylor*, 270 N.C. App. 514, 517 (2020). In vacating the verdict and judgment entered against defendant at trial, the lower appellate court also unanimously agreed that N.C.G.S. § 14-16.7(a) was unconstitutional as applied to convict defendant for his Facebook posts. *Id.* The Court of Appeals concluded that the State was required to prove that defendant possessed both a general and specific intent to threaten District Attorney Welch in order to establish that defendant had communicated a true threat. In so concluding, the Court of Appeals held that in order to prove that defendant communicated a true threat, the State was required to prove that he communicated a statement which was *objectively threatening* and that he *subjectively intended* to threaten District Attorney Welch when he posted the messages on Facebook.[4] The State needed to establish the objective component that defendant's statements "would be understood by people hearing or reading it in context as a serious expression of an intent to kill or injure" District Attorney Welch and that defendant "intended that the statement be understood as a threat" in order to satisfy the subjective component. *Id.* at 557 (quoting *United States v. Bagdasarian*, 652 F.3d 1113, 1118 (9th Cir. 2011)). The State failed, in the view of the Court of Appeals, to prove the existence of either prong because (1) defendant's Facebook posts were "simply not [ ] statement[s] that a reasonable person would understand as Defendant expressing a *serious intent to kill* D.A. Welch," and (2) "the record evidence could not have supported a finding that Defendant's intent in posting his comments was to cause D.A. Welch to believe Defendant was going to kill her." *Id.* at 581.[5]

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4. For ease of reading, we use the terms "objective" and "subjective," and their derivatives, throughout this opinion, rather than the terms "general intent" and "specific intent," to refer to the two elements that defendant alleges that the State must prove in order to convict him for communicating a true threat.

5. Additionally, the Court of Appeals held that the First Amendment's "true threats" requirement was an essential element of N.C.G.S. § 14-16.7(a). Because "[i]t is well

The Court of Appeals majority ultimately adopted defendant's argument that his social media messages were protected by the First Amendment because the State did not prove that defendant communicated a true threat against the elected official Welch.

¶ 15 In a concurring opinion, a member of the Court of Appeals panel reached the same outcome in the case as the majority of the panel did, concluding as a matter of law that defendant's messages were not objectively threatening. *Id.* at 591 (Dietz, J. concurring in part).

¶ 16 We granted the State's petition for discretionary review.

II. Analysis

A. Applicable free speech principles

¶ 17 **[1]** The Free Speech Clause of the First Amendment, as incorporated to apply to the states through the Due Process Clause of the Fourteenth Amendment, provides that the government "shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I. This provision serves as a bulwark against governmental action which threatens the robust exchange of ideas that is "the indispensable condition[ ] of nearly every other form of freedom." *Palko v. Connecticut*, 302 U.S. 319, 327 (1937), *overruled on other grounds by Benton v. Maryland*, 395 U.S. 784 (1969). Laws restricting speech "because of disapproval of the ideas expressed" are typically unconstitutional. *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 382 (1992); *see also Regan v. Time, Inc.*, 468 U.S. 641, 648–49 (1984) ("Regulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment."). "Content-based regulations"—including criminal statutes which target speech on the basis of its content—"are presumptively invalid." *R.A.V.*, 505 U.S. at 382.

¶ 18 However, "our society, like other free but civilized societies, has permitted restrictions upon the content of speech in a few limited areas." *Id.* at 382–83. Certain categories of expression "can, consistently with the First Amendment, be regulated *because of their constitutionally*

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established that a defendant cannot receive a fair, i.e., constitutional, trial, unless *all* essential elements of the crime charged are submitted to the jury and found beyond a reasonable doubt," the lower appellate court concluded that the trial court's failure to give any instruction incorporating First Amendment requirements rendered defendant's conviction as constitutionally infirm. *Taylor*, 270 N.C. App. at 541. The State has conceded this point and agrees that defendant's conviction must be vacated. Accordingly, the only question before this Court is whether to affirm the Court of Appeals decision vacating the trial court judgment and remanding for entry of a judgment of acquittal, or to reverse the Court of Appeals decision, vacate the trial court's judgment, and remand for a new trial.

proscribable content." *Id*. at 383. These "constitutionally proscribable" categories of expression include obscenity, *Miller v. California*, 413 U.S. 15 (1973), defamation, *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), fighting words, *Chaplinsky v. New Hampshir*e, 315 U.S. 568 (1942), incitement, *Brandenburg v. Ohio*, 395 U.S. 444 (1969), and true threats, *Watts v. United States*, 394 U.S. 705 (1969). If defendant's Facebook posts contained any true threats, then it is indisputable that he could be criminally punished for the content of his messages, provided that "the basis for the content discrimination consists entirely of the very reason the entire class of speech at issue is proscribable." *R.A.V.*, 505 U.S. at 388. If Taylor's Facebook posts did not contain any true threats, then his expression is shielded by the First Amendment. We are therefore compelled to identify the characteristics of true threats which allow the State to prosecute one kind of expression understood to be entirely lacking in constitutional value, while preventing N.C.G.S. § 14-16.7(a) from "becoming an instrument for the suppression of those 'vehement, caustic, and sometimes unpleasantly sharp attacks' which must be protected if the guarantees of the First and Fourteenth Amendments are to prevail." *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 277 (1971) (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)). Speakers need clarity on the type of communication which constitutes a true threat so that they can engage in protected First Amendment activities while ensuring their speech is lawful.

¶ 19 Neither this Court nor the Supreme Court of the United States has ever explicitly defined the scope of the true threats exception to the First Amendment. However, our analysis is guided by the high court's articulation of general principles in the few cases addressing the existence of true threats which it has decided, as well as the many cases involving other categories of constitutionally forbidden speech.

¶ 20 As the Supreme Court of the United States has repeatedly emphasized, when tasked with drawing the boundary line between constitutionally protected speech and criminally proscribable expression, the risk of hampering public debate should be a court's foremost concern. "Our profound national commitment to the free exchange of ideas, as enshrined in the First Amendment, demands . . . an area of breathing space so that protected speech is not discouraged." *Harte-Hanks Commc'ns, Inc. v. Connaughton*, 491 U.S. 657, 686 (1989) (extraneity omitted). This demand for "breathing space" is especially pronounced when governmental action risks targeting or dissuading "[s]peech concerning public affairs," which is "more than self-expression; it is the essence of self-government." *Snyder v. Phelps*, 562 U.S. 443, 452 (2011).

See also Fed. Election Comm'n v. Wisconsin Right to Life, Inc., 551 U.S. 449, 457 (2007) ("In drawing that line [between protected and proscribable expression], the First Amendment requires us to err on the side of protecting political speech rather than suppressing it."). To assure adequate "breathing space," the Court has "narrowed the scope of the traditional categorical exceptions" to the First Amendment, even though the Court continues to recognize their existence. *R.A.V.*, 505 U.S. at 383.

¶ 21 In deciding whether the First Amendment allows defendant to be convicted under N.C.G.S. § 14-16.7(a) for his Facebook posts, we "interpret the language that [the General Assembly] chose 'against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.' " *Watts v. United States*, 394 U.S. 705, 708 (1969) (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)). The various cases which expound upon this principle convey a clear message that we must avoid a definition of the true threats exception to the First Amendment which sweeps too broadly. Unduly enlarging any categorical exception to the First Amendment "would have substantial costs in discouraging the uninhibited, robust, and wide-open debate that the First Amendment is intended to protect." *Rogers v. United States*, 422 U.S. 35, 48 (1975) (Marshall, J., concurring) (extraneity omitted). Our examination and interpretation of the limited case law expressly addressing the true threats doctrine must respect and revere these fundamental First Amendment principles.

1. The true threats exception

¶ 22 The Supreme Court of the United States first recognized the true threats exception to the First Amendment in *Watts v. United States*. In *Watts*, the defendant—an eighteen-year-old Black protestor—attended a rally at the Washington Monument, where he participated in a discussion group about police brutality. 394 U.S. at 706. During this discussion, the defendant declared that

> I have already received my draft classification as 1-A and I have got to report for my physical this Monday coming. I am not going. *If they ever make me carry a rifle the first man I want to get in my sights is [President Lyndon Baines Johnson]*.[6] They are not going to make me kill my black brothers.

6. The defendant in *Watts* referred to the President as "LBJ."

Id. (extraneity omitted) (emphasis added). Befitting the era, one member of the discussion group was an investigator from the Army Counter Intelligence Corps. *Id.* The next day, the defendant was arrested by Secret Service agents. He was ultimately indicted and convicted under a federal statute which prohibited individuals from "knowingly and willfully . . . (making) any threat to take the life of or to inflict bodily harm upon the President of the United States[.]" *Id.* at 705.

¶ 23 Upon his appeal, the defendant argued that his statement "was a kind of very crude offensive method of stating a political opposition to the President" and was thus shielded by the First Amendment. *Id.* at 707. In a per curiam opinion, the preeminent forum agreed with the defendant and held that the First Amendment barred his conviction. The Supreme Court of the United States began by affirming that "[t]he Nation undoubtedly has a valid, even an overwhelming, interest in protecting the safety of its Chief Executive and in allowing him to perform his duties without interference from threats of physical violence." *Id.* Notwithstanding this "overwhelming" interest, the high Court concluded that the challenged federal statute could only be applied consistently with First Amendment requirements if prosecutors could prove that the defendant made a "true threat" against the President. *Id.* at 708. In its opinion, the Supreme Court of the United States did not discuss the difference between a true threat and protected political hyperbole; instead, the high court simply concluded that "[t]aken in context, and regarding the expressly conditional nature of the statement and the reaction of the listeners, we do not see how [the defendant's statement] could be interpreted" as anything other than constitutionally protected political speech. *Id.*

¶ 24 The *Watts* decision contains three insights that are germane to our analysis in the instant case. First, *Watts* confirms that in defining and applying the true threats exception, a statute criminalizing speech "must be interpreted with the commands of the First Amendment clearly in mind." *Id.* at 707. Second, *Watts* instructs us that even if a state's interest in protecting its public officials is "overwhelming," the First Amendment interest in protecting speakers who engage in controversial but constitutionally permissible speech is even more substantial. *Id.* In every case interpreting the permissible scope of a statute "which makes criminal a form of true speech . . . [w]hat is a threat must be distinguished from what is constitutionally protected speech." *Id.* Third, *Watts* provides that in order to determine whether a defendant's particular statements contain a true threat, a court must consider (1) the context in which the statement was made, (2) the nature of the language the defendant de-

ployed, and (3) the reaction of the listeners upon hearing the statement, although no single factor is dispositive. *Id.* at 708.

2. True threats and subjective intent

¶ 25 The Supreme Court of the United States next directly considered the true threats exception to the First Amendment in *Virginia v. Black*, 538 U.S. 343 (2003). In *Black*, the Supreme Court examined a Virginia statute criminalizing the act of burning a cross with "an intent to intimidate a person or group of persons." *Id.* at 347. The case was before the high tribunal by virtue of consolidated appeals from three defendants who were convicted under the enacted law for burning crosses: one who burned a cross during a Ku Klux Klan rally and two who attempted to burn a cross on the lawn of their Black neighbor. *Id.* at 348–50. The defendants challenged their convictions under the Virginia statute on two grounds. First, they argued that the statute was facially unconstitutional because it selectively discriminated against one specific type of speech—cross burning—on the basis of its "distinctive message," in violation of the First Amendment as interpreted in *R.A.V.*[7] *Id.* at 351. Second, the defendants argued that a provision of the statute which made the act of cross burning prima facie evidence of a defendant's intent to intimidate rendered the statute unconstitutional. *Id.*

¶ 26 In a fractured set of opinions, a plurality of the Supreme Court of the United States rejected the defendants' facial challenge but held that the prima facie evidence provision was unconstitutionally overbroad. After surveying the pervasive use of cross burnings as a tool for enforcing racial oppression across the South, the plurality examined the First Amendment implications of Virginia's statute. *Id.* at 357. The high court began with the fundamental principle that the First Amendment "ordinarily denies a State the power to prohibit dissemination of social, economic and political doctrine which a vast majority of its citizens believes to be false and fraught with evil consequence." *Id.* at 358 (extraneity omitted) (quoting *Whitney v. California*, 274 U.S. 357, 374 (1927)

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7. In *R.A.V.*, the Supreme Court of the United States held that the First Amendment's general prohibition on content-based speech restrictions precludes a government from regulating speech "based on hostility—or favoritism—towards the underlying message expressed," even when all of the regulated speech is contained within a broader category of proscribable speech. *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 386 (1992). Thus, while a government could prohibit certain forms of speech "*because of their constitutionally proscribable content* (obscenity, defamation, etc.)," a government could not prohibit only certain speech falling within one of the proscribable categories on the basis of something other than the feature which makes the expression proscribable in the first place. *Id.* at 383–84 ("[T]he government may proscribe libel; but it may not make the further content discrimination of proscribing *only* libel critical of the government.").

(Brandeis, J., concurring)). The Supreme Court then acknowledged the existence of well-established categorical exceptions to this general rule, explaining that the First Amendment did not prevent the government from "regulat[ing] certain categories of expression" which are utterly lacking in constitutional value, including true threats. *Id.*

> "True threats" encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals. The speaker need not actually intend to carry out the threat. Rather, a prohibition on true threats protect[s] individuals from the fear of violence and from the disruption that fear engenders, in addition to protecting people from the possibility that the threatened violence will occur. Intimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death.

Id. at 359–60 (extraneity omitted).

¶ 27 The plurality held that the First Amendment's general prohibition on content-based discrimination did not prevent Virginia from singling out for regulation one "particularly virulent form of intimidation," because "[u]nlike the statute at issue in *R.A.V.*, the Virginia statute does not single out for opprobrium only that speech directed toward . . . specified disfavored topics." *Id.* at 362–63. This determination was based upon the plurality's rationale that it was acceptable for the government to target one subset of a broader category of proscribable speech—cross burning—if the focus was motivated by characteristics which made the broader category of speech—true threats—proscribable in the first place. *Id.* at 362 ("[T]he First Amendment permits content discrimination based on the very reasons why the particular class of speech at issue is proscribable.") (extraneity omitted). However, the plurality concluded that the "prima facie evidence provision . . . renders the statute unconstitutional" because it "permits the Commonwealth to arrest, prosecute, and convict a person based solely on the fact of cross burning itself." *Id.* at 364–65.

¶ 28 While the scope, meaning, and influence of the *Black* plurality opinion is debatable, it appears clear that *Black* authorizes the government to regulate a narrower subset of one category of constitutionally proscribable speech without prohibiting all speech which falls within that

category, provided that the reason for targeting the subset of proscribable speech is the feature which pushes the broader category outside of the ambit of the First Amendment. Similarly, it also appears clear that the State need not prove that a defendant intended to actually carry out an act of violence in order to obtain a conviction of the defendant for communicating a threat. However, it remains unclear, and hence, a matter of dispute in cases such as the present one, as to whether *Black* establishes that proof of a defendant's subjective intent to threaten violence is a prerequisite to obtaining a constitutionally valid conviction under any criminal statute and in every possible circumstance.

¶ 29 Defendant here argues that *Black* establishes such a constitutional rule that the government must prove a defendant's subjective intent as an element of the charged crime, while the State contends, on the other hand, that the plurality's reasoning was restricted to Virginia's unique cross-burning statute. Both parties find support for their respective positions in cases from other jurisdictions interpreting *Black*. *Compare Bagdasarian*, 652 F.3d at 1116 ("The Court held in [*Black*] that under the First Amendment . . . [i]t is [ ] not sufficient that objective observers would reasonably perceive [a defendant's] speech as a threat of injury or death") *with United States v. White*, 810 F.3d 212, 219 (4th Cir. 2016) (reading *Black* as not disturbing its longstanding conclusion that "the Constitution [does not] require[ ] the Government to prove that a defendant subjectively intended the recipient of the communication to understand it as threatening" to prove a true threat). The Justices of the Supreme Court of the United States themselves appear to disagree about the interpretation of the plurality opinion in *Black*. *Compare Perez v. Fla.*, 137 S. Ct. 853, 855 (2017) (Sotomayor, J., concurring in the denial of certiorari) ("[*Watts* and *Black*] strongly suggest that it is not enough that a reasonable person might have understood the words as a threat—a jury must find that the speaker actually intended to convey a threat.") *with Elonis v. United States*, 575 U.S. 723, 765 (2015) (Thomas, J., dissenting) ("The Court's fractured opinion in *Black* . . . says little about whether an intent-to-threaten requirement is constitutionally mandated" in all cases). Both interpretations of *Black* are plausible.

¶ 30 The parties first dispute the meaning of the plurality's statement that " '[t]rue threats *encompass* those statements where the speaker *means to communicate a serious expression of an intent* to commit an act of unlawful violence to a particular individual or group of individuals." *Black*, 538 U.S. at 359 (emphasis added). Defendant construes this sentence to mean that an individual communicates a true threat only when he or she speaks with the specific intent of threatening the listener. The

State interprets this sentence to mean that an individual communicates a true threat whenever the individual intentionally communicates any statement which objectively contains a "serious expression of an intent" to threaten, regardless of whether the individual specifically intended to threaten the listener.

¶ 31 Defendant's narrower interpretation strikes some balance between the First Amendment's express safeguard of free speech and the government's necessary protection of society's members from acts of violence. In our view, the most "natural reading" of the language in dispute "is that the speaker intends to convey everything following the phrase *means to communicate*, rather than just to convey words that someone else would interpret as a 'serious expression of an intent to commit an act of unlawful violence.' " *United States v. Heineman*, 767 F.3d 970, 980 (10th Cir. 2014) (citation omitted); *see also United States v. Cassel*, 408 F.3d 622, 631 (9th Cir. 2005) ("A natural reading of this language embraces not only the requirement that the communication itself be intentional, but also the requirement that the speaker intend for his language to *threaten* the victim.")

¶ 32 By contrast, the State's argument that the plurality meant only that a speaker "must intend to make the forbidden *communication*" is broader and more direct. The State's approach hinges solely upon the speaker's volition, or lack thereof, in conveying the message, thus negating the need for a further probe into the speaker's intent to execute the described act which may or may not result in an improper imposition upon the speaker's First Amendment right to free speech. "If there is no requirement that the defendant intend the victim to feel threatened, it would be bizarre to argue that the defendant must still intend to carry out the threat." *Heineman*, 767 F.3d 970, 980–81 (10th Cir. 2014). "The clear import of this definition is that only *intentional* threats are criminally punishable consistently with the First Amendment." *Cassel*, 408 F.3d at 631.

¶ 33 The parties next dispute the significance of the Supreme Court's statement that "[i]ntimidation in the constitutionally proscribable sense of the word *is a type of true threat*, where a speaker directs a threat to a person or group of persons *with the intent of placing the victim in fear of bodily harm or death*." *Id.* at 359 (emphasis added). Defendant asserts that this legal observation identifies the characteristic which transforms protected speech into a proscribable true threat: the speaker's subjective intent to threaten. The State counters that this explanatory reference does nothing more than define a category of true threats—namely, intimidation—which is manifested when the speaker intends to threaten

the listener. Under this interpretation, the First Amendment does not necessarily require proof of the speaker's subjective intent in every case involving threats. We regard *Black* to hold that a speaker's subjective intent to threaten is the pivotal feature separating constitutionally protected speech from constitutionally proscribable true threats.

3. Applying subjective intent to the true threats exception

¶ 34 Under the First Amendment, the State may not punish an individual for speaking based upon the contents of the message communicated. This Court recognizes that there are limited exceptions to this principle, as the State is permitted to criminalize certain categories of expression which, by their very nature, lack constitutional value. However, these categories must have narrow parameters to ensure that the State does not target or dissuade constitutionally protected expression based upon the controversial nature of the speech. Statutes which criminalize pure speech but do not require any proof of the defendant's intent may chill the utterance of protected speech by punishing morally innocent speakers and inducing self-censorship. Based upon these conclusions, we define a true threat as an objectively threatening statement communicated by a party which possesses the subjective intent to threaten a listener or identifiable group.

¶ 35 When an individual communicates a true threat, the First Amendment allows the State to punish the individual because a true threat is not "the type of speech [which is] indispensable to decision making in a democracy." *First Nat. Bank of Bos. v. Bellotti*, 435 U.S. 765, 777 (1978). A true threat stems from the opposite form of speech, in that it reflects an individual's effort to settle political disputes by violence rather than deliberation. *Shackelford v. Shirley*, 948 F.2d 935, 938 (5th Cir. 1991) ("[E]xpression has special value only in the context of 'dialogue': . . . It is not plausible to uphold the right to use words as projectiles where no exchange of views is involved.") (quoting L. Tribe, American Constitutional Law, § 12–8 at 836–37 (2d ed. 1988)). An individual who communicates a true threat hopes to influence public decision-making not through legitimate means—the painstaking work of convincing fellow citizens or political leaders to change their actions or views—but by "creat[ing] a pervasive fear in victims that they are a target of violence." *Black*, 538 U.S. at 360; *see also Planned Parenthood of Columbia/Willamette, Inc. v. Am. Coal. of Life Activists*, 290 F.3d 1058, 1086 (9th Cir. 2002) (explaining that when a defendant makes a true threat, it is "not staking out a position of debate but of threatened demise").

¶ 36 The true threats exception emanates from the recognition that certain speech acts "do[ ] not in any sense contribute to the values the first amendment was designed to advance," *Shackelford*, 948 F.2d at 938, because these speech acts form "no essential part of any exposition of ideas." *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942). But it is inconsistent with the First Amendment to define the true threats category so broadly as to discourage constitutionally valued speech. There is existent peril when courts are challenged to distinguish between protected speech and proscribable speech, for our legal forums cannot permit the government to impinge upon the "free trade in ideas[,] even"—especially—"ideas that the overwhelming majority of people might find distasteful or discomforting." *Black*, 538 U.S. at 358. We thus interpret all exceptions to the First Amendment as necessary but narrow departures from the "bedrock principle" that "the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas v. Johnson*, 491 U.S. 397, 414 (1989).

¶ 37 The First Amendment interest in fostering speech is particularly substantial when, as in the present case, the speech in question is a message critiquing the manner in which an elected official has chosen to carry out the position's public duties. *See Connick v. Myers*, 461 U.S. 138, 145 (1983) ("[S]peech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection.") (extraneity omitted). The First Amendment's protection of the right to criticize public officials safeguards our democracy by keeping elected representatives accountable to the people whom they serve. To ensure that this right can be vigorously and unreservedly exercised, the First Amendment constrains us to reject any interpretation of N.C.G.S. § 14-16.7(a) which would "chill[ ] constitutionally protected political speech because of the possibility that the [State] will prosecute—and potentially convict—somebody engaging only in lawful political speech at the core of what the First Amendment is designed to protect." *Black*, 538 U.S. at 365.

¶ 38 The State contends that the subjective intent requirement is "inconsistent with the purposes of the true-threats exception to the First Amendment." We fully agree that the true threats doctrine, like all categorical exceptions to the First Amendment, permits the State to criminalize speech which is "of such slight social value . . . that any benefit that may be derived from [it] is clearly outweighed by the social interest in order and morality." *R.A.V.*, 505 U.S. at 383.

¶ 39 The State also submits that requiring prosecutors to establish a defendant's subjective intent will "hinder the State's ability to protect its

citizens from unlawful threats of violence." While we do not diminish the magnitude and legitimacy of the State's concern, nonetheless its desire to totally eliminate the element of a defendant's subjective intent must yield to the constitutional freedoms shielded by the First Amendment and recognized by the Supreme Court of the United States. In tandem with the preeminent tribunal's precedent, our interpretation of the First Amendment prompts us to decline the State's invitation to forsake a subjective intent requirement. As in *Watts*, our recognition of the State's "overwhelming[ ] interest in protecting the safety of its [public officers] and in allowing [them] to perform [their] duties without interference from threats of physical violence," *Watts*, 394 U.S at 707, is no substitute for the First Amendment's demand that we restrain the State from criminalizing protected expression.

¶ 40 Finally, the State argues that applying *Watts* and *Black* in a manner which requires the government to prove a defendant's subjective intent "would throw the true-threats exception out of step with the rest of the First Amendment," because other constitutionally proscribable categories of speech do not require proof of a defendant's subjective intent or state of mind. This legal deduction is not a definitive declaration of the status of the law in this area.[8]

¶ 41 Even if the State is correct in its assertion that there remain areas of First Amendment law where a speaker's intent or state of mind is not central to the constitutional inquiry, our decision to require proof of subjective intent in the true threats context does not rise to a level of appellate law upheaval nor create any academic discord that does not already exist.

¶ 42 Based on the foregoing analysis, and consistent with our interpretation of the First Amendment and cited relevant precedents, we determine that the State is required to prove both an objective and a subjective element in order to convict defendant under N.C.G.S. § 14-16.7(a).

B. Sufficiency of the evidence

¶ 43 **[2]** In determining whether the Court of Appeals erred in concluding that the State presented insufficient evidence to meet its burden on

8. Although there is not a consensus, many scholars agree that the First Amendment generally requires at least some consideration of a defendant's intent or state of mind when examining the permissible scope of civil or criminal liability for speech acts. *See*, *e.g.*, Leslie Kendrick, *Speech, Intent, and the Chilling Effect*, 54 Wm. & Mary L. Rev. 1633, 1641 (2013) ("The Supreme Court has recognized several categories of speech that the First Amendment does not protect, such as defamation, incitement, threats, obscenity, child pornography, fraud, and fighting words. . . . Virtually all of these categories are defined by reference to the speaker's state of mind.").

both the objective and subjective prongs, this Court must employ the elements previously discussed in order to determine if defendant communicated a true threat against District Attorney Welch.

1. Independent review

¶ 44 "[I]n cases raising First Amendment issues . . . an appellate court has an obligation to make an independent examination of the whole record in order to make sure that the judgment does not constitute a forbidden intrusion on the field of free expression." *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 499 (1984) (extraneity omitted). This obligation supplements rather than supplants the analysis that we typically utilize when reviewing a trial court's decision. In the context of a libel suit, this Court has explained that independent whole record review is not "inherently inconsistent with the principle that a court, on a motion for directed verdict or [judgment notwithstanding the verdict], must determine whether the evidence, taken in the light most favorable to the non-moving party, is sufficient as a matter of law to be submitted to the jury." *Desmond v. News and Observer Publ'g Co.*, 375 N.C. 21, 44, n.16 (2020) (extraneity omitted). The same principle is applicable in matters in which we examine a trial court's decision to deny a defendant's motion to dismiss in a criminal case.

¶ 45 Independent whole record review does not empower an appellate court to ignore a trial court's factual determinations. In this regard, an appellate court is not entitled to "make its own findings of fact and credibility determinations, or overrule those of the trier of fact." *Desmond*, 375 N.C. at 44, n.16. To the extent that the Court of Appeals failed to "defer[ ] to the jury's findings on . . . historical facts [and] credibility determinations," *United States v. Hanna*, 293 F.3d 1080, 1088 (9th Cir. 2002), the State is correct regarding the basic introductory determinations that the Court of Appeals erred in its application of independent whole record review.

¶ 46 This error can be illustrated by considering the words at issue in this case. Some of the most strident language employed by defendant in his criticism of the elected district attorney, which defendant readily admitted that defendant posted on his social media page, included these statements:

- I hope those that are friends with her [the elected district attorney] share my post because she will be the first to go, period and point made.
- When the deputy ask me is it worth it. I would say with a Shotgun Pointed at him and a ar15 in

> the other arm was it worth to him? Who cares what happens to the person I meet at the door. I'm sure he won't. I would open every gun I have. . . . Death to our so called judicial system . . . .
>
> - This is how politics works. That's why my harsh words to her and any other that will Listen and share it To her [social media] page.
> - If that [vigilante justice] what it takes [ ].[9] I will give them both [the elected district attorney and "any other that will Listen"][10] the [mountain] justice they deserve. . . . If our head prosecutor won't do anything then the death to her as well. Yea I said it. Now raid my house for communicating threats and see what they meet. . . .
> - It can start at my house. Hell this has to start somewhere. If the courts won't do it as have been proven. Then yes it Is up to the people to administer justice! I'm always game to do so. They make new ammo everyday!
> - It is time for old Time mtn justice! Yes [ ] I said it. Now let Them knock on my door.

¶ 47 While all of defendant's words *may* be political hyperbole, and hence, protected speech, defendant's social media utterances do not represent mere political hyperbole as a matter of law. Defendant's statements should not be read in isolation and are more properly considered in context; therefore, when viewed in the light most favorable to the State, these statements would potentially be reasonably regarded by a jury as constituting a true threat to inflict serious bodily injury upon or to kill the elected district attorney. Defendant's multiple uses of the word "death" in direct reference to the elected district attorney and the judicial system in which she was serving, defendant's favorable reception to the exercise of "vigilante justice" and "old time mountain justice" for those individuals who are a part of the court system, defendant's numerous representations of his willingness to utilize firearms to accomplish his manifesto, defendant's several expressions of bravado

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9. The word "that" was utilized by defendant in lieu of the phrase "vigilante justice" in response to an observer's social media post who used the phrase "vigilante justice" in supporting defendant's views.

10. The reference to "both" made by defendant was included in the next social media post which followed a social media post by him regarding two different persons: ". . . her and any other that will Listen . . . ."

concerning his commitment to employ firearms against any representative of the criminal justice system, and defendant's repeated expression of the hope that the elected district attorney would become aware of defendant's social media posts all combine to warrant consideration by a jury as to whether defendant has issued a true threat to inflict serious bodily injury upon or to kill the elected district attorney.

¶ 48 Because the question of whether the State presented substantial evidence of each essential element of the offense charged so as to survive defendant's motion to dismiss is a question of law, we review a trial court's denial of a defendant's motion to dismiss de novo. *State v. Blagg*, 377 N.C. 482, 2021-NCSC-66, ¶ 10. In contrast, in ruling on a defendant's motion to dismiss, the trial court itself

> need determine only whether there is substantial evidence of each essential element of the crime and that the defendant is the perpetrator. Substantial evidence is the amount necessary to persuade a rational juror to accept a conclusion. In evaluating the sufficiency of the evidence to support a criminal conviction, the evidence must be considered in the light most favorable to the State; the State is entitled to every reasonable intendment and every reasonable inference to be drawn therefrom. In other words, if the record developed at trial contains substantial evidence, whether direct or circumstantial, or a combination, to support a finding that the offense charged has been committed and that the defendant committed it, the case is for the jury and the motion to dismiss should be denied.

State v. Golder, 374 N.C. 238, 249–50 (2020) (extraneity omitted).

¶ 49 Justice Earls, our learned colleague who concurs in part and dissents in part with our opinion, views our determination of the correctness of the trial court's decision to deny defendant's motion to dismiss based upon the State's presentation of substantial evidence of the charged offense as an exercise of speculation on our part which reaches a conclusion which she opines that the evidence does not support. However, not only have we refrained from drawing such factual conclusions from the evidence, but we have observed the well-established principle that "[t]he *jury's* role is to weigh evidence, assess witness credibility, assign probative value to the evidence and testimony, and determine what the evidence proves or fails to prove." *State v. Moore*, 366 N.C. 100, 108

(2012) (emphasis added). Therefore, a jury is required to have the opportunity to fulfill these responsibilities in the present case upon remand.

¶ 50 The bar to survive a defendant's motion to dismiss for insufficiency of the evidence is low, such that "[i]t is sometimes difficult to distinguish between evidence sufficient to carry a case to the jury, and a mere scintilla, which only raises a suspicion or possibility of the fact in issue." *State v. Earnhardt*, 307 N.C. 62, 66 (1982) (quoting *State v. Johnson*, 199 N.C. 429, 431 (1930)). However, "if there be *any* evidence tending to prove the fact in issue, or which reasonably conduces to its conclusion as a fairly logical and legitimate deduction, and not merely such as raises a suspicion or conjecture in regard to it, the case should be submitted to the jury." *Id.* (emphasis added) (quoting *Johnson*, 199 N.C. at 431); *see also State v. Butler*, 356 N.C. 141, 145 (2002) ("To be substantial, the evidence need not be irrefutable or uncontroverted; it need only be such as would satisfy a reasonable mind as being 'adequate to support a conclusion.' " (quoting *State v. Lucas*, 353 N.C. 568, 581 (2001))). When considering a motion to dismiss for insufficiency of the evidence a trial court "should not be concerned with the weight of the evidence." *Earnhardt*, 307 N.C. at 67.

¶ 51 This oft-cited precedent reveals the great deference which our courts, whether at the trial or appellate level, must give to the vital role of the citizens of our state's local communities who are selected to serve as jurors.[11] "Once the [trial] court decides that a reasonable inference of defendant's guilt may be drawn from the circumstances, then *it is for the jury to decide* whether the facts, taken singly or in combination, satisfy it beyond a reasonable doubt that the defendant is actually guilty." *State v. Fritsch*, 351 N.C. 373, 379 (2000) (emphasis added) (extraneity omitted). For this reason, "[i]n borderline or close cases, our courts have consistently expressed a preference for submitting issues to the jury." *State v. Yisrael*, 255 N.C. App. 184 (2017), *aff'd per curiam*, 371 N.C. 108 (2018); *see also State v. Blagg*, 377 N.C. 482, 2021-NCSC-66, ¶ 12.

¶ 52 In applying the cited case law to the present case, it is clear that the duty of the trial court was to determine whether there was substantial evidence of the criminal offense of a threat against a court officer and substantial evidence that defendant was the perpetrator of the offense, as the trial court considered the evidence in the light most favorable to

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11. A role of the jury is "to act as the voice and conscience of the community . . . [and] to temper the harshness of the law with the 'commonsense judgment of the community.' " *State v. Scott*, 314 N.C. 309, 311–12 (1985) (quoting *Taylor v. Louisiana*, 419 U.S. 522, 530 (1975)).

the State in order to ascertain if defendant's motion to dismiss should be allowed or denied. Since there was no dispute that defendant created the social media posts at issue, and since these messages of defendant constitute substantial evidence of a threat against the elected district attorney when this evidence is viewed in the context of the State's entitlement to every reasonable intendment and inference to be taken from it, we therefore determine that our legal precedent has firmly established that defendant's motion to dismiss was correctly denied and that the case should have been considered by the jury. Once this modest standard of evidence was satisfied by the State, then a jury composed of defendant's neighboring citizens should have had the opportunity to determine if defendant had made a true threat to the local district attorney.

¶ 53 In acknowledging the State's concession that defendant's conviction must be vacated because of the trial court's error in failing to properly instruct the jury concerning the operation of the First Amendment, the sole issue for this Court to determine is whether to remand the matter to the trial court for, after vacating the trial court's judgment rendered pursuant to the conviction, entry of a judgment of acquittal or a new trial. Because, as we have discussed above, the facts presented by the State could have allowed a reasonable jury to conclude defendant uttered a true threat, a properly instructed jury must be allowed to consider this question.

¶ 54 Accordingly, while we agree with the Court of Appeals' decision to vacate defendant's conviction, there remain factual questions for a properly instructed jury to determine. Therefore, we reverse the Court of Appeals opinion that remands this case to the trial court for entry of a judgment of acquittal, and instead we remand the case to the trial court for a new trial in order to permit a jury composed of defendant's peers to determine whether defendant committed the criminal offense of making a threat to inflict serious bodily injury upon or to kill a court officer because of the exercise of that officer's duties, in violation of N.C.G.S. § 14-16.7.

REVERSED AND REMANDED.

Justice EARLS concurring in part, dissenting in part.

¶ 55 I concur in the portion of the majority opinion holding that, to convict a defendant under N.C.G.S. § 14-16.7(a), the First Amendment requires the State to prove both that the defendant has communicated

a message that a reasonable observer would understand to contain a threat of violence and that the defendant communicated the message with the subjective intent to threaten an individual or identifiable group. I write separately on this issue to offer two additional observations. First, the common law principles articulated in *Elonis v. United States*, 575 U.S. 723 (2015) bolster the majority's conclusion that a true threat requires proof of the speaker's subjective intent to threaten. Second, it is important to recognize the tension inherent in the true threats doctrine in light of the First Amendment's broader purpose of fostering the conditions for democratic self-governance.

¶ 56 However, I respectfully dissent from the majority's conclusion that the State's evidence in this case was sufficient to withstand Taylor's motion to dismiss. An objectively reasonable observer viewing Taylor's Facebook posts in their full context could not understand his messages to contain a serious intention to inflict bodily harm on District Attorney Welch. Further, even if the State had satisfied the objective element, there is insufficient evidence to support the conclusion that Taylor subjectively intended to threaten District Attorney Welch with violence. The majority's decision to hold otherwise reflects a misapplication of the independent review standard which is inconsistent with the assiduous protection of free expression the First Amendment demands.

I. Common law principles support the conclusion that attaching criminal liability to purportedly threatening speech requires consideration of the speaker's subjective intent.

¶ 57 In *Elonis v. United States*, 575 U.S. 723 (2015), the United States Supreme Court considered a defendant's challenge to his conviction under a federal statute criminalizing the act of communicating threats across state lines. In his argument to this Court, Taylor invoked *Elonis* for the proposition that to comport with the First Amendment, criminal statutes targeting pure speech must be construed to incorporate a heightened mens rea requirement. The State argued that because *Elonis* was decided solely on statutory interpretation grounds, the decision was entirely irrelevant. However, the common law principles *Elonis* was based on are especially salient in the First Amendment context and support the conclusion that statutes proscribing pure speech must be interpreted to incorporate a heightened mens rea requirement.

¶ 58 The defendant in *Elonis* posted "self-styled 'rap' lyrics," poems, and photographs with "graphically violent language and imagery" on Facebook. *Id.* at 726–27. Some of the language and imagery was directed

at the defendant's employer. *Id.* Other posts contained "crude, degrading, and violent material about [the defendant's] soon-to-be ex-wife," including a post asking if the protective order his wife had obtained was "thick enough to stop a bullet." *Id.* at 727–30. In the same post, the defendant claimed he possessed "enough explosives to take care of the State Police and the Sheriff's Department." *Id.* Another post read, "[e]nough elementary schools in a ten mile radius to initiate the most heinous school shooting ever imagined And hell hath no fury like a crazy man in a Kindergarten class The only question is . . . which one?" *Id.* at 729. The defendant invoked his "freedom of speech" under the First Amendment and asserted his messages were protected as artistic expression. *Id.*

¶ 59 Despite his disclaimers, the defendant in *Elonis* was indicted for "making threats to injure patrons and employees of the park, his estranged wife, police officers, a kindergarten class, and an FBI agent, all in violation of 18 U.S.C. § 875(c)." *Id.* at 731. As written, this federal statute applied to anyone who "transmit[ted] in interstate or foreign commerce any communication containing . . . any threat to injure the person of another." *Id.* at 732. At trial, the defendant requested a jury instruction stating that in order to convict him under 18 U.S.C. § 875(c), "the government must prove that he intended to communicate a true threat." *Id.* at 731. The government countered that "it was irrelevant whether [the defendant] intended the postings to be threats." *Id.* at 732. The trial court agreed with the government, the instruction was not given, and the defendant was convicted. *Id.* The Third Circuit affirmed, concluding that "the intent required by [18 U.S.C. § 875(c)] is only the intent to communicate words that the defendant understands, and that a reasonable person would view as a threat." *Id.* at 732.

¶ 60 In an opinion authored by Chief Justice Roberts, the United States Supreme Court reversed. According to the majority, although 18 U.S.C. § 875(c) "does not indicate whether the defendant must intend that his communication contain a threat," Congress's failure to "specify any required mental state . . . does not mean that none exists." *Id.* at 734. Instead, the majority invoked the longstanding "rule of construction" that criminal statutes should be interpreted to "include broadly applicable scienter requirements, even where the statute by its terms does not contain them." *Id.* (citing *United States v. X–Citement Video, Inc.*, 513 U.S. 64, 70 (1994)). In the majority's view, under 18 U.S.C. § 875(c), "the crucial element separating legal innocence from wrongful conduct is the threatening nature of the communication." *Id.* at 737 (cleaned up). Applying its own rule of statutory construction, the majority read 18 U.S.C. § 875(c) as incorporating a requirement that the defendant be at

least reckless with regards to the possibility that the "contents of" the communicated message contained a threat.[1] *Id.* at 740.

¶ 61 In justifying the statutory presumption it was invoking, the *Elonis* majority explained "that a defendant generally must know the facts that make his conduct fit the definition of the offense, even if he does not know that those facts give rise to a crime." *Id.* at 735 (cleaned up). That is, a defendant must know he is engaging in the type of conduct that is criminalized (in the defendant's case, communicating a threat), even if he or she does not know that the conduct gives rise to criminal liability. *See X-Citement Video, Inc.*, 513 U.S. at 72, n.3 ("Criminal intent serves to separate those who understand the wrongful nature of their act from those who do not, but [intent] does not require knowledge of the precise consequences that may flow from that act once aware that the act is wrongful."). This logic reflects a "basic principle underlying the common law, namely, the importance of showing what Blackstone called 'a vicious will.' " *Rehaif v. United States*, 139 S.Ct. 2191, 2196 (2019) (quoting 4 W. Blackstone, Commentaries on the Laws of England 21 (1769)). Accordingly, most criminal offenses incorporate a scienter requirement to distinguish between the "morally culpable" defendant who chooses to engage in wrongful conduct and the defendant whose "otherwise innocent conduct" happens to be criminal. *Elonis*, 575 U.S. at 745 (Alito, J., concurring in part, dissenting in part); *see also Rehaif*, 139 S. Ct. at 2196 ("The cases in which we have emphasized scienter's importance in separating wrongful from innocent acts are legion.").

¶ 62 The need to distinguish between culpable and innocent conduct is heightened when a statute criminalizes pure speech. Pure speech cannot ordinarily be made criminal based solely upon the message the speaker conveys. That is a core First Amendment premise. To the extent there are recognized exceptions to this baseline rule, it is never the act of speaking alone that statutes like N.C.G.S. § 14-16.7(a) criminalize. It is the act of speaking a particular kind of message which, by its very nature, removes the speech from the First Amendment's ambit. The State is allowed to convert an act which is ordinarily non-criminal—an act which individuals ordinarily possess a hallowed constitutional right to engage in—into criminal conduct solely because of the substance of the message communicated. An intent requirement helps ensure that only those individuals who are morally culpable are criminally punished.

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1. The majority vacated the defendant's conviction and remanded the case without deciding whether that scienter requirement could be satisfied by a showing of recklessness alone, or if the government was required to prove a defendant possessed actual knowledge that the message he or she communicated contained a threat. *Elonis*, 575 U.S. at 742.

¶ 63 At the same time, when a criminal statute implicates the First Amendment, the presumption in favor of a heightened mens rea requirement also helps ensure that the First Amendment protections enjoyed by all individuals remain vibrant. In his partial concurrence, Justice Alito acknowledged this interaction between criminal scienter requirements and First Amendment protections, noting the argument that defining a threats statute in a manner "not limited to threats made with the intent to harm[ ] will chill statements that do not qualify as true threats, e.g., statements that may be literally threatening but are plainly not meant to be taken seriously." *Elonis*, 575 U.S. at 748 (Alito, J., concurring in part, dissenting in part). In Justice Alito's view, "[r]equiring proof of recklessness" would strike a sufficient balance between providing "adequate breathing space" for the exercise of First Amendment rights and preventing the conversion of "hurtful, valueless threats into protected speech." *Id.* The concerns Justice Alito identified have both common law and First Amendment dimensions. There is a risk that individuals will lack notice that certain speech acts could subject them to criminal punishment, and a risk that individuals will engage in self-censorship to avoid treading past the inchoate boundaries of an expansive criminal statute targeting speech. An intent requirement helps ensure that all individuals can detect the boundary between protected and proscribable speech.

¶ 64 The principles at issue in *Elonis*, though couched in the common law, have purchase in the First Amendment context. In my view, these principles strongly imply that it would be impermissible to punish Taylor if he did not act with at least reckless disregard towards the possibility that he was communicating a threat of violence to District Attorney Welch. Without some scienter requirement, Taylor could be convicted even if he were unaware he had engaged in the type of conduct N.C.G.S. § 14-16.7(a) criminalizes. Such a conviction would offend both common law and First Amendment principles. Accordingly, I believe *Elonis* lends further support and important context to the majority's conclusion that true threats require proof of the speaker's subjective intent.

II. A true threat is speech without constitutional value, but the proliferation of true threats has constitutional salience.

¶ 65 The relevant precedents and First Amendment principles require the State to prove Taylor's subjective intent to threaten. Nevertheless, the scope of the true threats doctrine must not be too narrow because true threats can practically undermine the values of freedom of speech and civic engagement that the First Amendment serves.

¶ 66 One of the principal justifications for permitting the State to punish true threats is its interest in "protecting individuals from the fear of

violence, from the disruption that fear engenders, and from the possibility that the threatened violence will occur." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 388 (1992). As *R.A.V.* indicates, true threats may be regulated at least in part because of the reaction they engender in the individual recipients of these threats and in the broader community. The State's interest in preventing that fear is not just a practical matter of public safety. The reaction of recipients and the broader community to true threats is of significant concern because the proliferation of true threats undermines that which the First Amendment aspires to "grow[ ] and preserv[e]," our system of "democratic self-governance." *McDonald v. Smith*, 472 U.S. 479, 489 (1985) (Brennan J., concurring).

¶ 67 If the cost of participating in public life is to be bombarded with serious threats of violence towards one's self and family, many people will choose to forego contributing their voices to the "free exchange [that] facilitates an informed public opinion, which, when transmitted to lawmakers, helps produce laws that reflect the People's will." *Mahanoy Area Sch. Dist. v. B. L. by & through Levy*, 141 S. Ct. 2038, 2046 (2021); *see also Planned Parenthood of Columbia/Willamette, Inc.*, 290 F.3d at 1086 (concluding that it "turns the First Amendment on its head" to protect threats of violence because after being subjected to such a threat, victims "can no longer participate in the debate" about a controversial issue). This degrades the "marketplace of ideas" upon which "[o]ur representative democracy" depends. *Id.* As a result, the public will be left without the benefit of "information [which] is a precondition for public debate, which, in turn, is a precondition for democratic self-governance." *Hum. Life of Washington Inc. v. Brumsickle*, 624 F.3d 990, 1022 (9th Cir. 2010).

¶ 68 But true threats do more than dissuade others from contributing to the "marketplace of ideas." True threats interfere with the exercise of *all* the "cognate rights" and "indispensable democratic freedoms secured by the First Amendment." *Thomas v. Collins*, 323 U.S. 516, 530 (1945). When true threats proliferate, the attendant fear of imminent violence deters individuals from participating in the institutions, processes, and everyday interactions through which Americans endeavor to shape the course of collective life. Faced with the threat of retributory violence, individuals may choose to forego exercising their rights to associate with like-minded citizens, to publicly assemble in protest or support of existing policies, to petition their government and public officials, or to publish their views for widespread distribution. Because it is the exercise of these rights which "protect and nurture the sort of active citizenship and collective action that have been the lifeblood of our system of government since its founding," Ashutosh Bhagwat, *The Democratic First*

Amendment, 1098 Nw. U. L. Rev. 1097, 1123 (2016), the proliferation of true threats is a danger to the vitality of our democracy.

¶ 69 True threats represent a particular First Amendment problem because of the ways the specter of violence warps the processes from which our government derives its legitimacy. Our nation's and our state's own history reveal how threats of violence and actual violence have kept people from exercising democratic rights they formally enjoyed. *See*, *e.g.*, David Zucchino, *Wilmington's Lie: The Murderous Coup of 1898 and the Rise of White Supremacy*, Atlantic Monthly Press (2020). If our First Amendment doctrines foster the proliferation of threats which make the reasonable fear of imminent violence a pervasive feature of political life, the First Amendment loses its point. *R.A.V.* also highlighted the concern that allowing threats of violence to go unpunished would contribute to real-world violence. A First Amendment which fosters political violence is self-defeating, because a society which settles political disputes by resorting to violence—or a society which is forced to settle political disputes in the looming shadow of violence—cannot function as a self-governing democracy.

¶ 70 These realities highlight the risk that an overly narrow definition of what constitutes a true threat will lend a cloak of legitimacy to methods of achieving political change that are antithetical to everything the First Amendment stands for. At the same time, we must consider the First Amendment's paramount interest in fostering the free exchange of ideas, and the immense value to our system of governance that this free exchange provides. *Cf. United States v. Caldwell*, 408 U.S. 665, 720–21, (1972) ("[T]he wideopen and robust dissemination of ideas and counterthought . . . is essential to the success of intelligent self-government.") (Douglas, J., dissenting). This interest may seem remote when the speech at issue appears to most who encounter it to be crude, caustic, or fantastical, but our system functions best when citizens are "active, collective, disrespectful, and even sometimes incendiary." Bhagwat at 1123; *see also John Doe No. 1 v. Reed*, 561 U.S. 186, 228 (2010) ("[H]arsh criticism, short of unlawful action, is a price our people have traditionally been willing to pay for self-governance.") (Scalia, J., concurring).

¶ 71 Ultimately, this case is not about the State's authority to punish individuals who make true threats. That authority is uncontroverted. Instead, this case is about distinguishing protected from proscribable speech. While I recognize that the purposes the First Amendment serves require vigorous enforcement of statutes like N.C.G.S. § 14-16.7(a), the majority has appropriately defined the scope of the true threats doctrine. To prove a true threat, the State must prove both that the statement in

question contained an objective threat of violence and that the defendant intended to communicate a threatening message.[2] Thus, I concur fully in Part II of the majority opinion.

III. The State presented insufficient evidence to support the conclusion that Mr. Taylor communicated a true threat.

¶ 72 Although the majority correctly defines what constitutes a true threat, the majority falters when tasked with applying its definition to the facts of this case. Despite reciting the proper standard of review, the majority does not actually conduct the requisite independent review of Taylor's conviction.

¶ 73 As the United States Supreme Court has explained, when a defendant's conviction potentially violates the First Amendment, "an appellate court has an obligation to make an independent examination of the whole record in order to make sure that the judgment does not constitute a forbidden intrusion on the field of free expression." *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 499 (1984). The majority is correct that independent review "supplements rather than supplants" the trial court's role as a factfinder, in that we defer to the jury's findings on historical facts and its credibility determinations. In general, when reviewing pure questions of fact, we take the evidence in the light most favorable to the party opposing the motion to dismiss on all factual issues. *State v. Mason*, 336 N.C. 595, 597, 444 S.E.2d 169, 169 (1994) ("In determining whether evidence is sufficient to survive a motion to dismiss, the evidence is considered in the light most favorable to the State. If there is a conflict in the evidence, the resolution of the conflict is for the jury."). As we indicated in *Desmond*, the same should hold true when an appellate court applies independent review. *Desmond v. News & Observer Publ'g Co.*, 375 N.C. 21, 45, n.17, *reh'g denied*, 376

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2. Practically speaking, it is worth noting that in many cases, it is unlikely that a defendant who has conveyed a clear and unambiguous threat will be able to successfully argue they did not intend to do so. *See Pope v. Illinois*, 481 U.S. 497, 503 (1987) ("In many cases, the predicate facts conclusively establish intent, so that no rational jury could find that the defendant committed the relevant criminal act but did not intend to cause injury."). In this context, when a communication is so "unequivocal, unconditional, immediate and specific as to the person threatened, as to convey a gravity of purpose and imminent prospect of execution," then a defendant who understands the meaning of the words deployed will have a difficult time disputing the reasonable inference that he or she intended to place the listener in fear of imminent bodily harm. *United States v. Kelner*, 534 F.2d 1020, 1027 (2d Cir. 1976); *see also United States v. Maxton*, 940 F.2d 103, 106 (4th Cir. 1991) ("[M]ost of the time [a defendant's] intent [to threaten] can be gleaned from the very nature of the words used in the communication; extrinsic evidence to prove an intent to threaten should only be necessary when the threatening nature of the communication is ambiguous.").

N.C. 535 (2020). ("We emphasize that our discussion of the evidence in this case is a reflection of the record as viewed in the light most favorable to plaintiff and summarizes what the jury could permissibly have found as fact."); *Cf. Veilleux v. Nat'l Broad. Co.*, 206 F.3d 92, 107 (1st Cir. 2000) (explaining that when conducting independent review in a case implicating the First Amendment, "[p]urely factual determinations, particularly those involving the credibility of witnesses, remain best addressed by the factfinder, and are subject to the usual, more deferential standard of review.").

¶ 74 But the questions of whether Taylor's statements contained an objective threat of violence and whether he possessed an intent to threaten are mixed questions of constitutional law and fact. *Cf. Butt v. State*, 2017 UT 33, ¶ 29 ("The First Amendment defense at issue involves a mixed determination of law and fact."). On questions of constitutional law, our review is "plenary." *Veilleux*, 206 F.3d at 106. The majority collapses this distinction. The appellate court must take the evidence in the light most favorable to the State only with respect to disputed *factual* issues. For example, the parties dispute whether District Attorney Welch's actions after being notified of Taylor's posts evinced serious fear that reflected her contemporaneous belief that Taylor would try to harm her. On this issue, where there is evidence in the record supporting the State's position including District Attorney Welch's testimony, we must presume that she did in fact fear for her personal safety and consider that fact to the extent it is illustrative in the First Amendment analysis. Similarly, the parties dispute whether Taylor wanted District Attorney Welch to see his Facebook posts. Again, because there is evidence in the record supporting the State's assertion that Taylor did want District Attorney Welch to become aware of his statement, we must adopt that fact at this stage of the proceedings.

¶ 75 However, this Court has a "constitutional responsibility" to decide the ultimate question of whether the First Amendment permits Taylor to be convicted for violating N.C.G.S. § 14-16.7(a) on these facts. *Bose Corp.*, 466 U.S. at 501. ("[T]he rule of independent review assigns to judges a constitutional responsibility that cannot be delegated to the trier of fact, whether the factfinding function be performed in the particular case by a jury or by a trial judge."). Even if the defendant has been found guilty of violating a statute criminalizing potentially protected First Amendment activities, "our obligation is to make an independent examination of the whole record, so as to assure ourselves that th[is] judgment does not constitute a forbidden intrusion on the field of free expression." *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. Of Bos.*, 515 U.S. 557, 567–68

(1995) (cleaned up); *see also Veilleux*, 206 F.3d at 106 ("Deference to the jury is muted, however, when free speech is implicated . . . . Appellate courts—especially but not only the Supreme Court—have been assigned this obligation in order to safeguard precious First Amendment liberties."). Our task is not, as the majority frames it, to decide if Taylor's "statements would potentially be reasonably regarded by a jury as constituting a true threat." Our task is to decide if, taking the evidence on disputed factual issues in the light most favorable to the State, the jury could permissibly conclude that Taylor's Facebook posts contained a true threat consistent with applicable First Amendment principles. *See Desmond*, 375 N.C. at 44, n.16 (explaining that the goal of independent review in a libel case is "to ascertain whether the record can permissibly and constitutionally support a finding of actual malice"). By treating Taylor's appeal as no different than any criminal defendant's appeal from a trial court's motion to dismiss, the majority eschews an obligation we are not entitled to ignore.

¶ 76 If, as the majority claims, "[t]he bar to survive a defendant's motion to dismiss for insufficiency of the evidence is low," then there is very little to prevent the State from charging any individual who makes controversial or distasteful statements under N.C.G.S. § 14-16.7(a) and bringing the case to trial.[3] True, the defendant may ultimately prevail and be found not guilty. But the prospect of facing a lengthy, expensive trial is itself a deterrent to the free exercise of First Amendment rights. *Cf. Farah v. Esquire Mag.*, 736 F.3d 528, 534 (D.C. Cir. 2013) ("[S]ummary proceedings are essential in the First Amendment area because if a suit entails long and expensive litigation, then the protective purpose of the First Amendment is thwarted even if the defendant ultimately prevails.") (cleaned up). Taylor has been defending himself in this case for over five years and faces the prospect of still more litigation should the State choose to try him again. The practical effect of the majority's failure to properly construe and apply the independent review standard will be precisely the outcome the majority claims the First Amendment compels us to avoid, the chilling of constitutionally protected speech.

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3. In fact, on appellate review of a trial court's denial of a defendant's motion to dismiss, "the reviewing court must determine whether there is substantial evidence of each essential element of the offense and substantial evidence that the defendant was the perpetrator of the offense." *State v. Smith*, 307 N.C. 516, 518 (1983). The majority's formulation that the "bar . . . is low" appears to conflate the probable cause necessary to sustain an indictment with the substantial evidence necessary to survive a motion to dismiss. Logically, these two standards cannot be the same—if they were, there would be no point in allowing a defendant to file a motion to dismiss for insufficient evidence.

¶ 77 Properly applying independent review, the State has failed to present substantial evidence to sustain Taylor's conviction on either the objective or subjective elements of the true threats doctrine.

1. The objective element

¶ 78 Although the majority claims it is assessing Taylor's statements in their full context, the majority instead isolates snippets of "strident language" which it concludes "do not represent mere political hyperbole as a matter of law." The problem with the majority's approach is that it fails to account for how the context surrounding Taylor's statements would have informed how a reasonable observer could have interpreted the language he chose to deploy. A reasonable observer who viewed Taylor's Facebook posts in their full context could not understand his statements to contain an objective threat of violence.

¶ 79 Even the statements Taylor made which most plausibly read to suggest the possibility of actual violence—that District Attorney Welch "will be the first to go" and that "[i]f [she] won't do anything, then the death to her as well"—are not direct threats of harm. Both statements are conditional. Whatever Taylor is implying he will do is predicated on the occurrence of some antecedent event (a "rebellion against our government," District Attorney Welch refusing to "do anything" to prosecute alleged criminals in Macon County), events which a reasonable person would not believe to be imminent or inevitable, at least at the time Taylor posted his messages.[4] Given the context, no reasonable listener could infer that his hypothetical and conditional statements were literal pronouncements of his intent to physically harm District Attorney Welch.

¶ 80 Although Taylor did use language suggesting he might try to remedy perceived injustices through something other than political advocacy, none of these statements suggested he was planning to personally target District Attorney Welch with violent acts. Taylor's statements referencing violence included his promise to "open every gun I have" should law enforcement raid his home; his declaration that he is "always game" to

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4. In assessing what meaning a reasonable person could glean from Taylor's statements, a court must assess the statements from the perspective of a reasonable person who heard the statements at the time they were made, not a reasonable person who encountered his statements today. In 2016, a reasonable person would likely have found the prospect of a violent "rebellion against our government" far more remote than a reasonable person would today, with knowledge of the events at the United States Capital on 6 January 2021. *Cf. State v. Taylor*, 270 N.C. App. 514, 570 (2020) ("Further, if D.A. Welch 'will be the first to go,' it would only occur during a 'rebellion against our government[.]' The alleged 'threat' is contingent upon an event that no reasonable person would believe was ever likely to occur.").

"administer justice" because "[t]hey make new ammo everyday!"; his response "If that what it takes" when his Facebook friend called for "vigilante justice"; and his announcement that it was "time for old [t]ime m[ountain] justice," which Taylor would deliver "[r]egardless of what the law or courts say" because he was "tired of this political bullshit." None of these statements contain words threatening District Attorney Welch specifically with actual violence. Further, a message advocating for the use of violence to achieve political change is not the same as a message conveying a serious expression of an intent to harm a specific person. Protected political speech is not "remove[d] . . . from the protection of the First Amendment" merely because it contains "*advocacy* of the use of force or violence." *N.A.A.C.P. v. Claiborne Hardware Co.*, 458 U.S. 886, 927 (1982). There is nothing in the posts connecting Taylor's apparent willingness to resort to violence to his comments about what would happen to District Attorney Welch in the future if certain events were to occur. Taylor's messages reveal nothing more than the depth of his feeling regarding what he saw as a grave injustice in Macon County.

¶ 81 Importantly, Taylor communicated his threats in the midst of a heated discussion centered on political matters of significant concern to Taylor and his Facebook friends. The fact that a statement was communicated in the middle of a conversation regarding political issues is relevant when assessing what inferences an observer could reasonably draw from language that is only ambiguously violent. That Taylor "spoke his threatening words in the context of his political views" while a perceived political crisis "was just unfolding" is relevant information a reasonable listener would necessarily consider in ascertaining the meaning of Taylor's remarks. *United States v. Olson*, 629 F. Supp. 889, 894 (W.D. Mich. 1986). As is the fact that Taylor removed the messages from his Facebook page shortly after posting them. The majority errs in failing to account for this context.

¶ 82 Notably absent from Taylor's diatribe is any language supporting the reasonable belief that he intended "to do anything specific to anyone at any particular time." *Taylor*, 270 N.C. App. at 569. As the Supreme Court of Colorado has explained, the true threats inquiry "should include whether the threat contains accurate details tending to heighten its credibility." *Colorado ex rel. R.D.*, 2020 CO 44, ¶ 53. Here, Taylor did not specify a "date, time, and place" or method for where and how he intended to carry out his purported threat. *Cf. United States v. Callahan*, 702 F.2d 964, 966 (11th Cir. 1983). The majority points to nothing which would lead a reasonable listener to conclude that Taylor had considered

acting on these supposed threats.[5] *Cf. United States v. Ivers*, 967 F.3d 709, 717 (8th Cir. 2020) (finding sufficient evidence to support a threats conviction where defendant stated "[y]ou don't know the 50 different ways I planned to kill [the victim]").

¶ 83 Other courts have accorded significant weight to the presence or absence of such details in examining whether a defendant's statements could reasonably be construed as an objective threat. For example, the Supreme Court of Washington concluded that there "was ample evidence from which a reasonable jury could determine that [a defendant's] threats were 'true threats,' " *State v. Schaler*, 169 Wash. 2d 274, 291 (2010), based in part on the fact that defendant "specifically said that 'he wanted to kill them with his bare hands, by strangulation,' " "repeated his desire to kill his neighbors" on multiple occasions, and had previously threatened his neighbors with a chain saw, *id.* at 280.

¶ 84 By contrast, the Supreme Judicial Court of Massachusetts held that the evidence was insufficient to convict a defendant who posted a photograph of himself holding a gun with the caption "[m]ake no mistake of my will to succeed in bringing you two idiots to justice," because "nothing else about that image suggests a clear intent to commit violence." *Massachusetts v. Walters*, 472 Mass. 680, 695 (2015). Here, although Taylor's posts may have "come across as vaguely ominous or disturbing," *id.*, they do not give rise to the reasonable inference that Taylor intended to physically harm District Attorney Welch. Additionally, Taylor and District Attorney Welch previously maintained a cordial relationship, and there was no evidence indicating Taylor had a propensity for engaging in violent conduct. *Cf. In re S.W.*, 45 A.3d 151, 160 (D.C. 2012) (concluding that even "facially threatening words" could not be "reasonably and objectively perceived as communicating a threat" when "placed in the context of [the defendant and the purported victim's] acknowledged and unaltered friendship . . . and [the defendant's] manner of delivery"). Again, all this context which the majority ignores is relevant in assessing the meaning a reasonable person could draw from Taylor's posts.

¶ 85 The reaction of the individuals who interacted with Taylor's posts while his diatribe was unfolding is particularly telling. For example in *Watts*, the Supreme Court thought it notable that "[the defendant] and the crowd laughed after the [purported threat] was made." *Watts*,

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5. To be clear, the State need not prove Taylor intended to carry out the threatened act in order to prove he communicated a true threat. I raise this point only to demonstrate why a reasonable observer could not understand these statements as containing threats of imminent violence.

394 U.S. 705, 707 (1969). This emphasis on the reactions of those actively participating in the broader exchange within which the purported threats were communicated reflects the commonsense intuition that the actual and intended recipients of a message are in the best position to discern its meaning. *See, e.g.*, *D.M. ex rel. D.J.M. v. Hannibal Pub. Sch. Dist. No. 60*, 647 F.3d 754, 764 (8th Cir. 2011) ("The reaction of those who read [the speaker's] messages is evidence that his statements were understood as true threats. [The recipient] contacted . . . a trusted adult, to discuss what in her words was 'something serious.' "). As the Court of Appeals explained,

> Defendant was engaging in a heated discussion, or "debate," about a political concern with his Facebook friends, which was emotionally charged due to the content of the discussion, a dead child, as well as shared feelings, very likely incorrect, that D.A. Welch improperly declined to prosecute the parents. Facebook has the status of a "public square," but can feel like a "safer" place to discuss controversial topics or make inappropriate, hyperbolic, or boastful statements. The audience is generally known to the person posting, and there is often a sense of community and like-mindedness. The record evidence is that every response to Defendant's posts on Facebook was supportive of Defendant's comments. None of the responses on Facebook indicated concern that Defendant might be planning to kill D.A. Welch. By posting on Facebook, Defendant was expressing his feelings publicly, but selectively, in the "most important place[ ] ... for the exchange of views."

¶ 86 *State v. Taylor*, 270 N.C. App. 514, 578–79 (alterations in original) (quoting *Packingham v. North Carolina*, 137 S. Ct. 1730, 1735–36 (2017)). None of the active participants in this conversation said or did anything reflecting even a modicum of concern that Taylor was imminently planning to physically harm District Attorney Welch. The only person who did find Taylor's messages concerning—the detective in the Macon County Sheriff's Office—was an "*unintended* recipient[ ]" who "stumble[d] upon" the posts, not someone whose reaction is illustrative of what a reasonable person would conclude with full knowledge of the surrounding context. *Colorado ex rel. R.D.*, 2020 CO 44 at ¶ 60.

¶ 87 Taking this evidence in the light most favorable to the State, a reasonable person who encountered Taylor's statements—and who was

familiar with the context in which they were made—could, at most, conclude that Taylor communicated a statement containing an ambiguous, allusive threat of violence to be carried out in some unknown way, by some unknown person, at some unknown time, after the occurrence of two vaguely defined events which may or may not have ever occurred. That is not the kind of statement the First Amendment allows the State to criminally punish. In my view, even when all disputed factual issues are taken in the light most favorable to the State, a jury could not have found that Taylor communicated a message that a reasonable person would interpret as a threat to harm District Attorney Welch consistent with First Amendment principles.

2. The subjective element

¶ 88 The majority also errs in concluding that there is substantial evidence to support the conclusion that Taylor possessed a subjective intent to threaten District Attorney Welch.

¶ 89 "Intent is a mental attitude seldom provable by direct evidence. It must ordinarily be proved by circumstances from which it may be inferred." *State v. Bell*, 285 N.C. 746, 750 (1974). Here, the circumstances overwhelmingly and exclusively support the conclusion that Taylor intended to communicate his outrage over what he saw as District Attorney Welch's (and the broader criminal justice system's) malfeasance, not to threaten District Attorney Welch with violence. As described above, I do not believe Taylor's indirect language is itself indicative of any intent to threaten. Neither is the context in which the purported threats were communicated. Taylor's boastful, hyperbolic string of Facebook posts, which he quickly deleted, supports the conclusion that he was blowing off steam, not that he was seeking to make District Attorney Welch fear impending bodily harm. The fact that he chose profane, offensive, and opprobrious words to communicate his message does not convert what can only be understood as a "crude offensive method of stating a political opposition to" District Attorney Welch's actions into a true threat against her life. *Watts*, 394 U.S. at 707.

¶ 90 Taylor's actions after communicating the statements are also relevant in assessing his subjective intent. *Cf. State v. Biggs*, 224 N.C. 722, 726 (1944) ("[P]roof of the commission of like offenses may be competent to show intent, design, guilty knowledge, or identity of person or crime. This rule applies equally to evidence of like offenses committed subsequent to the offense charged.") (citation omitted). His actions provide no support for the inference that he intended to threaten District Attorney Welch.

¶ 91 First, Taylor deleted his Facebook posts shortly after they were published. Second, Taylor was fully cooperative with law enforcement investigators and immediately disclaimed any intent to threaten District Attorney Welch when questioned by the SBI. *Cf. Ivers*, 967 F.3d at 719 ("[W]hen deputy marshals later confronted [the defendant] about the [purported threat], he initially refused to speak with them; shouted at them; referred to [the victim] by a racial epithet; . . . and confirmed that he remained 'crazy fucking angry.' "). Third, Taylor tried to apologize to District Attorney Welch as soon as he learned his messages had caused her distress. *Cf. State v. Trey M.*, 186 Wash. 2d 884, 907 (2016) ("[The defendant's] failure to acknowledge that shooting the boys would be wrong [ ] argue[s] in favor of this being a true threat. Further, [the defendant] repeated his plan to kill the boys to [the investigating officer], who also testified regarding the plan's depth of detail, [the defendant's] demeanor, and [the defendant's] absence of misgivings about what he was planning."). While it is possible that a defendant could act with a fleeting intent to threaten violence, there is not "relevant evidence that a reasonable person might accept as adequate" to support the conclusion Taylor intended to threaten District Attorney Welch at the time he published his posts. *State v. Garcia*, 358 N.C. 382, 412 (2004).

¶ 92 The evidence the State relies upon in challenging this conclusion is minimal. According to the State, the evidence Taylor intended to threaten District Attorney Welch with death or bodily harm is that he described his posts as threats, he texted a friend his posts might get him in "[t]rouble with the law," and he asked his Facebook friends to "share" his posts on District Attorney Welch's Facebook page. As the Court of Appeals correctly observed, none of this evidence is evidence supporting the reasonable inference that Taylor "had the specific intent to threaten D.A. Welch, i.e., that Defendant *intended* D.A. Welch to believe he was actually planning to kill her." *Taylor*, 270 N.C. App. at 569–70.

¶ 93 Assuming the evidence does support the inference that Taylor considered his posts to be "threats"—and that he wanted District Attorney Welch to learn of his posts—these inferences do not answer the question of what message Taylor believed the threats contained which he hoped District Attorney Welch would receive. Not all threats are criminally proscribable. The content of what is being threatened matters. Had Taylor posted a message promising that if District Attorney Welch did not prosecute the parents of the children who died he would organize nightly protests outside of her house, or a message promising to run against District Attorney Welch in a future election if she did not change course, it might be reasonable to conclude Taylor communicated a threat with

the intent to instill fear. Yet, obviously, in neither of these circumstances would it be possible to conclude Taylor communicated a threat against District Attorney Welch in a manner which satisfies the elements of the true threats analysis.

¶ 94 Similarly, Taylor's apparent belief that his posts might lead to attention from law enforcement is not, in this context, evidence of Taylor's subjective intent to threaten. Read together, Taylor's messages reflect his profound distrust in Macon County's law enforcement officials and its judicial system. His text to a friend that his posts might get him in "trouble" is indicative of his beliefs about local law enforcement. There is no evidence supporting the conclusion that Taylor believed he would get in "[t]rouble with the law" because he knew he had just threatened District Attorney Welch's life.

¶ 95 The evidence presented by the State supports nothing more than "mere speculation or conjecture" that Taylor communicated his messages with the specific intent of threatening District Attorney Welch. *State v. Polke*, 361 N.C. 65, 72 (2006). Holding the State to its burden is especially important where, as in this case, failure to do so can chill protected speech and therefore comes at the cost of all North Carolinians' First Amendment rights. Absent substantial evidence of Taylor's intent to threaten District Attorney Welch, the majority disserves the First Amendment principles it purports to uphold by speculatively reaching for a conclusion the evidence does not reasonably support. Therefore, I dissent from the portion of the majority opinion holding that the State has presented substantial evidence to support the conclusion that Taylor communicated a true threat to District Attorney Welch.

STATE v. JOHNSON

[379 N.C. 629, 2021-NCSC-165]

STATE OF NORTH CAROLINA
v.
DMARLO LEVONNE FAULK JOHNSON

No. 420A20

Filed 17 December 2021

Continuances—time to prepare for trial—constitutional adequacy—late notice of intent to introduce evidence—harmless error analysis

The trial court committed constitutional error by denying defendant's motion to continue where the State had disclosed on the eve of trial that it planned to use certain recorded jailhouse phone calls made by defendant, giving defendant constitutionally inadequate time to review and address the calls. The error was harmless beyond a reasonable doubt as to his first-degree murder conviction under the felony murder rule, because the conviction was based on the underlying felony of assault with a firearm on a government official—a general intent crime—and the State introduced the calls as rebuttal evidence to defendant's evidence of lack of specific intent. But as to defendant's conviction for robbery with a dangerous weapon—a specific intent crime—defendant was awarded a new trial because his trial counsel's ability to give an effective opening statement was materially impaired.

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. 358 (2020), finding no error after appeal from a judgment entered on 12 May 2017 by Judge Rebecca W. Holt in Superior Court, Durham County. Heard in the Supreme Court on 5 October 2021.

Joshua H. Stein, Attorney General, by Zachary K. Dunn, Assistant Attorney General, for the State-appellee.

Marilyn G. Ozer for defendant-appellant.

BARRINGER, Justice.

¶ 1 In this case, we address whether the trial court committed constitutional error when it denied defendant's motion to continue. The motion to continue was based on the State's disclosure on the eve of trial that it

planned to use select phone calls of over 800 recorded calls made by defendant from jail (the calls). Previously, the State had informed defense counsel that it did not intend to introduce any of the calls and that the State had ceased reviewing the calls. We conclude that on the record before us, the trial court erred. However, the error was harmless beyond a reasonable doubt as to one of defendant's convictions, first-degree murder. The jury found defendant guilty of first-degree murder under the felony murder rule with assault with a firearm on a government official as the underlying felony. Because the calls were admitted as rebuttal evidence to defendant's evidence of lack of specific intent, there can be no prejudice as a matter of law to the conviction of a general-intent crime. In this case, the general-intent crime is assault with a firearm on a government official. Therefore, there is no prejudice to a felony murder conviction premised on that general-intent crime. Accordingly, we affirm that conviction, and we only order the trial court to vacate the judgment of and order a new trial on the conviction dependent on a finding of specific intent, robbery with a dangerous weapon.

I. Background

¶ 2 Armed with a handgun, defendant robbed a gas station, shot the gas station attendant, and pointed a firearm at law enforcement on 4 July 2015. The gas station attendant died. The grand jury indicted defendant for robbery with a dangerous weapon, assault with a firearm on a government official, and murder. While defendant's actions were recorded by a security camera and he was apprehended fleeing the gas station, defendant's state of mind was disputed. Defendant through his counsel filed notice of three defenses: (1) mental infirmity and insanity under N.C.G.S. § 15A-959(a), (2) mental infirmity and diminished capacity under N.C.G.S. § 15A-959(b), and (3) voluntary intoxication.

¶ 3 Relevant to this appeal, on 12 April 2017, the State gave defense counsel a compact disc (CD) with 335 calls made by defendant from jail. A day later, the State gave notice to defendant of its intent to offer hearsay evidence from a witness, concerning statements made by the victim about a confrontation with defendant.

¶ 4 Defense counsel asked defendant's investigator to review the calls. However, the investigator for defendant could not open the contents of the CD that contained the calls. Accordingly, defense counsel contacted and informed the district attorney's office that they could not open the contents of the CD. On 18 April 2017, defense counsel followed up with the State by email. In that email, defense counsel informed and inquired of the State as follows: "I will not have time to listen to [the calls] and do

not think I have anyone in my office that can assist. Please let me know if there are any calls which you believe are somehow relevant to your case." The State responded as follows:

> I had requested the calls once [the State's] Inv[estigator] informed me that there were issues securing [the appearance of a witness who encountered defendant in the gas station]. . . . I haven't listen[ed] to most of them, but it is clear that [defendant] indicates that he will not talk on the phone about certain matters and will only talk in person. At this time[,] I do not intend to use any of those calls, and I am no longer requesting anyone to continue listening to the calls.

Essentially, the State had obtained the calls to assess whether defendant knew of or had sought to intimidate the witness who encountered defendant in the gas station, but the State decided that reviewing the calls would not be helpful and stopped listening to the calls.

¶ 5 That same day, the State provided a new CD of the 335 calls to defense counsel, which defendant's investigator could open. Given the State's response and the fact that it was less than a week before trial, defense counsel and defendant's investigator "dropped listening" to the calls. Defense counsel and defendant's investigator instead spent a considerable part of the week before trial trying to locate the witness identified in the State's 13 April 2017 notice.

¶ 6 On 20 April 2017, the State gave notice to defendant of its intent to offer hearsay evidence from another witness, the gas station owner. That same day, the State filed an amended version of the 13 April 2017 notice and included an exhibit containing the substance of the witness's statements.

¶ 7 Also on 20 April 2017, the State provided defense counsel with a CD of 545 additional calls made by defendant from jail. Defense counsel emailed the State about these calls, and the State responded, without qualification, "I do not intend to introduce any of the jail calls." The State had obtained these calls to see if defendant's girlfriend said anything during the calls which may have been helpful to the State's case. Based on the State's representation, defense counsel did not ask anyone to help him listen to the calls. April 20 was also the last day defendant's investigator was at work before the trial commenced because the investigator had contracted pneumonia. On 21 April 2017, defense counsel filed an objection to the State's offering of hearsay evidence.

¶ 8 At 5:50 p.m. on 23 April 2017, the State emailed defense counsel stating as follows:

> [I]t occurred to us that there are recordings of the [d]efendant on [the day he met with defendant's expert, Dr. George Corvin], although not with Dr. Corvin. The recordings are of the jail calls. We have listened to some jail calls and decided that they are relevant material to his state of mind as well as his memory of the night of the murder.

The prosecutor also identified that the calls were "from August 12–August 14, 2015" and were "numbered 251–274."

¶ 9 The next day, 24 April 2017, the matter was called for trial. Defense counsel moved for a continuance to afford him time to review the calls and deal with how they might affect the testimony of defendant's two experts. Defense counsel had not been able to listen to the twenty-three calls identified by the State. Defense counsel argued that defendant's rights would be violated under the Fifth, Sixth, and Fourteenth Amendments of the United States Constitution and Article I, Sections Nineteen and Twenty-Three of the North Carolina Constitution, specifically defendant's rights to due process, effective assistance of counsel, and confrontation of witnesses. Defense counsel also tendered into the record for the trial court's consideration the emails between defense counsel and the State, as summarized herein, and the CDs containing the over 800 calls.

¶ 10 The trial court denied the motion to continue.[1] After the denial of the motion to continue, defense counsel further requested that he be given a day or a half-day after the completion of jury selection but before opening statements to listen to the four hours of calls identified by the State and to speak with his experts. Defense counsel indicated that he had spoken to his experts and they would make themselves available.

¶ 11 After jury selection was completed on Friday, 28 April 2017, defense counsel, at around 11:30 a.m., renewed his request for a continuance. Defense counsel asked the trial court to delay opening statements until Monday to afford him the rest of the day and the weekend to review the calls and talk with his experts. Defense counsel argued that he had not had the time to listen to all twenty-three calls, had yet to understand them, and would be compelled to make an opening statement without

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1. The trial court orally ruled on the motion to continue. No order with findings of fact or conclusions of law was entered.

knowledge of material rebuttal evidence. The trial court denied the request, and the State and defense counsel proceeded to present their respective opening statements.

¶ 12 Ultimately, defendant was convicted of first-degree murder under the felony murder rule with the underlying felony being assault with a firearm on a government official, robbery with a dangerous weapon, and assault with a firearm on a government official. The trial court imposed a term of life without parole for first-degree murder and a consecutive term of 60 months to 84 months for robbery with a dangerous weapon. The trial court arrested judgment on assault with a firearm on a government official.

¶ 13 On appeal, a divided panel of the Court of Appeals concluded that the trial court committed no reversible error. *State v. Johnson*, 273 N.C. App. 358, 367 (2020). The Court of Appeals held that regardless of the standard of review, any error by the trial court in not allowing the motion to continue was not prejudicial to the felony murder conviction because the underlying felony was a "general[-]intent" crime, and the calls were admitted to rebut testimony from defendant's expert concerning defendant's diminished capacity. *Id.* at 361–63. The Court of Appeals also concluded that the denial of the motion to continue was not an error. *Id.* at 363, 366–67. The dissent disagreed, contending that the majority failed to apply the correct standard of review for addressing a motion to continue based on a constitutional right and that under the correct standard, defendant is entitled to a new trial. *Id.* at 367–68 (Stroud, J., dissenting). Defendant appealed as of right based on the dissent.

II. Standard of Review

¶ 14 A ruling on a motion to continue is addressed to the sound discretion of the trial court and reviewed on appeal for abuse of discretion unless the motion "raises a constitutional issue." *State v. Searles*, 304 N.C. 149, 153 (1981). If the motion raises a constitutional issue, "the trial court's action upon it involves a question of law which is fully reviewable by an examination of the particular circumstances of each case." *Id.* However, regardless of the nature of the motion to continue, whether constitutional or not, a denial of a motion to continue is "grounds for a new trial only upon a showing by [the] defendant that the denial was erroneous and that [ ]his case was prejudiced thereby." *Id.*

¶ 15 "If the defendant shows that the time allowed his counsel to prepare for trial was constitutionally inadequate, he is entitled to a new trial unless the State shows that the error was harmless beyond a reasonable doubt." *State v. Tunstall*, 334 N.C. 320, 329 (1993); *see* N.C.G.S.

§ 15A-1443(b) (2019) ("A violation of the defendant's rights under the Constitution of the United States is prejudicial unless the appellate court finds that it was harmless beyond a reasonable doubt. The burden is upon the State to demonstrate, beyond a reasonable doubt, that the error was harmless.").

III. Analysis

¶ 16 Defendant's motion to continue raised a constitutional issue, requiring de novo review by this Court. As set forth herein, exercising our judgment anew, we conclude the trial court erred by denying the motion to continue. Defendant had constitutionally inadequate time to address the calls. Yet, the trial court's constitutional error was harmless beyond a reasonable doubt as to defendant's conviction of first-degree murder under the felony murder rule with the underlying felony being assault with a firearm on a government official. The calls were admitted as rebuttal evidence to defendant's evidence of lack of specific intent. However, the offense of assault with a firearm on a government official does not require a defendant to have a specific intent. It is a general-intent crime. Therefore, there can be no prejudice from the denial of the motion to continue as a matter of law to the conviction of assault with a firearm on a government official or felony murder resulting therefrom, because the calls were not relevant to any element of these crimes.

A. Constitutional adequacy of time to prepare for trial

¶ 17 As defendant's request for a continuance before the trial court raised a constitutional issue, we review de novo the constitutional issue. The constitutional guarantees of assistance of counsel and confrontation of one's accusers and adverse witnesses implicitly provide that "an accused and his counsel shall have a reasonable time to investigate, prepare[,] and present his defense." *State v. Rogers*, 352 N.C. 119, 124 (2000) (quoting *State v. McFadden*, 292 N.C. 609, 616 (1977)). "To establish a constitutional violation, a defendant must show that he did not have [adequate] time to confer with counsel and to investigate, prepare[,] and present his defense." *Tunstall*, 334 N.C. at 329. "To demonstrate that the time allowed was inadequate, the defendant must show 'how his case would have been better prepared had the continuance been granted or that he was materially prejudiced by the denial of his motion.' " *Id.* (quoting *State v. Covington*, 317 N.C. 127, 130 (1986)). What constitutes inadequate time "must be determined upon the basis of the circumstances of each case." *Id.* (quoting *State v. Harris*, 290 N.C. 681, 687 (1976)).

¶ 18 Exercising our judgment anew, we conclude that the trial court erred by denying defendant's motion to continue because defendant

showed the trial court that he did not have reasonable time to address the calls, that he would have been better prepared had the continuance been granted, and that he was materially prejudiced by the denial of his motion.[2] In other words, defendant demonstrated to the trial court that the time allowed his counsel to prepare his defense was constitutionally inadequate.

¶ 19 We first recognize that the time available to defense counsel to address the calls was limited. Defense counsel informed the trial court and tendered into the record the calls and the emails reflecting that defense counsel received notice at 5:50 p.m. the night before jury selection started that the State intended to use twenty-three of the calls—after the State had indicated that it was not using any of the calls and defense counsel and investigator had stopped reviewing them. Under these unique circumstances, where defense counsel relied on the State's representations, one of which was unqualified, and was reasonably preoccupied with other filings by the State and preparation for trial, we consider the relevant date and time for our analysis to be when the State informed defense counsel that the State intended to use the twenty-three calls. Thus, this case is unlike *Tunstall*, where "defendant's counsel had at least three days between notification of [two oral] statements [made by defendant to law enforcement] and the beginning of jury selection in the defendant's trial in which to investigate the circumstances under which the statements were made." *Id.* at 332.

¶ 20 Further, defendant's sole counsel only had the early mornings of and the late evenings of five days to listen to the calls and assess their impact on defendant's defense before making his opening statement to the jury. During the day, defense counsel was in court for the pretrial proceedings and jury selection for this case and unable to listen to the 3 hours and 53 minutes of the identified twenty-three calls or any other of the more than 800 calls. Defendant's investigator was also unavailable due to pneumonia.

¶ 21 We also find defendant's showing in support of his position that he would have been better prepared for trial both sufficient and compelling. Defense counsel indicated to the trial court on 28 April 2017 that

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2. Here, defense counsel showed the trial court that he would be better prepared if the continuance had been granted and counsel's actual performance supports defendant's claim of material prejudice. Accordingly, we do not conclude or hold that prejudice could be presumed in this matter. *See United States v. Cronic*, 466 U.S. 648, 662 (1984) ("[O]nly when surrounding circumstances justify a presumption of ineffectiveness can a Sixth Amendment claim be sufficient without inquiry into counsel's actual performance at trial."); *State v. Rogers*, 352 N.C. 119, 126 (2000).

with a delay of opening statements until the next business day, Monday, he could listen to all twenty-three calls,[3] determine their implication on defendant's defense, and then consult with his expert. Defense counsel specifically identified that he would speak to defendant's expert, Dr. Corvin, over the weekend to discuss the calls and their implication. The State had isolated these calls specifically to rebut Dr. Corvin's testimony and defendant's sole defense that he was incapable of forming the intent to commit the charged crimes. The twenty-three calls were communications made by defendant the day before, the day of, and the day after Dr. Corvin first met with defendant on 13 August 2015, and Dr. Corvin noted unusual behaviors relevant to his opinions.[4]

¶ 22 Finally, defendant has met his burden to show that he was prejudiced by the denial of the motion to continue. Defendant argues that the denial of the motion to continue impaired defense counsel's ability to give an "accurate forecast of his expert testimony and his anticipated response to the [S]tate's use of [the] calls" in his opening statement. Under the circumstances of this case and upon review of defense counsel's actual performance at trial, we agree.[5] As defendant identified, the calls were intended to undermine defendant's only defense to the charge of robbery with a dangerous weapon—his state of mind as impacted by his mental health and consumption of impairing substances. And this defense was complicated and involved experts.

¶ 23 Examining defense counsel's actual performance, the opening statement of defense counsel also reflects a vagueness regarding the evidence from defendant's experts. The opening statement concerned testimony about the impact of mental health conditions generally rather than specific details concerning defendant, even though Dr. Corvin ultimately testified as an expert in forensic psychiatry that the combination of bipolar disorder, an intellectual disability, and intoxication, which he found defendant to have on 4 July 2015 at the time of the alleged crimes, rendered defendant without the ability to form specific intent. Robbery with a dangerous weapon is a specific-intent offense, requiring the State to prove that defendant had the intent to steal. *State v. Smith*, 268 N.C. 167, 169 (1966). Further, even though defendant had retained and no-

3. The State ultimately decided to tender as rebuttal evidence only nine of the twenty-three calls. The State did not notify defendant of this until 8 May 2017, which was after opening statements were made.

4. Dr. Corvin also met with defendant on 20 April 2016.

5. However, as addressed in section B of this opinion, this error was not prejudicial as a matter of law to the conviction of first-degree murder under the felony murder rule.

ticed two mental health experts, Dr. Corvin and Dr. Jennifer Sapia, the opening statement did not refer to experts. Instead, the singular, expert, was used. Thus, at the time of opening statements, defense counsel's ability to provide meaningful adversarial testing of the State's case against defendant concerning the robbery with a dangerous weapon charge was compromised by the inadequacy of time afforded him to prepare his defense.[6] *Cf. United States v. Cronic*, 466 U.S. 648, 656 (1984) ("When a true adversarial criminal trial has been conducted—even if defense counsel may have made demonstrable errors—the kind of testing envisioned by the Sixth Amendment has occurred." (footnote omitted)). Thus, we are persuaded that the impact of the denial of the motion to continue was material and prejudicial.

¶ 24 Ultimately, what amount of time is constitutionally adequate or constitutionally inadequate depends on the circumstances of the case and requires a case-by-case assessment. Here, the assessment of the circumstances leads to our holding that the amount of time afforded defendant was constitutionally inadequate. Hence, we conclude that defendant has shown that the trial court committed constitutional error by denying defendant's justifiable request for delay in his motion to continue.[7]

B. Harmless error

¶ 25 Since we conclude from our de novo review of the constitutional issue in defendant's request for a continuance that the trial court erred, the State bears the burden of showing that the error was harmless beyond a reasonable doubt. However, any error by the trial court was harmless beyond a reasonable doubt as a matter of law regarding the conviction of first-degree murder based on the felony murder rule because there

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6. Notably, the jury found defendant not guilty of the other charged specific-intent offense—first-degree murder based on malice, premeditation, and deliberation. *See State v. Chapman*, 359 N.C. 328, 374 (2005) ("Specific intent to kill is an essential element of first[-]degree murder, but it is also a necessary constituent of the elements of premeditation and deliberation." (cleaned up)). Thus, this is not a case where the evidence was overwhelming in the favor of the State concerning defendant's state of mind. Therefore, an impact on defense counsel's opening statement could have been prejudicial.

7. The Supreme Court of the United States has recognized that the amount of time the government spends investigating a case or the number of documents that the government reviews is not necessarily relevant to the constitutional adequacy of defense counsel's preparation time. *Cronic*, 466 U.S. at 663. Here, the State intended to use twenty-three calls recorded on the day of, the day before, and the day after Dr. Corvin first met with defendant as rebuttal evidence. Therefore, especially in this context, our holding that the trial court erred by not granting a continuance until Monday for opening statements in no way endorses the contention that effective assistance of counsel necessitates review of all the calls.

was no factual dispute regarding whether or not defendant committed the offense—the evidence supporting his conviction was uncontroverted[8]—and the admitted evidence that solely addressed defendant's mental state was entirely irrelevant to this offense given that the legal elements of this conviction do not require anything more than general intent. *See Johnson*, 273 N.C. App. at 361–63. In this matter, the underlying felony supporting the jury's felony murder conviction—assault with a firearm on a government official—is a "general-intent offense." *State v. Page*, 346 N.C. 689, 700 (1997) (holding the offense of assault with a firearm on a government official is a general-intent offense). A felony murder conviction requires no intent other than the intent necessary to secure conviction of the underlying felony. *State v. Richardson*, 341 N.C. 658, 666–67 (1995). Accordingly, defendant's conviction of first-degree murder under the felony murder rule with the underlying felony being assault with a firearm on a government official is also a general-intent offense.

¶ 26 General-intent offenses are offenses "which only require the doing of some act." *State v. Jones*, 339 N.C. 114, 148 (1994). In contrast, specific-intent offenses are offenses "which have as an essential element a specific intent that a result be reached." *Id.* Thus, any evidence in this case[9] supporting or negating that defendant was incapable of forming intent at the time of the crime is not relevant to a general-intent offense. *See id.* (holding intoxication defense is not available for general-intent offense); *Page*, 346 N.C. at 700 (holding diminished-capacity defense is not available for a general-intent offense).

¶ 27 Here, the calls were introduced as rebuttal evidence to the testimony of defendant's expert, Dr. Corvin, who opined on defendant's mental health diagnosis and capacity to form intent for the purposes of defendant's defense. As a matter of law, Dr. Corvin's testimony and the State's rebuttal evidence of the calls are irrelevant to the assault with a firearm on a government official conviction and resulting felony murder convic-

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8. In fact, in both the opening statement and closing argument at trial, defense counsel did not contest any element of the offenses charged except intent. His sole defense was that defendant did not act with the requisite intent because of his diminished capacity from a mixture of a manic bipolar episode, mental disability, alcohol intoxication, and cocaine digestion. Later at the jury charge conference, defense counsel acknowledged that a diminished capacity argument was unavailable with respect to the general intent charges. Nevertheless, he still argued that the jury should receive an instruction that they could consider the facts allegedly demonstrating diminished capacity in connection with the knowledge element of the general intent crime.

9. The jury was not instructed on the defense of insanity, and defense counsel did not argue that defendant was legally insane.

tion. Therefore, we conclude that the trial court's error in denying the motion to continue for defense counsel to review the calls and consult with the experts was harmless beyond a reasonable doubt as to the conviction of felony murder based on the underlying felony of assault with a firearm on a government official conviction. We hold that defendant is entitled to a new trial only on the charge of robbery with a dangerous weapon.

IV. Conclusion

¶ 28 For the reasons set forth herein, we conclude that the Court of Appeals erred as the trial court committed constitutional error by denying the motion to continue. However, the error by the trial court was harmless beyond a reasonable doubt as a matter of law to the conviction of first-degree murder under the felony murder rule where the underlying felony was a general-intent crime. Therefore, we affirm in part and reverse in part the decision of the Court of Appeals and direct the trial court to vacate the judgment as to the robbery with a dangerous weapon conviction for a new trial.

AFFIRMED IN PART AND REVERSED IN PART.

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

STATE OF NORTH CAROLINA
v.
LEONARD PAUL SCHALOW

No. 40PA20

Filed 17 December 2021

1. Criminal Law—vindictive prosecution—after successful appeal—motivation for additional charges—application of N.C.G.S. § 15A-1335

The prosecutor's decision to pursue additional charges against defendant after defendant successfully appealed a conviction of attempted first-degree murder on constitutional grounds was not presumptively vindictive where the prosecutor's statements made clear that his motives in filing additional charges (for felony child abuse) were to punish defendant for his alleged criminal conduct and not in retaliation for defendant exercising his right to appeal

and where there was no other evidence that the charging decision, which was presumptively lawful, was actually vindictive. Further, the Court of Appeals failed to consider the effect of N.C.G.S. § 15A-1335 when calculating the maximum potential period of incarceration for the current charges as compared with the prior charge, since the operation of the statute would prevent a significantly increased sentence for offenses based on the same conduct.

2. Appeal and Error—preservation of issues—failure to join related criminal offenses—basis for motion to dismiss—issue not raised before trial court

Defendant was not entitled to dismissal, pursuant to N.C.G.S. § 15A-926 (failure to join), of fourteen counts of felony child abuse that were brought after he successfully challenged on appeal his conviction for attempted first-degree murder. The statute did not apply because defendant had not been indicted on the additional charges at the time of his murder trial, and although he contended in this appeal that there were applicable exceptions, as stated in *State v. Warren*, 313 N.C. 254 (1985), he failed to properly preserve this issue by raising it before the trial court. Further, the Court of Appeals misapplied *Warren* by determining that it mandated rather than permitted dismissal.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 269 N.C. App. 369 (2020), reversing an order entered on 7 August 2018 by Judge W. Robert Bell, in Superior Court, Henderson County. Heard in the Supreme Court on 27 April 2021.

Joshua H. Stein, Attorney General, by Joseph L. Hyde, Assistant Attorney General, for the State-appellant.

Appellate Defender Glenn Gerding, by Daniel Shatz, Assistant Appellate Defender, for defendant-appellee.

HUDSON, Justice.

¶ 1 Leonard Paul Schalow (defendant) was charged with fourteen counts of felony child abuse. He moved to dismiss the charges, arguing that the charges were barred by double jeopardy and amounted to vindictive prosecution, and that the State impermissibly failed to join the charges in an earlier prosecution. The trial court denied his motion, but the Court of Appeals allowed his petition for writ of certiorari and

reversed the trial court's denial of the motion to dismiss based on vindictive prosecution and failure to join. Before this Court, the State argued the Court of Appeals misapplied or unduly expanded settled caselaw in doing so. After careful review, we reverse the decision of the Court of Appeals.

I. Facts and Procedural History

¶ 2 Defendant was married to Erin Henry Schalow in 1997. The couple moved to North Carolina in 2010. Ms. Schalow is a registered nurse who worked for eight months with a hospice service in Hendersonville. Defendant was not working during this time. The State's evidence presented at trial tended to show that defendant engaged in many severe acts of domestic violence on an almost daily basis that resulted in multiple bodily injuries to his wife.[1]

¶ 3 In February 2014, defendant was arrested for multiple violent offenses against Ms. Schalow on a warrant finding probable cause for assault on a female, assault inflicting serious injury with a minor present, assault with a deadly weapon, assault by strangulation, and assault inflicting serious bodily injury. On 10 March 2014, defendant was indicted for attempted murder of Ms. Schalow in 14 CRS 50887. The indictment described the offense charged as "attempt first degree murder" for "unlawfully, willfully and feloniously . . . attempt[ing] to murder and kill Erin Henry Schalow." The State dismissed other charges pending against defendant.

¶ 4 After the case came on for trial and the jury was impaneled in March 2015, the trial court noted the indictment failed to allege malice aforethought, a necessary element of attempted first-degree murder under the short-form indictment statute. N.C.G.S. § 15-144 (2019). Although defendant objected that the indictment sufficiently alleged attempted voluntary manslaughter and that a mistrial should not be declared because jeopardy had attached, the prosecutor asked the trial court to dismiss the charges so he could bring a new indictment. The trial court declared a mistrial and dismissed the case because the indictment was fatally defective and the trial court thus lacked jurisdiction.

¶ 5 On 18 May 2015, the State issued a new indictment against defendant in a new prosecution, 15 CRS 50922, for "attempt first degree murder." Now, the body of the indictment stated that defendant "unlawfully, willfully and feloniously . . . with malice aforethought attempt[ed] to

1. The testimony presented at the second trial is recounted in *State v. Schalow*, 251 N.C. App. 334 (2016) (*Schalow I*), *disc. rev. improvidently allowed*, 370 N.C. 525 (2018).

murder and kill Erin Henry Schalow by torture." Defendant moved to dismiss 15 CRS 50922, arguing that the second prosecution for attempted first-degree murder was barred by double jeopardy because jeopardy had attached in the first prosecution for attempted voluntary manslaughter, a lesser offense. The trial court denied defendant's motion. The Court of Appeals denied his pretrial petition for writ of certiorari. The matter came on for trial in November 2015 and defendant was convicted by a jury of attempted first-degree murder and sentenced to imprisonment for 157 to 201 months.

¶ 6 Defendant appealed to the Court of Appeals. The Court of Appeals vacated the conviction and indictment, holding that defendant's trial and conviction in 15 CRS 50922 were barred by the prohibition against double jeopardy because jeopardy had attached. *State v. Schalow*, 251 N.C. App. 334, 354 (2016) (*Schalow I*), *disc. rev. improvidently allowed*, 370 N.C. 525 (2018) (per curiam).

¶ 7 The State obtained further indictments against defendant on 4 January 2017, this time for felony child abuse under N.C.G.S. § 14-318.4(a5). The State petitioned this Court for discretionary review of *Schalow I* the next day. This Court initially allowed discretionary review; however, we later held discretionary review in *Schalow I* was improvidently allowed. *See State v. Schalow*, 370 N.C. 525 (2018). On 19 March 2018, after this Court ruled discretionary review was improvidently allowed, defendant was also indicted for three counts of assault with a deadly weapon with intent to kill inflicting serious injury, two counts of assault inflicting serious bodily injury, and one count of assault by strangulation. These charges were based on conduct that included acts of violence against his wife in 2014.

¶ 8 On 19 July 2018, defendant filed a pretrial motion to dismiss alleging, *inter alia*, that double jeopardy barred the indictments, that the State had failed to join all claims earlier, and that the prosecution was vindictive. Regarding the vindictive prosecution claim, defendant argued the State indicted him because of his successful appeal from the attempted murder judgment. On 9 January 2017, after the State petitioned this Court for discretionary review in *Schalow I*, Greg Newman, the District Attorney for Henderson County, who oversaw the prosecution of defendant, was quoted in the press as saying "If . . . the Supreme Court refuses to take up the case, then I have a plan in place to address that circumstance and will take additional action to see that [defendant] is held accountable for his actions. . . . I will do everything that I can to see that [defendant] remains in custody for as long as possible." He further stated that "[d]omestic violence is unacceptable in any cir-

cumstance, but this case revealed an extreme case of brutality." After a hearing, the trial court denied defendant's pretrial motion to dismiss. Defendant filed a petition for writ of certiorari with the Court of Appeals seeking immediate review of the order, which that court allowed.

¶ 9 The Court of Appeals reversed the trial court's denial of defendant's motion to dismiss. *State v. Schalow*, 269 N.C. App. 369, 383 (2020) (*Schalow II*). It held the charges should have been dismissed because: (1) "[d]efendant is entitled to a presumption of prosecutorial vindictiveness" and "the State has failed to overcome the presumption"; and (2) "[d]efendant has made a showing that should have compelled a determination by the trial court that the prosecutor withheld the indictments here at issue in order to circumvent [N.C.G.S. § 15A-]926," and "[d]efendant is entitled to dismissal of the new charges under [N.C.G.S. § 15A-]926(c)(2), as well." *Id.* at 377, 383. The Court of Appeals declined to reach the question of whether defendant's motion to dismiss should have been granted on double-jeopardy grounds. *Id.* at 383.

¶ 10 This Court allowed the State's petition for discretionary review. *Schalow*, 839 S.E.2d 340 (2020) (order).

II. Analysis

¶ 11 The State argues the Court of Appeals erred in reversing the trial court's denial of defendant's motion to dismiss because: (1) defendant was not subjected to vindictive prosecution; (2) defendant was not subjected to a joinder violation; and (3) prosecution was not barred by double jeopardy.[2] For the reasons stated, we reverse the Court of Appeals and remand this case to that court to reconsider whether prosecution was barred by double jeopardy.

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2. The State also argues the Court of Appeals in *Schalow I* erred in holding the second prosecution for attempted first-degree murder was barred by double jeopardy. That was not the basis for the trial court's holding that defendant's prosecution for assault was barred by double jeopardy and, although the Court of Appeals below recognized the holding of *Schalow I*, to which it was bound as law of the case, that issue was not before the trial court or the Court of Appeals and, accordingly, is not properly before us now. N.C. R. App. P. 10(a)(1). Moreover, the issue is barred by issue preclusion. *See State v. Summers*, 351 N.C. 620, 623 (2000) (recognizing that once an issue is "decided in a court of record, neither of the parties shall be allowed to call it into question, and have it tried over again at any time thereafter, so long as the judgment or decree stands unreversed" (quoting *King v. Grindstaff*, 284 N.C. 348, 355 (1973))). The Court of Appeals below declined to determine the separate argument made by defendant as to whether the present offenses are barred by double jeopardy.

A. Vindictive Prosecution

¶ 12 **[1]** It is well established that "neither the double jeopardy provision nor the Equal Protection Clause imposes an absolute bar to a more severe sentence upon reconviction"; however, "[d]ue process of law . . . requires that vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial." *North Carolina v. Pearce*, 395 U.S. 711, 723, 725 (1969). In *Pearce* the defendant was convicted upon a charge of assault to commit rape, and the trial judge sentenced him to imprisonment for a term of twelve to fifteen years. *Id.* at 713. Several years later, his conviction was reversed by this Court after the defendant filed a state post-conviction proceeding in which he successfully argued that an involuntary confession had been unconstitutionally admitted against him. *Id.* The defendant was later tried again and convicted of the same offense. *Id.* The trial court sentenced him to an eight-year term which, when combined with time previously served, amounted to a longer total sentence than that originally imposed. *Id.* After that conviction and sentence were upheld by this Court, the defendant challenged his sentence in federal court. A federal district court held that the longer sentence imposed upon retrial was unconstitutional and thus void, and the Fourth Circuit affirmed. *Id.* at 714. After granting certiorari, the United States Supreme Court affirmed the judgment of the Fourth Circuit. *Id.* at 714, 726. In so doing, the Court concluded that "whenever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for his doing so must affirmatively appear" in the record and "[t]hose reasons must be based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding." *Id.* at 726. Thus, in such circumstances, vindictiveness is presumed, and the trial court must affirmatively provide an objective basis for the increased sentence in the record. The rationale is that vindictiveness for the exercise of a constitutional right, or a defendant's apprehension of that motivation in the trial court, penalizes the exercise of that right and "may unconstitutionally deter a defendant's exercise of the right to appeal or collaterally attack his first conviction." *Id.* at 725.

¶ 13 In *Blackledge v. Perry*, 417 U.S. 21 (1974) *limited by Alabama v. Smith*, 390 U.S. 794, the United States Supreme Court, again in a case from North Carolina, expanded the presumption of vindictiveness to cases in which a prosecutor seeks conviction for a more serious charge with a significantly more severe penalty after a defendant successfully appeals and obtains a trial de novo. *Id.* at 28–29. In *Blackledge*, the de-

fendant was convicted of misdemeanor assault in district court and sentenced to six months. *Id.* at 22. Exercising his right to a trial de novo, he filed notice of appeal to the Superior Court of North Carolina, after which the prosecutor indicted him for felony assault. *Id.* at 23. The indictment covered the same conduct for which the defendant had received the misdemeanor conviction. *Id.* The defendant entered a plea of guilty to the more serious offense and was sentenced to five to seven years. The Supreme Court held due process was violated because the indictment for a more serious offense carrying a significantly increased sentence was presumptively vindictive, meted out in retaliation for the defendant's pursuing his statutory right to a trial de novo in the superior court. *Id.* at 28–29. The Court observed that, unlike *Pearce*, the vindictiveness was not exercised by "the judge or the jury, but the prosecution." *Id.* at 27.

¶ 14 Subsequent decisions of the Supreme Court have declined to expand the rule in *Pearce* and *Blackledge* presuming vindictiveness beyond the circumstances in those cases. *See, e.g.*, *Alabama v. Smith*, 490 U.S. 801 (1989) (presumption inapplicable to greater sentence imposed following a jury trial after a prior guilty plea); *United States v. Goodwin*, 457 U.S. 368, 382–84 (1982) (presumption not warranted when the defendant is indicted after refusing plea deal); *see also Gilbert v. N.C. State Bar*, 363 N.C. 70, 77–78 (2009).

¶ 15 North Carolina courts have also declined to expand the presumption of vindictiveness, instead applying it only when the facts match those in *Pearce* or *Blackledge*. *Cf. State v. Bissette*, 142 N.C. App. 669, 673 (2001) (applying *Blackledge* after finding similar factual scenario); *State v. Phillips*, 38 N.C. App. 377, 379 (1978) (same); *State v. Mayes*, 31 N.C. App. 694, 696–97 (1976) (same). After *Pearce* was decided, North Carolina enacted N.C.G.S. § 15A-1335, which provides that when a conviction or sentence has been set aside on direct review or through collateral attack, the trial court may not impose a more severe sentence for the same offense "or for a different offense based on the same conduct." N.C.G.S. § 15A-1335 (2019). Thus, *Pearce*-type judicial vindictiveness would not be established so long as the trial court complies with this prophylactic and mandatory statutory provision, which meets the constitutional requirement of due process established in *Pearce*.

¶ 16 Not every case of repeated prosecution falls under *Blackledge* and warrants the presumption of vindictiveness on the part of the prosecutor. The filing of additional charges following the defendant's exercise of a procedural right does not necessarily warrant a presumption of prosecutorial vindictiveness. *See Goodwin*, 457 U.S. at 379; *see also United*

States v. Johnson, 325 F.3d 205, 211 (4th Cir.) (concluding that the filing of "more appropriate charges" on the same set of facts was not evidence of vindictiveness), *cert. denied*, 540 U.S. 897 (2003). Specifically, evidence that repeated prosecution is motivated by the desire to punish the defendant for his offenses does not, without more, suffice to warrant a presumption of vindictiveness. The Supreme Court in *Goodwin* explained:

> The imposition of punishment is the very purpose of virtually all criminal proceedings. The presence of a punitive motivation, therefore, does not provide an adequate basis for distinguishing governmental action that is fully justified as a legitimate response to perceived criminal conduct from governmental action that is an impermissible response to noncriminal, protected activity. Motives are complex and difficult to prove. As a result, in certain cases in which action detrimental to the defendant has been taken after the exercise of a legal right, the Court has found it necessary to "presume" an improper vindictive motive. Given the severity of such a presumption, however—which may operate in the absence of any proof of an improper motive and thus may block a legitimate response to criminal conduct—the Court has done so only in cases in which a reasonable likelihood of vindictiveness exists.

Goodwin, 457 U.S. at 372–73. Accordingly, a reasonable likelihood of vindictiveness is not shown (and the presumption not warranted) merely by evidence that the prosecutor sought to punish the defendant for his criminal conduct by reprosecution.

¶ 17 Here, the evidence showed that after defendant's successful appeal to the Court of Appeals in *Schalow I*, the State indicted the defendant for fourteen counts of felony child abuse and Mr. Newman stated to the media that, if this Court declined to allow the State's petition for discretionary review, he "w[ould] take additional action to see that [defendant] is held accountable for his actions." In his statements Mr. Newman specifically noted the "extreme case of brutality" demonstrated by the acts of domestic violence here. Furthermore, in his Facebook post, Mr. Newman said, "My goal is to have [defendant] receive a comparable sentence to the one originally imposed." Although the prosecution obtained additional charges, the stated purpose was to ensure defendant was punished for his criminal conduct and to obtain "a comparable

sentence" to the original one—not a substantially more severe sentence in retaliation for the appeal. Thus, to the extent that the public statements of the prosecutor evidence any discernable motive to the reprosecution attributable to the State, it is to punish defendant for his crimes and not for the successful exercise of his right of appeal.

¶ 18 In determining whether the circumstances warranted a presumption of vindictive prosecution, the Court of Appeals below considered only that (1) "[t]his is the third time that District Attorney Newman has attempted to try [d]efendant for crimes based upon the same alleged conduct," and (2) that, based on its calculation, the maximum potential period of incarceration defendant could serve if he were convicted of all of the newly-indicted offenses under the present prosecution significantly exceeded the sentence he could have received under the second prosecution for attempted first-degree murder. *Schalow II*, 269 N.C. App. at 374–75. The Court of Appeals erred in its analysis.

¶ 19 First, the Court of Appeals erred in calculating the maximum term to which defendant could be sentenced for the offenses here because it failed to consider the applicability of N.C.G.S. § 15A-1335 to the hypothetical maximum sentence here. As previously noted, Section 15A-1335 was enacted specifically to prevent vindictiveness arising from repeated prosecutions under *Pearce* and its progeny. While its enactment following *Pearce* was aimed at prophylactically eliminating violations of due process resulting from *judicial* vindictiveness, the effect of the statute is to potentially preclude due process violations for *prosecutorial* vindictiveness under *Blackledge* as well. Section 15A-1335 states:

> When a conviction or sentence imposed in superior court has been set aside on direct review or collateral attack, the court may not impose a new sentence for the same offense, or for a different offense based on the same conduct, which is more severe than the prior sentence less the portion of the prior sentence previously served. This section shall not apply when a defendant, on direct review or collateral attack, succeeds in having a plea of guilty vacated.

N.C.G.S. § 15A-1335. Section 15A-1335 is mandatory; thus, even if a prosecutor successfully pursues a second prosecution that would otherwise carry a substantially more severe sentence, so long as the charges are "for the same offense, or for a different offense based on the same conduct," the statute operates to prohibit the trial court from imposing a sentence with a length greater than the sentence which was set aside

minus the portion of the prior sentence that the defendant had already served. Accordingly, applying N.C.G.S. § 15A-1335, the presumption of prosecutorial vindictiveness under *Blackledge*, which applies only where the more serious charge "subject[ed]" the defendant "to a significantly increased potential period of incarceration," *Blackledge*, 417 U.S. at 28, cannot be implicated because a "significantly increased" sentence for offenses based on the same conduct is a legal impossibility under North Carolina law. The Court of Appeals correctly noted that the offenses charged here were "based upon the same alleged conduct" as the previous prosecutions. *Schalow II*, 269 N.C. App. at 374. Therefore, N.C.G.S. § 15A-1335 applies and the maximum potential period of incarceration was limited to an amount less than or equal to the maximum sentence set aside in *Schalow I* minus the time defendant served, namely, a maximum potential sentence of 201 months minus time served. *See Schalow I*, 251 N.C. App. at 338. The Court of Appeals erred in failing to apply Section 15A-1335 to its sentencing calculation. As a result, it further erred in holding a presumption of prosecutorial vindictiveness under *Blackledge* was shown.[3]

¶ 20 The Court of Appeals compared the potential period of incarceration under the new prosecution to the potential period of incarceration under the second prosecution. *See Schalow II*, 269 N.C. App. at 375 ("Therefore, the 'increased potential period of incarceration' [d]efendant now faces relative to what he potentially faced in the Second Prosecution is *more than 35 years of incarceration* in aggregate."). Defendant, however, argues that the most appropriate point of comparison is not between the current potential period of incarceration and the potential period of incarceration for the previous prosecution, but zero months because "[w]hen judging whether a charging decision is vindictive, the most appropriate point of comparison is the defendant's exposure immediately before and immediately after that charging decision." But this is not the rule in *Blackledge*, which was based on the rationale that a defendant "is entitled to pursue his [procedural right] without apprehension that the State will retaliate by substituting a more serious charge *for the original one*." *Blackledge*, 417 U.S. at 28 (emphasis

3. In his brief, defendant repeatedly notes the discrepancy between the single count of attempted murder originally brought against him and the twenty charges he now faces, arguing that the number of new charges alone could also justify a presumption of prosecutorial vindictiveness. While colloquially "quantity has a quality all its own," that is not the presumption recognized in *Blackledge*. Rather, the relevant criterion is solely whether the new charge or charges subject the defendant "to a significantly increased potential period of incarceration." 417 U.S. at 28.

added). Hence, the comparison under *Blackledge* is between the present potential criminal liability and that under the original charge or charges. Moreover, taken literally, defendant's argument would presume vindictiveness for *any* prosecution, given that deciding to charge after initially not charging, or deciding to pursue additional charges, both result in an increase in exposure compared to immediately before the charging decision.

¶ 21 Defendant next argues as an alternative basis that the Court of Appeals should be affirmed because, under the United States Supreme Court's decision in *Goodwin*, the trigger for applying the presumption of vindictiveness is "a change in the charging decision made after an initial trial is completed." *Goodwin*, 457 U.S. at 381. Defendant fundamentally misreads *Goodwin*. In *Goodwin* the Court held that due process does not necessitate the imposition of a prophylactic presumption of prosecutorial vindictiveness whenever a prosecutor brings greater charges after a defendant requests a jury trial. *Id.* at 383. In reasoning the presumption was unwarranted, the Court noted, "There is good reason to be cautious before adopting an inflexible presumption of prosecutorial vindictiveness in a pretrial setting" because

> [a]t this stage of the proceedings, the prosecutor's assessment of the proper extent of prosecution may not have crystallized. In contrast, once a trial begins—and certainly by the time a conviction has been obtained—it is much more likely that the State has discovered and assessed all of the information against an accused and has made a determination, on the basis of that information, of the extent to which he should be prosecuted. Thus, a change in the charging decision made after an initial trial is completed is much more likely to be improperly motivated than is a pretrial decision.

Id. at 381. The Court in *Goodwin* was simply distinguishing the likelihood of vindictiveness undergirding decisions to change charging decisions at various stages of trial and reasoning that a presumption of vindictiveness was less warranted in decisions made before trial than after. Merely because the Court held that a presumption was not warranted in a pre-trial change in charging decision, it does not follow that it held that such a presumption was warranted for all post-trial charging decision changes. Indeed, the Court in *Goodwin* reaffirmed the longstanding principle that, "[g]iven the severity of such a presumption . . . the Court has done so only in cases in which a reasonable likelihood

of vindictiveness exists." *Id.* at 373. We decline defendant's invitation to adopt his reading of *Goodwin* so as to dramatically expand the categories of cases in which a presumption of vindictiveness is warranted by. We join the Court in *Goodwin* in recognizing the harshness of such a presumption, "which may operate in the absence of any proof of an improper motive and thus may block a legitimate response to criminal conduct." *Id.*

¶ 22 Finally, although the Court of Appeals did not reach the issue of whether actual vindictiveness was shown, the State argues it was not shown and defendant argues it was. In arguing there was actual vindictiveness, defendant points to evidence of Mr. Newman's statements to the press and to the trial court about his intention to pursue new charges if this Court denied the State's petition for discretionary review. As discussed above, the only motive these statements reflected on the part of the State was its desire to punish defendant's alleged criminal conduct. As the Court in *Goodwin* noted, "The imposition of punishment is the very purpose of virtually all criminal proceedings," and, accordingly, "does not provide an adequate basis for distinguishing governmental action that is fully justified as a legitimate response to perceived criminal conduct from governmental action that is an impermissible response to noncriminal, protected activity." *Id.* at 372–73. Indeed, a prosecutor's charging decision is presumptively lawful. *United States v. Armstrong*, 517 U.S. 456, 464 (1996). Only in rare cases may that presumption be overcome, and it has not been overcome by evidence of actual vindictiveness here. *See Goodwin*, 457 U.S. at 384 n.19; *Johnson*, 325 F.3d at 210–11.

¶ 23 We hold that by failing to consider the application of Section 15A-1335, the Court of Appeals erred in its calculation of the possible period of incarceration for the present charges when compared with the prior charge. A proper comparison of the potential sentences establishes that the *Blackledge* presumption of prosecutorial vindictiveness is not warranted. Moreover, no other presumption of prosecutorial vindictiveness is warranted and the defendant has failed to show actual vindictiveness.

B. Joinder Violation

¶24 **[2]** The Court of Appeals next held that the trial court erred in denying defendant's motion to dismiss the charges because they should have been joined for trial with the original attempted murder charge. We disagree.

¶ 25 Subsection 15A-926(a) of the North Carolina General Statutes states that two or more offenses may be joined for trial when the offenses "are based on the same act or transaction or on a series of acts or transactions connected together or constituting parts of a single scheme or plan." N.C.G.S. § 15A-926 (2019). Once a defendant has been tried for one offense, the defendant's motion to dismiss a subsequent charge of a joinable offense must be granted. *Id.* § 15A-926(c)(2). The motion to dismiss must be made before the second trial and must be granted unless "a. A motion for joinder of these offenses was previously denied, or b. The court finds that the right of joinder has been waived, or c. The court finds that because the prosecutor did not have sufficient evidence to warrant trying this offense at the time of the first trial, or because of some other reason, the ends of justice would be defeated if the motion were granted." *Id.* § 15A-926(c)(2).

¶ 26 In *State v. Furr*, 292 N.C. 711, *cert. denied*, 434 U.S. 924 (1977), a defendant was tried for the murder of his wife, resulting in a mistrial, *id.* at 723–24, and was subsequently tried and convicted for murder and for twelve counts of solicitation, *id.* at 714. The defendant argued on appeal that the trial court erred in not dismissing the solicitation charges for failure to join under N.C.G.S. § 15A-926 at the initial murder trial. *Id.* at 723–24. We disagreed, holding that Section 15A-926 did not apply because "[a]t the time of [the] defendant's first trial for murder . . . no indictments had yet been returned against him for solicitation." *Id.* The solicitation charges "could not, therefore, have been joined with the murder charge." *Id.* We also noted that nothing "indicated that the state held the solicitation charges in reserve pending the outcome of the murder trial as defendant suggests." *Id.*

¶ 27 In *State v. Warren*, 313 N.C. 254 (1985), the defendant was tried for murder and convicted on the lesser offense of manslaughter. *Id.* at 256. He was then tried for burglary and larceny from the home of the victim. *Id.* We restated the rule in *Furr* that Section 15A-926 does not apply when the defendant had not been indicted for the additional charges at the time of the first trial. *Id.* at 260. But we also recognized an exception to the rule in *Furr* that the subsequent offenses must be dismissed "[i]f a defendant shows that the prosecution withheld indictment on additional charges solely in order to circumvent the statutory joinder requirements." *Id.* We described two circumstances, "[a] finding of either or both" of which "would support but not compel a determination by the trial court that the prosecutor withheld the additional indictment in order to circumvent the statute": (1) "during the first trial the prosecutor

was aware of substantial evidence that the defendant had committed the crimes for which he was later indicted"; and (2) "[a] showing that the State's evidence at the second trial would be the same as the evidence presented at the first." *Id.* at 260 (emphasis omitted). We nevertheless concluded that the charges in *Warren* did not warrant dismissal, because the record showed "valid reasons" for bringing the charges later, *id.* at 263, in that the stolen property was recovered after completion of the murder trial, and the State thus had insufficient evidence of larceny at the time of the murder trial, *id.* at 261–63. Accordingly, as in the case of prosecutorial vindictiveness, in assessing a claim the prosecution withheld an indictment to circumvent the statute, the court must assess the justification offered by the State and determine if legitimate prosecutorial reasons supported the conduct.

¶ 28 Here defendant moved to dismiss arguing, *inter alia*, that the current charges for felony child abuse and various kinds of assault should have been joined with the attempted murder charge from the earlier prosecutions. He argued these offenses arose from the same act or transaction and thus warranted dismissal. At the hearing on the motion, defendant's counsel stated the motion was based on the "statutory prohibition on prosecuting joinable offenses after a defendant has already been tried for an offense that would have been joinable under [N.C.G.S. §] 15A-926," and that Section 15A-926 "makes it clear that if there is a joinable offense and the State proceeds to try in a second trial offenses that should have been joined in the first trial, . . . the court must grant a motion to dismiss." The trial court denied defendant's motion to dismiss.

¶ 29 The record reveals no evidence that defendant alleged the State originally held the additional charges in reserve, nor did he allege under *Warren* that the prosecution withheld indictment on the additional charges in order to circumvent the statute. Under *Warren* it is the defendant's burden to make such a showing, because a prosecutor's charging decision is presumptively lawful. *See Armstrong*, 517 U.S. at 464; *Warren*, 313 N.C. at 260. Because the defendant made no argument under *Warren*, the trial court did not make findings of fact regarding the prosecutor's motive in not pursuing the indictments.

¶ 30 Nevertheless, on appeal to the Court of Appeals, defendant argued the offenses were joinable and should be dismissed for failure to join under N.C.G.S. § 15A-926, and while acknowledging *Furr*'s holding that such offenses could not be charged when no indictments had been returned, also argued for the first time that the record supported the exception under *Warren*.

¶ 31 The Court of Appeals below held that the trial court erred in denying defendant's motion to dismiss, opining that defendant had "shown both *Warren* circumstances." *Schalow II*, 269 N.C. App. at 382. Although *Warren* expressly states that a showing of one or both circumstances merely "would support *but not compel* a determination by the trial court that the prosecutor withheld the additional indictment in order to circumvent the statute," *Warren*, 313 N.C. at 260 (emphasis added), the Court of Appeals went further and held for the first time that a showing of the circumstances described in *Warren* not merely permitted but mandated dismissal by the trial court. *Schalow II*, 269 N.C. App. at 382. Acknowledging that in *Warren* itself this Court held that the circumstances outlined would support, but not compel, such a determination and that it was "left with no precedent regarding what, beyond the two *Warren* circumstances, a defendant needs to show in order to implicate the *Warren* exception," *id.*, the Court of Appeals announced a new test for when the *Warren* exception compels reversal of a denial of a motion to dismiss:

> [B]ecause (1) Defendant has shown that both *Warren* circumstances are present, (2) the State has had multiple previous opportunities to join the offenses on which it now seeks to try Defendant, and (3) the State has neither argued that it was somehow unable to try the offenses at an earlier time nor proffered any explanation for why the offenses were not tried along with the earlier charge, we hold that the *Warren* exception should apply.

Id. The Court of Appeals then concluded that "[d]efendant has made a showing that should have compelled a determination by the trial court that the prosecutor withheld the indictments here at issue in order to circumvent [N.C.G.S. § 15A-]926, and that [d]efendant is entitled to dismissal of the new charges under [N.C.G.S. § 15A-]926(c)(2), as well." *Id.* at 383.

¶ 32 The State argues the Court of Appeals erred in finding a joinder violation, and we agree. First, defendant contended that the *Warren* exception applies to require dismissal for failure to join when that argument is made for the first time at the Court of Appeals. That argument was not made to the trial court; rather, defendant's motion to dismiss there was based on a violation of N.C.G.S. § 15A-926. Defendant did not cite *Warren* and, most importantly, made no allegation or argument that the prosecution withheld the subsequent indictments for the purpose of circumventing the joinder statute. Because no such showing was made

by defendant to the trial court, the issue of whether the *Warren* exception applied was not passed upon by the trial court. Accordingly, under Rule of Appellate Procedure 10(a)(1), the issue was not preserved for appeal.[4] N.C. R. App. P. 10(a)(1).

¶ 33 Beyond defendant's failure to preserve the issue and the Court of Appeals' reversal of the trial court's order on a ground not argued to the trial court in the first instance, the Court of Appeals also erred by disregarding our rule in *Warren* and transforming the exception recognized there from one permitting dismissal of the subsequent charges by the trial court to one requiring it. In *Warren*, we specifically stated that showing one or both circumstances identified therein "would support *but not compel* a determination by the trial court that the prosecutor withheld the additional indictment in order to circumvent the statute." 313 N.C. at 260 (emphasis added). Accordingly, converting a showing of both *Warren* circumstances into a mandate requiring dismissal contravenes precedent of this Court.[5]

III. Conclusion

¶ 34 In conclusion, we hold the Court of Appeals erred in holding a presumption of prosecutorial vindictiveness was warranted and in holding the trial court should have dismissed the charges under *Warren*, both because the issue is not preserved and, even if it were, the Court of Appeals decision contravenes our precedents. Furthermore, the State's argument the Court of Appeals in *Schalow I* erred in holding the second prosecution was barred by double jeopardy is barred by issue preclusion. Finally, the Court of Appeals declined to address the additional argument defendant made in appealing from the trial court's denial of his motion to dismiss that double jeopardy barred the present charges.

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4. In *State v. Golder*, we opined that "[b]y not requiring that a defendant state the specific grounds for his or her objection, Rule 10(a)(3) provides that a defendant preserves all insufficiency of the evidence issues for appellate review simply by making a motion to dismiss the action at the proper time." *State v. Golder*, 374 N.C. 238, 246 (2020). We specifically contrasted this approach to sufficiency of the evidence under Rule 10(a)(3) with Rules 10(a)(1)–(2), which require "specific grounds" for preserving other issues. *See id.* at 245–46.

5. Likewise, the second criterion identified in the test created by the Court of Appeals—that "the State has had multiple opportunities to join the offenses"—would require overruling *Furr*, in which we determined that the State had not had an opportunity to join the offenses when, as here, an indictment for the offenses had not been returned. *Furr*, 292 N.C. at 723–24. Indeed, defendant asks us to overrule *Furr*. We are not persuaded and decline to do so.

Schalow II, 269 N.C. App. at 383. Accordingly, we reverse the decision of the Court of Appeals and remand this case to that court for consideration of defendant's double-jeopardy arguments.

REVERSED AND REMANDED.

REBECCA HARPER; AMY CLARE OSEROFF; DONALD RUMPH; JOHN ANTHONY BALLA; RICHARD R. CREWS; LILY NICOLE QUICK; GETTYS COHEN, JR.; SHAWN RUSH; JACKSON THOMAS DUNN, JR.; MARK S. PETERS; KATHLEEN BARNES; VIRGINIA WALTERS BRIEN; AND DAVID DWIGHT BROWN

PLAINTIFFS,

v.

REPRESENTATIVE DESTIN HALL, IN HIS OFFICIAL CAPACITY AS CHAIR OF THE HOUSE STANDING COMMITTEE ON REDISTRICTING; SENATOR WARREN DANIEL, IN HIS OFFICIAL CAPACITY AS CO-CHAIR OF THE SENATE STANDING COMMITTEE ON REDISTRICTING AND ELECTIONS; SENATOR RALPH HISE, IN HIS OFFICIAL CAPACITY AS CO-CHAIR OF THE SENATE STANDING COMMITTEE ON REDISTRICTING AND ELECTIONS; SENATOR PAUL NEWTON, IN HIS OFFICIAL CAPACITY AS CO-CHAIR OF THE SENATE STANDING COMMITTEE ON REDISTRICTING AND ELECTIONS; SPEAKER OF THE NORTH CAROLINA HOUSE OF REPRESENTATIVES, TIMOTHY K. MOORE; PRESIDENT PRO TEMPORE OF THE NORTH CAROLINA SENATE, PHILIP E. BERGER; THE NORTH CAROLINA STATE BOARD OF ELECTIONS; AND DAMON CIRCOSTA, IN HIS OFFICIAL CAPACITY

DEFENDANTS.

NORTH CAROLINA LEAGUE OF CONSERVATION VOTERS, INC.; HENRY M. MICHAUX, JR.; DANDRIELLE LEWIS; TIMOTHY CHARTIER; TALIA FERNÓS; KATHERINE NEWHALL; R. JASON PARSLEY ; EDNA SCOTT ; ROBERTA SCOTT ; YVETTE ROBERTS; JEREANN KING JOHNSON; REVEREND REGINALD WELLS; YARBROUGH WILLIAMS, JR.; REVEREND DELORIS L. JERMAN; VIOLA RYALS FIGUEROA; AND COSMOS GEORGE

PLAINTIFFS,

v.)
)
REPRESENTATIVE DESTIN HALL,)
IN HIS OFFICIAL CAPACITY AS CHAIR OF THE)
HOUSE STANDING COMMITTEE ON REDISTRICTING;)
SENATOR WARREN DANIEL, IN HIS)
OFFICIAL CAPACITY AS CO-CHAIR OF THE SENATE)
STANDING COMMITTEE ON REDISTRICTING AND)
ELECTIONS; SENATOR RALPH E. HISE, JR.,)
IN HIS OF FICIAL CAPACITY AS CO-CHAIR OF THE)
SENATE STANDING COMMITTEE ON REDISTRICTING)
AND ELECTIONS; SENATOR PAUL NEWTON,)
IN HIS OFFICIAL CAPACITY AS CO-CHAIR OF THE)
SENATE STANDING COMMITTEE ON REDISTRICTING)
AND ELECTIONS; REPRESENTATIVE)
TIMOTHY K. MOORE, IN HIS OFFICIAL)
CAPACITY AS SPEAKER OF THE NORTH CAROLINA)
HOUSE OF REPRESENTATIVES; SENATOR)
PHILIP E. BERGER, IN HIS OFFICIAL)
CAPACITY AS PRESIDENT PRO TEMPORE OF THE)
NORTH CAROLINA SENATE; THE STATE OF)
NORTH CAROLINA; THE NORTH)
CAROLINA STATE BOARD OF)
ELECTIONS; DAMON CIRCOSTA, IN HIS)
OFFICIAL CAPACITY AS CHAIRMAN OF THE NORTH)
CAROLINA STATE BOARD OF ELECTIONS; STELLA)
ANDERSON, IN HER OFFICIAL CAPACITY AS)
SECRETARY OF THE NORTH CAROLINA STATE)
BOARD OF ELECTIONS; JEFF CARMON III,)
IN HIS OFFICIAL CAPACITY AS MEMBER OF THE)
NORTH CAROLINA STATE BOARD OF ELECTIONS;)
STACY EGGERS IV , IN HIS OFFICIAL CAPACITY)
AS MEMBER OF THE NORTH CAROLINA STATE)
BOARD OF ELECTIONS; TOMMY TUCKER,)
IN HIS OF FICIAL CAPACITY AS MEMBER OF THE)
NORTH CAROLINA STATE BOARD OF ELECTIONS;)
AND KAREN BRINSON BELL, IN HER OFFICIAL)
CAPACITY AS EXECUTIVE DIRECTOR OF THE)
NORTH CAROLINA STATE BOARD OF ELECTIONS)

TENTH DISTRICT

No. 413P21

ORDER

Plaintiffs' Petitions for Discretionary Review Prior to Determination by the Court of Appeals, Motion to Suspend Appellate Rules to Expedite

a Decision, and Motion to Suspend Appellate Rules and Expedite Schedule, filed in these consolidated cases on 6 December 2021 are allowed as follows:

In light of the great public interest in the subject matter of these cases, the importance of the issues to the constitutional jurisprudence of this State, and the need for urgency in reaching a final resolution on the merits at the earliest possible opportunity, the Court grants a preliminary injunction and temporarily stays the candidate-filing period for the 2022 elections for all offices until such time as a final judgment on the merits of plaintiffs' claims, including any appeals, is entered and a remedy, if any is required, has been ordered.

1. Defendants are hereby enjoined from conducting elections for any public offices in the state on Tuesday, March 8, 2022 and, consistent with the response and affidavit of the North Carolina State Board of Elections, defendants instead are directed to hold primaries for all offices on Tuesday, May 17, 2022. The trial court is authorized to issue any orders necessary to accomplish the resulting changes in the election schedule, including implementing shortened filing periods and other administrative adjustments.

2. Any individual who has already filed to run for public office in 2022 and whose filing has been accepted by the appropriate board of elections, will be deemed to have filed for the same office under the new election schedule for the May 2022 primary unless they provide timely notice of withdrawal of their candidacy to the board of elections during the newly-established filing period; and except to the extent that a remedy in this matter, if any, impacts a candidate's eligibility to hold the office for which they have currently filed. Any individual who has properly withdrawn their candidacy is free to file for any other office for which they may be eligible during the reopened filing period.

3. The trial court is directed to hold proceedings necessary to reach a ruling on the merits of plaintiffs' claims and to provide a written ruling on or before Tuesday, January 11, 2022.

4. Any party wishing to appeal the trial court's ruling must file a Notice of Appeal within two business days of the trial court's ruling, exclusive of weekends and holidays, in the trial court and with this Court, and should expect that an expedited briefing and hearing schedule in this Court will commence immediately thereafter.

The Petition for Writ of Supersedeas and Motion for Temporary Stay are dismissed as moot.

By order of the Court in Conference, this the 8th day of December, 2021.

s/Barringer, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 8th day of December, 2021.

AMY L. FUNDERBURK
Clerk, Supreme Court of
North Carolina

s/Amy L. Funderburk
~~Assistant~~ Clerk, Supreme Court of
North Carolina

IN RE	)	
B.B., S.B., S.B.	)	Burke County

No. 24A21

ORDER

Confronted with unique circumstances and potentially speculative requests for inferences from both parties, this Court, in the exercise of its discretion, finds it prudent to remand this case so the parties may supplement the record with evidence related to the trial court's statements on the record concerning respondent-mother's motion to continue on 4 September 2020: specifically, the statement that "[respondent-mother] was prepared for transport yesterday at some point, so she knew of today's court date. She did bond out, but she is not present today, despite the fact that she was aware yesterday and prepared to come to court yesterday."[1]

Given these unique circumstances, this Court, in the exercise of its discretion, also remands this case to the trial court for the trial court to hear respondent-mother's claim of ineffective assistance of counsel. The record before this Court contains no findings of fact or conclusions of law as to the claim of ineffective assistance of counsel because respondent-mother asserted her claim of ineffective assistance of counsel for the first time on appeal and has not sought relief from the trial court.

Hence, within ten days of this order, appellate counsel for respondent-mother may file a Rule 60(b) motion with evidentiary support to set aside the termination-of-parental-rights order as to respondent-mother for ineffective assistance of counsel and serve such on the trial counsel

1. Respondent-mother was served with a notice of a hearing on the termination-of-parental-rights motion, which reflected a hearing time and date of 2:00 p.m. on *3 September 2020*. A writ of habeas corpus ad testificandum was also issued on 31 August 2020 to the Caldwell County Sheriff to bring respondent-mother from the Caldwell County Jail into the custody of the Burke County Sheriff for the Burke County Sheriff to deliver respondent-mother to the Burke County Courthouse, Courtroom #2, at 9:00 a.m. on *4 September 2020*. The hearing on the motion to terminate parental rights occurred on *4 September 2020*, commencing at or about 9:22 a.m. Respondent-mother was not in the courtroom on 4 September 2020 at or about 9:22 a.m. The parties do not dispute that respondent-mother was released from jail the night of 3 September 2020 as represented by respondent-mother's trial counsel and the bailiff at the 4 September 2020 hearing. Because the record reflects that respondent-father was present for the termination-of-parental-rights hearing, this Court does not need supplementation of the record regarding the trial court's statement on the record that "[w]e do have the [r]espondent[-f]ather here."

for respondent-mother, the Guardian ad Litem (GAL), and Burke County Department of Social Services (DSS). Other parties should serve any responsive materials within ten days of receiving respondent-mother's motion.

If any evidentiary hearing is necessary, it shall be calendared with priority and in no event later than twenty-five days from this order. The trial court shall enter an order with any necessary findings of fact and conclusions of law within five days of the evidentiary hearing.

If the Rule 60(b) motion is granted, the trial court shall set aside the termination-of-parental-rights order as to respondent-mother and hold a new hearing on DSS's motion to terminate the parental rights of respondent-mother, and respondent-mother's appellate counsel shall file a notice of dismissal of the appeal before this Court.

If the Rule 60(b) motion is denied, appellate counsel for respondent-mother shall, in consultation with appellate counsel for other parties, file any supplement to the appellate record within thirty-five days of the present order of this Court. Respondent-mother may file a supplemental appellate brief within five days of filing the record supplement, and the GAL and DSS may file responsive briefs within five days of service of respondent-mother's brief. No reply shall be allowed. If necessary, the appeal will then be promptly scheduled for oral argument.

This Court retains jurisdiction and the discretion to enter additional orders to facilitate the prompt adjudication of this appeal.

By order of the Court in Conference, this the 14th day of December 2021.

s/Berger, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 17th day of December 2021.

AMY L. FUNDERBURK
Clerk of the Supreme Court

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

IN RE M.C.B.

[379 N.C. 662 (2021)]

IN THE MATTER OF	)	
M.C.B.	)	Cumberland County

No. 221A21

ORDER

Pursuant to Rule 29(b) of the North Carolina Rules of Appellate Procedure and for cause deemed appropriate, further consideration of the appeal in this matter in this Court shall be held in abeyance pending resolution of the appeal pending in the North Carolina Court of Appeals in this same matter under file number 21-339. The Petition for Discretionary Review, Motion to Suspend the Appellate Rules to Permit Expedited Review and Motion to Consolidate Appeals filed on 29 October 2021 are denied.

By order of the Court in Conference, this the 2nd day of November, 2021.

s/Barringer, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 2nd day of November, 2021.

AMY FUNDERBURK
Clerk of the Supreme Court

s/Amy Funderburk
~~Assistant~~ Clerk

MILLER v. CAROLINA COAST EMERGENCY PHYSICIANS, LLC

[379 N.C. 663 (2021)]

CHARLOTTE POPE MILLER, ADMINISTRATRIX OF THE ESTATE OF THE LATE JOHN LARRY MILLER	)	
v.	)	HARNETT COUNTY
CAROLINA COAST EMERGENCY PHYSICIANS, LLC, HARNETT HEALTH SYSTEM, INC. D/B/A BETSY JOHNSON REGIONAL HOSPITAL, AND DR. AHMAD S. RANA	)	

No. 222P21

ORDER

Upon consideration of the petition filed on the 22nd of June 2021 by defendants in this matter for discretionary review of the decision of the North Carolina Court of Appeals pursuant to N.C.G.S. § 7A-31, the petition is ALLOWED as to:

Issue I – Did the Court of Appeals err in affirming the trial court's order denying Harnett Health's Motion to Dismiss pursuant to Rule 9(j) of the North Carolina Rules of Civil Procedure when Plaintiff-Appellee's Rule 9(j) expert testified that he had never been critical of Harnett Health; and,

Issue II – Did the Court of Appeals err in applying a de novo standard of review instead of an abuse of discretion standard in its exclusion of Dr. Harris.

By order of this Court in Conference, this the 14th day of December 2021.

s/Berger, J.
For the Court

The case is docketed as of the date of this order's certification. Briefs of the respective parties shall be submitted to this Court within the times allowed and in the manner provided by Appellate Rule 15(g)(2).

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 17th day of December 2021.

AMY L. FUNDERBURK
Clerk of the Supreme Court

s/Amy Funderburk
~~Assistant~~ Clerk

N.C. NAACP v. BERGER

[379 N.C. 665 (2021)]

NORTH CAROLINA STATE CONFERENCE OF THE NAACP, COMMON CAUSE, MARILYN HARRIS, GARY GRANT, JOYAH BULLUCK, AND THOMASINA WILLIAMS,	)	
PLAINTIFFS-PETITIONERS,	)	
v.	)	From Wake County
PHILLIP E.BERGER *in his official capacity as President Pro Tempore of the North Carolina Senate*; TIMOTHY K. MOORE *in his official capacity as Speaker of the North Carolina House of Representatives*; RALPH E. HISE, JR., WARREN DANIEL, PAUL NEWTON, *in their official capacities as Co-Chairmen of the Senate Committee on Redistricting and Elections*; DESTIN HALL, *in his official capacity as Chairman of the House Standing Committee on Redistricting*, THE STATE OF NORTH CAROLINA; THE NORTH CAROLINA STATE BOARD OF ELECTIONS; DAMON CIRCOSTA, *in his official capacity as Chair of the State Board of Elections*; STELLA ANDERSON, *in her official capacity as Secretary of the State Board of Elections*; STACY EGGERS IV, *in his official capacity as Member of the State Board of Elections*; JEFF CARMON III, *in his official capacity as Member of the State Board of Elections*; TOMMY TUCKER, *in his official capacity as Member of the State Board of Elections*; KAREN BRINSON BELL, *in her official capacity as Executive Director of the State Board of Elections*,	)	
DEFENDANTS-RESPONDENTS	)	

No. 416P21-1

ORDER

Plaintiffs-petitioners' Motion to Expedite Consideration of Decision in the Public Interest is allowed. Pursuant to Rule 15 of the North Carolina Rules of Appellate Procedure, the Petition for Discretionary Review is dismissed ex mero motu without prejudice to the plaintiffs-petitioners' right to seek leave from the Superior Court to intervene in

the trial court proceedings in the consolidated cases of *Harper v. Hall*, No. 21 CVS 50085 (N.C. Super. Ct., Wake Cnty.) and *North Carolina League of Conservation Voters, Inc. v. Hall*, No. 21 CVS 015426 (N.C. Super. Ct., Wake Cnty.). Plaintiff-petitioners' motions for temporary stay, to disqualify Justice Berger, Jr. and for the pro hac vice admission of J. Tom Boer and Olivia T. Molodanof of the law firm Hogan Lovells US LLP are dismissed as moot.

By order of the Court in Conference, this the 8th day of December, 2021.

s/Barringer, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 8th day of December, 2021.

AMY L. FUNDERBURK
Clerk of the Supreme Court

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

STATE v. ANDERSON

[379 N.C. 667 (2021)]

STATE OF NORTH CAROLINA	)	
	)	
v.	)	Davidson County
	)	
DARRELL TRISTAN ANDERSON	)	

No. 23A21

ORDER

This matter is before this Court on defendant's appeal from a divided panel of the Court of Appeals. The Court of Appeals unanimously held in *State v. Anderson*, 275 N.C. App. 689 (2020), that a resentencing hearing was required because of the trial court's determination that it lacked the discretion to impose concurrent sentences for defendant's two convictions of first-degree murder. Until the trial court holds a resentencing hearing, defendant's appeal is not ripe for resolution. This Court, *ex mero motu*, dismisses the current appeal and remands the matter to the Court of Appeals for further remand to the trial court for a resentencing hearing (with any appeal therefrom proceeding in the usual manner).

By order of the Court in conference, this the 14th day of December 2021.

s/Berger, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 17th day of December 2021.

s/Amy L. Funderburk

AMY L. FUNDERBURK
~~Assistant~~ Clerk of the
Supreme Court

STATE OF NORTH CAROLINA	)	
	)	
v.	)	Rowan County
	)	
KENNETH RUSSELL ANTHONY	)	

No. 352P19-2

ORDER

The State's petition for discretionary review is allowed for the limited purpose of remanding to the Court of Appeals to reconsider its holding in light of this Court's decisions in *State v. Hilton*, 378 N.C. 692, 2021-NCSC-115, and *State v. Strudwick*, 2021-NCSC-127, as well as the General Assembly's recent amendments to the satellite-based monitoring program, *see* Act of Sep. 2, 2021, S.L. 2021-138, § 18, https://www.ncleg.gov/EnactedLegislation/SessionLaws/PDF/2021-2022/SL2021-138.pdf (effective 1 December 2021). The Court of Appeals should take such additional actions as are warranted.

By Order of the Court in Conference, this the 14th day of December 2021.

s/Berger, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 17th day of December 2021.

AMY L. FUNDERBURK
Clerk of the Supreme Court

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

STATE v. COOPER

[379 N.C. 669 (2021)]

STATE OF NORTH CAROLINA	)	
	)	
v.	)	Beaufort County
	)	
ORLANDO COOPER	)	

No. 90P19-2

ORDER

The State's petition for discretionary review is allowed for the limited purpose of remanding to the Court of Appeals to reconsider its holding in light of this Court's decisions in *State v. Hilton*, 378 N.C. 692, 2021-NCSC-115, and *State v. Strudwick*, 2021-NCSC-127, as well as the General Assembly's recent amendments to the satellite-based monitoring program, *see* Act of Sep. 2, 2021, S.L. 2021-138, § 18, https://www.ncleg.gov/EnactedLegislation/SessionLaws/PDF/2021-2022/SL2021-138.pdf (effective 1 December 2021). The Court of Appeals should take such additional actions as are warranted.

By Order of the Court in Conference, this the 14th day of December 2021.

s/Berger, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 17th day of December 2021.

AMY L. FUNDERBURK
Clerk of the Supreme Court

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

STATE v. GORDON

[379 N.C. 670 (2021)]

STATE OF NORTH CAROLINA	)	
	)	
v.	)	FORSYTH COUNTY
	)	
AARON LEE GORDON	)	

No. 312PA18-2

ORDER

This case is remanded to the Court of Appeals for further consideration in light of this Court's decisions in *State v. Hilton*, 2021-NCSC-115 and *State v. Strudwick*, 2021-NCSC-127, as well as the General Assembly's recent amendments to the satellite-based monitoring program, *see* Act of Sep. 2, 2021, S.L. 2021-138, § 18, https://www.ncleg.gov/EnactedLegislation/SessionLaws/PDF/2021-2022/SL2021-138.pdf (effective 1 December 2021). The Court of Appeals should take such additional actions as are warranted.

By order of the Court in Conference, this the 14th day of December, 2021.

s/Berger, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 17th day of December, 2021.

AMY L. FUNDERBURK
Clerk of the Supreme Court

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

STATE v. GRIFFIN

[379 N.C. 671 (2021)]

STATE OF NORTH CAROLINA	)	
	)	
v.	)	Craven County
	)	
THOMAS EARL GRIFFIN	)	

No. 270A18-2

ORDER

This case is remanded to the Court of Appeals to reconsider its holding in light of this Court's decisions in *State v. Hilton*, 378 N.C. 692, 2021-NCSC-115, and *State v. Strudwick*, 2021-NCSC-127, as well as the General Assembly's recent amendments to the satellite-based monitoring program, *see* Act of Sep. 2, 2021, S.L. 2021-138, § 18, https://www.ncleg.gov/EnactedLegislation/SessionLaws/PDF/2021-2022/SL2021-138.pdf (effective 1 December 2021). The Court of Appeals should take such additional actions as are warranted.

By Order of the Court in Conference, this the 14th day of December 2021.

s/Berger, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 17th day of December 2021.

AMY L. FUNDERBURK
Clerk of the Supreme Court

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

STATE OF NORTH CAROLINA	)	
	)	
v.	)	Granville County
	)	
VINCENT LAMONT HARRIS	)	

No. 548A04-3

ORDER

The State's notice of appeal is decided as follows: The Court, on its own motion, dismisses the State's appeal and remands this case to the Court of Appeals to reconsider its holding in light of this Court's decisions in *State v. Hilton*, 378 N.C. 692, 2021-NCSC-115, and *State v. Strudwick*, 2021-NCSC-127. The Court of Appeals should further remand this matter to the trial court for proceedings under the General Assembly's recent amendments to the satellite-based monitoring program, *see* Act of Sep. 2, 2021, S.L. 2021-138, § 18, https://www.ncleg.gov/Enacted Legislation/SessionLaws/PDF/2021-2022/SL2021-138.pdf (effective 1 December 2021). Defendant's motion to dismiss the State's appeal is dismissed as moot.

By Order of the Court in Conference, this the 14th day of December 2021.

s/Berger, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 17th day of December 2021.

AMY L. FUNDERBURK
Clerk of the Supreme Court

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

STATE v. O'KELLY

[379 N.C. 673 (2021)]

STATE OF NORTH CAROLINA	)	
	)	
v.	)	DURHAM COUNTY
	)	
D'MONTE LAMONT O'KELLY	)	

No. 295P21

ORDER

The State's petition for discretionary review is allowed for the limited purpose of remanding to the Court of Appeals to reconsider its holding in light of this Court's decisions in *State v. Hilton*, 2021-NCSC-115, and *State v. Strudwick*, 2021-NCSC-127, as well as the General Assembly's recent amendments to the satellite-based monitoring program, *see* Act of Sep. 2, 2021, S.L. 2021-138, § 18, https://www.ncleg.gov/EnactedLegislation/SessionLaws/PDF/2021-2022/SL2021-138.pdf (effective 1 December 2021). The Court of Appeals should take such additional actions as are warranted.

By Order of the Court in Conference, this the 14th day of December, 2021.

s/Berger, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 17th day of December, 2021.

AMY L. FUNDERBURK
Clerk of the Supreme Court

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

WILSON v. OSADNICK

[379 N.C. 674 (2021)]

FREDERICK WILSON	)	
	)	
v.	)	PAMLICO COUNTY
	)	
KEN OSADNICK, ET AL.	)	

No. 400P21

ORDER

Plaintiff's motions for relief filed on 16 and 22 November 2021 are dismissed.

By order of this Court in Conference, this the 14th day of December, 2021.

s/Berger, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 17th day of December, 2021.

AMY L. FUNDERBURK
Clerk of the Supreme Court

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

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

17 DECEMBER 2021

9A21	In the Matter of L.M.M.	1. Petitioners' Motion for Sanctions Pursuant to Rule 25(b) 2. Petitioners' Motion for Sanctions Pursuant to Rule 34 3. Respondent-Father's Petition for Writ of Certiorari to Review Order of District Court, Gaston County	1. Denied 2. Denied 3. Allowed
19A21	In the Matter of D.C.	Respondent-Parents' Joint Petition for Rehearing	Denied **11/15/2021**
19A21-2	In the Matter of D.C.	1. Respondent-Parents' Motion Seeking Clarification 2. Respondent-Parents' Motion in the Alternative for Reconsideration of the Court's Ruling	1. Dismissed 2. Dismissed
23A21	State v. Darrell Tristan Anderson	North Carolina Advocates for Justice's Motion to Amend Brief	Allowed **10/29/2021**
23A21	State v. Darrell Tristan Anderson	The Court's *Ex Mero Motu* Motion to Remand	Special Order
24A21	In the Matter of B.B., S.B., S.B.	The Court's *Ex Mero Motu* Motion to Remand	Special Order
31P21	State v. Jonathan Matthew Harris	Def's PDR Under N.C.G.S. § 7A-31 (COA19-1156)	Denied
40PA20	State v. Leonard Paul Schalow	1. Def's Motion for Judicial Notice 2. Def's Supplemental Motion for Judicial Notice	1. Dismissed as moot 2. Dismissed as moot
55A21	In the Matter of K.A.M.A.	Petitioner's Motion to Amend the Record on Appeal	Allowed
64A21	State v. Riley Dawson Conner	North Carolina Advocates for Justice's Motion to Amend Brief (COA19-1087)	Allowed **10/29/2021**
90P19-2	State v. Orlando Cooper	1. State's Motion for Temporary Stay (COA18-637-2) 2. State's Petition for Writ of Supersedeas 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **11/06/2020** Dissolved **12/14/2021** 2. Denied 3. Special Order

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

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94P21	State v. Anthony Mark Esposito	1. Def's Petition for Writ of Certiorari to Review Order of the COA (COAP21-47) 2. Def's Petition for Writ of Certiorari to Review Order of Superior Court 3. Def's Petition for Writ of Mandamus 4. Def's Motion to Arrest Criminal Judgment	1. Denied 2. Denied 3. Denied 4. Denied
95P21	State v. Paul Edward Swino	Def's PDR Under N.C.G.S. § 7A-31 (COA20-302)	Denied
102A20-2	Chester Taylor, III, Ronda and Brian Warlick, Lori Mendez, Lori Martinez, Crystal Price, Jeanette and Andrew Aleshire, Marquita Perry, Whitney Whiteside, Kimberly Stephan, Keith Peacock, Zelmon McBride v. Bank of America, N.A.	Def's Motion to Admit Keith Levenberg and James McGarry Pro Hac Vice	Allowed **12/07/2021**
102A21	In the Matter of C.N.R.	Petitioner's Motion to Amend the Record on Appeal	Dismissed as moot
103P21	Wright Construction Services, Inc. v. the Hard Art Studio, PLLC, George W. Carter, Jr., Collins Structural Consulting, PLLC, and Scott A. Collins	1. Defs' (The Hard Art Studio, PLLC, and George W. Carter, Jr.) PDR Under N.C.G.S. § 7A-31 (COA19-1089) 2. Defs' (Collins Structural Consulting, PLLC, and Scott A. Collins) PDR Under N.C.G.S. § 7A-31	1. Denied 2. Denied
104P21	Molly Schwarz v. Thomas J. Weber, Jr., D.O.	1. Def's Motion to Strike Reply 2. Def's Motion for Reasonable Attorney Fees 3. Plt's Motion to Withdraw Reply to Response to PDR 4. Def's Motion for Sanctions	1. Dismissed as moot **11/04/2021** 2. Denied **11/04/2021** 3. Dismissed as moot **11/04/2021** 4. Denied **11/04/2021**
112P21	State v. Shakur Deandre Stephenson	Def's Pro Se Motion for Appropriate Relief	Dismissed

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

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126P21	State v. Yul V. Bannerman	1. Def's PDR Under N.C.G.S. § 7A-31 (COA20-495) 2. State's Conditional PDR	1. Denied 2. Dismissed as moot
132P16-2	State v. Calvin Sherwood Watts	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA20-158) 2. Def's PDR Under N.C.G.S. § 7A-31 3. Def's Motion to Amend Certificate of Service 4. State's Motion to Dismiss Appeal	1. --- 2. Denied 3. Allowed 4. Allowed
135P21	Amy H. Alexander, Plaintiff, v. Edward D. Alexander, Defendant v. Charles Alexander and Claria Alexander, Intervenor-Defendants	1. Intervenor-Defs' PDR Under N.C.G.S. § 7A-31 (COA19-391) 2. Plt's Notice of Appeal Based Upon a Constitutional Question 3. Plt's Petition in the Alternative for Discretionary Review Under N.C.G.S. § 7A-31	1. Denied 2. Dismissed *ex mero motu* 3. Denied
143P21	In the Matter of Grievance Against John Scott Austin, Attorney	Petitioner's Pro Se Motion to Review Dismissal of Grievance	Dismissed
148P14-2	Frankie Delano Washington and Frankie Delano Washington, Jr. v. Tracey Cline, Anthony Smith, William Bell, John Peter, Andre T. Caldwell, Moses Irving, Anthony Marsh, Edward Sarvis, Beverly Council, Steven Chalmers, Patrick Baker, the City of Durham, NC, and the State of North Carolina	1. Plt's (Frankie Delano Washington) Notice of Appeal Based Upon a Constitutional Question (COA18-1069) 2. Plt's (Frankie Delano Washington) PDR Under N.C.G.S. § 7A-31 3. Defs' (Tracey Cline & State of NC) Motion to Dismiss Appeal	1. --- 2. Allowed 3. Allowed

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

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150P21	State v. Namique Farrow	1. Def's Emergency Motion for Temporary Stay	1. Allowed **05/06/2021** Dissolved **12/14/2021**
		2. Def's Petition for Writ of Supersedeas	2. Denied
		3. Def's Petition for Writ of Certiorari to Review Order of Superior Court, Lee County	3. Denied
		4. Def's Petition for Writ of Certiorari to Review Order of Superior Court, Lee County	4. Denied **12/03/2021**
166A21	In the Matter of J.C. and D.C.	Petitioner's Motion for Leave to File a Motion to Correct the March 29, 2021 Order in the District Court	Denied
167A21	Inhold, LLC and Novalent, LTD. v. Pureshield, Inc.; Joseph Raich; and Viaclean Technologies, LLC	1. Plts' Motion to Dismiss Appeal	1. Allowed
		2. Defs' Motion for Extension of Time to File Response	2. Allowed **05/24/2021**
		3. Defs' Motion to Admit Brian Paul Gearing, Ali H.K. Tehrani, and Joshua M. Rychlinski Pro Hac Vice	3. Allowed **06/15/2021**
		4. Defs' Motion for Leave to File Corrected Opposition to Motion to Dismiss	4. Allowed **08/06/2021**
180P21	Sharon Cash West, Wife of Keith West (Decedent), Jessica West Hayes, Adult Daughter of Keith West (Decedent), Raymond West, Adult Son of Keith West (Decedent), and Shannon Stocks v. Hoyle's Tire & Axle, LLC, Employer and Travelers Indemnity Company, Carrier	Plt's (Shannon Stocks) PDR Under N.C.G.S. § 7A-31 (COA20-470)	Allowed
189P21-2	Michael Buttacavoli v. Maris F. Buttacavoli	Plt's Pro Se Motion for Correction of Facts	Dismissed **Berger, J., recused**
201P21	Judith E. Crosland v. Bailey Patrick, Jr., as Executor of the Estate of John Crosland, Jr.	1. Petitioner's PDR Under N.C.G.S. § 7A-31 (COA19-713-2)	1. Denied
		2. Respondent's Motion for Correction in Response to PDR	2. Allowed
		3. Petitioner's Motion to Strike	3. Denied

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

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204P21	State v. Shanion J. Donta Watson	Def's PDR Under N.C.G.S. § 7A-31 (COA20-147)	Denied
211P21-2	Marvin Millsaps v. Joshua H. Stein	1. Petitioner's Pro Se Motion for Notice of Appeal of Final Judgment of Commission 2. Petitioner's Pro Se Motion to Proceed Without Prepaying Fees or Costs	1. Dismissed 2. Dismissed
212P21-3	State v. Milton Eugene Lancaster	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA20-727) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. --- 2. Denied 3. Allowed
221A21	In the Matter of M.C.B.	1. Petitioner's Motion to Dismiss Appeal 2. Guardian ad Litem's Motion to Dismiss Appeal 3. Guardian ad Litem's PDR Prior to a Determination by the COA 4. Guardian ad Litem's Motion to Suspend the Appellate Rules to Permit Expedited Review 5. Guardian ad Litem's Motion to Consolidate Appeals	1. 2. 3. Special Order **11/02/2021** 4. Special Order **11/02/2021** 5. Special Order **11/02/2021**
222P21	Charlotte Pope Miller, Administratrix of the Estate of the Late John Larry Miller v. Carolina Coast Emergency Physicians, LLC, Harnett Health System, Inc. d/b/a Betsy Johnson Regional Hospital, and Dr. Ahmad S. Rana	Def's (Harnett Health Systems, Inc. d/b/a Betsy Johnson Regional Hospital) PDR Under N.C.G.S. § 7A-31 (COA20-399)	Special Order
224P21	State v. Walter McKoy	Def's PDR Under N.C.G.S. § 7A-31 (COA20-582)	Denied
234P21	State v. Michael Anthony O'Neal	Def's PDR Under N.C.G.S. § 7A-31 (COA20-375)	Denied
236P21	State v. Shawn Martez McKoy	Def's PDR Under N.C.G.S. § 7A-31 (COA20-452)	Denied

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

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237P21	Ascendum Machinery, Inc. f/k/a ASC Construction Equipment USA v. Edward C. Kalebich	Plt's PDR Under N.C.G.S. § 7A-31	Denied **10/27/2021**
254P21	State v. Demorris Van Cathcart, II	Def's PDR Under N.C.G.S. § 7A-31 (COA20-872)	Denied **Berger, J., recused**
261A18-3	North Carolina State Conference of the National Association for the Advancement of Colored People v. Tim Moore, in his official capacity, Philip Berger, in his official capacity	1. Plt's Motion to Disqualify Justice Barringer and Justice Berger (COA19-384)	1.
		2. Former Chairs of the North Carolina Judicial Standards Commission's Motion for Leave to File Amicus Brief	2. Allowed **10/29/2021**
		3. North Carolina Professors of Professional Responsibility's Motion for Leave to File Amicus Brief	3. Allowed **11/02/2021**
		4. North Carolina Professors of Constitutional Law's Motion for Leave to File Amicus Brief	4. Allowed **11/02/2021**
		5. North Carolina Institute for Constitutional Law and the John Locke Foundation Motion for Leave to File Amicus Brief	5. Allowed **11/04/2021**
		6. Scholars of Judicial Ethics and Professional Responsibility's Motion for Leave to File Amicus Brief	6. Allowed **11/05/2021**
		7. Brennan Center for Justice at New York University School of Law's Motion for Leave to File Amicus Brief	7. Allowed **11/05/2021**
		8. North Carolina Legislative Black Caucus's Motion for Leave to File Amicus Brief	8. Allowed **11/05/2021**
		9. Legislative Black Caucus' Motion to Admit Aaron Marcu Pro Hac Vice	9. Allowed **11/15/2021**
		10. Legislative Black Caucus' Motion to Admit Shannon McGovern Pro Hac Vice	10. Allowed **11/15/2021**
264A21	State v. Isaiah Scott Beck	1. State's Motion for Temporary Stay (COA20-499)	1. Allowed **07/26/2021**
		2. State's Petition for Writ of Supersedeas	2. Allowed
		3. State's Notice of Appeal Based Upon a Dissent	3. ---
		4. Def's PDR Under N.C.G.S. § 7A-31	4. Allowed

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

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270A18-2	State v. Thomas Earl Griffin	The Court's *Ex Mero Motu* Motion to Remand	Special Order
271P21	Lamont Jeremiah McCauley v. Department of Social Services/ Davidson County Child Support Services/Wendy Burchan	Petitioner's Pro Se Petition for Writ of Mandamus	Denied **11/18/2021**
276A21	State v. Michael Steven Elder	Def's PDR Under N.C.G.S. § 7A-31 (COA20-215)	Denied
280P21-2	Travis Wayne Baxter v. Roy Cooper USA Attorney LEO Act	1. Plt's Pro Se Motion for Petition for Constitutional Question 2. Plt's Pro Se Motion for Removal to Court of Appeals 3. Plt's Pro Se Motion for New Appeal/s and Consolidation	1. Dismissed 2. Dismissed 3. Dismissed
283P21-6	American Transportation Group Insurance Risk Retention Group v. MVT Insurance Services, Inc., Amrit Singh, Eleazar Rojas, and Shamsher Singh	1. Def's (Amrit Singh) Pro Se Motion to Dismiss Case Due to Plt's Failure to Adhere to Rule 37 2. Def's (Amrit Singh) Pro Se Motion for Order to Show Cause for Plt's Failure to Adhere to Rule 37 and as to Why They Should Not Be Held in Civil Contempt	1. Dismissed 2. Dismissed
288A21	In the Matter of J.C.J. & J.R.J.	1. Guardian ad Litem's Motion to Withdraw Brief 2. Guardian ad Litem Program's Motion for Leave to File Amicus Brief	1. Allowed **11/12/2021** 2. Allowed **11/30/2021**
295P21	State v. D'Monte Lamont O'Kelly	1. State's Motion for Temporary Stay (COA20-693) 2. State's Petition for Writ of Supersedeas 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **08/20/2021** Dissolved **12/14/2021** 2. Denied 3. Special Order
298A21	State v. David Myron Dover	1. State's Notice of Appeal Based Upon a Dissent (COA20-362) 2. State's Motion to Withdraw and Substitute Counsel	1. --- 2. Allowed **11/10/2021**
304P21	State v. Patrick Jamaal Chambers	Def's PDR Under N.C.G.S. § 7A-31 (COA20-238)	Denied

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

17 DECEMBER 2021

305P19-2	State v. Walter Paul Thomas	1. Def's Pro Se Petition for Writ of Certiorari to Review Decision of the COA 2. Def's Pro Se Motion to Proceed *In Forma Pauperis* 3. Def's Pro Se Motion to Appoint Counsel	1. Denied 2. Allowed 3. Dismissed as moot
312PA18-2	State v. Aaron Lee Gordon	The Court's *Ex Mero Motu* Motion to Remand	Special Order
313A21	In the Matter of J.R.	Respondents and State's Joint Motion to Designate Lead Case (COA20-457)	Allowed **11/15/2021**
330P21	State v. Cordero Deon Newborn	1. State's Motion for Temporary Stay (COA20-411) 2. State's Petition for Writ of Supersedeas 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **09/03/2021** 2. Allowed 3. Allowed
334P01-2	State v. Michael Dwayne Rogers	1. Def's Pro Se Petition for Writ of Certiorari to Review Order of Superior Court, Cumberland County 2. Def's Motion to Appoint Counsel	1. Dismissed 2. Dismissed as moot
337P21	State v. Ramon Davaul Malone-Bullock	Def's PDR Under N.C.G.S. § 7A-31 (COA20-334)	Denied

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

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340P21	Ethel P. Goforth Primary Trust, by and Through R. Lynn Goforth, Sue Goforth Hedrick, and Deborah Goforth-Taylor, as Trustees v. LR Development-Charlotte, LLC, Mark F. Jones, Nubia E. Jones, Warren S. Boger, Christopher E. Clark, Keri I. Clark, Christy R. Millsaps, Melanie J. Ellis, Scott Tucker, Jennifer Tucker, Cassandra Y. Patterson, Elmber B. Barber, Melinda N. Barber, Thomas N. Scott, Ashley E. Lail, James Holly, Timothy S. Lefever as Trustee of the 178 Wedge Way View Trust, Constance N. Terll as Trustee of the Constance N. Terll Revocable Living Trust, Lewis J. Tondo, Lilia R. Cox, Alan J. Zanotti Revocable Living Trust, James Seth Key, Charles Robert Fogle, Valarie A. Fogle, and Walter H. Jones, Jr. as Trustee of That Certain Deed of Trust Executed by Fox Den Development Company, LLC Dated May 19, 2004, and Recorded in Book 1621 at Page 1101, Iredell County Registry	1. Plt's PDR Under N.C.G.S. § 7A-31 (COA20-558) 2. Plt's Motion for Withdrawal of PDR	1. --- 2. Allowed **11/10/2021**
348A21	In the Matter of N.W., J.W., L.W.	Petitioner's Motion to Amend Record on Appeal	Allowed **11/03/2021**

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351P21	Susan Lynn Moschos v. Stergios Moschos	1. Def's PDR Under N.C.G.S. § 7A-31 (COA20-919)	1. Denied **12/10/2021**
		2. Def's Motion for Temporary Stay	2. Denied **12/10/2021**
		3. Def's Petition for Writ of Supersedeas	3. Denied **12/10/2021**
		4. Def's Motion for Determination that Judge Hall's 22 November 2021 Order is Void	4. Denied **12/10/2021**
		5. Def's Motion for Costs of Undertaking Petition for Writ of Supersedeas and Motion for Stay	5. Denied **12/10/2021**
352P19-2	State v. Kenneth Russell Anthony	1. State's Motion for Temporary Stay (COA18-1118-2)	1. Allowed **12/04/2020** Dissolved **12/14/2021**
		2. State's Petition for Writ of Supersedeas	2. Denied
		3. State's PDR Under N.C.G.S. § 7A-31	3. Special Order
352P21	State v. Kisha Joann Welch	Def's PDR Under N.C.G.S. § 7A-31 (COA20-642)	Denied
353P21-2	State v. Travis Wayne Baxter	1. Def's Pro Se Motion for Notice of Constitutional Exception to the Question of Public Policy	1. Dismissed
		2. Def's Pro Se Motion to Dismiss Case and Appropriate Fees be Awarded	2. Dismissed
		3. Def's Pro Se Motion for Leave of the Court Along with a Stay Put in Place on the Docket	3. Dismissed
		4. Def's Pro Se Motion for Court to Address the Fundamentals of the Case	4. Dismissed
		5. Def's Pro Se Petition for Writ of Habeas Corpus	5. Denied **11/04/2021**
		6. Def's Pro Se Motion for Removal to Court of Appeals	6. Dismissed
		7. Def's Pro Se Motion for New Appeal/s and Consolidation	7. Dismissed
356P21	State v. Jody Allen Tarlton	1. Def's Pro Se PDR Under N.C.G.S. § 7A-31 (COA20-100)	1. Denied
		2. Def's Pro Se Motion to Dismiss	2. Dismissed
359P21	Cheryl A. Groves v. Governor of North Carolina Roy Cooper	Petitioner's Pro Se Petition for Writ of Mandamus	Denied **11/03/2021**

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361P21	911 S. 3rd Street, LLC v. Robert Emory Creech	Def's Pro Se Petition for Writ of Certiorari to Review Order of the COA (COA21-414)	Denied
362P21	Epes Logistics Services, Inc. v. Steen Marcuslund, Anthony De Piante, Jillian Caron, Brad Wiedner, Login Logistics, LLC, and Noble Worldwide Logistics, LLC	1. Defs' (Anthony De Piante, Jillian Caron, Brad Wiedner, and Noble Worldwide Logistics, LLC) Motion for Temporary Stay (COA20-338) 2. Defs' (Anthony De Piante, Jillian Caron, Brad Wiedner, and Noble Worldwide Logistics, LLC) Petition for Writ of Supersedeas 3. Defs' (Anthony De Piante, Jillian Caron, Brad Wiedner, and Noble Worldwide Logistics, LLC) PDR Under N.C.G.S. § 7A-31	1. Allowed **09/27/2021** Dissolved **12/14/2021** 2. Denied 3. Denied
364A20	In the Matter of M.Y.P.	Petition for Rehearing	Denied **11/12/2021**
365P21	Glenda K. Gribble v. Charles D. Bostian, Jr. and Wife Alma Jean Bostian	Plt's PDR Under N.C.G.S. § 7A-31 (COA20-412)	Denied
367P21	State v. Guy Everette Boyd, III	1. Def's Pro Se Motion for Review 2. Def's Pro Se Motion to Amend	1. Dismissed 2. Dismissed
369P21	State v. David Wayne Hemrick	1. Def's PDR Under N.C.G.S. § 7A-31 (COAP21-345) 2. Def's Petition for Writ of Certiorari to Review Order of the COA	1. Dismissed 2. Denied
375P21	85' and Sunny, LLC v. Currituck County	Petitioner's PDR Under N.C.G.S. § 7A-31 (COA20-648)	Denied
377P21	State v. Jeffrey Tremont Suggs	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA20-596) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. --- 2. Denied 3. Allowed
379P21	State v. Hakeem Sanders	Def's PDR Under N.C.G.S. § 7A-31 (COA20-460)	Denied
384P21	State v. Adam John Wheeler	1. Def's Pro Se Motion to take Judicial Notice of Jurisdiction of the Elements of the Dismissed and Elements in Pleading for Double Jeopardy Purposes 2. Def's Pro Se Motion for Pendent Jurisdiction Same Offense	1. Dismissed 2. Dismissed

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386P21	State v. James Opleton Bradley	Def's PDR Under N.C.G.S. § 7A-31 (COA20-566)	Denied
388P21	State v. Anthony Lamont McNeill	1. Def's Pro Se Motion for Judicial Review 2. Def's Pro Se Motion to I nvestigate Cases	1. Dismissed 2. Dismissed
389P20-2	State v. Gordon V. Hendricks, Jr.	1. Def's Pro Se Motion for Grievance and Cruel and Unusual Punishment Declaration (COAP20-322) 2. Def's Pro Se Motion of Grievance (Complaint) 3. Def's Pro Se Motion of Tort	1. Dismissed 2. Dismissed 3. Dismissed
389P21	Thomas F. Kennihan, Jr. v. Elizabeth Palmer	Def's Pro Se Petition for Writ of Mandamus	Denied **11/04/2021**
389P21-2	Thomas F. Kennihan, Jr. v. Elizabeth Palmer	1. Def's Pro Se Motion to Deem Timely 2. Def's Pro Se Motion to Deem Timely 3. Plt's Motion to Dismiss Def's Petition for Writ of Mandamus 4. Def's Pro Se Motion to Seal Documents	1. Dismissed 2. Dismissed 3. Dismissed as moot 4. Allowed
393P20	In the Matter of L.N.H.	1. Petitioner's PDR Under N.C.G.S. § 7A-31 (COA19-1020) 2. Respondent-Mother's Conditional PDR Under N.C.G.S. § 7A-31 3. Petitioner and Guardian ad Litem's Motion for Temporary Stay 4. Petitioner and Guardian ad Litem's Petition for Writ of Supersedeas	1. Allowed 2. Allowed 3. Allowed **10/14/2020** 4. Allowed
398P21	Duke Energy Carolinas, LLC, Plaintiff v. Michael L. Kiser, Robin S. Kiser, and Sunset Keys, LLC, Defendants/Third-Party Plaintiffs v. Thomas E. Schmitt and Karen A. Schmitt, et al., Third-Party Defendants	Plt's Motion for Temporary Stay (COA20-333)	Allowed **11/15/2021** **Ervin, J., recused**
399P21	State v. Casey Allen May	Def's Pro Se PDR Under N.C.G.S. § 7A-31 (COA20-703)	Denied

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

17 DECEMBER 2021

400P21	Frederick Wilson v. Ken Osadnick, et al.	1. Plt's Pro Se Motion to Consider Motion to Proceed in Normative Jurisprudence	1. Special Order
		2. Plt's Pro Se Motion for Subpoena	2. Special Order
		3. Plt's Pro Se Motion for Subpoena	3. Special Order
		4. Plt's Motion to Consider Motion to Proceed in Normative Jurisprudence	4. Special Order
		5. Plt's Pro Se Motion for Subpoena	5. Special Order
		6. Plt's Pro Se Motion for Subpoena	6. Special Order
		7. Plt's Pro Se Motion for Subpoena	7. Special Order
		8. Plt's Pro Se Motion for Subpoena	8. Special Order
		9. Plt's Pro Se Motion for Subpoena	9. Special Order
		10. Plt's Pro Se Motion for Subpoena	10. Special Order
		11. Plt's Pro Se Motion for Subpoena	11. Special Order
		12. Plt's Pro Se Motion for Subpoena	12. Special Order
		13. Plt's Pro Se Motion for Subpoena	13. Special Order
		14. Plt's Pro Se Motion for Subpoena	14. Special Order
		15. Plt's Pro Se Motion for Subpoena	15. Special Order
		16. Plt's Pro Se Motion for Subpoena	16. Special Order
		17. Plt's Pro Se Motion for Subpoena	17. Special Order
402A21	State v. Montez Gibbs	1. State's Motion for Temporary Stay (COA20-591)	1. Allowed **11/19/2021**
		2. State's Petition for Writ of Supersedeas	2.

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

17 DECEMBER 2021

402P20	State v. Avenger Ridgeway	1. Def's Pro Se Motion for Order to Lower Court to have Hearing on Ineffective Assistance of Counsel Claims 2. Def's Pro Se Motion to Appoint Counsel 3. Def's Pro Se Motion to Amend	1. Denied 2. Dismissed as moot 3. Allowed **Ervin, J., recused**
404P21	State v. Halo Garrett	1. Def's Motion for Temporary Stay (COA19-1171) 2. Def's Petition for Writ of Supersedeas	1. Allowed **11/19/2021** 2.
407P20-4	State v. Archie M. Sampson	Def's Motion for Review of Trial Issue for Newly Discovered Evidence	Dismissed
410P21	State v. Devin Charles Singleton	1. Def's Pro Se Motion to Replace Lawyer 2. Def's Pro Se Motion for Speedy Trial	1. Dismissed **11/29/2021** 2. Dismissed **11/29/2021**
412P21	State v. Roger Levern Sanders	1. Def's Motion for Temporary Stay (COA21-89) 2. Def's Petition for Writ of Supersedeas	1. Allowed **12/03/2021** 2.

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

17 DECEMBER 2021

413P21	Harper, et al. v. Hall, et al., and NC League of Conservation Voters, et al. v. Hall	1. Plts' (Harper, et al.) PDR Prior to Determination by the COA (COAP21-525)	1. Special Order **12/08/2021**
		2. Plts' (Harper, et al.) Motion to Suspend Appellate Rules to Expedite a Decision	2. Special Order **12/08/2021**
		3. Plts' (Harper, et al.) Motion for Prompt Disqualification of Justice Berger, Jr.	3.
		4. Plts' (Harper, et al.) Motion in the Alternative for Deferred Consideration of Disqualification Following the Court's Resolution of PDR Prior to a Determination by the COA	4.
		5. Plts' (N.C. League of Conservation Voters, Inc., et al.) PDR Prior to Determination by the COA	5. Special Order **12/08/2021**
		6. Plts' (N.C. League of Conservation Voters, Inc., et al.) Petition in the Alternative for Writ of Certiorari to Review Order of Superior Court, Wake County	6. Special Order **12/08/2021**
		7. Plts' (N.C. League of Conservation Voters, Inc., et al.) Motion to Suspend Appellate Rules and Expedite Schedule	7. Special Order **12/08/2021**
		8. Plts' (N.C. League of Conservation Voters, Inc., et al.) Petition for Writ of Supersedeas or Prohibition	8. Special Order **12/08/2021**
		9. Governor Roy A. Cooper, III and Attorney General Joshua H. Stein's Motion for Leave to File Amicus Brief	9.
		10. Plts' (N.C. League of Conservation Voters, Inc., et al.) Motion for Temporary Stay	10.
		11. Plts' (Harper, et al.) Notice of Joinder of Motion for Temporary Stay	11.
		12. Defs' (Hall, et al.) Notice of Intent to Respond	12.

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

17 DECEMBER 2021

416P21	NC NAACP, et al. v. Berger, et al.	1. Plts' PDR Prior to Determination by the COA	1. Special Order **12/08/2021**
		2. Plts' Motion to Expedite Consideration of Decision in the Public Interest	2. Special Order **12/08/2021**
		3. Plts' Motion for Disqualification of Justice Berger, Jr.	3. Special Order **12/08/2021**
		4. Plts' Motion to Admit J. Tom Boer and Olivia T. Molodanof Pro Hac Vice	4. Special Order **12/08/2021**
		5. Plts' Motion for Temporary Stay	5. Special Order **12/08/2021**
		6. Defs' Notice of Intent to Respond	6. ---
421P21	State v. John Anthony Rouse	Def's Pro Se Petition for Writ of Mandamus	Denied **12/10/2021**
422P21	Allan Michael Smith v. Emily Cowan	Plt's Pro Se Petition for Writ of Habeas Corpus	Denied **12/10/2021**
430P20	Diana Tsonev for the Estate of Robert Shearer and Minerva Shearer by Diana Tsonev v. McAir, Inc. d/b/a Outer Banks Heating & Cooling and McAir, Inc. d/b/a Dr. Energy Saver	Plt's PDR Under N.C.G.S. § 7A-31 (COA19-674)	Denied
438P20	State v. Carleton Edwin Davis, Jr.	Def's PDR Under N.C.G.S. § 7A-31 (COA19-546)	Denied **Berger, J., recused**
442PA20	State v. James Ryan Kelliher	North Carolina Advocates for Justice's Motion to Amend Brief (COA19-530)	Allowed **10/29/2021**
470P20	Cassia Ferreira Jordao v. Nivaldo Jordao	Plt's PDR Under N.C.G.S. § 7A-31 (COA19-858)	Denied

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

17 DECEMBER 2021

476P20-2	Timothy Omar Hankins, Sr. v. Sardia M. Hankins, Officers of the Court, Wake County District Court	1. Petitioner's Pro Se Motion for Removal of Case and Review 15CVD7476 2. Petitioner's Pro Se Motion for Removal of Case and Review 14CVD8806 3. Petitioner's Pro Se Motion for Petition for Review and Appropriate Relief	1. Dismissed 2. Dismissed 3. Dismissed
479P11-2	State v. Charles O'Brien Teague	Def's Pro Se Motion to Consolidate Sentences	Dismissed
507P20	State v. Michael Ray Waterfield	1. Def's Motion for Temporary Stay (COA19-813) 2. Def's Petition for Writ of Supersedeas 3. Def's PDR Under N.C.G.S. § 7A-31	1. Allowed **12/11/2020** 2. 3.
511A20	In the Matter of S.C.C.	Respondent-Mother's Petition for Rehearing	Denied **12/09/2021**
548A04-3	State v. Vincent Lamont Harris	1. Notice of Appeal Based Upon a Dissent 2. Def's Motion to Dismiss Appeal	1. Special Order 2. Special Order

APPENDIXES

ORDER CONCERNING RECUSAL MOTIONS

RULES OF APPELLATE PROCEDURE

GENERAL RULES OF PRACTICE

ELECTION AND APPOINTMENT OF STATE BAR COUNCILORS

LEGAL SPECIALIZATION

CERTIFICATION STANDARDS FOR CHILD WELFARE LAW SPECIALTY

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PRACTICAL TRAINING OF LAW STUDENTS

SUPREME COURT OF NORTH CAROLINA

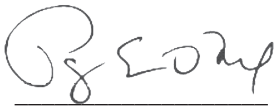
ORDER

Pursuant to the powers conferred by the North Carolina Constitution and General Statutes, the Court hereby determines that with regard to any motion filed with the Court under Rule 37 of the North Carolina Rules of Appellate Procedure seeking the recusal or disqualification of a Justice from participation in the deliberation and decision of a matter pending before the Court, the Court shall assign the motion to the Justice who is the subject of the motion for their determination. That determination shall be final.

As an alternative, any Justice who is the subject of a recusal or disqualification motion filed with the Court may decline to decide the motion on their own and exercise the discretion to refer the motion to the full Court for disposition without their participation. In that instance, a majority of the Court must concur to disqualify a Justice from participating in the deliberation and decision of a case. The determination by the Court shall then be final.

Any Order reporting the disposition on a motion to recuse shall indicate whether it was decided by the Justice who was the subject of the motion or was by them referred to the remaining members of the Court for decision.

By order of the Court in Conference, this the 23rd day of December, 2021.



For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 23rd day of December, 2021.

AMY L. FUNDERBURK
Clerk, Supreme Court of
North Carolina

s/Amy L. Funderburk
~~Assistant~~ Clerk, Supreme Court of
North Carolina

ORDER AMENDING THE RULES OF APPELLATE PROCEDURE

Pursuant to Article IV, Section 13(2), of the Constitution of North Carolina, the Court hereby amends the North Carolina Rules of Appellate Procedure. This order affects Rules 3.1, 5, 6, 7, 9, 10, 11, 12, 13, 14, 15, 17, 18, 21, 22, 23, 24, 26, 27, 28, 30, 34, 37, and 39, and Appendixes B, C, D, and F.

* * *

Rule 3.1. Review in Cases Governed by Subchapter I of the Juvenile Code

(a) **Scope**. This rule applies in appeals filed under N.C.G.S. § 7B-1001 and in cases certified for review by the appellate courts in which the right to appeal under this statute has been lost.

(b) **Filing the Notice of Appeal**. Any party entitled to an appeal under N.C.G.S. § 7B-1001(a) ~~and (a1)~~ may take appeal by filing notice of appeal with the clerk of superior court ~~and serving copies of the notice on all other parties~~ in the time and manner set out in N.C.G.S. § 7B-1001(b) and (c) and by serving copies of the notice of appeal on all other parties.

(c) **Expediting the Delivery of the Transcript**. The clerk of superior court must complete the Expedited Juvenile Appeals Form within one business day after the notice of appeal is filed. The court reporting manager of the Administrative Office of the Courts must assign a transcriptionist for the appeal within five business days after the clerk completes the form.

The transcriptionist must produce the transcript of the entire proceedings at the State's expense if there is an order that establishes the indigency of the appellant. Otherwise, the appellant has ten days after the transcriptionist is assigned to contract for the transcription of the entire proceedings. In either situation, the transcriptionist must deliver electronically the transcript to each party to the appeal within forty days after receiving the assignment.

(d) **Expediting the Filing of the Record on Appeal**. The parties may settle the record on appeal by agreement at any time before the record on appeal is settled by any other procedure described in this subsection.

Absent agreement, the appellant must serve a proposed record on appeal on each party to the appeal within fifteen days after delivery of the transcript. Within ten days after having been served with the proposed record on appeal, the appellee may serve on each party to the appeal:

(1) a notice of approval of the proposed record on appeal;

(2) specific objections or amendments to the proposed record on appeal; or

(3) a proposed alternative record on appeal.

If the appellee serves a notice of approval, then this notice settles the record on appeal. If the appellee serves specific objections or amendments, or a proposed alternative record on appeal, then the provisions of Rule 11(c) apply. If the appellee fails to serve a notice of approval, specific objections or amendments, or a proposed alternative record on appeal, then the expiration of the ten-day period to serve one of these documents settles the record on appeal.

The appellant must file the record on appeal within five business days after the record is settled.

(e) **No-Merit Briefs**. When counsel for the appellant concludes that there is no issue of merit on which to base an argument for relief, counsel may file a no-merit brief. The appellant then may file a pro se brief within thirty days after the date of the filing of counsel's no-merit brief.

In the no-merit brief, counsel must identify any issues in the record on appeal that arguably support the appeal and must state why those issues lack merit or would not alter the ultimate result. 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~~printed record, transcripts, copies of exhibits and other items included in the record on appeal pursuant to Rule 9(d), and any supplement prepared pursuant to Rule 11(c). 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.

(f) ~~**Word-Count Limitations Applicable to Briefs**. Briefs filed in the Supreme Court or in the Court of Appeals must comply with the word-count limitations found in Rule 28(j).~~[Reserved]

(g) **Motions for Extensions of Time**. Motions for extensions of time to produce and deliver the transcript, to file the record on appeal, and to file briefs are disfavored and will be allowed by the appellate courts only in extraordinary circumstances.

(h) **Duty of Trial Counsel**. Trial counsel for the appellant has a duty to assist appellate counsel with the preparation and service of appellant's proposed record on appeal.

(i) **~~Electronic Filing Required~~**. ~~Unless granted an exception for good cause, counsel must file all documents electronically.~~[Reserved]

(j) **Calendaring Priority**. Cases subject to this rule will be given priority over other cases being considered by the Court of Appeals and will be calendared in accordance with a schedule promulgated by the Chief Judge. Unless otherwise ordered by the Court of Appeals, cases subject to this rule shall be disposed of on the record and briefs and without oral argument.

* * *

Rule 5. Joinder of Parties on Appeal

(a) **Appellants**. If two or more parties are entitled to appeal from a judgment, order, or other determination and their interests are such as to make their joinder in appeal practicable, they may file and serve a joint notice of appeal in accordance with Rules 3 and 4; or they may join in appeal after having timely taken separate appeals by filing notice of joinder in the office of the clerk of superior court and serving copies thereof upon all other parties, or in a criminal case they may give a joint oral notice of appeal.

(b) **Appellees**. Two or more appellees whose interests are such as to make their joinder on appeal practicable may, by filing notice of joinder in the office of the clerk of superior court and serving copies thereof upon all other parties, so join.

(c) **Procedure after Joinder**. After joinder, the parties proceed as a single appellant or appellee. Filing and service of ~~papers~~items by and upon joint appellants or appellees is as provided by Rule 26(e).

* * *

Rule 6. Security for Costs on Appeal

(a) **In Regular Course**. Except in pauper appeals, an appellant in a civil action must provide adequate security for the costs of appeal in accordance with the provisions of N.C.G.S. §§ 1-285 and -286.

(b) ***In Forma Pauperis* Appeals**. A party in a civil action may be allowed to prosecute an appeal *in forma pauperis* without providing security for costs in accordance with the provisions of N.C.G.S. § 1-288.

(c) **Filed with Record on Appeal**. When security for costs is required, the appellant shall file with the record on appeal a certified copy of the appeal bond or make a ~~cash~~monetary deposit ~~made~~ in lieu of bond.

(d) **Dismissal for Failure to File or Defect in Security**. For failure of the appellant to provide security as required by subsection (a) or to file evidence thereof as required by subsection (c), or for a substantial defect or irregularity in any security provided, the appeal may on motion of an appellee be dismissed by the appellate court where docketed, unless for good cause shown the court permits the security to be provided or the filing to be made out of time, or the defect or irregularity to be corrected. A motion to dismiss on these grounds shall be made and determined in accordance with Rule 37. When the motion to dismiss is made on the grounds of a defect or irregularity, the appellant may as a matter of right correct the defect or irregularity by filing a proper bond or making proper deposit with the clerk of the appellate court within ten days after service of the motion upon appellant or before the case is called for argument, whichever first occurs.

(e) **No Security for Costs in Criminal Appeals**. Pursuant to N.C.G.S. § 15A-1449, no security for costs is required upon appeal of criminal cases to the appellate division.

* * *

Rule 7. Transcripts

(a) **Scope**. This rule applies to the ordering, preparation, delivery, and filing of each transcript that is to be designated as part of the record on appeal.

(b) **Ordering by a Party**. A party may order a transcript of any proceeding that the party considers necessary for the appeal.

(1) **Transcript Contract**. A party who orders a transcript for the appeal after notice of appeal is filed or given must use an Appellate Division Transcript Contract form to order the transcript. That form is available on the Supreme Court's rules webpage.

(2) **Service of Transcript Contract**. An appellant must serve its transcript contract on each party and on the transcriptionist no later than fourteen days after filing or giving notice of appeal. An appellee must serve its transcript contract on each party and on the transcriptionist no later than twenty-eight days after any appellant files or gives notice of appeal.

(3) **Transcript Documentation**. A party who has ordered a transcript for the appeal, whether ordered before or after notice of appeal, must complete an Appellate Division

Transcript Documentation form. That form is available on the Supreme Court's rules webpage.

(4) **Service of Transcript Documentation**. A party must serve the transcript documentation on all other parties within the time allowed under subsection (b)(2) of this rule for that party to serve a transcript contract.

(c) **Ordering by the Clerk of Superior Court**. If a party is indigent and entitled to appointed appellate counsel, then that party is entitled to have the clerk of superior court order a transcript on that party's behalf.

(1) **Appellate Entries**. The clerk of superior court must use an appropriate appellate entries form to order a transcript. Those forms are available on the Judicial Branch's forms webpage.

(2) **Service of Appellate Entries**. The clerk must serve the appellate entries on each party and on each transcriptionist no later than fourteen days after a judge signs the form. Service on a party who has appointed appellate counsel must be made upon that party's appointed appellate counsel.

(d) **Formatting**. The transcriptionist must format the transcript according to standards set by the Administrative Office of the Courts.

(e) **Delivery**.

(1) **Deadlines**. The transcriptionist must deliver the transcript to the parties no later than ninety days after having been served with the transcript contract or the appellate entries, except:

a. In a capitally tried case, the deadline is one hundred eighty days.

b. In an undisciplined or delinquent juvenile case under Subchapter II of Chapter 7B of the General Statutes, the deadline is sixty days.

c. In a special proceeding about the admission or discharge of clients under Article 5 of Chapter 122C of the General Statutes, the deadline is sixty days.

(2) **Certification**. The transcriptionist must certify to the parties and to the clerk of superior court that the transcript has been delivered.

(f) **Filing.** ~~As soon as practicable after the appeal is docketed, the appellant must file each transcript that the parties have designated as part of the record on appeal. Unless granted an exception for good cause, the appellant must file each transcript electronically.~~[Reserved]

(g) **Neutral Transcriptionist**. The transcriptionist must not have a personal or financial interest in the proceeding~~,~~ unless the parties otherwise agree by stipulation.

* * *

Rule 9. The Record on Appeal

(a) **Function; ~~Notice in Cases Involving Juveniles;~~ Composition ~~of Record~~**. In appeals from the trial division of the General Court of Justice, review is solely upon the record on appeal~~, the transcript of proceedings, if one is designated, and any other items filed pursuant to this Rule 9~~. The components of the record on appeal include: the printed record, transcripts, exhibits and other items included in the record on appeal pursuant to Rule 9(d), any supplement prepared pursuant to Rule 11(c) or Rule 18(d)(3), and any additional materials filed pursuant to this Rule 9. Parties may cite any of these items in their briefs and arguments before the appellate courts.

(1) **Composition of the Printed Record in Civil Actions and Special Proceedings**. The printed record ~~on appeal~~ in civil actions and special proceedings shall contain:

a. an index of the contents of the printed record, which shall appear as the first page thereof;

b. a statement identifying the judge from whose judgment or order appeal is taken, the session at which the judgment or order was rendered, or if rendered out of session, the time and place of rendition, and the party appealing;

c. a copy of the summons with return, or of other ~~papers~~documents showing jurisdiction of the trial court over persons or property, or a statement showing same;

d. copies of the pleadings, and of any pretrial order on which the case or any part thereof was tried;

e. so much of the litigation, set out in the form provided in Rule 9(c)(1), as is necessary for an understanding of all issues presented on appeal, or a statement specifying that the transcript of proceedings is being

filed ~~with the record~~ pursuant to Rule 9(c)(2), or designating portions of the transcript to be so filed;

f. where an issue presented on appeal relates to the giving or omission of instructions to the jury, a transcript of the entire charge given; and identification of the omitted instruction by setting out the requested instruction or its substance in the record on appeal immediately following the instruction given;

g. copies of the issues submitted and the verdict, or of the trial court's findings of fact and conclusions of law;

h. a copy of the judgment, order, or other determination from which appeal is taken;

i. a copy of the notice of appeal, of all orders establishing time limits relative to the perfecting of the appeal, of any order finding a party to the appeal to be a civil pauper, and of any agreement, notice of approval, or order settling the record on appeal and settling the transcript of proceedings if one is filed pursuant to Rule 9(c)(2) and (3);

j. copies of all other ~~papers~~documents filed and statements of all other proceedings had in the trial court which are necessary to an understanding of all issues presented on appeal unless they appear in ~~the transcript of proceedings which is being filed with the record pursuant to Rule 9(c)(2)~~another component of the record on appeal;

k. proposed issues on appeal set out in the manner provided in Rule 10;

l. a statement, where appropriate, that the record of proceedings was made with an electronic recording device;

m. a statement, where appropriate, that a supplement compiled pursuant to Rule 11(c) is being filed separately~~with the record on appeal; and~~

n. any order (issued prior to the filing of the record on appeal) ruling upon a motion by an attorney who is not licensed to practice law in North Carolina to be admitted pursuant to N.C.G.S. § 84-4.1 to appear in the appeal. In the event such a motion is filed prior

to the filing of the printed record but has not yet been ruled upon when the printed record is filed, the printed record shall include a statement that such a motion is pending and the date that motion was filed.;

o. a statement, where appropriate, that copies of exhibits, copies of other items, or both have been included in the record on appeal pursuant to Rule 9(d) and are being filed separately; and

p. a brief description of each original exhibit and other original item that has been included in the record on appeal pursuant to Rule 9(d).

(2) **Composition of the Printed Record in Appeals from Superior Court Review of Administrative Boards and Agencies**. The printed record ~~on appeal~~ in cases of appeal from judgments of the superior court rendered upon review of the proceedings of administrative boards or agencies, other than those specified in Rule 18(a), shall contain:

a. an index of the contents of the printed record, which shall appear as the first page thereof;

b. a statement identifying the judge from whose judgment or order appeal is taken, the session at which the judgment or order was rendered, or if rendered out of session, the time and place of rendition, and the party appealing;

c. a copy of the summons, notice of hearing, or other ~~papers~~documents showing jurisdiction of the board or agency over persons or property sought to be bound in the proceeding, or a statement showing same;

d. copies of all petitions and other pleadings filed in the superior court;

e. copies of all items properly before the superior court as are necessary for an understanding of all issues presented on appeal unless they appear in another component of the record on appeal;

f. so much of the litigation in the superior court, set out in the form provided in Rule 9(c)(1), as is necessary for an understanding of all issues presented,

or a statement specifying that the transcript of proceedings is being filed ~~with the record~~ pursuant to Rule 9(c)(2), or designating portions of the transcript to be so filed;

g. a copy of any findings of fact and conclusions of law and of the judgment, order, or other determination of the superior court from which appeal is taken;

h. a copy of the notice of appeal from the superior court, of all orders establishing time limits relative to the perfecting of the appeal, of any order finding a party to the appeal to be a civil pauper, and of any agreement, notice of approval, or order settling the record on appeal and settling the transcript of proceedings, if one is filed pursuant to Rule 9(c)(2) and (3);

i. proposed issues on appeal relating to the actions of the superior court, set out in the manner provided in Rule 10; ~~and~~

j. any order (issued prior to the filing of the record on appeal) ruling upon any motion by an attorney who is not licensed to practice law in North Carolina to be admitted pursuant to N.C.G.S. § 84-4.1 to appear in the appeal. In the event such a motion is filed prior to the filing of the printed record but has not yet been ruled upon when the printed record is filed, the printed record shall include a statement that such a motion is pending and the date that motion was filed~~.~~;

k. a statement, where appropriate, that a supplement compiled pursuant to Rule 11(c) is being filed separately;

l. a statement, where appropriate, that copies of exhibits, copies of other items, or both have been included in the record on appeal pursuant to Rule 9(d) and are being filed separately; and

m. a brief description of each original exhibit and other original item that has been included in the record on appeal pursuant to Rule 9(d).

(3) **Composition of the Printed Record in Criminal Actions.** The printed record ~~on appeal~~ in criminal actions shall contain:

a. an index of the contents of the printed record, which shall appear as the first page thereof;

b. a statement identifying the judge from whose judgment or order appeal is taken, the session at which the judgment or order was rendered, or if rendered out of session, the time and place of rendition, and the party appealing;

c. copies of all warrants, informations, presentments, and indictments upon which the case has been tried in any court;

d. copies of docket entries or a statement showing all arraignments and pleas;

e. so much of the litigation, set out in the form provided in Rule 9(c)(1), as is necessary for an understanding of all issues presented on appeal, or a statement specifying that the entire transcript of the proceedings is being filed ~~with the record~~ pursuant to Rule 9(c)(2), or designating portions of the transcript to be so filed;

f. where an issue presented on appeal relates to the giving or omission of instructions to the jury, a transcript of the entire charge given; and identification of the omitted instruction by setting out the requested instruction or its substance in the printed record ~~on appeal~~ immediately following the instruction given;

g. copies of the verdict and of the judgment, order, or other determination from which appeal is taken; and in capitally tried cases, a copy of the jury verdict sheet for sentencing, showing the aggravating and mitigating circumstances submitted and found or not found;

h. a copy of the notice of appeal or an appropriate entry or statement showing appeal taken orally; of all orders establishing time limits relative to the perfecting of the appeal; of any order finding defendant indigent for the purposes of the appeal and assigning counsel; and of any agreement, notice of approval, or order settling the record on appeal and settling the transcript of proceedings, if one is to be filed pursuant to Rule 9(c)(2);

i. copies of all other ~~papers~~documents filed and statements of all other proceedings had in the trial courts which are necessary for an understanding of all issues presented on appeal~~,~~ unless they appear in ~~the transcript of proceedings which is being filed with the record pursuant to Rule 9(c)(2)~~another component of the record on appeal;

j. proposed issues on appeal set out in the manner provided in Rule 10;

k. a statement, where appropriate, that the record of proceedings was made with an electronic recording device;

l. a statement, where appropriate, that a supplement compiled pursuant to Rule 11(c) is being filed separately~~with the record on appeal; and~~

m. any order (issued prior to the filing of the record on appeal) ruling upon any motion by an attorney who is not licensed to practice law in North Carolina to be admitted pursuant to N.C.G.S. § 84-4.1 to appear in the appeal. In the event such a motion is filed prior to the filing of the printed record but has not yet been ruled upon when the printed record is filed, the printed record shall include a statement that such a motion is pending and the date that motion was filed~~.~~;

n. a statement, where appropriate, that copies of exhibits, copies of other items, or both have been included in the record on appeal pursuant to Rule 9(d) and are being filed separately; and

o. a brief description of each original exhibit and other original item that has been included in the record on appeal pursuant to Rule 9(d).

(b) **Form of Printed Record; Amendments.** The printed record ~~on appeal~~ shall be in the format prescribed by Rule 26(g) and the appendixes to these rules.

(1) **Order of Arrangement**. The items constituting the printed record ~~on appeal~~ should be arranged, so far as practicable, in the order in which they occurred or were filed in the trial tribunal.

(2) **Inclusion of Unnecessary Matter; Penalty**. It shall be the duty of counsel for all parties to an appeal to avoid including in the printed record ~~on appeal~~ matter not necessary for an understanding of the issues presented on appeal. The cost of including such matter may be charged as costs to the party or counsel who caused or permitted its inclusion.

(3) **Filing Dates and Signatures on ~~Papers~~Documents**. Every pleading, motion, affidavit, or other ~~paper~~ document included in the printed record ~~on appeal shall~~should show the date on which it was filed and, if verified, the date of verification and the person who verified it. Every judgment, order, or other determination ~~shall~~should show the date on which it was entered. ~~The typed or printed name of the person signing a paper shall be entered immediately below the signature~~.

(4) **Pagination; Counsel Identified**. The pages of the printed record ~~on appeal~~ shall be numbered consecutively, be referred to as "record pages," and be cited as "(R p ___)." Pages of the Rule 11(c) or Rule 18(d)(3) supplement ~~to the record on appeal~~ shall be numbered consecutively with the pages of the printed record ~~on appeal~~, the first page of the record supplement to bear the next consecutive number following the number of the last page of the printed record ~~on appeal~~. These pages shall be referred to as "record supplement pages" and be cited as "(R S p ___)." Pages of the transcript of proceedings filed under Rule 9(c)(2) shall be referred to as "transcript pages" and be cited as "(T p ___)." At the end of the printed record ~~on appeal~~ shall appear the names, office addresses, telephone numbers, State Bar numbers, and e-mail addresses of counsel of record for all parties to the appeal.

(5) **Additions and Amendments to Record on Appeal**.

a. **Additional Materials in the Record on Appeal**. If the record on appeal as settled is insufficient to respond to the issues presented in an appellant's brief or the issues presented in an appellee's brief pursuant to Rule 10(c), the responding party may supplement the record on appeal with any items that could otherwise have been included pursuant to this Rule 9. The responding party shall serve a

copy of those items on opposing counsel and shall file the items in a volume captioned "Rule 9(b)(5) Supplement ~~to the Printed Record on Appeal~~." The supplement shall be filed no later than the responsive brief or within the time allowed for filing such a brief if none is filed.

b. **Motions Pertaining to Additions to the Record <u>on Appeal</u>**. On motion of any party or on its own initiative, the appellate court may order additional portions of a trial court record or transcript sent up and added to the record on appeal. On motion of any party, the appellate court may order any portion of the record on appeal ~~or transcript~~ amended to correct error shown as to form or content. Prior to the filing of the record on appeal in the appellate court, such motions may be filed by any party in the trial court.

(c) **Presentation of Testimonial Evidence and Other Proceedings**. Testimonial evidence, voir dire, statements and events at evidentiary and non-evidentiary hearings, and other trial proceedings necessary to be presented for review by the appellate court may be included either in the <u>printed</u> record ~~on appeal~~ in the form specified in Rule 9(c)(1) or by designating the transcript of proceedings of the trial tribunal as provided in Rule 9(c)(2) and (3). When an issue presented on appeal relates to the giving or omission of instructions to the jury, a transcript of the entire charge given shall be included in the <u>printed</u> record ~~on appeal~~.

(1) **When Testimonial Evidence, Voir Dire, Statements and Events at Evidentiary and Non-Evidentiary Hearings, and Other Trial Proceedings Narrated—How Set Out in <u>Printed</u> Record**. When an issue is presented on appeal with respect to the admission or exclusion of evidence, the question and answer form shall be utilized in setting out the pertinent questions and answers. Other testimonial evidence, voir dire, statements and events at evidentiary and non-evidentiary hearings, and other trial proceedings required by Rule 9(a) to be included in the <u>printed</u> record ~~on appeal~~ shall be set out in narrative form except where such form might not fairly reflect the true sense of the evidence received, in which case it may be set out in question and answer form. Parties shall use that form or combination of forms best

calculated under the circumstances to present the true sense of the required testimonial evidence concisely and at a minimum of expense to the litigants. Parties may object to particular narration on the basis that it does not accurately reflect the true sense of testimony received, statements made, or events that occurred; or to particular questions and answers on the basis that the testimony might with no substantial loss in accuracy be summarized in narrative form at substantially less expense. When a judge or referee is required to settle the record on appeal under Rule 11(c) and there is dispute as to the form, the judge or referee shall settle the form in the course of settling the record on appeal.

(2) **Designation that Transcript of Proceedings in Trial Tribunal Will Be Used**. Appellant may designate in the printed record ~~on appeal~~ that the testimonial evidence will be presented in the transcript of the evidence of the trial tribunal in lieu of narrating the evidence and other trial proceedings as permitted by Rule 9(c)(1). When a transcript of those proceedings has been made, appellant may also designate that the transcript will be used to present voir dire, statements and events at evidentiary and non-evidentiary hearings, or other trial proceedings when those proceedings are the basis for one or more issues presented on appeal. Any such designation shall refer to the page numbers of the transcript being designated. Appellant need not designate all of the transcript that has been made, provided that when the transcript is designated to show the testimonial evidence, so much of the testimonial evidence must be designated as is necessary for an understanding of all issues presented on appeal. When appellant has narrated the evidence and other trial proceedings under Rule 9(c)(1), the appellee may designate the transcript as a proposed alternative record on appeal.

(3) **Transcript of Proceedings—Settlement, Filing, Notice, Briefs**. Whenever a transcript is designated to be used pursuant to Rule 9(c)(2):

a. it shall be settled, together with the other components of the record on appeal, according to the procedures established by Rule 11;

b. appellant shall ~~cause~~file the transcript ~~to be filed~~ pursuant to ~~Rule 7~~Rule 12 with the clerk of the appellate court in which the appeal has been docketed;

c. in criminal appeals, upon settlement of the record on appeal, the district attorney shall notify the Attorney General of North Carolina that the record on appeal ~~and transcript have~~has been settled; and

d. the briefs of the parties must comport with the requirements of Rule 28 regarding complete statement of the facts of the case and regarding appendixes to the briefs.

(4) **Presentation of Discovery Materials**. Discovery materials offered into evidence at trial shall be brought forward, if relevant, as other evidence. In all instances in which discovery materials are considered by the trial tribunal, other than as evidence offered at trial, the following procedures for presenting those materials to the appellate court shall be used: Depositions shall be treated as testimonial evidence and shall be presented by narration or by transcript of the deposition in the manner prescribed by this Rule 9(c). Other discovery materials, including interrogatories and answers, requests for admission, responses to requests, motions to produce, and the like, pertinent to issues presented on appeal, may be set out in the printed record ~~on appeal~~ or may be sent up ~~as documentary exhibits~~ in accordance with Rule 9(d)~~(2)~~.

(5) **Electronic Recordings**. When a narrative or transcript has been produced from an electronic recording, the parties shall not file a copy of the electronic recording with the appellate division except at the direction or with the approval of the appellate court.

~~(d) **Exhibits**. Any exhibit filed, served, submitted for consideration, admitted, or made the subject of an offer of proof may be made a part of the record on appeal if a party believes that its inclusion is necessary to understand an issue on appeal.~~

~~(1) **Documentary Exhibits Included in the Printed Record on Appeal**. A party may include a documentary exhibit in the printed record on appeal if it is of a size and nature to make inclusion possible without impairing the legibility or original significance of the exhibit.~~

~~(2) **Exhibits Not Included in the Printed Record on Appeal**. A documentary exhibit that is not included in the printed record on appeal can be made a part of the record on appeal by filing a copy of the exhibit with the clerk of the appellate court. The copy shall be paginated. If multiple exhibits are filed, an index must be included in the filing. A copy that impairs the legibility or original significance of the exhibit may not be filed. An exhibit that is a tangible object or is an exhibit that cannot be copied without impairing its legibility or original significance can be made a part of the record on appeal by having it delivered by the clerk of superior court to the clerk of the appellate court. When a party files a written request with the clerk of superior court that the exhibit be delivered to the appellate court, the clerk must promptly have the exhibit delivered to the appellate court in a manner that ensures its security and availability for use in further trial proceedings. The party requesting delivery of the exhibit to the appellate court shall not be required to move in the appellate court for delivery of the exhibit.~~

~~(3) [Reserved]~~

~~(4) **Removal of Exhibits from Appellate Court**. All models, diagrams, and exhibits of material placed in the custody of the clerk of the appellate court must be taken away by the parties within ninety days after the mandate of the Court has issued or the case has otherwise been closed by withdrawal, dismissal, or other order of the Court, unless notified otherwise by the clerk. When this is not done, the clerk shall notify counsel to remove the articles forthwith; and if they are not removed within a reasonable time after such notice, the clerk shall destroy them, or make such other disposition of them as to the clerk may seem best.~~

(d) **Exhibits and Other Items**. Exhibits and other items that have been filed, served, submitted for consideration, admitted, or made the subject of an offer of proof may be included in the record on appeal under this subsection if a party believes that they are necessary to understand an issue on appeal. To the extent practicable, the parties should include copies of exhibits and copies of other items in the record on appeal rather than originals.

(1) **Copies**. Copies of exhibits and other items that are letter size documents may be included in the printed record or

may be grouped together and presented to the appellate court in one or more separate Rule 9(d) volumes. Each separate volume must be paginated and indexed, and it must display at the top of the first page this notice: "Rule 9(d) Copies of Exhibits and Other Items." Copies of exhibits and other items that are oversized documents or non-documentary items may be presented to the appellate court individually but must be labeled as a copy.

(2) **Originals**. Original exhibits and other original items that have been settled as part of the record on appeal may be relied on by the parties in their briefs and arguments, but they may not be delivered to the appellate court without the appellate court's permission.

a. **Delivering Originals to the Appellate Court**. If a party believes that the appellate court should examine an original exhibit or other original item, then that party must file a motion with the appellate court that asks for permission to deliver the original exhibit or other original item. The movant must explain the relevance of the original exhibit or other original item to the appeal and identify its custodian. If the appellate court allows the motion, then the custodian must promptly deliver the original exhibit or other original item to the clerk of the appellate court in a manner that ensures its security and availability for use in further trial proceedings. If the custodian is not a party, then the clerk of the appellate court must send the appellate court's order allowing the motion to the custodian. The clerk of the appellate court will add the original exhibit or other original item to the case file when the appellate court receives it. Nothing in this subsection precludes the appellate court from ordering the delivery of an original exhibit on its own initiative.

b. **Removing Originals from the Appellate Court**. A custodian who has delivered an original exhibit or other original item to the appellate court must remove it at the direction of the clerk of the appellate court. If the custodian does not remove the original exhibit or other original item as directed, then the clerk of the appellate court may dispose of it.

* * *

Rule 10. Preservation of Issues at Trial; Proposed Issues on Appeal

(a) **Preserving Issues During Trial Proceedings**.

(1) **General**. In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context. It is also necessary for the complaining party to obtain a ruling upon the party's request, objection, or motion. Any such issue that was properly preserved for review by action of counsel taken during the course of proceedings in the trial tribunal by objection noted or which by rule or law was deemed preserved or taken without any such action, including, but not limited to, whether the judgment is supported by the verdict or by the findings of fact and conclusions of law, whether the court had jurisdiction over the subject matter, and whether a criminal charge is sufficient in law, may be made the basis of an issue presented on appeal.

(2) **Jury Instructions**. A party may not make any portion of the jury charge or omission therefrom the basis of an issue presented on appeal unless the party objects thereto before the jury retires to consider its verdict, stating distinctly that to which objection is made and the grounds of the objection; provided that opportunity was given to the party to make the objection out of the hearing of the jury, and, on request of any party, out of the presence of the jury.

(3) **Sufficiency of the Evidence**. In a criminal case, a defendant may not make insufficiency of the evidence to prove the crime charged the basis of an issue presented on appeal unless a motion to dismiss the action, or for judgment as in case of nonsuit, is made at trial. If a defendant makes such a motion after the State has presented all its evidence and has rested its case and that motion is denied and the defendant then introduces evidence, defendant's motion for dismissal or judgment in case of nonsuit made at the close of State's evidence is waived. Such a waiver precludes the defendant from urging the denial of such motion as a ground for appeal.

A defendant may make a motion to dismiss the action, or for judgment as in case of nonsuit, at the conclusion of all the evidence, irrespective of whether defendant made an earlier such motion. If the motion at the close of all the evidence is denied, the defendant may urge as ground for appeal the denial of the motion made at the conclusion of all the evidence. However, if a defendant fails to move to dismiss the action, or for judgment as in case of nonsuit, at the close of all the evidence, defendant may not challenge on appeal the sufficiency of the evidence to prove the crime charged.

If a defendant's motion to dismiss the action, or for judgment as in case of nonsuit, is allowed, or shall be sustained on appeal, it shall have the force and effect of a verdict of "not guilty" as to such defendant.

(4) **Plain Error**. In criminal cases, an issue that was not preserved by objection noted at trial and that is not deemed preserved by rule or law without any such action nevertheless may be made the basis of an issue presented on appeal when the judicial action questioned is specifically and distinctly contended to amount to plain error.

(b) **Appellant's Proposed Issues on Appeal**. Proposed issues that the appellant intends to present on appeal shall be stated without argument at the conclusion of the printed record ~~on appeal~~ in a numbered list. Proposed issues on appeal are to facilitate the preparation of the record on appeal and shall not limit the scope of the issues presented on appeal in an appellant's brief.

(c) **Appellee's Proposed Issues on Appeal as to an Alternative Basis in Law**. Without taking an appeal, an appellee may list proposed issues on appeal in the printed record ~~on appeal~~ based on any action or omission of the trial court that was properly preserved for appellate review and that deprived the appellee of an alternative basis in law for supporting the judgment, order, or other determination from which appeal has been taken. An appellee's list of proposed issues on appeal shall not preclude an appellee from presenting arguments on other issues in its brief. Portions of the record or transcript of proceedings necessary to an understanding of such proposed issues on appeal as to an alternative basis in law may be included in the record on appeal by agreement of the parties under Rule 11(a), may be included by the appellee in a proposed alternative record on appeal under Rule 11(b), or may be designated for inclusion in the transcript of proceedings, if one is filed under Rule 9(c)(2).

* * *

Rule 11. Settling the Record on Appeal

(a) **By Agreement**. Within forty-five days after all of the transcripts that have been ordered according to Rule 7 are delivered (seventy days in capitally tried cases) or forty-five days after the last notice of appeal is filed or given, whichever is later, the parties may by agreement entered in the printed record ~~on appeal~~ settle a proposed record on appeal that has been prepared by any party in accordance with Rule 9 as the record on appeal.

(b) **By Appellee's Approval of Appellant's Proposed Record on Appeal**. If the record on appeal is not settled by agreement under Rule 11(a), the appellant shall, within the same times provided, serve upon all other parties a proposed record on appeal constituted in accordance with the provisions of Rule 9. Within thirty days (thirty-five days in capitally tried cases) after service of the proposed record on appeal upon an appellee, that appellee may serve upon all other parties a notice of approval of the proposed record on appeal, or objections, amendments, or a proposed alternative record on appeal in accordance with Rule 11(c). If all appellees within the times allowed them either serve notices of approval or fail to serve either notices of approval or objections, amendments, or proposed alternative records on appeal, appellant's proposed record on appeal thereupon constitutes the record on appeal.

(c) **By Agreement, by Operation of Rule, or by Court Order After Appellee's Objection or Amendment**. Within thirty days (thirty-five days in capitally tried cases) after service upon appellee of appellant's proposed record on appeal, that appellee may serve upon all other parties specific amendments or objections to the proposed record on appeal, or a proposed alternative record on appeal. Amendments or objections to the proposed record on appeal shall be set out in a separate ~~paper~~document and shall specify any item(s) for which an objection is based on the contention that the item was not filed, served, submitted for consideration, admitted, or made the subject of an offer of proof, or that the content of a statement or narration is factually inaccurate. An appellant who objects to an appellee's response to the proposed record on appeal shall make the same specification in its request for judicial settlement. The formatting of the record on appeal and the order in which items appear in it are the responsibility of the appellant.

If any appellee timely serves amendments, objections, or a proposed alternative record on appeal, the record on appeal shall ~~consist of~~ include each item that is either among those items required by Rule 9(a)

~~to be in the record on appeal~~ or that is requested by any party to the appeal and agreed upon for inclusion by all other parties to the appeal. ~~If~~Additionally, if a party requests that an item be included in the record on appeal but not all other parties to the appeal agree to its inclusion, then that item ~~shall not be included in the printed record on appeal, but~~ shall be filed by the appellant ~~with the printed record on appeal~~ in a volume captioned "Rule 11(c) Supplement~~ to the Printed Record on Appeal," along with any transcripts, narrations of proceedings, documentary exhibits, and other items that are filed pursuant to these rules;~~ provided that any item not filed, served, submitted for consideration, or admitted, or for which no offer of proof was tendered, shall not be included in the record on appeal. Subject to the additional requirements of Rule 28(d), items in the Rule 11(c) supplement may be cited and used by the parties ~~as would items in the printed record on appeal~~like any other component of the record on appeal.

If a party does not agree to the wording of a statement or narration required or permitted by these rules, there shall be no judicial settlement to resolve the dispute unless the objection is based on a contention that the statement or narration concerns an item that was not filed, served, submitted for consideration, admitted, or tendered in an offer of proof, or that a statement or narration is factually inaccurate. Instead, the objecting party is permitted to have inserted in the settled record on appeal a concise counter-statement. Parties are strongly encouraged to reach agreement on the wording of statements in records on appeal. Judicial settlement is not appropriate for disputes that concern only the formatting of a record on appeal or the order in which items appear in a record on appeal.

The Rule 11(c) supplement ~~to the printed record on appeal~~ shall contain an index of the contents of the supplement, which shall appear as the first page thereof. The Rule 11(c) supplement shall be paginated as required by Rule 9(b)(4) and the contents should be arranged, so far as practicable, in the order in which they occurred or were filed in the trial tribunal. If a party does not agree to the inclusion or specification of an exhibit or transcript in the printed record, the printed record shall include a statement that such items are separately filed along with the supplement.

If any party to the appeal contends that materials proposed for inclusion in the record or for filing therewith pursuant to these rules were not filed, served, submitted for consideration, admitted, or made the subject of an offer of proof, or that a statement or narration permitted by these rules is not factually accurate, then that party, within ten days after expiration of the time within which the appellee last served with the

appellant's proposed record on appeal might have served amendments, objections, or a proposed alternative record on appeal, may in writing request that the judge from whose judgment, order, or other determination appeal was taken settle the record on appeal. A copy of the request, endorsed with a certificate showing service on the judge, shall be filed forthwith in the office of the clerk of the superior court and served upon all other parties. Each party shall promptly provide to the judge a reference copy of the record items, amendments, or objections served by that party in the case.

The functions of the judge in the settlement of the record on appeal are to determine whether a statement permitted by these rules is not factually accurate, to settle narrations of proceedings under Rule 9(c)(1), and to determine whether the record accurately reflects material filed, served, submitted for consideration, admitted, or made the subject of an offer of proof, but not to decide whether material desired in the record by either party is relevant to the issues on appeal, non-duplicative, or otherwise suited for inclusion in the record on appeal.

The judge shall send written notice to counsel for all parties setting a place and a time for a hearing to settle the record on appeal. The hearing shall be held not later than fifteen days after service of the request for hearing upon the judge. The judge shall settle the record on appeal by order entered not more than twenty days after service of the request for hearing upon the judge. If requested, the judge shall return the record items submitted for reference during the judicial-settlement process with the order settling the record on appeal.

If any appellee timely serves amendments, objections, or a proposed alternative record on appeal, and no judicial settlement of the record is timely sought, the record is deemed settled as of the expiration of the ten-day period within which any party could have requested judicial settlement of the record on appeal under this Rule 11(c).

Provided that, nothing herein shall prevent settlement of the record on appeal by agreement of the parties at any time within the times herein limited for settling the record by judicial order.

(d) **Multiple Appellants; Single Record on Appeal**. When there are multiple appellants (two or more), whether proceeding separately or jointly, as parties aligned in interest, or as cross-appellants, there shall nevertheless be but one record on appeal. The proposed issues on appeal of the several appellants shall be set out separately in the single record on appeal and attributed to the several appellants by any clear means of reference. In the event multiple appellants cannot agree to the procedure for constituting a proposed record on appeal, the

judge from whose judgment, order, or other determination the appeals are taken shall, on motion of any appellant with notice to all other appellants, enter an order settling the procedure, including the allocation of costs.

(e) **Extensions of Time**. The times provided in this rule for taking any action may be extended in accordance with the provisions of Rule 27(c).

* * *

Rule 12. Filing the Record on Appeal; Docketing the Appeal; Copies ~~of the Record~~

(a) **Time for Filing Record on Appeal**. ~~Within fifteen days after the record on appeal has been settled by any of the procedures provided in Rule 11 or Rule 18, the appellant shall file the record on appeal with the clerk of the court to which appeal is taken.~~The appellant must file the record on appeal no later than fifteen days after it has been settled by any of the procedures provided in Rule 11 or Rule 18. This deadline applies only to the printed record, transcripts, copies of exhibits and other items included in the record on appeal pursuant to Rule 9(d), and any supplement prepared pursuant to Rule 11(c) or Rule 18(d)(3). This deadline does not apply to original exhibits and other original items included in the record on appeal, which are subject to the delivery and removal procedures in Rule 9(d)(2).

(b) **Docketing the Appeal**. ~~At the time of filing the record on appeal, the~~The appellant shall pay to the clerk the docket fee fixed pursuant to N.C.G.S. § 7A-20(b), and the clerk shall thereupon enter the appeal upon the docket of the appellate court. If an appellant is authorized to appeal *in forma pauperis* as provided in N.C.G.S. §§ 1-288 or 7A-450 et seq., the clerk shall docket the appeal upon timely filing of the record on appeal. An appeal is docketed under the title given to the action in the trial division, with the appellant identified as such. The clerk shall forthwith give notice to all parties of the date on which the appeal was docketed in the appellate court.

(c) **Copies ~~of Record on Appeal~~**. ~~The appellant shall file one copy of the printed record on appeal, one copy of each exhibit designated pursuant to Rule 9(d), one copy of any supplement to the record on appeal submitted pursuant to Rule 11(c) or Rule 18(d)(3), and one copy of any deposition or administrative hearing transcript. The appellant is encouraged to file each of these documents electronically, if permitted to do so by the electronic-filing site. Unless granted an exception for good cause, the appellant shall file one copy of each transcript that the parties have designated as part of the record on appeal electronically~~

~~pursuant to Rule 7.~~ The clerk will reproduce and distribute copies of the printed record ~~on appeal~~ as directed by the court, billing the parties pursuant to these rules.

* * *

Rule 13. Filing and Service of Briefs

(a) **Time for Filing and Service of Briefs**.

(1) **Cases Other Than Death Penalty Cases**. Within thirty days after the record on appeal has been filed with the appellate court, the appellant shall file a brief in the office of the clerk of the appellate court and serve copies thereof upon all other parties separately represented. Within thirty days after appellant's brief has been served on an appellee, the appellee shall similarly file and serve copies of a brief. An appellant may file and serve a reply brief as provided in Rule 28(h).

(2) **Death Penalty Cases**. Within sixty days after the record on appeal has been filed with the Supreme Court, the appellant in a criminal appeal which includes a sentence of death shall file a brief in the office of the clerk and serve copies thereof upon all other parties separately represented. Within sixty days after appellant's brief has been served, the appellee shall similarly file and serve copies of a brief. An appellant may file and serve a reply brief as provided in Rule 28(h).

(b) **Copies Reproduced by Clerk**. ~~A party need file but a single copy of a brief. At the time of filing the~~A party may be required to pay to the clerk of the appellate court a deposit fixed by the clerk to cover the cost of reproducing copies of the party's brief. The clerk will reproduce and distribute copies of briefs as directed by the court.

(c) **Consequence of Failure to File and Serve Briefs**. If an appellant fails to file and serve a brief within the time allowed, the appeal may be dismissed on motion of an appellee or on the court's own initiative. If an appellee fails to file and serve its brief within the time allowed, the appellee may not be heard in oral argument except by permission of the court.

* * *

Rule 14. Appeals of Right from Court of Appeals to Supreme Court under N.C.G.S. § 7A-30

(a) **Notice of Appeal; Filing and Service**. Appeals of right from the Court of Appeals to the Supreme Court are taken by filing notices

of appeal with the clerk of the Court of Appeals and with the clerk of the Supreme Court and serving notice of appeal upon all other parties within fifteen days after the mandate of the Court of Appeals has been issued to the trial tribunal. For cases which arise from the Industrial Commission, a copy of the notice of appeal shall be served on the Chair of the Industrial Commission. The running of the time for filing and serving a notice of appeal is tolled as to all parties by the filing by any party within such time of a petition for rehearing under Rule 31 of these rules, and the full time for appeal thereafter commences to run and is computed as to all parties from the date of entry by the Court of Appeals of an order denying the petition for rehearing. If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within ten days after the first notice of appeal was filed. A petition prepared in accordance with Rule 15(c) for discretionary review in the event the appeal is determined not to be of right or for issues in addition to those set out as the basis for a dissenting opinion may be filed with or contained in the notice of appeal.

(b) **Content of Notice of Appeal**.

(1) **Appeal Based Upon Dissent in Court of Appeals**. In an appeal which is based upon the existence of a dissenting opinion in the Court of Appeals, the notice of appeal shall specify the party or parties taking the appeal; shall designate the judgment of the Court of Appeals from which the appeal is taken; shall state the basis upon which it is asserted that appeal lies of right under N.C.G.S. § 7A-30; and shall state the issue or issues which are the basis of the dissenting opinion and which are to be presented to the Supreme Court for review.

(2) **Appeal Presenting Constitutional Question**. In an appeal which is asserted by the appellant to involve a substantial constitutional question, the notice of appeal shall specify the party or parties taking the appeal; shall designate the judgment of the Court of Appeals from which the appeal is taken; shall state the issue or issues which are the basis of the constitutional claim and which are to be presented to the Supreme Court for review; shall specify the articles and sections of the Constitution asserted to be involved; shall state with particularity how appellant's rights thereunder have been violated; and shall affirmatively state that the constitutional issue was timely raised (in the trial tribunal if it could have been, in the Court of Appeals if not) and either not determined or determined erroneously.

(c) **Record on Appeal**.

(1) **Composition**. The record on appeal filed in the Court of Appeals constitutes the record on appeal for review by the Supreme Court. However, the Supreme Court may note de novo any deficiencies in the record on appeal and may take such action in respect thereto as it deems appropriate, including dismissal of the appeal.

(2) **Transmission; Docketing; Copies**. Upon the filing of a notice of appeal, the clerk of the Court of Appeals will forthwith transmit the original record on appeal to the clerk of the Supreme Court, who shall thereupon file the record and docket the appeal. The clerk of the Supreme Court will procure or reproduce copies of the record on appeal for distribution as directed by the Court, and may require a deposit from appellant to cover the cost of reproduction.

(d) **Briefs**.

(1) **Filing and Service; Copies**. Within thirty days after filing notice of appeal in the Supreme Court, the appellant shall file with the clerk of the Supreme Court and serve upon all other parties copies of a new brief prepared in conformity with Rule 28, presenting only those issues upon which review by the Supreme Court is sought; provided, however, that when the appeal is based upon the existence of a substantial constitutional question or when the appellant has filed a petition for discretionary review for issues in addition to those set out as the basis of a dissent in the Court of Appeals, the appellant shall file and serve a new brief within thirty days after entry of the order of the Supreme Court which determines for the purpose of retaining the appeal on the docket that a substantial constitutional question does exist or allows or denies the petition for discretionary review in an appeal based upon a dissent. Within thirty days after service of the appellant's brief upon appellee, the appellee shall similarly file and serve copies of a new brief. An appellant may file and serve a reply brief as provided in Rule 28(h).

~~The parties need file but single copies of their respective briefs.~~ The clerk will reproduce and distribute copies <u>of the briefs</u> as directed by the Court, billing the parties pursuant to these rules.

(2) **Failure to File or Serve**. If an appellant fails to file or serve its brief within the time allowed, the appeal may be dismissed on motion of an appellee or on the Court's own initiative. If an appellee fails to file and serve its brief within the time allowed, it may not be heard in oral argument except by permission of the Court.

* * *

Rule 15. Discretionary Review on Certification by Supreme Court under N.C.G.S. § 7A-31

(a) **Petition of Party**. Either prior to or following determination by the Court of Appeals of an appeal docketed in that court, any party to the appeal may in writing petition the Supreme Court upon any grounds specified in N.C.G.S. § 7A-31 to certify the cause for discretionary review by the Supreme Court; except that a petition for discretionary review of an appeal from the Industrial Commission, the North Carolina State Bar, the Property Tax Commission, the Board of State Contract Appeals, or the Commissioner of Insurance may only be made following determination by the Court of Appeals; and except that no petition for discretionary review may be filed in any post-conviction proceeding under Article 89 of Chapter 15A of the General Statutes, or in valuation of exempt property under Chapter 1C of the General Statutes.

(b) **Petition of Party—Filing and Service**. A petition for review prior to determination by the Court of Appeals shall be filed with the clerk of the Supreme Court and served on all other parties within fifteen days after the appeal is docketed in the Court of Appeals. For cases that arise from the Industrial Commission, a copy of the petition shall be served on the Chair of the Industrial Commission. A petition for review following determination by the Court of Appeals shall be similarly filed and served within fifteen days after the mandate of the Court of Appeals has been issued to the trial tribunal. Such a petition may be contained in or filed with a notice of appeal of right, to be considered by the Supreme Court in the event the appeal is determined not to be of right, as provided in Rule 14(a). The running of the time for filing and serving a petition for review following determination by the Court of Appeals is terminated as to all parties by the filing by any party within such time of a petition for rehearing under Rule 31 of these rules, and the full time for filing and serving such a petition for review thereafter commences to run and is computed as to all parties from the date of entry by the Court of Appeals of an order denying the petition for rehearing. If a timely petition for review is filed by a party, any other party may file a petition for review within ten days after the first petition for review was filed.

(c) **Petition of Party—Content**. The petition shall designate the petitioner or petitioners and shall set forth plainly and concisely the factual and legal basis upon which it is asserted that grounds exist under N.C.G.S. § 7A-31 for discretionary review. The petition shall state each issue for which review is sought and shall be accompanied by a copy of the opinion of the Court of Appeals when filed after determination by that court. No supporting brief is required, but supporting authorities may be set forth briefly in the petition.

(d) **Response**. A response to the petition may be filed by any other party within ten days after service of the petition upon that party. No supporting brief is required, but supporting authorities may be set forth briefly in the response. If, in the event that the Supreme Court certifies the case for review, the respondent would seek to present issues in addition to those presented by the petitioner, those additional issues shall be stated in the response. A motion for extension of time is not permitted.

(e) **Certification by Supreme Court—How Determined and Ordered.**

(1) **On Petition of a Party**. The determination by the Supreme Court whether to certify for review upon petition of a party is made solely upon the petition and any response thereto and without oral argument.

(2) **On Initiative of the Court**. The determination by the Supreme Court whether to certify for review upon its own initiative pursuant to N.C.G.S. § 7A-31 is made without prior notice to the parties and without oral argument.

(3) **Orders; Filing and Service**. Any determination to certify for review and any determination not to certify made in response to a petition will be recorded by the Supreme Court in a written order. The clerk of the Supreme Court will forthwith enter such order, deliver a copy thereof to the clerk of the Court of Appeals, and mail copies to all parties. The cause is docketed in the Supreme Court upon entry of an order of certification by the clerk of the Supreme Court.

(f) **Record on Appeal**.

(1) **Composition**. The record on appeal filed in the Court of Appeals constitutes the record on appeal for review by the Supreme Court. However, the Supreme Court may note de novo any deficiencies in the record on appeal and may take such action in respect thereto as it deems appropriate, including dismissal of the appeal.

(2) **Filing; Copies**. When an order of certification is filed with the clerk of the Court of Appeals, he or she will forthwith transmit the original record on appeal to the clerk of the Supreme Court. The clerk of the Supreme Court will procure or reproduce copies thereof for distribution as directed by the Court. If it is necessary to reproduce copies, the clerk may require a deposit by the petitioner to cover the costs thereof.

(g) **Filing and Service of Briefs**.

(1) **Cases Certified Before Determination by Court of Appeals**. When a case is certified for review by the Supreme Court before being determined by the Court of Appeals, the times allowed the parties by Rule 13 to file their respective briefs are not thereby extended. If a party has filed its brief in the Court of Appeals and served copies before the case is certified, the clerk of the Court of Appeals shall forthwith transmit to the clerk of the Supreme Court the original brief and any copies already reproduced for distribution, and if filing was timely in the Court of Appeals this constitutes timely filing in the Supreme Court. If a party has not filed its brief in the Court of Appeals and served copies before the case is certified, the party shall file its brief in the Supreme Court and serve copies within the time allowed and in the manner provided by Rule 13 for filing and serving in the Court of Appeals.

(2) **Cases Certified for Review of Court of Appeals Determinations.** When a case is certified for review by the Supreme Court of a determination made by the Court of Appeals, the appellant shall file a new brief prepared in conformity with Rule 28 in the Supreme Court and serve copies upon all other parties within thirty days after the case is docketed in the Supreme Court by entry of its order of certification. The appellee shall file a new brief in the Supreme Court and serve copies upon all other parties within thirty days after a copy of appellant's brief is served upon the appellee. An appellant may file and serve a reply brief as provided in Rule 28(h).

(3) **Copies**. ~~A party need file, or the clerk of the Court of Appeals transmit, but a single copy of any brief required by this Rule 15 to be filed in the Supreme Court upon certification for discretionary review.~~ The clerk of the

Supreme Court will ~~thereupon procure from the Court of Appeals or will~~ reproduce copies of the briefs for distribution as directed by the Supreme Court. The clerk may require a deposit by any party to cover the costs of reproducing copies of its brief. In civil appeals *in forma pauperis* a party need not pay the deposit for reproducing copies~~, but at the time of filing its original new brief shall also deliver to the clerk two legible copies thereof~~.

(4) **Failure to File or Serve**. If an appellant fails to file and serve its brief within the time allowed by this Rule 15, the appeal may be dismissed on motion of an appellee or upon the Court's own initiative. If an appellee fails to file and serve its brief within the time allowed by this Rule 15, it may not be heard in oral argument except by permission of the Court.

(h) **Discretionary Review of Interlocutory Orders**. An interlocutory order by the Court of Appeals, including an order for a new trial or for further proceedings in the trial tribunal, will be certified for review by the Supreme Court only upon a determination by the Court that failure to certify would cause a delay in final adjudication which would probably result in substantial harm to a party.

(i) **Appellant, Appellee Defined**. As used in this Rule 15, the terms "appellant" and "appellee" have the following meanings:

(1) With respect to Supreme Court review prior to determination by the Court of Appeals, whether on petition of a party or on the Court's own initiative, "appellant" means a party who appealed from the trial tribunal; "appellee" means a party who did not appeal from the trial tribunal.

(2) With respect to Supreme Court review of a determination of the Court of Appeals, whether on petition of a party or on the Court's own initiative, "appellant" means the party aggrieved by the determination of the Court of Appeals; "appellee" means the opposing party; provided that, in its order of certification, the Supreme Court may designate either party an appellant or appellee for purposes of proceeding under this Rule 15.

* * *

Rule 17. Appeal Bond in Appeals Under N.C.G.S. §§ 7A-30, 7A-31

(a) **Appeal of Right**. In all appeals of right from the Court of Appeals to the Supreme Court in civil cases, the party who takes appeal

shall, upon filing the notice of appeal in the Supreme Court, file with the clerk of that Court a written undertaking, with good and sufficient surety in the sum of $250, or make a monetary deposit ~~cash~~ in lieu thereof, to the effect that all costs awarded against the appealing party on the appeal will be paid.

(b) **Discretionary Review of Court of Appeals Determination**. When the Supreme Court on petition of a party certifies a civil case for review of a determination of the Court of Appeals, the petitioner shall file an undertaking for costs in the form provided in subsection (a). When the Supreme Court on its own initiative certifies a case for review of a determination of the Court of Appeals, no undertaking for costs shall be required of any party.

(c) **Discretionary Review by Supreme Court Before Court of Appeals Determination**. When a civil case is certified for review by the Supreme Court before being determined by the Court of Appeals, the undertaking on appeal initially filed in the Court of Appeals shall stand for the payment of all costs incurred in either the Court of Appeals or the Supreme Court and awarded against the party appealing.

(d) **Appeals *In Forma Pauperis***. No undertakings for costs are required of a party appealing *in forma pauperis*.

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Rule 18. Taking Appeal; Record on Appeal—Composition and Settlement

(a) **General**. Appeals of right from administrative agencies, boards, commissions, or the Office of Administrative Hearings (referred to in these rules as "administrative tribunals") directly to the appellate division under N.C.G.S. § 7A-29 shall be in accordance with the procedures provided in these rules for appeals of right from the courts of the trial divisions, except as provided in this Article.

(b) **Time and Method for Taking Appeals**.

(1) The times and methods for taking appeals from an administrative tribunal shall be as provided in this Rule 18 unless the General Statutes provide otherwise, in which case the General Statutes shall control.

(2) Any party to the proceeding may appeal from a final decision of an administrative tribunal to the appropriate court of the appellate division for alleged errors of law by filing and serving a notice of appeal within thirty days after receipt of a copy of the final decision of the

administrative tribunal. The final decision of the administrative tribunal is to be sent to the parties by Registered or Certified Mail. The notice of appeal shall specify the party or parties taking the appeal; shall designate the final administrative tribunal decision from which appeal is taken and the court to which appeal is taken; and shall be signed by counsel of record for the party or parties taking the appeal, or by any such party not represented by counsel of record.

(3) If a transcript of fact-finding proceedings is not made as part of the process leading up to the final administrative tribunal decision, then the parties may order transcripts using the procedures applicable to court proceedings in Rule 7.

(c) **Composition of Printed Record ~~on Appeal~~**. The printed record ~~on appeal~~ in appeals from any administrative tribunal shall contain:

(1) an index of the contents of the printed record ~~on appeal~~, which shall appear as the first page thereof;

(2) a statement identifying the administrative tribunal from whose judgment, order, or opinion appeal is taken; the session at which the judgment, order, or opinion was rendered, or if rendered out of session, the time and place of rendition; and the party appealing;

(3) a copy of the summons with return, notice of hearing, or other ~~papers~~documents showing jurisdiction of the administrative tribunal over persons or property sought to be bound in the proceeding, or a statement showing same;

(4) copies of all other notices, pleadings, petitions, or other ~~papers~~documents required by law or rule to be filed with the administrative tribunal to present and define the matter for determination, including a Form 44 for all workers' compensation cases which originate from the Industrial Commission;

(5) a copy of any findings of fact and conclusions of law and a copy of the order, award, decision, or other determination of the administrative tribunal from which appeal was taken;

(6) so much of the litigation before the administrative tribunal or before any division, commissioner, deputy

commissioner, or hearing officer of the administrative tribunal, set out in the form provided in Rule 9(c)(1), as is necessary for an understanding of all issues presented on appeal, or a statement specifying that the transcript of proceedings is being filed ~~with the record~~ pursuant to Rule 9(c)(2) and (3);

(7) when the administrative tribunal has reviewed a record of proceedings before a division or an individual commissioner, deputy commissioner, or hearing officer of the administrative tribunal, copies of all items included in the record filed with the administrative tribunal which are necessary for an understanding of all issues presented on appeal;

(8) copies of all other ~~papers~~documents filed and statements of all other proceedings had before the administrative tribunal or any of its individual commissioners, deputies, or divisions which are necessary to an understanding of all issues presented on appeal~~,~~ unless they appear in ~~the transcript of proceedings being filed pursuant to Rule 9(c)(2) and (3)~~another component of the record on appeal;

(9) a copy of the notice of appeal from the administrative tribunal, of all orders establishing time limits relative to the perfecting of the appeal, of any order finding a party to the appeal to be a civil pauper, and of any agreement, notice of approval, or order settling the record on appeal ~~and settling the transcript of proceedings if one is filed pursuant to Rule 9(c)(2) and (3)~~;

(10) proposed issues on appeal relating to the actions of the administrative tribunal, set out as provided in Rule 10;

(11) a statement, when appropriate, that the record of proceedings was made with an electronic recording device;

(12) a statement, when appropriate, that a supplement compiled pursuant to Rule 18(d)(3) is being filed separately ~~with the record on appeal~~; ~~and~~

(13) any order (issued prior to the filing of the record on appeal) ruling upon any motion by an attorney who is not licensed to practice law in North Carolina to be admitted pursuant to N.C.G.S. § 84-4.1 to appear in the appeal. In the event such a motion is filed prior to the filing of the printed record but has not yet been ruled upon when

the printed record is filed, the printed record shall include a statement that such a motion is pending and the date that motion was filed.;

(14) a statement, when appropriate, that copies of exhibits, copies of other items, or both have been included in the record on appeal pursuant to Rule 9(d) and are being filed separately; and

(15) a brief description of each original exhibit and other original item that has been included in the record on appeal pursuant to Rule 9(d).

(d) **Settling the Record on Appeal**. The record on appeal may be settled by any of the following methods:

(1) **By Agreement**. Within forty-five days after all of the transcripts that have been ordered according to Rule 7 and Rule 18(b)(3) are delivered or forty-five days after the last notice of appeal is filed, whichever is later, the parties may by agreement entered in the printed record ~~on appeal~~ settle a proposed record on appeal that has been prepared by any party in accordance with this Rule 18 as the record on appeal.

(2) **By Appellee's Approval of Appellant's Proposed Record on Appeal**. If the record on appeal is not settled by agreement under Rule 18(d)(1), the appellant shall, within the same times provided, serve upon all other parties a proposed record on appeal constituted in accordance with the provisions of Rule 18(c). Within thirty days after service of the proposed record on appeal upon an appellee, that appellee may serve upon all other parties a notice of approval of the proposed record on appeal or objections, amendments, or a proposed alternative record on appeal. Amendments or objections to the proposed record on appeal shall be set out in a separate ~~paper~~document and shall specify any item(s) for which an objection is based on the contention that the item was not filed, served, submitted for consideration, admitted, or made the subject of an offer of proof, or that the content of a statement or narration is factually inaccurate. An appellant who objects to an appellee's response to the proposed record on appeal shall make the same specification in its request for judicial settlement. The formatting of the record on appeal and the order in which items appear in it is the responsibility of the appellant. Judicial

settlement is not appropriate for disputes concerning only the formatting or the order in which items appear in the settled record on appeal. If all appellees within the times allowed them either serve notices of approval or fail to serve either notices of approval or objections, amendments, or proposed alternative records on appeal, appellant's proposed record on appeal thereupon constitutes the record on appeal.

(3) **By Agreement, by Operation of Rule, or by Court Order After Appellee's Objection or Amendment.** If any appellee timely serves amendments, objections, or a proposed alternative record on appeal, the record on appeal shall ~~consist of~~include each item that is either among those items required by Rule 18(c) ~~to be in the record on appeal~~ or that is requested by any party to the appeal and agreed upon for inclusion by all other parties to the appeal, in the absence of contentions that the item was not filed, served, or offered into evidence. ~~If~~Additionally, if a party requests that an item be included in the record on appeal but not all parties to the appeal agree to its inclusion, then that item ~~shall not be included in the printed record on appeal, but~~ shall be filed by the appellant ~~with the record on appeal~~ in a volume captioned "Rule 18(d)(3) Supplement~~ to the Printed Record on Appeal,"~~ ~~along with any transcripts, narrations of proceedings, documentary exhibits, and other items that are filed pursuant to these rules~~; provided that any item not filed, served, submitted for consideration, admitted, or for which no offer of proof was tendered shall not be included in the record on appeal. Subject to the additional requirements of Rule 28(d), items in the Rule 18(d)(3) supplement may be cited and used by the parties ~~as would items in the printed record on appeal~~like any other component of the record on appeal.

If a party does not agree to the wording of a statement or narration required or permitted by these rules, there shall be no judicial settlement to resolve the dispute unless the objection is based on a contention that the statement or narration concerns an item that was not filed, served, submitted for consideration, admitted, or tendered in an offer of proof, or that a statement or narration is factually inaccurate. Instead, the objecting party is permitted to have inserted in the settled record on

appeal a concise counter-statement. Parties are strongly encouraged to reach agreement on the wording of statements in records on appeal.

The Rule 18(d)(3) supplement ~~to the printed record on appeal~~ shall contain an index of the contents of the supplement, which shall appear as the first page thereof. The Rule 18(d)(3) supplement shall be paginated consecutively with the pages of the printed record ~~on appeal~~, the first page of the supplement to bear the next consecutive number following the number of the last page of the printed record ~~on appeal~~. These pages shall be referred to as "record supplement pages," and shall be cited as "(R S p ___)." The contents of the supplement should be arranged, so far as practicable, in the order in which they occurred or were filed in the administrative tribunal. If a party does not agree to the inclusion or specification of an exhibit or transcript in the printed record, the printed record shall include a statement that such items are separately filed along with the supplement.

If any party to the appeal contends that materials proposed for inclusion in the record or for filing therewith pursuant to these rules were not filed, served, submitted for consideration, admitted, or offered into evidence, or that a statement or narration permitted by these rules is not factually accurate, then that party, within ten days after expiration of the time within which the appellee last served with the appellant's proposed record on appeal might have served amendments, objections, or a proposed alternative record on appeal, may in writing request that the administrative tribunal convene a conference to settle the record on appeal. A copy of that request, endorsed with a certificate showing service on the administrative tribunal, shall be served upon all other parties. Each party shall promptly provide to the administrative tribunal a reference copy of the record items, amendments, or objections served by that party in the case.

The functions of the administrative tribunal in the settlement of the record on appeal are to determine whether a statement permitted by these rules is not factually accurate, to settle narrations of proceedings under Rule 18(c)(6), and to determine whether the record accurately reflects material filed, served, submitted for

consideration, admitted, or made the subject of an offer of proof, but not to decide whether material desired in the record by either party is relevant to the issues on appeal, non-duplicative, or otherwise suited for inclusion in the record on appeal.

Upon receipt of a request for settlement of the record on appeal, the administrative tribunal shall send written notice to counsel for all parties setting a place and time for a conference to settle the record on appeal. The conference shall be held not later than fifteen days after service of the request upon the administrative tribunal. The administrative tribunal or a delegate appointed in writing by the administrative tribunal shall settle the record on appeal by order entered not more than twenty days after service of the request for settlement upon the administrative tribunal. If requested, the settling official shall return the record items submitted for reference during the settlement process with the order settling the record on appeal.

When the administrative tribunal is a party to the appeal, the administrative tribunal shall forthwith request the Chief Judge of the Court of Appeals or the Chief Justice of the Supreme Court, as appropriate, to appoint a referee to settle the record on appeal. The referee so appointed shall proceed after conference with all parties to settle the record on appeal in accordance with the terms of these rules and the appointing order.

If any appellee timely serves amendments, objections, or a proposed alternative record on appeal, and no judicial settlement of the record is sought, the record is deemed settled as of the expiration of the ten-day period within which any party could have requested judicial settlement of the record on appeal under this Rule 18(d)(3).

Nothing herein shall prevent settlement of the record on appeal by agreement of the parties at any time within the times herein limited for settling the record by administrative tribunal decision.

(e) **Further Procedures and Additional Materials in the Record on Appeal.** Further procedures for perfecting and prosecuting the appeal shall be as provided by these rules for appeals from the courts of the trial divisions.

(f) **Extensions of Time**. The times provided in this rule for taking any action may be extended in accordance with the provisions of Rule 27(c).

* * *

Rule 21. Certiorari

(a) **Scope of the Writ**.

(1) **Review of the Judgments and Orders of Trial Tribunals**. The writ of certiorari may be issued in appropriate circumstances by either appellate court to permit review of the judgments and orders of trial tribunals when the right to prosecute an appeal has been lost by failure to take timely action, or when no right of appeal from an interlocutory order exists, or for review pursuant to N.C.G.S. § 15A-1422(c)(3) of an order of the trial court ruling on a motion for appropriate relief.

(2) **Review of the Judgments and Orders of the Court of Appeals**. The writ of certiorari may be issued by the Supreme Court in appropriate circumstances to permit review of the decisions and orders of the Court of Appeals when the right to prosecute an appeal of right or to petition for discretionary review has been lost by failure to take timely action, or for review of orders of the Court of Appeals when no right of appeal exists.

(b) **Petition for Writ—to Which Appellate Court Addressed**. Application for the writ of certiorari shall be made by filing a petition therefor with the clerk of the court of the appellate division to which appeal of right might lie from a final judgment in the cause by the tribunal to which issuance of the writ is sought.

(c) **Petition for Writ—Filing and Service; Content**. The petition shall be filed without unreasonable delay and shall be accompanied by proof of service upon all other parties. For cases which arise from the Industrial Commission, a copy of the petition shall be served on the Chair of the Industrial Commission. The petition shall contain a statement of the facts necessary to an understanding of the issues presented by the application; a statement of the reasons why the writ should issue; and certified copies of the judgment, order, or opinion or parts of the record which may be essential to an understanding of the matters set forth in the petition. The petition shall be verified by counsel or the petitioner. Upon receipt of the prescribed docket fee, the clerk will docket the petition.

(d) **Response; Determination by Court**. Within ten days after service of the petition any party may file a response thereto with supporting affidavits or certified portions of the record not filed with the petition. Filing shall be accompanied by proof of service upon all other parties. The court for good cause shown may shorten the time for filing a response. Determination will be made on the basis of the petition, the response, and any supporting ~~papers~~items. No briefs or oral argument will be received or allowed unless ordered by the court upon its own initiative.

(e) **Petition for Writ in Post-conviction Matters—to Which Appellate Court Addressed**. Petitions for writ of certiorari to review orders of the trial court denying motions for appropriate relief upon grounds listed in N.C.G.S. § 15A-1415(b) by persons who have been convicted of murder in the first degree and sentenced to death shall be filed in the Supreme Court. In all other cases such petitions shall be filed in and determined by the Court of Appeals, and the Supreme Court will not entertain petitions for certiorari or petitions for further discretionary review in these cases. In the event the petitioner unreasonably delays in filing the petition or otherwise fails to comply with a rule of procedure, the petition shall be dismissed by the court. If the petition is without merit, it shall be denied by the court.

(f) **Petition for Writ in Post-conviction Matters—Death Penalty Cases**. A petition for writ of certiorari to review orders of the trial court on motions for appropriate relief in death penalty cases shall be filed in the Supreme Court within sixty days after delivery of the transcript of the hearing on the motion for appropriate relief to the petitioning party. The responding party shall file its response within thirty days of service of the petition.

* * *

Rule 22. Mandamus and Prohibition

(a) **Petition for Writ—to Which Appellate Court Addressed**. Applications for the writs of mandamus or prohibition directed to a judge, judges, commissioner, or commissioners shall be made by filing a petition therefor with the clerk of the court to which appeal of right might lie from a final judgment entered in the cause by the judge, judges, commissioner, or commissioners to whom issuance of the writ is sought.

(b) **Petition for Writ—Filing and Service; Content**. The petition shall be filed without unreasonable delay after the judicial action sought to be prohibited or compelled has been undertaken, or has occurred, or has been refused, and shall be accompanied by proof of

service on the respondent judge, judges, commissioner, or commissioners and on all other parties to the action. The petition shall contain a statement of the facts necessary to an understanding of the issues presented by the application; a statement of the issues presented and of the relief sought; a statement of the reasons why the writ should issue; and certified copies of any order or opinion or parts of the record that may be essential to an understanding of the matters set forth in the petition. The petition shall be verified by counsel or the petitioner. Upon receipt of the prescribed docket fee, the clerk shall docket the petition.

(c) **Response; Determination by Court**. Within ten days after service of the petition the respondent or any party may file a response thereto with supporting affidavits or certified portions of the record not filed with the petition. Filing shall be accompanied by proof of service upon all other parties. The court for good cause shown may shorten the time for filing a response. Determination will be made on the basis of the petition, the response, and any supporting ~~papers~~items. No briefs or oral argument will be received or allowed unless ordered by the court upon its own initiative.

* * *

Rule 23. Supersedeas

(a) **Pending Review of Trial Tribunal Judgments and Orders**.

(1) **Application—When Appropriate**. Application may be made to the appropriate appellate court for a writ of supersedeas to stay the execution or enforcement of any judgment, order, or other determination of a trial tribunal which is not automatically stayed by the taking of appeal when an appeal has been taken, or a petition for mandamus, prohibition, or certiorari has been filed to obtain review of the judgment, order, or other determination; and (1) a stay order or entry has been sought by the applicant by deposit of security or by motion in the trial tribunal and such order or entry has been denied or vacated by the trial tribunal, or (2) extraordinary circumstances make it impracticable to obtain a stay by deposit of security or by application to the trial tribunal for a stay order.

(2) **Application—How and to Which Appellate Court Made**. Application for the writ is by petition which shall in all cases, except those initially docketed in the Supreme Court, be first made to the Court of Appeals. Except when an appeal from a superior court is initially

docketed in the Supreme Court, no petition will be entertained by the Supreme Court unless application has been made first to the Court of Appeals and denied by that court.

(b) **Pending Review by Supreme Court of Court of Appeals Decisions**. Application may be made in the first instance to the Supreme Court for a writ of supersedeas to stay the execution or enforcement of a judgment, order, or other determination mandated by the Court of Appeals when a notice of appeal of right or a petition for discretionary review has been or will be timely filed, or a petition for review by certiorari, mandamus, or prohibition has been filed to obtain review of the decision of the Court of Appeals. No prior motion for a stay order need be made to the Court of Appeals.

(c) **Petition for Writ—Filing and Service; Content**. The petition shall be filed with the clerk of the court to which application is being made and shall be accompanied by proof of service upon all other parties. The petition shall be verified by counsel or the petitioner. Upon receipt of the required docket fee, the clerk will docket the petition.

For stays of the judgments of trial tribunals, the petition shall contain a statement that stay has been sought in the court to which issuance of the writ is sought and denied or vacated by that court, or shall contain facts showing that it was impracticable there to seek a stay. For stays of any judgment, the petition shall contain: (1) a statement of any facts necessary to an understanding of the basis upon which the writ is sought; and (2) a statement of reasons why the writ should issue in justice to the applicant. The petition may be accompanied by affidavits and by any certified portions of the record pertinent to its consideration. It may be included in a petition for discretionary review by the Supreme Court under N.C.G.S. § 7A-31, or in a petition to either appellate court for certiorari, mandamus, or prohibition.

(d) **Response; Determination by Court**. Within ten days after service of the petition any party may file a response thereto with supporting affidavits or certified portions of the record not filed with the petition. Filing shall be accompanied by proof of service upon all other parties. The court for good cause shown may shorten the time for filing a response. Determination will be made on the basis of the petition, the response, and any supporting ~~papers~~items. No briefs or oral argument will be received or allowed unless ordered by the court upon its own initiative.

(e) **Temporary Stay**. Upon the filing of a petition for supersedeas, the applicant may apply, either within the petition or by a separate ~~paper~~filing, for an order temporarily staying enforcement or execution

of the judgment, order, or other determination pending decision by the court upon the petition for supersedeas. If application is made by a separate ~~paper~~filing, it shall be filed and served in the manner provided for the petition for supersedeas in Rule 23(c). The court for good cause shown in such a petition for temporary stay may issue such an order ex parte. In capital cases, such stay, if granted, shall remain in effect until the period for filing a petition for certiorari in the United States Supreme Court has passed without a petition being filed, or until certiorari on a timely filed petition has been denied by that Court. At that time, the stay shall automatically dissolve.

* * *

Rule 24. ~~Form of Papers; Copies~~[Reserved]

~~A party should file with the appellate court a single copy of any paper required to be filed in connection with applications for extraordinary writs. The court may direct that additional copies be filed. The clerk will not reproduce copies.~~

* * *

Rule 26. Filing and Service

~~(a) **Filing.** Papers required or permitted by these rules to be filed in the trial or appellate divisions shall be filed with the clerk of the appropriate court. Filing may be accomplished by mail or by electronic means as set forth in this rule.~~

~~(1) **Filing by Mail**. Filing may be accomplished by mail addressed to the clerk but is not timely unless the papers are received by the clerk within the time fixed for filing, except that motions, responses to petitions, the record on appeal, and briefs shall be deemed filed on the date of mailing, as evidenced by the proof of service.~~

~~(2) **Filing by Electronic Means**. Filing in the appellate courts may be accomplished by electronic means by use of the electronic-filing site at https://www.ncappellatecourts.org. Many documents may be filed electronically through the use of this site. The site identifies those types of documents that may not be filed electronically. A document filed by use of the electronic-filing site is deemed filed as of the time that the document is received electronically. Responses and motions may be filed by facsimile machines, if an oral request for permission to do so has first been tendered to and approved by the clerk of the appropriate appellate court. In all cases in which a document has been filed by facsimile machine pursuant to this rule, counsel must forward the following items by first class mail, contemporaneously with the transmission: the original signed document, the electronic transmission fee, and the~~

~~applicable filing fee for the document, if any. The party filing a document by electronic means shall be responsible for all costs of the transmission, and neither they nor the electronic transmission fee may be recovered as costs of the appeal. When a document is filed to the electronic filing site at https://www.ncappellatecourts.org, counsel may either have his or her account drafted electronically by following the procedures described at the electronic-filing site, or counsel must forward the applicable filing fee for the document by first class mail, contemporaneously with the transmission~~.

(a) **Filing**. Counsel must file documents in the appellate courts electronically. The electronic-filing site for the appellate courts is located at https://www.ncappellatecourts.org. If a technical failure prevents counsel from filing a document by use of the electronic-filing site, then the clerk of the appellate court may permit the document to be filed by hand delivery, mail, or fax. Counsel may file copies of oversized documents and non-documentary items electronically if permitted to do so by the electronic-filing site, but otherwise by hand delivery or mail.

A person who is not represented by counsel is encouraged to file items in the appellate courts electronically but is not required to do so. A person not represented by counsel may file items by hand delivery or mail.

An item is filed in the appellate court electronically when it is received by the electronic-filing site. An item is filed in paper when it is received by the clerk, except that motions, responses to petitions, the record on appeal, and briefs filed by mail are deemed filed on the date of mailing as evidenced by the proof of service.

(b) **Service ~~of All Papers~~ Required**. Copies of all ~~papers~~items filed by any party and not required by these rules to be served by the clerk shall, at or before the time of filing, be served on all other parties to the appeal.

(c) **Manner of Service**. Service may be made in the manner provided for service and return of process in Rule 4 of the Rules of Civil Procedure and may be so made upon a party or upon its attorney of record. Service may also be made upon a party or its attorney of record by delivering a copy to either or by mailing a copy to the recipient's last known address, or if no address is known, by filing it in the office of the clerk with whom the original ~~paper~~item is filed. Delivery of a copy within this rule means handing it to the attorney or to the party, or leaving it at the attorney's office with a partner or employee. Service by mail is complete upon deposit of the ~~paper~~item enclosed in a postpaid, properly addressed wrapper in a post office or official depository under

the exclusive care and custody of the United States Postal Service, or, for those having access to such services, upon deposit with the State Courier Service or Inter-Office Mail. When a document is filed electronically to the electronic-filing site, service also may be accomplished electronically by use of the other counsel's correct and current e-mail address(es), or service may be accomplished in the manner described previously in this subsection.

(d) **Proof of Service**. ~~Papers~~Items presented for filing shall contain an acknowledgment of service by the person served or proof of service in the form of a statement of the date and manner of service and of the names of the persons served, certified by the person who made service. Proof of service shall appear on or be affixed to the ~~papers~~ items filed.

(e) **Joint Appellants and Appellees**. Any ~~paper~~item required by these rules to be served on a party is properly served upon all parties joined in the appeal by service upon any one of them.

(f) **Numerous Parties to Appeal Proceeding Separately**. When there are unusually large numbers of appellees or appellants proceeding separately, the trial tribunal, upon motion of any party or on its own initiative, may order that any ~~papers~~items required by these rules to be served by a party on all other parties need be served only upon parties designated in the order, and that the filing of such ~~a paper~~an item and service thereof upon the parties designated constitutes due notice of it to all other parties. A copy of every such order shall be served upon all parties to the action in such manner and form as the court directs.

(g) **Documents Filed with Appellate Courts.**

(1) **Form of ~~Papers~~Documents**. ~~Papers~~Documents composed for an appeal and presented to either appellate court for filing shall be letter size (8½ x 11") ~~with the exception of wills and exhibits. All printed matter must appear in font~~Documents shall be prepared using a proportionally spaced font with serifs that is no smaller than 12-point and no larger than 14-point in size~~, using a proportionally spaced font with serifs~~. Examples of proportionally spaced fonts with serifs include, but are not limited to, Constantia and Century typeface as described in Appendix B to these rules. ~~Unglazed white paper of 16- to 20-pound substance should be utilized so as to produce a clear, black image, leaving a margin of approximately one inch on each side.~~ The body of text shall be presented with double spacing between each line of text.

Lines of text shall be no wider than 6½ inches, leaving a margin of approximately one inch on each side. The format of all ~~papers~~documents presented for filing shall follow the additional instructions found in the appendixes to these rules. The format of briefs shall follow the additional instructions found in Rule 28(j).

(2) **Index Required**. ~~All documents~~Documents composed for an appeal and presented to either appellate court, other than records on appeal, which in this respect are governed by Rule 9, shall, unless they are less than ten pages in length, be preceded by a subject index of the matter contained therein, with page references, and a table of authorities, i.e., cases (alphabetically arranged), constitutional provisions, statutes, and textbooks cited, with references to the pages where they are cited.

(3) **Closing**. The body of ~~the document~~a document composed for an appeal shall at its close bear the printed name, post office address, telephone number, State Bar number, and e-mail address of counsel of record, and in addition, at the appropriate place, the ~~manuscript~~ signature of counsel of record. ~~If the document has been filed electronically by use of the electronic-filing site at https://www.ncappellatecourts.org, the manuscript signature of counsel of record is not required.~~

* * *

Rule 27. Computation and Extension of Time

(a) **Computation of Time**. In computing any period of time prescribed or allowed by these rules, by order of court, or by any applicable statute, the day of the act, event, or default after which the designated period of time begins to run is not to be included. The last day of the period so computed is to be included, unless it is a Saturday, Sunday, or a legal holiday when the courthouse is closed for transactions, in which event the period runs until the end of the next day which is not a Saturday, Sunday, or a legal holiday when the courthouse is closed for transactions.

(b) **Additional Time After Service**. Except as to filing of notice of appeal pursuant to Rule 3(c), whenever a party has the right to do some act or take some proceedings within a prescribed period after the service of a notice or other ~~paper~~item and the notice or ~~paper~~item is served by mail, or by e-mail if allowed by these rules, three days shall be added to the prescribed period.

(c) **Extensions of Time; By Which Court Granted**. Except as herein provided, courts for good cause shown may upon motion extend any of the times prescribed by these rules, or by order of court, for doing any act required or allowed under these rules, or may permit an act to be done after the expiration of such time. Courts may not extend the time for taking an appeal or for filing a petition for discretionary review or a petition for rehearing or the responses thereto prescribed by these rules or by law.

(1) **Motions for Extension of Time in the Trial Division**. The trial tribunal for good cause shown by the appellant may extend once, for no more than thirty days, the time permitted by: (1) Rule 7 for a transcriptionist to deliver a transcript; and (2) Rule 11 or Rule 18 for service of the proposed record on appeal.

Motions for extensions of time made to a trial tribunal may be made orally or in writing and without notice to other parties and may be determined at any time or place within the state.

Motions made under this Rule 27 to a court of the trial division may be heard and determined by any of those judges of the particular court specified in Rule 36 of these rules. Such motions made to a commission may be heard and determined by the chair of the commission; or if to a commissioner, then by that commissioner.

(2) **Motions for Extension of Time in the Appellate Division**. All motions for extensions of time other than those specifically enumerated in Rule 27(c)(1) may be made only to the appellate court to which appeal has been taken.

(d) **Motions for Extension of Time; How Determined**. Motions for extension of time made in any court may be determined *ex parte*, but the moving party shall promptly serve on all other parties to the appeal a copy of any order extending time; provided that motions made after the expiration of the time allowed in these rules for the action sought to be extended must be in writing and with notice to all other parties and may be allowed only after all other parties have had an opportunity to be heard.

* * *

Rule 28. Briefs—Function and Content

(a) **Function**. The function of all briefs required or permitted by these rules is to define clearly the issues presented to the reviewing court

and to present the arguments and authorities upon which the parties rely in support of their respective positions thereon. The scope of review on appeal is limited to issues so presented in the several briefs. Issues not presented and discussed in a party's brief are deemed abandoned. Similarly, issues properly presented for review in the Court of Appeals, but not then stated in the notice of appeal or the petition accepted by the Supreme Court for review and discussed in the new briefs required by Rules 14(d)(1) and 15(g)(2) to be filed in the Supreme Court for review by that Court, are deemed abandoned.

(b) **Content of Appellant's Brief**. An appellant's brief shall contain, under appropriate headings and in the form prescribed by Rule 26(g) and the appendixes to these rules, in the following order:

(1) A cover page, followed by a subject index and table of authorities as required by Rule 26(g).

(2) A statement of the issues presented for review. The proposed issues on appeal listed in the printed record ~~on appeal~~ shall not limit the scope of the issues that an appellant may argue in its brief.

(3) A concise statement of the procedural history of the case. This shall indicate the nature of the case and summarize the course of proceedings up to the taking of the appeal before the court.

(4) A statement of the grounds for appellate review. Such statement shall include citation of the statute or statutes permitting appellate review. When an appeal is based on Rule 54(b) of the Rules of Civil Procedure, the statement shall show that there has been a final judgment as to one or more but fewer than all of the claims or parties and that there has been a certification by the trial court that there is no just reason for delay. When an appeal is interlocutory, the statement must contain sufficient facts and argument to support appellate review on the ground that the challenged order affects a substantial right.

(5) A full and complete statement of the facts. This should be a non-argumentative summary of all material facts underlying the matter in controversy which are necessary to understand all issues presented for review, supported by references to pages in ~~the transcript of proceedings,~~ the record on appeal~~, or exhibits, as the case may be~~.

(6) An argument, to contain the contentions of the appellant with respect to each issue presented. Issues not

presented in a party's brief, or in support of which no reason or argument is stated, will be taken as abandoned.

The argument shall contain a concise statement of the applicable standard(s) of review for each issue, which shall appear either at the beginning of the discussion of each issue or under a separate heading placed before the beginning of the discussion of all the issues.

The body of the argument and the statement of applicable standard(s) of review shall contain citations of the authorities upon which the appellant relies. Evidence or other proceedings material to the issue may be narrated or quoted in the body of the argument, with appropriate reference to the record on appeal, the transcript of proceedings, or exhibits.

(7) A short conclusion stating the precise relief sought.

(8) Identification of counsel by signature, typed name, post office address, telephone number, State Bar number, and e-mail address.

(9) The proof of service required by Rule 26(d).

(10) Any appendix required or allowed by this Rule 28.

(c) **Content of Appellee's Brief; Presentation of Additional Issues**. An appellee's brief shall contain a subject index and table of authorities as required by Rule 26(g), an argument, a conclusion, identification of counsel, and proof of service in the form provided in Rule 28(b) for an appellant's brief, and any appendix required or allowed by this Rule 28. It does not need to contain a statement of the issues presented, procedural history of the case, grounds for appellate review, the facts, or the standard(s) of review, unless the appellee disagrees with the appellant's statements and desires to make a restatement or unless the appellee desires to present issues in addition to those stated by the appellant.

Without taking an appeal, an appellee may present issues on appeal based on any action or omission of the trial court that deprived the appellee of an alternative basis in law for supporting the judgment, order, or other determination from which appeal has been taken. Without having taken appeal or listing proposed issues as permitted by Rule 10(c), an appellee may also argue on appeal whether a new trial should be granted to the appellee rather than a judgment notwithstanding the verdict awarded to the appellant when the latter relief is sought on appeal by the appellant. If the appellee presents issues in addition to those stated by the appellant, the appellee's brief must contain a full, non-argumentative

summary of all material facts necessary to understand the new issues supported by references to pages in the record on appeal, the transcript of proceedings, or the appendixes, as appropriate, as well as a statement of the applicable standard(s) of review for those additional issues.

An appellee may supplement the record with any materials pertinent to the issues presented on appeal, as provided in Rule 9(b)(5).

(d) **Appendixes to Briefs**. Whenever the transcript of proceedings is filed pursuant to Rule 9(c)(2), the parties must file portions of the transcript as appendixes to their briefs, if required by this Rule 28(d).

(1) **When Appendixes to Appellant's Brief Are Required.** Except as provided in Rule 28(d)(2), the appellant must reproduce as appendixes to its brief:

a. those portions of the transcript of proceedings which must be reproduced in order to understand any issue presented in the brief;

b. those portions of the transcript showing the pertinent questions and answers when an issue presented in the brief involves the admission or exclusion of evidence;

c. relevant portions of statutes, rules, or regulations, the study of which is required to determine issues presented in the brief;

d. relevant items from the Rule 11(c) or Rule 18(d)(3) supplement ~~to the printed record on appeal,~~ the study of which are required to determine issues presented in the brief.

(2) **When Appendixes to Appellant's Brief Are Not Required**. Notwithstanding the requirements of Rule 28(d)(1), the appellant is not required to reproduce an appendix to its brief with respect to an issue presented:

a. whenever the portion of the transcript necessary to understand an issue presented in the brief is reproduced in the body of the brief;

b. to show the absence or insufficiency of evidence unless there are discrete portions of the transcript where the subject matter of the alleged insufficiency of the evidence is located; or

c. to show the general nature of the evidence necessary to understand an issue presented in the brief if such

evidence has been fully summarized as required by Rule 28(b)(4) and (5).

(3) **When Appendixes to Appellee's Brief Are Required**. An appellee must reproduce appendixes to its brief in the following circumstances:

a. Whenever the appellee believes that appellant's appendixes do not include portions of the transcript or items from the Rule 11(c) or Rule 18(d)(3) supplement ~~to the printed record on appeal~~ that are required by Rule 28(d)(1), the appellee shall reproduce those portions of the transcript or supplement it believes to be necessary to understand the issue.

b. Whenever the appellee presents a new or additional issue in its brief as permitted by Rule 28(c), the appellee shall reproduce portions of the transcript or relevant items from the Rule 11(c) or Rule 18(d)(3) supplement ~~to the printed record on appeal~~ as if it were the appellant with respect to each such new or additional issue.

(4) **Format of Appendixes**. The appendixes to the briefs of any party shall be in the format prescribed by Rule 26(g) and shall consist of ~~clear photocopies~~copies of transcript pages that have been deemed necessary for inclusion in the appendix under this Rule 28(d). The pages of the appendix shall be consecutively numbered, and an index to the appendix shall be placed at its beginning.

(e) **References in Briefs to the Record on Appeal**. References in the briefs to parts of the printed record ~~on appeal and to parts of the transcript or parts of documentary exhibits~~, transcripts, documents included in the record on appeal pursuant to Rule 9(d), or supplements shall be to the pages in such filings where those portions appear.

(f) **Joinder of Multiple Parties in Briefs**. Any number of appellants or appellees in a single cause or in causes consolidated for appeal may join in a single brief even though they are not formally joined on the appeal. Any party to any appeal may adopt by reference portions of the briefs of others.

(g) **Additional Authorities**. Additional authorities discovered by a party after filing its brief may be brought to the attention of the court by filing a memorandum thereof with the clerk of the court and serving copies upon all other parties. The memorandum may not be used as a reply brief or for additional argument, but shall simply state the issue to which the additional authority applies and provide a full citation of the

authority. Authorities not cited in the briefs or in such a memorandum may not be cited and discussed in oral argument.

(h) **Reply Briefs**. Within fourteen days after an appellee's brief has been served on an appellant, the appellant may file and serve a reply brief, subject to the length limitations set forth in Rule 28(j). Any reply brief which an appellant elects to file shall be limited to a concise rebuttal of arguments set out in the appellee's brief and shall not reiterate arguments set forth in the appellant's principal brief. Upon motion of the appellant, the Court may extend the length limitations on such a reply brief to permit the appellant to address new or additional issues presented for the first time in the appellee's brief. Otherwise, motions to extend reply brief length limitations or to extend the time to file a reply brief are disfavored.

(i) **Amicus Curiae Briefs**. An amicus curiae may file a brief with the permission of the appellate court in which the appeal is docketed.

(1) **Motion**. To obtain the court's permission to file a brief, amicus curiae shall file a motion with the court that states concisely the nature of amicus curiae's interest, the reasons why the brief is desirable, the issues of law to be addressed in the brief, and the position of amicus curiae on those issues.

(2) **Brief**. The motion must be accompanied by amicus curiae's brief. The amicus curiae brief shall contain, in a footnote on the first page, a statement that identifies any person or entity—other than amicus curiae, its members, or its counsel—who, directly or indirectly, either wrote the brief or contributed money for its preparation.

(3) **Time for Filing**. If the amicus curiae brief is in support of a party to the appeal, then amicus curiae shall file its motion and brief within the time allowed for filing that party's principal brief. If amicus curiae's brief does not support either party, then amicus curiae shall file its motion and proposed brief within the time allowed for filing appellee's principal brief.

(4) **Service on Parties**. When amicus curiae files its motion and brief, it must serve a copy of its motion and brief on all parties to the appeal.

(5) **Action by Court**. Unless the court orders otherwise, it will decide amicus curiae's motion without responses or argument. An amicus motion filed by an individual on his or her own behalf will be disfavored.

(6) **Reply Briefs**. A party to the appeal may file and serve a reply brief that responds to an amicus curiae brief no later than thirty days after having been served with the amicus curiae brief. A party's reply brief to an amicus curiae brief shall be limited to a concise rebuttal of arguments set out in the amicus curiae brief and shall not reiterate or rebut arguments set forth in the party's principal brief. The court will not accept a reply brief from an amicus curiae.

(7) **Oral Argument**. The court will allow a motion of an amicus curiae requesting permission to participate in oral argument only for extraordinary reasons.

(j) **Word-Count Limitations Applicable to Briefs Filed in the Court of Appeals**. Each brief filed in the Court of Appeals, whether filed by an appellant, appellee, or amicus curiae, shall be set in font as set forth in Rule 26(g)(1) and described in Appendix B to these rules. A principal brief may contain no more than 8,750 words. A reply brief may contain no more than 3,750 words. An amicus curiae brief may contain no more than 3,750 words.

(1) **Portions of Brief Included in Word Count**. Footnotes and citations in the body of the brief must be included in the word count. Covers, captions, indexes, tables of authorities, certificates of service, certificates of compliance with this rule, counsel's signature block, and appendixes do not count against these word-count limits.

(2) **Certificate of Compliance**. Parties shall submit with the brief, immediately before the certificate of service, a certification, signed by counsel of record, or in the case of parties filing briefs pro se, by the party, that the brief contains no more than the number of words allowed by this rule. For purposes of this certification, counsel and parties may rely on word counts reported by word-processing software, as long as footnotes and citations are included in those word counts.

* * *

Rule 30. Oral Argument and Unpublished Opinions

(a) **Order and Content of Argument**.

(1) The appellant is entitled to open and conclude the argument. The opening argument shall include a fair statement of the case. Oral arguments should complement the

written briefs, and counsel will therefore not be permitted to read at length from briefs, records, and authorities.

(2) In matters listed in Rule 42(b), counsel must use initials or a pseudonym in oral argument instead of the minor's name.

(b) **Time Allowed for Argument**.

(1) **In General**. Ordinarily a total of thirty minutes will be allowed all appellants and a total of thirty minutes will be allowed all appellees for oral argument. Upon written or oral application of any party, the court for good cause shown may extend the times limited for argument. Among other causes, the existence of adverse interests between multiple appellants or between multiple appellees may be suggested as good cause for such an extension. The court of its own initiative may direct argument on specific points outside the times limited.

Counsel is not obliged to use all the time allowed, and should avoid unnecessary repetition; the court may terminate argument whenever it considers further argument unnecessary.

(2) **Numerous Counsel**. Any number of counsel representing individual appellants or appellees proceeding separately or jointly may be heard in argument within the times herein limited or allowed by order of court. When more than one counsel is heard, duplication or supplementation of argument on the same points shall be avoided unless specifically directed by the court.

(c) **Non-Appearance of Parties**. If counsel for any party fails to appear to present oral argument, the court will hear argument from opposing counsel. If counsel for no party appears, the court will decide the case on the written briefs unless it orders otherwise.

(d) ~~**Submission on Written Briefs**. By agreement of the parties, a case may be submitted for decision on the written briefs, but the court may nevertheless order oral argument before deciding the case.~~ **Argument Conducted by Audio and Video Transmission**. The appellate courts may deviate from traditional in-person oral argument and instead require that oral argument be conducted by audio and video transmission. A party may move the court to conduct oral argument by audio and video transmission but must explain in its motion why the request is being made.

(e) **Unpublished Opinions**.

(1) In order to minimize the cost of publication and of providing storage space for the published reports, the Court of Appeals is not required to publish an opinion in every decided case. If the panel that hears the case determines that the appeal involves no new legal principles and that an opinion, if published, would have no value as a precedent, it may direct that no opinion be published.

(2) The text of a decision without published opinion shall be posted on the opinions web page of the Court of Appeals at https://appellate.nccourts.org/opinion-filings/coa and reported only by listing the case and the decision in the advance sheets and the bound volumes of the North Carolina Court of Appeals Reports.

(3) An unpublished decision of the North Carolina Court of Appeals does not constitute controlling legal authority. Accordingly, citation of unpublished opinions in briefs, memoranda, and oral arguments in the trial and appellate divisions is disfavored, except for the purpose of establishing claim preclusion, issue preclusion, or the law of the case. If a party believes, nevertheless, that an unpublished opinion has precedential value to a material issue in the case and that there is no published opinion that would serve as well, the party may cite the unpublished opinion if that party serves a copy thereof on all other parties in the case and on the court to which the citation is offered. This service may be accomplished by including the copy of the unpublished opinion in an addendum to a brief or memorandum. A party who cites an unpublished opinion for the first time at a hearing or oral argument must attach a copy of the unpublished opinion relied upon pursuant to the requirements of Rule 28(g). When citing an unpublished opinion, a party must indicate the opinion's unpublished status.

(4) Counsel of record and pro se parties of record may move for publication of an unpublished opinion, citing reasons based on Rule 30(e)(1) and serving a copy of the motion upon all other counsel and pro se parties of record. The motion shall be filed and served within ten days of the filing of the opinion. Any objection to the requested publication by counsel or pro se parties of record must be filed within five days after service of the motion requesting

publication. The panel that heard the case shall determine whether to allow or deny such motion.

(f) **~~Pre-Argument Review;~~ Decision of Appeal Without Oral Argument**.

(1) At any time that the Supreme Court concludes that oral argument in any case pending before it will not be of assistance to the Court, it may dispose of the case on the record and briefs. In those cases, counsel will be notified not to appear for oral argument.

(2) The Chief Judge of the Court of Appeals may from time to time designate a panel to review any pending case, after all briefs are filed but before argument, for decision under this rule. If all of the judges of the panel to which a pending appeal has been referred conclude that oral argument will not be of assistance to the Court, the case may be disposed of on the record and briefs. Counsel will be notified not to appear for oral argument.

(3) By agreement of the parties, a case may be submitted for decision on the written briefs, but the court may nevertheless order oral argument before deciding the case.

* * *

Rule 34. Frivolous Appeals; Sanctions

(a) A court of the appellate division may, on its own initiative or motion of a party, impose a sanction against a party or attorney or both when the court determines that an appeal or any proceeding in an appeal was frivolous because of one or more of the following:

(1) the appeal was not well-grounded in fact and was not warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law;

(2) the appeal was taken or continued for an improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

(3) a petition, motion, brief, record, or other ~~paper~~item filed in the appeal was grossly lacking in the requirements of propriety, grossly violated appellate court rules, or grossly disregarded the requirements of a fair presentation of the issues to the appellate court.

(b) A court of the appellate division may impose one or more of the following sanctions:

(1) dismissal of the appeal;

(2) monetary damages including, but not limited to,

a. single or double costs,

b. damages occasioned by delay,

c. reasonable expenses, including reasonable attorney fees, incurred because of the frivolous appeal or proceeding;

(3) any other sanction deemed just and proper.

(c) A court of the appellate division may remand the case to the trial division for a hearing to determine one or more of the sanctions under subdivisions (b)(2) or (b)(3) of this rule.

(d) If a court of the appellate division remands the case to the trial division for a hearing to determine a sanction under subsection (c) of this rule, the person subject to sanction shall be entitled to be heard on that determination in the trial division.

* * *

Rule 37. Motions in Appellate Courts

(a) **Time; Content of Motions; Response**. An application to a court of the appellate division for an order or for other relief available under these rules may be made by filing a motion for such order or other relief with the clerk of the court, with service on all other parties. Unless another time is expressly provided by these rules, the motion may be filed and served at any time before the case is called for oral argument. The motion shall contain or be accompanied by any matter required by a specific provision of these rules governing such a motion and shall state with particularity the grounds on which it is based and the order or relief sought. If a motion is supported by affidavits, briefs, or other ~~papers~~items, these shall be served and filed with the motion. Within ten days after a motion is served or until the appeal is called for oral argument, whichever period is shorter, a party may file and serve copies of a response in opposition to the motion, which may be supported by affidavits, briefs, or other ~~papers~~items in the same manner as motions. The court may shorten or extend the time for responding to any motion.

(b) **Determination**. Notwithstanding the provisions of Rule 37(a), a motion may be acted upon at any time, despite the absence of notice to all parties and without awaiting a response thereto. A party who has not received actual notice of such a motion, or who has not filed a response at the time such action is taken, and who is adversely affected

by the action may request reconsideration, vacation, or modification thereof. Motions will be determined without argument, unless the court orders otherwise.

(c) ~~[Reserved]~~**Notification and Consent**. In cases where all parties are represented by counsel, motions should contain a statement by counsel reporting counsel's good-faith effort to inform counsel for all other parties of the intended filing of the motion. The statement should indicate (i) whether the other parties consent to the relief being sought and (ii) whether any other party intends to file a response.

(d) **Withdrawal of Appeal in Criminal Cases**. Withdrawal of appeal in criminal cases shall be in accordance with N.C.G.S. § 15A-1450. In addition to the requirements of N.C.G.S. § 15A-1450, after the record on appeal in a criminal case has been filed in an appellate court but before the filing of an opinion, the defendant shall also file a written notice of the withdrawal with the clerk of the appropriate appellate court.

(e) **Withdrawal of Appeal in Civil Cases.**

(1) Prior to the filing of a record on appeal in the appellate court, an appellant or cross-appellant may, without the consent of the other party, file a notice of withdrawal of its appeal with the tribunal from which appeal has been taken. Alternatively, prior to the filing of a record on appeal, the parties may file a signed stipulation agreeing to dismiss the appeal with the tribunal from which the appeal has been taken.

(2) After the record on appeal has been filed, an appellant or cross-appellant or all parties jointly may move the appellate court in which the appeal is pending, prior to the filing of an opinion, for dismissal of the appeal. The motion must specify the reasons therefor, the positions of all parties on the motion to dismiss, and the positions of all parties on the allocation of taxed costs. The appeal may be dismissed by order upon such terms as agreed to by the parties or as fixed by the appellate court.

(f) **Effect of Withdrawal of Appeal**. The withdrawal of an appeal shall not affect the right of any other party to file or continue such party's appeal or cross-appeal.

* * *

Rule 39. Duties of Clerks; When Offices Open

(a) **General Provisions**. The clerks of the courts of the appellate division shall take the oaths and give the bonds required by law. The

courts shall be deemed always open for the purpose of filing any proper ~~paper~~item and of making motions and issuing orders. The offices of the clerks with the clerks or deputies in attendance shall be open during business hours on all days except Saturdays, Sundays, and legal holidays, but the respective courts may provide by order that the offices of their clerks shall be open for specified hours on Saturdays or on particular legal holidays or shall be closed on particular business days.

(b) **Records to Be Kept**. The clerk of each of the courts of the appellate division shall keep and maintain the records of that court on paper, microfilm, or electronic media, or any combination thereof. The records kept by the clerk shall include indexed listings of all cases docketed in that court, whether by appeal, petition, or motion, and a notation of the dispositions attendant thereto; a listing of final judgments on appeals before the court, indexed by title, docket number, and parties, containing a brief memorandum of the judgment of the court and the party against whom costs were adjudicated; and records of the proceedings and ceremonies of the court.

* * *

Appendix B. Format and Style

~~All documents for filing in either appellate court are prepared on 8½ x 11", plain, white unglazed paper of 16- to 20-pound weight. Typing is done on one side only, although the document will be reproduced in two-sided format. No vertical rules, law firm marginal return addresses, or punched holes will be accepted. The papers need not be stapled; a binder clip or rubber bands are adequate to secure them in order.~~

Documents composed for an appeal and presented to either appellate court for filing shall be formatted and styled as described in this appendix.

GENERAL REQUIREMENTS

Documents shall be letter size (8½ x 11"). ~~Papers~~Documents shall be prepared using ~~font~~a proportionally spaced font with serifs that is no smaller than 12-point and no larger than 14-point in size~~using a proportionally spaced font with serifs~~. Examples of proportionally spaced fonts with serifs include, but are not limited to, Constantia, Century, Century Schoolbook, and Century Old Style typeface. To allow for binding of documents, a margin of approximately one inch shall be left on all sides of the page. The formatted page should be approximately 6½ inches wide and 9 inches long. Tabs are located at the following distances from the left margin: ½", 1", 1½", 2", 4¼" (center), and 5".

CAPTIONS OF DOCUMENTS

~~All documents to be filed in either appellate court~~Documents shall be headed by a caption. The caption contains: the number to be assigned the case by the clerk; the Judicial District from which the case arises; the appellate court to whose attention the document is addressed; the style of the case showing the names of all parties to the action, except as provided by Rule 42; the county from which the case comes; the indictment or docket numbers of the case below (in records on appeal and in motions and petitions in the cause filed prior to the filing of the record); and the title of the document. The caption shall be placed beginning at the top margin of a cover page and again on the first textual page of the document.

No. _____ (Number) DISTRICT

(SUPREME COURT OF NORTH CAROLINA)
(or)
(NORTH CAROLINA COURT OF APPEALS)

****

STATE OF NORTH CAROLINA	)	
or	)	
(NAME OF PLAINTIFF)	)	FROM (NAME) COUNTY
	)	
v	)	No. _____
	)	
(NAME OF DEFENDANT)	)	

****

(TITLE OF DOCUMENT)

****

The caption should reflect the title of the action (all parties named except as provided by Rule 42) as it appeared in the trial division. The appellant or petitioner is not automatically given topside billing; the relative positions of the plaintiff and defendant should be retained.

The caption of a component of the record on appeal and of a notice of appeal from the trial division should include directly below the name of the county, the indictment or docket numbers of the case in the trial

division. Those numbers, however, should not be included in other documents, except a petition for writ of certiorari or other petitions and motions in which no record on appeal has yet been created in the case. In notices of appeal or petitions to the Supreme Court from decisions of the Court of Appeals, the caption should show the Court of Appeals docket number in similar fashion.

Immediately below the caption of each document, centered and underlined, in all capital letters, should be the title of the document, e.g., PETITION FOR DISCRETIONARY REVIEW UNDER N.C.G.S. § 7A-31, or DEFENDANT-APPELLANT'S BRIEF. A brief filed in the Supreme Court in a case previously heard and decided by the Court of Appeals is entitled NEW BRIEF.

INDEXES

A brief or petition that is ten pages or more in length and all appendixes to briefs (Rule 28) must contain an index to the contents.

The index should be indented approximately ¾" from each margin, providing a 5" line. The form of the index for a printed record ~~on appeal~~ should be as follows (indexes for briefs are addressed in Appendix E):

(Printed Record)

INDEX

USE OF THE TRANSCRIPT OF EVIDENCE WITH RECORD ON APPEAL

Those portions of the printed record ~~on appeal~~ that correspond to the items asterisked (*) in the sample index above would be omitted if the transcript option were selected under Rule 9(c). In their place, counsel should insert a statement in substantially the following form:

> "Per Rule 9(c) of the Rules of Appellate Procedure, the transcript of proceedings in this case, taken by (name), transcriptionist, from (date) to (date) and consisting of (# of volumes) volumes and (# of pages) pages, numbered (1) through (last page #), is ~~electronically~~ filed pursuant to ~~Rule 7~~Rule 12."

Entire transcripts should not be inserted into the printed record ~~on appeal, but rather should be electronically filed by the appellant pursuant to Rule 7~~. Transcript pages inserted into the printed record ~~on appeal~~ will be treated as a narration and will be printed at the standard page charge. Counsel should note that transcripts will not be reproduced with the printed record ~~on appeal~~, but will be treated and used as an exhibit.

TABLE OF CASES AND AUTHORITIES

Immediately following the index and before the inside caption, all briefs, petitions, and motions that are ten pages or greater in length shall contain a table of cases and authorities. Cases should be arranged alphabetically, followed by constitutional provisions, statutes, regulations, and other textbooks and authorities. The format should be similar to that of the index. Citations should be made according to the most recent edition of *The Bluebook: A Uniform System of Citation*. Citations to regional reporters shall include parallel citations to official state reporters.

FORMAT OF BODY OF DOCUMENT

Paragraphs within the body of the printed record ~~on appeal~~ should be single-spaced, with double spaces between paragraphs. The body of petitions, notices of appeal, responses, motions, and briefs should be double-spaced, with captions, headings, issues, and long quotes single-spaced.

Adherence to the margins is important because the document will be reproduced front and back and will be bound on the side. No part of the text should be obscured by that binding.

Quotations of more than three lines in length should be indented ¾" from each margin and should be single-spaced. The citation should immediately follow the quote.

References to the record on appeal should be made using a parenthetical in the text: (R pp 38-40). References to the transcript, if used, should be made in a similar manner: (T p 558, line 21).

TOPICAL HEADINGS

The various sections of the brief or petition should be separated (and indexed) by topical headings, centered and underlined, in all capital letters.

Within the argument section, the issues presented should be set out as a heading in all capital letters and in paragraph format from margin to margin. Sub-issues should be presented in similar format, but block indented ½" from the left margin.

NUMBERING PAGES

The cover page containing the caption of the document (and the index in records on appeal) is unnumbered. The index and table of cases and authorities are on pages numbered with lowercase Roman numerals, e.g., i, ii, iv.

While the page containing the inside caption and the beginning of the substance of the petition or brief bears no number, it is page 1. Subsequent pages are sequentially numbered by Arabic numbers, flanked by dashes, at the center of the top margin of the page, e.g., -4-.

An appendix to the brief should be separately numbered in the manner of a brief.

SIGNATURE AND ADDRESS

Unless filed pro se, ~~all original papers~~documents filed in a case will bear the ~~original~~ signature of at least one counsel participating in the case, as in the example below. The name, address, telephone number, State Bar number, and e-mail address of the person signing, together with the capacity in which that person signs the ~~paper~~document, will be included. When counsel or the firm is retained, the firm name should be included above the signature; however, if counsel is appointed in an indigent criminal appeal, only the name of the appointed counsel should appear, without identification of any firm affiliation. Counsel participating in argument must have signed the brief in the case prior to that argument.

(Retained) [LAW FIRM NAME]

By: _____
[Name]
By: _____
[Name]
Attorneys for Plaintiff-Appellants
P. O. Box 0000
Raleigh, NC 27600
(919) 999-9999
State Bar No. _____
[e-mail address]

(Appointed) _____
[Name]
Attorney for Defendant-Appellant
P. O. Box 0000
Raleigh, NC 27600
(919) 999-9999
State Bar No. _____
[e-mail address]

* * *

Appendix C. ~~Arrangement of Record on Appeal~~[Reserved]

~~Only those items listed in the following tables and that are required by Rule 9(a) in the particular case should be included in the record. See Rule 9(b)(2) for sanctions for including unnecessary items in the record. The items marked by an asterisk (*) could be omitted from the printed record if the transcript option of Rule 9(c) is used and a transcript of the items exists.~~

~~Table 1~~
~~SUGGESTED ORDER IN APPEAL FROM CIVIL JURY CASE~~

~~1. Title of action (all parties named) and case number in caption, per Appendix B~~
~~2. Index, per Rule 9(a)(1)a~~
~~3. Statement of organization of trial tribunal, per Rule 9(a)(1)b~~
~~4. Statement of record items showing jurisdiction, per Rule 9(a)(1)c~~
~~5. Complaint~~
~~6. Pre-answer motions of defendant, with rulings thereon~~
~~7. Answer~~

8. Motion for summary judgment, with rulings thereon (* if oral)
9. Pretrial order
*10. Plaintiff's evidence, with any evidentiary rulings that a party to the appeal contends are erroneous
*11. Motion for directed verdict, with ruling thereon
*12. Defendant's evidence, with any evidentiary rulings that a party to the appeal contends are erroneous
*13. Plaintiff's rebuttal evidence, with any evidentiary rulings that a party to the appeal contends are erroneous
14. Issues tendered by parties
15. Issues submitted by court
16. Court's instructions to jury, per Rule 9(a)(1)f
17. Verdict
18. Motions after verdict, with rulings thereon (* if oral)
19. Judgment
20. Items, including Notice of Appeal, required by Rule 9(a)(1)i
21. Statement of transcript option as required by Rule 9(a)(1)i and 9(a)(1)l
22. Statement required by Rule 9(a)(1)m when a record supplement will be filed
23. Entries showing settlement of record on appeal, extensions of time, etc.
24. Proposed Issues on Appeal per Rule 9(a)(1)k
25. Names, office addresses, telephone numbers, State Bar numbers, and e-mail addresses of counsel for all parties to the appeal

Table 2

SUGGESTED ORDER IN APPEAL FROM SUPERIOR COURT REVIEW OF ADMINISTRATIVE AGENCY DECISION

1. Title of action (all parties named) and case number in caption, per Appendix B
2. Index, per Rule 9(a)(2)a
3. Statement of organization of superior court, per Rule 9(a)(2)b
4. Statement of record items showing jurisdiction of the board or agency, per Rule 9(a)(2)c
5. Copy of petition or other initiating pleading
6. Copy of answer or other responsive pleading
7. Copies of all pertinent items from administrative proceeding filed for review in superior court, including evidence
*8. Evidence taken in superior court, in order received
9. Copies of findings of fact, conclusions of law, and judgment of superior court

10. Items required by Rule 9(a)(2)h
11. Entries showing settlement of record on appeal, extensions of time, etc.
12. Proposed issues on appeal, per Rule 9(a)(2)i
13. Names, office addresses, telephone numbers, State Bar numbers, and e-mail addresses of counsel for all parties to the appeal

Table 3

SUGGESTED ORDER IN APPEAL OF CRIMINAL CASE

1. Title of action (all parties named) and case number in caption, per Appendix B
2. Index, per Rule 9(a)(3)a
3. Statement of organization of trial tribunal, per Rule 9(a)(3)b
4. Warrant
5. Judgment in district court (where applicable)
6. Entries showing appeal to superior court (where applicable)
7. Bill of indictment (if not tried on original warrant)
8. Arraignment and plea in superior court
9. *Voir dire* of jurors

*10. State's evidence, with any evidentiary rulings that a party to the appeal contends are erroneous

11. Motions at close of State's evidence, with rulings thereon (* if oral)

*12. Defendant's evidence, with any evidentiary rulings that a party to the appeal contends are erroneous

13. Motions at close of defendant's evidence, with rulings thereon (* if oral)

*14. State's rebuttal evidence, with any evidentiary rulings that a party to the appeal contends are erroneous

15. Motions at close of all evidence, with rulings thereon (* if oral)
16. Court's instructions to jury, per Rules 9(a)(3)f and 10(a)(2)
17. Verdict
18. Motions after verdict, with rulings thereon (* if oral)
19. Judgment and order of commitment
20. Appeal entries
21. Entries showing settlement of record on appeal, extensions of time, etc.
22. Proposed issues on appeal, per Rule 9(a)(3)j
23. Names, office addresses, telephone numbers, State Bar numbers, and e-mail addresses of counsel for all parties to the appeal

~~**Table 4**~~

~~**PROPOSED ISSUES ON APPEAL**~~

~~A. Examples related to pretrial rulings in civil actions~~

~~1. Did the trial court err in denying defendant's motion to dismiss for lack of personal jurisdiction under N.C. R. Civ. P. 12(b)(2)?~~

~~2. Did the trial court err in denying defendant's motion to dismiss for failure to state a claim upon which relief may be granted under N.C. R. Civ. P. 12(b)(6)?~~

~~3. Did the trial court err in denying defendant's motion to require plaintiff to submit to an independent physical examination under N.C. R. Civ. P. 35?~~

~~4. Did the trial court err in denying defendant's motion for summary judgment under N.C. R. Civ. P. 56?~~

~~B. Examples related to civil jury trial rulings~~

~~1. Did the trial court err in admitting the hearsay testimony of E.F.?~~

~~2. Did the trial court err in denying defendant's motion for a directed verdict?~~

~~3. Did the trial court err in instructing the jury on the doctrine of last clear chance?~~

~~4. Did the trial court err in instructing the jury on the doctrine of sudden emergency?~~

~~5. Did the trial court err in denying defendant's motion for a new trial?~~

~~C. Examples related to civil non-jury trials~~

~~1. Did the trial court err in denying defendant's motion to dismiss at the close of plaintiff's evidence?~~

~~2. Did the trial court err in its finding of fact No. 10?~~

~~3. Did the trial court err in its conclusion of law No. 3?~~

* * *

Appendix D. Forms

Captions for all documents filed in the appellate division should be in the format prescribed by Appendix B, addressed to the Court whose review is sought.

NOTICES OF APPEAL

(1) To Court of Appeals from Trial Division

Appropriate in all appeals of right from district or superior court except appeals from criminal judgments imposing sentences of death.

(Caption)

****

TO THE HONORABLE COURT OF APPEALS OF NORTH CAROLINA:

(Plaintiff)(Defendant), (Name of Party), hereby gives notice of appeal to the Court of Appeals of North Carolina (from the final judgment)(from the order) entered on (date) in (District)(Superior) Court, _____ County, (describing it).

Respectfully submitted this the __ day of _____, 2___.

s/_____
Attorney for (Plaintiff)
(Defendant)-Appellant
(Address, Telephone Number, State Bar Number, and E-mail Address)

(2) To Supreme Court from a Judgment of the Superior Court Including a Sentenceof Death

(Caption)

****

TO THE HONORABLE SUPREME COURT OF NORTH CAROLINA:

(Name of Defendant), Defendant, hereby gives notice of appeal to the Supreme Court of North Carolina from the final judgment entered by (name of Judge) in Superior Court, _____ County, on (date), which judgment included a conviction of murder in the first degree and a sentence of death.

Respectfully submitted this the __ day of _____, 2___.

s/_____
Attorney for Defendant-Appellant
(Address, Telephone Number, State Bar Number, and E-mail Address)

(3) To Supreme Court from a Judgment of the Court of Appeals

Appropriate in all appeals taken as of right from opinions and judgments of the Court of Appeals to the Supreme Court under N.C.G.S. § 7A-30. The appealing party shall enclose a clear copy of the opinion of

the Court of Appeals with the notice. To take account of the possibility that the Supreme Court may determine that the appeal does not lie of right, an alternative petition for discretionary review may be filed with the notice of appeal.

(Caption)

****

TO THE HONORABLE SUPREME COURT OF NORTH CAROLINA:

(Plaintiff)(Defendant), (Name of Party), hereby appeals to the Supreme Court of North Carolina from the judgment of the Court of Appeals (describe it), which judgment . . . .

(Constitutional question—N.C.G.S. § 7A-30(1)) . . . directly involves a substantial question arising under the Constitution(s) (of the United States)(and)(or)(of the State of North Carolina) as follows:

(Here describe the specific issues, citing constitutional provisions under which they arise and showing how such issues were timely raised below and are set out in the record of appeal, e.g.:

Issue 1: Said judgment directly involves a substantial question arising under the Fourth and Fourteenth Amendments to the Constitution of the United States and under Article 1, Section 20 of the Constitution of the State of North Carolina, in that it deprives rights secured thereunder to the defendant by overruling defendant's challenge to the denial of (his)(her) Motion to Suppress Evidence Obtained by a Search Warrant, thereby depriving defendant of the constitutional right to be secure in his or her person, house, papers, and effects against unreasonable searches and seizures and violating constitutional prohibitions against warrants issued without probable cause and warrants not supported by evidence. This constitutional issue was timely raised in the trial tribunal by defendant's Motion to Suppress Evidence Obtained by a Search Warrant made prior to trial of defendant (R pp 7–10). This constitutional issue was determined erroneously by the Court of Appeals.)

In the event the Court finds this constitutional question to be substantial, petitioner intends to present the following issues in its brief for review:

(Here list all issues to be presented in appellant's brief to the Supreme Court, not limited to those which are the basis of the constitutional question claim. An issue may not be briefed if it is not listed in the notice of appeal.)

(Dissent—N.C.G.S. § 7A-30(2)) . . . was entered with a dissent by Judge (name), based on the following issue(s):

(Here state the issue or issues that are the basis of the dissenting opinion in the Court of Appeals. Do not state additional issues. Any additional issues desired to be raised in the Supreme Court when the appeal of right is based solely on a dissenting opinion must be presented by a petition for discretionary review as to the additional issues.)

Respectfully submitted this the __ day of _____, 2___.

s/_____
Attorney for (Plaintiff)
(Defendant)-Appellant
(Address, Telephone Number, State Bar Number, and E-mail Address)

PETITION FOR DISCRETIONARY REVIEW UNDER N.C.G.S. § 7A-31

To seek review of the opinion and judgment of the Court of Appeals when petitioner contends the case involves issues of public interest or jurisprudential significance. May also be filed as a separate paper document in conjunction with a notice of appeal to the Supreme Court when the appellant contends that such appeal lies of right due to substantial constitutional questions under N.C.G.S. § 7A-30, but desires to have the Court consider discretionary review should it determine that appeal does not lie of right in the particular case.

(Caption)

****

TO THE HONORABLE SUPREME COURT OF NORTH CAROLINA:

(Plaintiff)(Defendant), (Name of Party), respectfully petitions the Supreme Court of North Carolina to certify for discretionary review the judgment of the Court of Appeals (describing it) on the basis that (here set out the grounds from N.C.G.S. § 7A-31 that provide the basis for the petition). In support of this petition, (Plaintiff)(Defendant) shows the following:

Facts

(Here state first the procedural history of the case through the trial division and the Court of Appeals. Then set out factual background necessary for understanding the basis of the petition.)

Reasons Why Certification Should Issue

(Here set out factual and legal arguments to justify certification of the case for full review. While some substantive argument will certainly be helpful, the focus of the argument in the petition should show how the opinion of the Court of Appeals conflicts with prior decisions of the Supreme Court or how the case is significant to the jurisprudence of the State or of significant public interest. If the Court is persuaded to take the case, the appellant may deal thoroughly with the substantive issues in the new brief.)

Issues to Be Briefed

In the event the Court allows this petition for discretionary review, petitioner intends to present the following issues in its brief for review:

(Here list all issues to be presented in appellant's brief to the Supreme Court, not limited to those that are the basis of the petition. An issue may not be briefed if it is not listed in the petition.)

Respectfully submitted this the __ day of _____, 2___.

s/_____
Attorney for (Plaintiff)
(Defendant)-Appellant
(Address, Telephone Number, State Bar Number, and E-mail Address)

Attached to the petition shall be a certificate of service upon the opposing parties and a clear copy of the opinion of the Court of Appeals in the case.

PETITION FOR WRIT OF CERTIORARI

To seek review: (1) by the appropriate appellate court of judgments or orders of trial tribunals when the right to prosecute an appeal has been lost or when no right to appeal exists; and (2) by the Supreme Court of decisions and orders of the Court of Appeals when no right to appeal or to petition for discretionary review exists or when such right has been lost by failure to take timely action.

(Caption)

****

TO THE HONORABLE (SUPREME COURT)(COURT OF APPEALS) OF NORTH CAROLINA:

(Plaintiff)(Defendant), (Name of Party), respectfully petitions this Court to issue its writ of certiorari pursuant to Rule 21 of the Rules

of Appellate Procedure to review the (judgment)(order)(decree) of the [Honorable (name), Judge Presiding, (Superior)(District) Court, _____ County][North Carolina Court of Appeals], dated (date), (here describe the judgment, order, or decree appealed from), and in support of this petition shows the following:

Facts

(Here set out factual background necessary for understanding the basis of the petition: e.g., failure to perfect appeal by reason of circumstances constituting excusable neglect; non-appealability of right of an interlocutory order, etc.) (If circumstances are that transcript could not be procured from court reporter, statement should include estimate of date of availability and supporting affidavit from the court reporter.)

Reasons Why Writ Should Issue

(Here set out factual and legal arguments to justify issuance of writ: e.g., reasons why interlocutory order makes it impracticable for petitioner to proceed further in trial court; meritorious basis of petitioner's proposed issues, etc.)

Attachments

Attached to this petition for consideration by the Court are certified copies of the (judgment)(order)(decree) sought to be reviewed, and (here list any other certified items from the trial court record and any affidavits attached as pertinent to consideration of the petition).

Wherefore, petitioner respectfully prays that this Court issue its writ of certiorari to the [(Superior)(District) Court, _____ County] [North Carolina Court of Appeals] to permit review of the (judgment) (order)(decree) above specified, upon issues stated as follows: (here list the issues, in the manner provided for in the petition for discretionary review); and that the petitioner have such other relief as to the Court may seem proper.

Respectfully submitted this the __ day of _____, 2___.

s/_____
Attorney for Petitioner
(Address, Telephone Number, State Bar Number, and E-mail Address)

(Verification by petitioner or counsel)

(Certificate of service upon opposing parties)

(Attach a clear copy of the opinion, order, etc. which is the subject of the petition and other attachments as described in the petition.)

PETITION FOR WRIT OF SUPERSEDEAS UNDER RULE 23 AND MOTION FOR TEMPORARY STAY

A writ of supersedeas operates to stay the execution or enforcement of any judgment, order, or other determination of a trial court or of the Court of Appeals in civil cases under Rule 8 or to stay imprisonment or execution of a sentence of death in criminal cases (other portions of criminal sentences, e.g., fines, are stayed automatically pending an appeal of right).

A motion for temporary stay under Rule 23(e) is appropriate to seek an immediate stay of execution on an *ex parte* basis pending the Court's decision on the petition for supersedeas or the substantive petition in the case.

(Caption)

****

TO THE HONORABLE (COURT OF APPEALS)(SUPREME COURT) OF NORTH CAROLINA:

(Plaintiff)(Defendant), (Name of Party), respectfully petitions this Court to issue its writ of supersedeas to stay (execution)(enforcement) of the (judgment)(order)(decree) of the [Honorable _____, Judge Presiding, (Superior)(District) Court, _____ County][North Carolina Court of Appeals] dated _____, pending review by this Court of said (judgment)(order)(decree) which (here describe the judgment, order, or decree and its operation if not stayed); and in support of this petition shows the following:

Facts

(Here set out factual background necessary for understanding the basis of the petition and justifying its filing under Rule 23: e.g., trial judge has vacated the entry upon finding security deposited under N.C.G.S. § _____ inadequate; trial judge has refused to stay execution upon motion therefor by petitioner; circumstances make it impracticable to apply first to trial judge for stay, etc.; and showing that review of the trial court judgment is being sought by appeal or extraordinary writ.)

Reasons Why Writ Should Issue

(Here set out factual and legal arguments for justice of issuing the writ; e.g., that security deemed inadequate by trial judge is adequate under the circumstances; that irreparable harm will result to petitioner if it is required to obey decree pending its review; that petitioner has meritorious basis for seeking review, etc.)

Attachments

Attached to this petition for consideration by the court are certified copies of the (judgment)(order)(decree) sought to be stayed and (here list any other certified items from the trial court record and any affidavits deemed necessary to consideration of the petition).

Wherefore, petitioner respectfully prays that this Court issue its writ of supersedeas to the [(Superior)(District) Court, _____ County)] [North Carolina Court of Appeals] staying (execution)(enforcement) of its (judgment)(order)(decree) above specified, pending issuance of the mandate to this Court following its review and determination of the (appeal)(discretionary review)(review by extraordinary writ) (now pending)(the petition for which will be timely filed); and that the petitioner have such other relief as to the Court may seem proper.

Respectfully submitted this the __ day of _____, 2___.

s/_____
Attorney for Petitioner
(Address, Telephone Number, State Bar Number, and E-mail Address)

(Verification by petitioner or counsel)

(Certificate of Service upon opposing party)

Rule 23(e) provides that in conjunction with a petition for supersedeas, either as part of it or separately, the petitioner may move for a temporary stay of execution or enforcement pending the Court's ruling on the petition for supersedeas. The following form is illustrative of such a motion for temporary stay, either included as part of the main petition or filed separately.

Motion for Temporary Stay

(Plaintiff)(Defendant) respectfully applies to the Court for an order temporarily staying (execution)(enforcement) of the (judgment)(order) (decree) that is the subject of (this)(the accompanying) petition for writ of supersedeas, such order to be in effect until determination by this Court whether it shall issue its writ. In support of this Application, movant shows that (here set out the legal and factual arguments for the issuance of such a temporary stay order; e.g., irreparable harm practically threatened if petitioner must obey decree of trial court during interval before decision by Court whether to issue writ of supersedeas).

Motion for Stay of Execution

In death cases, the Supreme Court uses an order for stay of execution of death sentence in lieu of the writ of supersedeas. Counsel should

promptly apply for such a stay after the judgment of the superior court imposing the death sentence. The stay of execution order will provide that it remains in effect until dissolved. The following form illustrates the contents needed in such a motion.

(Caption)

****

TO THE HONORABLE SUPREME COURT OF NORTH CAROLINA:

Now comes the defendant, (name), who respectfully shows the Court:

1. That on (date of judgment), The Honorable _____, Judge Presiding, Superior Court, _____ County, sentenced the defendant to death, execution being set for (date of execution).

2. That pursuant to N.C.G.S. § 15A-2000(d)(1), there is an automatic appeal of this matter to the Supreme Court of North Carolina, and defendant's notice of appeal was given (describe the circumstances and date of notice).

3. That the record on appeal in this case cannot be served and settled, the matter docketed, the briefs prepared, the arguments heard, and a decision rendered before the date scheduled for execution.

WHEREFORE, the defendant prays the Court to enter an order staying the execution pending judgment and further orders of this Court.

Respectfully submitted this the __ day of _____, 2___.

s/_____
Attorney for Defendant-Appellant
(Address, Telephone Number, State Bar Number, and E-mail Address)

(Certificate of Service on Attorney General, District Attorney, and Warden of Central Prison)

* * *

Appendix F. Fees and Costs

Fees and costs are provided by order of the Supreme Court and apply to proceedings in either appellate court. A fee payment is due when the document to which it pertains is filed and must be submitted to the clerk of the appropriate appellate court. A person may submit payment for an applicable fee by hand delivery or mail.

There is no fee for filing a motion in a cause; other fees are as follows ~~and should be submitted with the document to which they pertain, made payable to the clerk of the appropriate appellate court~~:

Notice of Appeal, Petition for Discretionary Review, Petition for Writ of Certiorari or other extraordinary writ, Petition for Writ of Supersedeas—docketing fee of $10.00 for each document, i.e., docketing fees for a notice of appeal and petition for discretionary review filed jointly would be $20.00.

Petitions to rehear require a docketing fee of $20.00. (Petitions to rehear are only entertained in civil cases.)

An appeal bond or ~~cash~~a monetary deposit of $250.00 is required in civil cases per Rules 6 and 17. The bond should be filed contemporaneously with the record in the Court of Appeals and with the notice of appeal in the Supreme Court. The bond will not be required in cases brought by petition for discretionary review or certiorari unless and until the court allows the petition.

Costs for printing documents are $1.75 per printed page. The appendix to a brief under the transcript option of Rules 9(c) and 28(b) and (c) will be reproduced as is, but billed at the rate of the printing of the brief. Both appellate courts will bill the parties for the costs of printing their documents.

Court costs on appeal total $9.00, plus the cost of copies of the opinion to each party filing a brief, and are imposed when a notice of appeal is withdrawn or dismissed, or when the mandate is issued following the opinion in a case.

Photocopying charges are $.20 per page. The facsimile transmission fee for documents sent from the clerk's office, which is in addition to standard photocopying charges, is $5.00 for the first twenty-five pages and $.20 for each page thereafter.

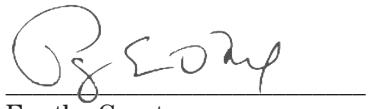
The fee for a certified copy of an appellate court decision, in addition to photocopying charges, is $10.00.

* * *

These amendments to the North Carolina Rules of Appellate Procedure become effective on 1 January 2022 and apply to cases that are appealed on or after that date.

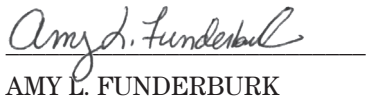
These amendments shall be published in the North Carolina Reports and posted on the rules web page of the Supreme Court of North Carolina.

Ordered by the Court in Conference, this the 13th day of October 2021.



For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 13th day of October 2021.



AMY L. FUNDERBURK
Clerk of the Supreme Court

**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 adopts Rule 28 of the General Rules of Practice for the Superior and District Courts.

* * *

Rule 28. Equitable Imposition of Monetary Obligations in Criminal Cases and Infraction Cases Based on the Defendant's Ability to Pay

(a) **Scope**. This rule applies only in criminal cases and infraction cases in which the court has discretion to impose costs, fees, fines, restitution, or other monetary obligations equitably based on the defendant's ability to pay.

(b) **Motion for Relief**. A defendant convicted of a crime or found responsible for an infraction may use AOC-CR-415, Request for Relief from Fines, Fees, and Other Monetary Obligations, to move the court to impose costs, fees, fines, restitution, or other monetary obligations equitably based on the defendant's ability to pay.

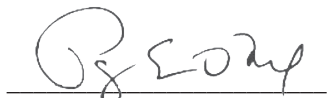
(c) **Determination by Court**. The court must consider the defendant's motion and, if necessary, conduct a hearing. The court must rule on the motion prior to imposing costs, fees, fines, restitution, or other monetary obligations and may grant the defendant any relief permitted by law.

* * *

This amendment to the General Rules of Practice for the Superior and District Courts becomes effective on 1 January 2022.

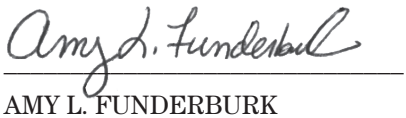
This amendment shall be published in the North Carolina Reports and posted on the rules web page of the Supreme Court of North Carolina.

Ordered by the Court in Conference, this the 14th day of December 2021.



For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 16th day of December 2021.



AMY L. FUNDERBURK
Clerk of the Supreme Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR:

RULES CONCERNING THE ELECTION AND APPOINTMENT OF STATE BAR COUNCILORS

The following amendments to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on April 16, 2021.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar as set forth in 27 N.C.A.C. 1A, Section .0800, *Election and Appointment of State Bar Councilors*, be amended as shown on the following attachment:

ATTACHMENT A: 27 N.C.A.C. 1A, Section .0800, Rule .0802, *Election - When Held; Notice; Nominations*

NORTH CAROLINA
WAKE COUNTY

I, Alice Neece Mine, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on April 16, 2021.

Given over my hand and the Seal of the North Carolina State Bar, this the 9th day of September, 2021.

s/Alice Neece Mine
Alice Neece Mine, Secretary

After examining the foregoing amendments to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same are not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 14th day of December, 2021.

s/Paul M. Newby
Paul M. Newby, Chief Justice

On this date, the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were entered upon the minutes of the Supreme Court. The amendments shall be published in the forthcoming volume of the Advance Sheets as provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 14th day of December, 2021.

s/Berger, J.
For the Court

SUBCHAPTER 1A – ORGANIZATION OF THE NORTH CAROLINA STATE BAR

SECTION .0800 – ELECTION AND APPOINTMENT OF STATE BAR COUNCILORS

27 NCAC 01A .0802 ELECTION - WHEN HELD; NOTICE; NOMINATIONS

(a) Every judicial district bar, in any calendar year at the end of which the term of one or more of its councilors will expire, shall fill said vacancy or vacancies at an election to be held during that year.

(b) The officers of the district bar shall fix the time and place of such election and shall give to each active member (as defined in G.S. 84-16) of the district bar a written notice thereof ~~directed to him or her~~. Notice may be sent by email or United States Mail to the ~~at his or her~~ email or mailing address on file with the North Carolina State Bar~~,~~. Such ~~which~~ notice shall be ~~placed in the United States Mail, postage prepaid,~~sent at least 30 days prior to the date of the election.

(c) The district bar shall submit its written notice by regular mail or email of the election to the North Carolina State Bar, at least six weeks before the date of the election.

(d) The North Carolina State Bar will, at its expense, ~~mail~~ email these notices to the lawyers in the district bar holding the election using the lawyers' email address on record with the North Carolina State Bar. If a lawyer does not have an email address on record, the notice shall be sent by regular mail to the lawyer's mailing address on record with the North Carolina State Bar.

(e) The notice shall state the date, time and place of the election, give the number of vacancies to be filled, identify how and to whom nominations may be made before the election, and advise that all elections must be by a majority of the votes cast. If the election will be held at a meeting of the bar, the notice will also advise that additional nominations may be made from the floor at the meeting itself. In judicial districts that permit elections by mail or early voting, the notice to members shall advise that nominations may be made in writing directed to the president of the district bar and received prior to a date set out in the notice. Sufficient notice shall be provided to permit nominations received from district bar members to be included on the printed ballots.

History Note: *Authority G.S. 84-18; 84-23;*
Readopted Eff. December 8, 1994;
Amendments Approved by the Supreme Court: November 5, 1999; August 27, 2013; December 14, 2021.

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR:

RULES GOVERNING THE PLAN OF LEGAL SPECIALIZATION

The following amendments to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on April 16, 2021.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar as set forth in 27 N.C.A.C. 1D, Sections .1700, *The Plan of Legal Specialization*; .2700, *Certification Standards for the Workers' Compensation Specialty*; .2800, *Certification Standards for the Social Security Disability Law Specialty;* .2900, *Certification Standards for the Elder Law Specialty*; .3000, *Certification Standards for the Appellate Practice Specialty*; .3100, *Certification Standards for the Trademark Law Specialty;* .3200, *Certification Standards for the Utilities Law Specialty*; and .3300, *Certification Standards for the Privacy and Information Security Law Specialty*, be amended as shown on the following attachments:

ATTACHMENT B-1: 27 N.C.A.C. 1D, Section .1700, Rule .1714, *Meetings*

ATTACHMENT B-2: 27 N.C.A.C. 1D, Section .1700, Rule .1716, *Powers and Duties of the Board*

ATTACHMENT B-3: 27 N.C.A.C. 1D, Section .1700, Rule .1718, *Privileges Conferred and Limitations Imposed*

ATTACHMENT B-4: 27 N.C.A.C. 1D, Section .2700, Rule .2705, *Standards for Certification as a Specialist in Workers' Compensation Law*

ATTACHMENT B-5: 27 N.C.A.C. 1D, Section .2800, Rule .2805, *Standards for Certification as a Specialist in Social Security Disability Law*

ATTACHMENT B-6: 27 N.C.A.C. 1D, Section .2900, Rule .2905, *Standards for Certification as a Specialist in Elder Law*

ATTACHMENT B-7: 27 N.C.A.C. 1D, Section .3000, Rule .3005, *Standards for Certification as a Specialist in Appellate Practice*

ATTACHMENT B-8: 27 N.C.A.C. 1D, Section .3100, Rule .3105, *Standards for Certification as a Specialist in Trademark Law*

ATTACHMENT B-9: 27 N.C.A.C. 1D, Section .3200, Rule .3205, S*tandards for Certification as a Specialist in Utilities Law*

ATTACHMENT B-10: 27 N.C.A.C. 1D, Section .3300, Rule .3305, *Standards for Certification as a Specialist in Privacy and Information Security Law*

NORTH CAROLINA
WAKE COUNTY

I, Alice Neece Mine, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on April 16, 2021.

Given over my hand and the Seal of the North Carolina State Bar, this the 9th day of September, 2021.

s/Alice Neece Mine
Alice Neece Mine, Secretary

After examining the foregoing amendments to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same are not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 14th day of December, 2021.

s/Paul M. Newby
Paul M. Newby, Chief Justice

On this date, the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were entered upon the minutes of the Supreme Court. The amendments shall be published in the forthcoming volume of the Advance Sheets as provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 14th day of December, 2021.

s/Berger, J.
For the Court

SUBCHAPTER 01D – RULES OF THE STANDING COMMITTEES OF THE NORTH CAROLINA STATE BAR

SECTION .1700 – THE PLAN OF LEGAL SPECIALIZATION

27 NCAC 01D .1714 MEETINGS

~~The annual meeting of the board shall be held in the spring of each year.~~ The board by resolution may set ~~the annual meeting date and~~ regular meeting dates and places. Special meetings of the board may be called at any time upon notice given by the chairperson, the vice-chairperson or any two members of the board. Notice of meeting shall be given at least two days prior to the meeting by mail, electronic mail, telegram, facsimile transmission, or telephone. A quorum of the board for conducting its official business shall be four or more of the members serving at the time of the meeting.

History Note: *Authority G.S. 84-23;*
Readopted Eff. December 8, 1994;
Amendments Approved by the Supreme Court: September 28, 2017; December 14, 2021.

SUBCHAPTER 01D – RULES OF THE STANDING COMMITTEES OF THE NORTH CAROLINA STATE BAR

SECTION .1700 – THE PLAN OF LEGAL SPECIALIZATION

27 NCAC 01D .1716 POWERS AND DUTIES OF THE BOARD

Subject to the general jurisdiction of the council and the North Carolina Supreme Court, the board shall have jurisdiction of all matters pertaining to regulation of certification of specialists in the practice of law and shall have the power and duty

(1) to administer the plan;

. . .

(8) to cooperate with other boards or agencies in enforcing standards of professional conduct and to report apparent violations of the ~~Revised~~ Rules of Professional Conduct to the appropriate disciplinary authority;

. . . .

History Note: *Authority G.S. 84-23;*
Readopted Eff. December 8, 1994;
Amendments Approved by the Supreme Court: November 16, 2006; December 14, 2021.

SUBCHAPTER 01D – RULES OF THE STANDING COMMITTEES OF THE NORTH CAROLINA STATE BAR

SECTION .1700 – THE PLAN OF LEGAL SPECIALIZATION

27 NCAC 01D .1718 PRIVILEGES CONFERRED AND LIMITATIONS IMPOSED

The board in the implementation of this plan shall not alter the following privileges and responsibilities of certified specialists and other lawyers.

(1) No standard shall be approved which shall in any way limit the right of a certified specialist to practice in all fields of law. Subject to ~~Canon 6 of~~ the Rules of Professional Conduct, any lawyer, alone or in association with any other lawyer, shall have the right to practice in all fields of law, even though he or she is certified as a specialist in a particular field of law.

(2) No lawyer shall be required to be certified as a specialist in order to practice in the field of law covered by that specialty. Subject to ~~Canon 6 of~~ the ~~North Carolina~~ Rules of Professional Conduct, any lawyer, alone or in association with any other lawyer, shall have the right to practice in any field of law, or advertise his or her availability to practice in any field of law consistent with ~~Canon 2 of~~ the Rules of Professional Conduct, even though he or she is not certified as a specialist in that field.

. . . .

History Note: *Authority G.S. 84-23;*
Readopted Eff. December 8, 1994;
Amendments approved by the Supreme Court: December 14, 2021.

SUBCHAPTER 01D – RULES OF THE STANDING COMMITTEES OF THE NORTH CAROLINA STATE BAR

SECTION .2700 – CERTIFICATION STANDARDS FOR THE WORKERS' COMPENSATION SPECIALTY

27 NCAC 01D .2705 STANDARDS FOR CERTIFICATION AS A SPECIALIST IN WORKERS' COMPENSATION LAW

Each applicant for certification as a specialist in workers' compensation law shall meet the minimum standards set forth in Rule .1720 of this subchapter. In addition, each applicant shall meet the following standards for certification in workers' compensation law:

(a) . . . .

. . .

(d) Peer Review - An applicant must make a satisfactory showing of qualification through peer review. An applicant must provide the names of ten lawyers, commissioners or deputy commissioners of the North Carolina Industrial Commission, or judges who are familiar with the competence and qualification of the applicant in the specialty field. Written peer reference forms will be sent by the board or the specialty committee to each of the references. Completed peer reference forms must be received from at least five of the references. All references must be licensed and in good standing to practice in North Carolina and have substantial practice or judicial experience in workers' compensation law. An applicant consents to the confidential inquiry by the board or the specialty committee of the submitted references and other persons concerning the applicant's competence and qualification.

(1) A reference may not be related by blood or marriage to the applicant nor may the reference be a partner or associate of the applicant at the time of the application.

(2) The references shall be given on standardized forms ~~mailed~~ provided by the board to each reference. These forms shall be returned directly to the specialty committee.

. . . .

History Note: *Authority G.S. 84-23;*
Approved by the Supreme Court May 4, 2000;
Amendments Approved by the Supreme Court: March 10, 2011; March 5, 2015; December 14, 2021

SUBCHAPTER 01D – RULES OF THE STANDING COMMITTEES OF THE NORTH CAROLINA STATE BAR

SECTION .2800 - CERTIFICATION STANDARDS FOR THE SOCIAL SECURITY DISABILITY LAW SPECIALTY

27 NCAC 01D .2805 STANDARDS FOR CERTIFICATION AS A SPECIALIST IN SOCIAL SECURITY DISABILITY LAW

Each applicant for certification as a specialist in Social Security disability law shall meet the minimum standards set forth in Rule .1720 of this subchapter. In addition, each applicant shall meet the following standards for certification in Social Security disability law:

(a) . . . .

. . .

(d) Peer Review. An applicant must make a satisfactory showing of qualification through peer review. An applicant must provide the names of ten lawyers or judges who are familiar with the competence and qualification of the applicant in the specialty field. Written peer reference forms will be sent by the board or the specialty committee to each of the references. Completed peer reference forms must be received from at least five of the references. All references must be licensed and in good standing to practice law in a jurisdiction in the United States and have substantial practice or judicial experience in Social Security disability law. An applicant consents to the confidential inquiry by the board or the specialty committee of the submitted references and other persons concerning the applicant's competence and qualification.

(1) A reference may not be related by blood or marriage to the applicant nor may the reference be a partner or associate of the applicant at the time of the application.

(2) The references shall be given on standardized forms ~~mailed~~ provided by the board to each reference. These forms shall be returned directly to the specialty committee.

. . . .

History Note: *Authority G.S. 84-23;*
Approved by the Supreme Court March 2, 2006;
Amendments Approved by the Supreme Court: March 10, 2011; December 14, 2021.

SUBCHAPTER 01D – RULES OF THE STANDING COMMITTEES OF THE NORTH CAROLINA STATE BAR

SECTION .2900 – CERTIFICATION STANDARDS FOR THE ELDER LAW SPECIALTY

27 NCAC 01D .2905 STANDARDS FOR CERTIFICATION AS A SPECIALIST IN ELDER LAW

Each applicant for certification as a specialist in elder law shall meet the minimum standards set forth in Rule .1720 of this subchapter. In addition, each applicant shall meet the following standards for certification in elder law:

(a) . . .

. . .

(e) Peer Review - An applicant must make a satisfactory showing of qualification through peer review. An applicant must provide the names of ten lawyers or judges who are familiar with the competence and qualification of the applicant in the specialty field. Written peer reference forms will be sent by the board or the specialty committee to each of the references. Completed peer reference forms must be received from at least five of the references. All references must be licensed and in good standing to practice in North Carolina and have substantial practice or judicial experience in elder law or in a related field as set forth in Rule .2905(d). An applicant consents to the confidential inquiry by the board or the specialty committee of the submitted references and other persons concerning the applicant's competence and qualification.

(1) A reference may not be related by blood or marriage to the applicant nor may the reference be a partner or associate of the applicant at the time of the application.

(2) The references shall be given on standardized forms ~~mailed~~ provided by the board to each reference. These forms shall be returned directly to the specialty committee.

. . . .

History Note: *Authority G.S. 84-23;*
Approved by the Supreme Court February 5, 2009;
Amendments Approved by the Supreme Court: March 11, 2010; March 10, 2011; March 8, 2012; September 20, 2018; December 14, 2021.

SUBCHAPTER 01D – RULES OF THE STANDING COMMITTEES OF THE NORTH CAROLINA STATE BAR

SECTION .3000 - CERTIFICATION STANDARDS FOR THE APPELLATE PRACTICE SPECIALTY

27 NCAC 01D .3005 STANDARDS FOR CERTIFICATION AS A SPECIALIST IN APPELLATE PRACTICE

Each applicant for certification as a specialist in appellate practice shall meet the minimum standards set forth in Rule .1720 of this Subchapter. In addition, each applicant shall meet the following standards for certification in appellate practice:

(a) . . . .

. . .

(d) Peer Review. An applicant must make a satisfactory showing of qualification through peer review. An applicant must provide the names of 10 lawyers or judges who are familiar with the competence and qualification of the applicant in the specialty field. Written peer reference forms will be sent by the board or the specialty committee to each of the references. Completed peer reference forms must be received from at least five of the references. All references must be licensed and in good standing to practice law and must have significant legal or judicial experience in appellate practice. An applicant consents to confidential inquiry by the board or the specialty committee to the submitted references and other persons concerning the applicant's competence and qualification.

(1) A reference may not be related by blood or marriage to the applicant nor may the reference be a colleague at the applicant's place of employment at the time of the application.

(2) The references shall be given on standardized forms ~~mailed~~ provided by the board to each reference. These forms shall be returned to the board and forwarded by the board to the specialty committee.

. . . .

History Note: *Authority G.S. 84-23;*
Approved by the Supreme Court March 10, 2011;
Amendments Approved by the Supreme Court: December 14, 2021.

SUBCHAPTER 01D – RULES OF THE STANDING COMMITTEES OF THE NORTH CAROLINA STATE BAR

SECTION .3100 - CERTIFICATION STANDARDS FOR THE TRADEMARK LAW SPECIALTY

27 NCAC 01D .3105 STANDARDS FOR CERTIFICATION AS A SPECIALIST IN TRADEMARK LAW

Each applicant for certification as a specialist in trademark law shall meet the minimum standards set forth in Rule .1720 of this subchapter. In addition, each applicant shall meet following standards for certification in trademark law:

(a) . . .

. . .

(d) Peer Review - An applicant must make a satisfactory showing of qualification through peer review. An applicant must provide the names of ten lawyers or judges who are familiar with the competence and qualification of the applicant in the specialty field. Written peer reference forms will be sent by the board or the specialty committee to each of the references. Completed peer reference forms must be received from at least five of the references. All references must be licensed and in good standing to practice law and must have significant legal or judicial experience in trademark law. An applicant consents to confidential inquiry by the board or the specialty committee to the submitted references and other persons concerning the applicant's competence and qualification.

(1) A reference may not be related by blood or marriage to the applicant nor may the reference be a colleague at the applicant's place of employment at the time of the application.

(2) The references shall be given on standardized forms ~~mailed~~ provided by the board to each reference. These forms shall be returned to the board and forwarded by the board to the specialty committee.

. . . .

History Note: *Authority G.S. 84-23;*
Approved by the Supreme Court March 8, 2013;
Amendments Approved by the Supreme Court: December 14, 2021.

SUBCHAPTER 01D – RULES OF THE STANDING COMMITTEES OF THE NORTH CAROLINA STATE BAR

SECTION .3200 – CERTIFICATION STANDARDS FOR THE UTILITIES LAW SPECIALTY

27 NCAC 01D .3205 STANDARDS FOR CERTIFICATION AS A SPECIALIST IN UTILITIES LAW

Each applicant for certification as a specialist in utilities law shall meet the minimum standards set forth in Rule .1720 of this Subchapter. In addition, each applicant shall meet the following standards for certification in utilities law:

(a) . . . .

. . .

(d) Peer Review - An applicant must make a satisfactory showing of qualification through peer review. An applicant must provide the names of ten lawyers or judges who are familiar with the competence and qualification of the applicant in the specialty field. Written peer reference forms will be sent by the board or the specialty committee to each of the references. Completed peer reference forms must be received from at least five of the references. All references must be licensed and in good standing to practice law and must have significant legal or judicial experience in utilities law. An applicant consents to confidential inquiry by the board or the specialty committee to the submitted references and other persons concerning the applicant's competence and qualification.

(1) A reference may not be related by blood or marriage to the applicant nor may the reference be a colleague at the applicant's place of employment at the time of the application.

(2) The references shall be given on standardized forms ~~mailed~~ provided by the board to each reference. These forms shall be returned to the board and forwarded by the board to the specialty committee.

. . . .

History Note: *Authority G.S. 84-23;*
Approved by the Supreme Court June 9, 2016;
Amendments Approved by the Supreme Court: December 14, 2021.

SUBCHAPTER 01D – RULES OF THE STANDING COMMITTEES OF THE NORTH CAROLINA STATE BAR

SECTION .3300 - CERTIFICATION STANDARDS FOR THE PRIVACY AND INFORMATION SECURITY LAW SPECIALTY

27 NCAC 01D .3305 STANDARDS FOR CERTIFICATION AS A SPECIALIST IN PRIVACY AND INFORMATION SECURITY LAW

Each applicant for certification as a specialist in privacy and information security law shall meet the minimum standards set forth in Rule .1720 of this subchapter. In addition, each applicant shall meet following standards for certification in privacy and information security law:

(a) . . . .

. . .

(d) Peer Review - An applicant must make a satisfactory showing of qualification through peer review. An applicant must provide the names of ten lawyers or judges who are familiar with the competence and qualification of the applicant in the specialty field to serve as references for the applicant. Completed peer reference forms must be received from at least five of the references. All references must be licensed and in good standing to practice law in North Carolina or another jurisdiction in the United States; however, no more than five references may be licensed in another jurisdiction. References with legal or judicial experience in privacy and information security law are preferred. An applicant consents to confidential inquiry by the board or the specialty committee to the submitted references and other persons concerning the applicant's competence and qualification.

(1) A reference may not be related by blood or marriage to the applicant nor may the reference be a colleague at the applicant's place of employment at the time of the application. A lawyer who is in-house counsel for an entity that is the applicant's client may serve as a reference.

(2) Peer review shall be given on standardized forms ~~mailed~~ provided by the board to each reference. These forms shall be returned to the board and forwarded by the board to the specialty committee.

. . . .

History Note: *Authority G.S. 84-23;*
Approved by the Supreme Court September 28, 2017;
Amendments Approved by the Supreme Court: December 14, 2021.

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR:

RULES GOVERNING THE PLAN OF LEGAL SPECIALIZATION

The following amendments to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on April 16, 2021.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar as set forth in 27 N.C.A.C. 1D, Section .3400, *Certification Standards for the Child Welfare Law Specialty*, be amended as shown on the following attachments:

ATTACHMENT C-1: 27 N.C.A.C. 1D, Section .3400, Rule .3401, *Establishment of Specialty Field*

ATTACHMENT C-2: 27 N.C.A.C. 1D, Section .3400, Rule .3402, *Definition of Specialty*

ATTACHMENT C-3: 27 N.C.A.C. 1D, Section .3400, Rule .3403, *Recognition as a Specialist in Child Welfare Law*

ATTACHMENT C-4: 27 N.C.A.C. 1D, Section .3400, Rule .3404, *Applicability of Provisions of the North Carolina Plan of Legal Specialization*

ATTACHMENT C-5: 27 N.C.A.C. 1D, Section .3400, Rule .3405, *Standards for Certification as a Specialist in Child Welfare Law*

ATTACHMENT C-6: 27 N.C.A.C. 1D, Section .3400, Rule .3406, *Standards for Continued Certification as a Specialist*

NORTH CAROLINA
WAKE COUNTY

I, Alice Neece Mine, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on April 16, 2021.

Given over my hand and the Seal of the North Carolina State Bar, this the 9th day of September, 2021.

s/Alice Neece Mine
Alice Neece Mine, Secretary

After examining the foregoing amendments to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same are not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 14th day of December, 2021.

s/Paul M. Newby
Paul M. Newby, Chief Justice

On this date, the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were entered upon the minutes of the Supreme Court. The amendments shall be published in the forthcoming volume of the Advance Sheets as provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 14th day of December, 2021.

s/Berger, J.
For the Court

SUBCHAPTER 01D – RULES OF THE STANDING COMMITTEES OF THE NORTH CAROLINA STATE BAR

NEW SECTION .3400 – CERTIFICATION STANDARDS FOR THE CHILD WELFARE LAW SPECIALTY

27 NCAC 01D .3401 ESTABLISHMENT OF SPECIALTY FIELD

The North Carolina State Bar Board of Legal Specialization (the board) hereby designates child welfare law as a specialty for which certification of specialists under the North Carolina Plan of Legal Specialization (see Section .1700 of this subchapter) is permitted.

History Note: *Authority G.S. 84-23;*
Approved by the Supreme Court December 14, 2021.

SUBCHAPTER 01D – RULES OF THE STANDING COMMITTEES OF THE NORTH CAROLINA STATE BAR

NEW SECTION .3400 – CERTIFICATION STANDARDS FOR THE CHILD WELFARE LAW SPECIALTY

27 NCAC 01D .3402 DEFINITION OF SPECIALTY

Child welfare law is a unique area of law that requires knowledge of substantive and procedural rights provided for in the North Carolina General Statutes, Chapter 7B. The cases are complex and multi-faceted both in the issues they present and the number of type of court hearings required by federal and state law. The substantive area includes abuse, neglect, dependency, and termination of parental rights. Knowledge of additional substantive areas is also required; such as child custody, the Uniform Child Custody Jurisdiction Enforcement Act, the Interstate Compact on the Placement of Children, the Indian Child Welfare Act, adoptions, and education law. The cases revolve around children and families that are experiencing significant issues resulting in the government's intervention to protect children's safety while also protecting parents' constitutional rights to parent their children. Child welfare differs from family law/domestic relations in that different laws and procedures apply and the government through a county department of social services is involved.

History Note: *Authority G.S. 84-23;*
Approved by the Supreme Court December 14, 2021.

SUBCHAPTER 01D – RULES OF THE STANDING COMMITTEES OF THE NORTH CAROLINA STATE BAR

NEW SECTION .3400 – CERTIFICATION STANDARDS FOR THE CHILD WELFARE LAW SPECIALTY

27 NCAC 01D .3403 RECOGNITION AS A SPECIALIST IN CHILD WELFARE LAW

If a lawyer qualifies as a specialist in child welfare law by meeting the standards set for the specialty, the lawyer shall be entitled to represent that he or she is a "Board Certified Specialist in Child Welfare Law."

History Note: *Authority G.S. 84-23;*
Approved by the Supreme Court December 14, 2021.

SUBCHAPTER 01D – RULES OF THE STANDING COMMITTEES OF THE NORTH CAROLINA STATE BAR

NEW SECTION .3400 – CERTIFICATION STANDARDS FOR THE CHILD WELFARE LAW SPECIALTY

27 NCAC 01D .3404 APPLICABILITY OF PROVISIONS OF THE NORTH CAROLINA PLAN OF LEGAL SPECIALIZATION

Certification and continued certification of specialists in child welfare law shall be governed by the provisions of the North Carolina Plan of Legal Specialization (see Section .1700 of this subchapter) as supplemented by these standards for certification.

History Note: *Authority G.S. 84-23;*
Approved by the Supreme Court December 14, 2021.

SUBCHAPTER 01D – RULES OF THE STANDING COMMITTEES OF THE NORTH CAROLINA STATE BAR

NEW SECTION .3400 – CERTIFICATION STANDARDS FOR THE CHILD WELFARE LAW SPECIALTY

27 NCAC 01D .3405 STANDARDS FOR CERTIFICATION AS A SPECIALIST IN CHILD WELFARE LAW

Each applicant for certification as a specialist in child welfare law shall meet the minimum standards set forth in Rule .1720 of this subchapter. In addition, each applicant shall meet following standards for certification in child welfare law:

(a) Licensure and Practice - An applicant shall be licensed and in good standing to practice law in North Carolina as of the date of application. An applicant shall continue to be licensed and in good standing to practice law in North Carolina during the period of certification.

(b) Substantial Involvement - An applicant shall affirm to the board that the applicant has experience through substantial involvement in child welfare law.

(1) Substantial involvement shall mean that during the five years immediately preceding the application, the applicant devoted an average of at least 500 hours a year to the practice of child welfare law but not less than 350 hours in any one year.

(2) Practice shall mean substantive legal work in child welfare law done primarily for the purpose of providing legal advice or representation, including the activities described in paragraph (3), or a practice equivalent as described in paragraph (4).

(3) Substantive legal work in child welfare law focuses on a combination of abuse, neglect, dependency, and termination of parental rights proceedings as governed by N.C.G.S. Chapter 7B ("the Juvenile Code"). Types of work involve staffing cases; advising clients; participating in department of social services' team meeting involving the juvenile and family; preparing for trial; researching, drafting, or editing written pleadings (petitions, motions, responses to motions, written argument to the district court, appellate briefs); representing clients in

district court juvenile proceedings, and family law court proceedings with substantial child protective services involvement; participating in oral arguments before the North Carolina appellate courts; consultation on child welfare issues with other counsel and child welfare professionals; authoring scholarly work related to child welfare; and teaching child welfare i) at an ABA accredited North Carolina law school, ii) for approved CLE credit at both a North Carolina or national program, iii) for North Carolina professional continuing education requirements, and iv) for prospective and current Guardian ad Litem staff and volunteers.

(4) "Practice equivalent" shall mean:

(A) Service as a law professor concentrating in the teaching of child welfare law for up to two years during the five years prior to application may be substituted for an equivalent number of years of experience necessary to meet the five-year requirement set forth in Rule .3405(b)(1);

(B) Service as a district court judge who has attained juvenile court certification through the AOC in North Carolina. Such certification may count for one year of experience in meeting the five-year requirement.

(c) Continuing Legal Education - To be certified as a specialist in child welfare law, an applicant must have earned no less than 36 hours of accredited continuing legal education credits in child welfare law/juvenile law and related fields during the three years preceding application. The 36 hours must include at least 27 hours in child welfare/juvenile law; the remaining 9 hours may be in related-field CLE. Related fields include family law, adoption law, juvenile delinquency law, immigration law, public benefits law, ethics, education law, trial advocacy, evidence, appellate practice, and trainings on topics including implicit bias, cultural humility, disproportionality, and substance use and mental health disorders. The applicant may request recognition of an additional field as related to child welfare practice for the purpose of meeting the CLE standard.

(d) Peer Review - An applicant must make a satisfactory showing of qualification through peer review. An applicant must provide the names of ten lawyers or judges who are familiar with the competence and qualification of the applicant in the specialty field. Written peer reference forms will be sent by the board or the specialty committee to each of

the references. Completed peer reference forms must be received from at least five of the references. All references must be licensed and in good standing to practice in North Carolina. An applicant consents to the confidential inquiry by the board or the specialty committee of the submitted references and other persons concerning the applicant's competence and qualification.

(1) A reference may not be related by blood or marriage to the applicant nor may the reference be a partner or associate of the applicant at the time of the application.

(2) The references shall be given on standardized forms provided by the board with the application for certification in the specialty field. These forms shall be returned directly to the specialty committee.

(e) Examination - The applicant must pass a written examination designed to test the applicant's knowledge and ability in child welfare law.

(1) Terms - The examination shall be in written form and shall be given annually. The examination shall be administered and graded uniformly by the specialty committee.

(2) Subject Matter - The examination shall cover the applicant's knowledge and application of the law relating to abuse, neglect, dependency, and termination of parental rights, child custody, adoptions, and education law including, but not limited to, the following:

(A) State and Federal Sources of Authority: Laws, Rules, and Policy

(B) The Constitutional Rights of Parents and Children and Requirements of State Intervention

(C) Jurisdiction, Venue, Overlapping Proceedings

(D) Procedures Regarding the Petition, Summons and Service

(E) How a Case Enters the Court System

(F) Central Registry and Responsible Individuals List

(G) Parties, Appointment of Counsel, and Guardians ad Litem

(H) Purpose and Requirements of Temporary and Nonsecure Custody

(I) Aspects of Adjudication and Its Consequences

(J) Dispositional Hearings and Alternatives

(K) Visitation

(L) Permanency Outcomes

(M) Voluntary Placements of Juveniles and Foster Care (ages 18-21)

(N) Termination of Parental Rights (TPR) Procedure, Grounds Phase, Best Interests Phase and Legal Consequences

(O) Post TPR/Relinquishment, Adoption, Reinstatement of Parental Rights

(P) Applicability of Rules of Evidence and Evidentiary Standards

(Q) Appealable Orders, Notices of Appeal and Expedited Appeals

(R) Relevant Federal Laws Including, but not limited to, the Uniform Child Custody Jurisdiction Enforcement Act, the Interstate Compact on the Placement of Children and the Indian Child Welfare Act

(S) Confidentiality and Information Sharing

History Note: *Authority G.S. 84-23;*
Approved by the Supreme Court December 14, 2021.

SUBCHAPTER 01D – RULES OF THE STANDING COMMITTEES OF THE NORTH CAROLINA STATE BAR

NEW SECTION .3400 – CERTIFICATION STANDARDS FOR THE CHILD WELFARE LAW SPECIALTY

27 NCAC 01D .3406 STANDARDS FOR CONTINUED CERTIFICATION AS A SPECIALIST

The period of certification is five years. Prior to the expiration of the certification period, a certified specialist who desires continued certification must apply for continued certification within the time limit described in Rule .3406(d) below. No examination will be required for continued certification. However, each applicant for continued certification as a specialist shall comply with the specific requirements set forth below in addition to any general standards required by the board of all applicants for continued certification.

(a) Substantial Involvement - The specialist must demonstrate that, for each of the five years preceding application for continuing certification, he or she has had substantial involvement in the specialty as defined in Rule .3405(b) of this subchapter.

(b) Continuing Legal Education - The specialist must earn no less than 60 hours of accredited CLE credits in child welfare law and related fields during the five years preceding application for continuing certification. Of the 60 hours of CLE, at least 42 hours shall be in child welfare/juvenile law, and the balance of 18 hours may be in related field CLE. A list of the topics that qualify as related-field CLE and technical CE shall be maintained by the board on its official website.

(c) Peer Review - The applicant must provide, as references, the names of at least six lawyers or judges, all of whom are licensed and currently in good standing to practice law in North Carolina. References must be familiar with the competence and qualification of the applicant as a specialist. For an application to be considered, completed peer reference forms must be received from at least three of the references. All other requirements relative to peer review set forth in Rule .3405(d) of this subchapter apply to this standard.

(d) Time for Application - Application for continued certification shall be made not more than 180 days, nor less than 90 days, prior to the expiration of the prior period of certification.

(e) Lapse of Certification - Failure of a specialist to apply for continued certification in a timely fashion will result in a lapse of certification. Following such a lapse, recertification will require compliance with all requirements of Rule .3405 of this subchapter, including the examination.

(f) Suspension or Revocation of Certification - If an applicant's certification was suspended or revoked during a period of certification, the application shall be treated as if it were for initial certification under Rule .3405 of this subchapter.

History Note: *Authority G.S. 84-23;*
Approved by the Supreme Court December 14, 2021.

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR:

RULES GOVERNING THE DISCIPLINE AND DISABILITY OF ATTORNEYS

The following amendments to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on July 16, 2021.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar as set forth in 27 N.C.A.C. 1B, Section .0100, *Discipline and Disability of Attorneys*, be amended as shown on the following attachment:

ATTACHMENT D: 27 N.C.A.C. 1B, Section .0100, Rule .0129, *Reinstatement*

NORTH CAROLINA
WAKE COUNTY

I, Alice Neece Mine, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on July 16, 2021.

Given over my hand and the Seal of the North Carolina State Bar, this the 9th day of September, 2021.

s/Alice Neece Mine
Alice Neece Mine, Secretary

After examining the foregoing amendments to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same are not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 14th day of December, 2021.

s/Paul M. Newby
Paul M. Newby, Chief Justice

On this date, the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were entered upon the minutes of the Supreme Court. The amendments shall be published in the forthcoming volume of the Advance Sheets as provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 14th day of December, 2021.

s/Berger, J.
For the Court

SUBCHAPTER 1B – DISCIPLINE AND DISABILITY RULES

SECTION .0100 – DISCIPLINE AND DISABILITY OF ATTORNEYS

27 NCAC 01B .0129 REINSTATEMENT

(a) After Disbarment

(1) Reinstatement Procedure and Costs - ~~No~~ A person who has been disbarred may have his or her license restored ~~but~~ upon ~~order of the council after the filing of~~ a verified petition for reinstatement~~, and the holding of~~ a hearing before a hearing panel of the commission, and entry of an order of reinstatement by the council as provided herein. ~~No such~~ The hearing will commence ~~until~~ only if security for the costs of such hearing has been deposited by the petitioner with the secretary in an amount not to exceed $500.00.

(2) Time Limits - ~~No~~ A disbarred ~~attorney~~ lawyer may petition for reinstatement ~~until~~ upon the expiration of at least five years from the effective date of the disbarment.

(3) Burden of Proof and Elements to be Proved - The petitioner will have the burden of proving by clear, cogent, and convincing evidence that

(A) not more than six months or less than 60 days before filing the petition for reinstatement, a notice of intent to seek reinstatement has been published by the petitioner in an official publication of the North Carolina State Bar. The notice will inform members of the Bar about the application for reinstatement and will request that all interested individuals file with the secretary notice of ~~their~~ opposition to or concurrence with the petition ~~the secretary~~ within 60 days after the date of publication;

(B) not more than six months or less than 60 days before filing the petition for reinstatement, the petitioner has notified the complainant(s) in the disciplinary proceeding which led to the lawyer's disbarment of the notice of intent to seek reinstatement. The notice will specify that each complainant has 60 days from the date of publication in which to file with the secretary notice of opposition to or concurrence with the ~~raise objections or support the lawyer's~~ petition;

. . .

(L) the petitioner has reimbursed the Client Security Fund of the North Carolina State Bar for all sums, including costs other than overhead expenses, disbursed by the Client Security Fund as a result of the petitioner's misconduct. ~~This section shall not be deemed to permit t~~The petitioner is not permitted to collaterally attack the decision of the Client Security Fund Board of Trustees regarding whether to reimburse losses occasioned by the misconduct of the petitioner. This provision shall apply to petitions for reinstatement submitted by ~~attorneys~~ petitioners who were disbarred ~~disciplined~~ after August 29, 1984; ~~the effective date of this amendment;~~

. . .

(O) if a trustee was appointed by the court to protect the interests of the petitioner's clients, the petitioner has reimbursed the State Bar all sums expended by the State Bar to compensate the trustee and to reimburse the trustee for any expenses of the trusteeship;

(P) the petitioner has properly reconciled all trust or fiduciary accounts, and all entrusted funds of which the petitioner took receipt have been disbursed to the beneficial owner(s) of the funds or the petitioner has taken all necessary steps to escheat the funds.

(4) Petitions Filed Less than Seven Years After Disbarment

(A) Proof of Competency and Learning - If less than seven years have elapsed between the effective date of the disbarment and the filing date of the petition for reinstatement, the petitioner will also have the burden of proving by clear, cogent, and convincing evidence that the petitioner has the competency and learning in the law required to practice law in this state.

(B) Factors which may be considered in deciding the issue of competency include

(i) experience in the practice of law;

. . .

(v) certification by three ~~attorneys~~ lawyers who are familiar with the petitioner's present

knowledge of the law that the petitioner is competent to engage in the practice of law.

(C) . . . .

(D) Passing Bar Exam as Conclusive Evidence - ~~The a~~Attainment of a passing ~~grade~~ score on a regularly scheduled written Uniform ~~b~~Bar ~~e~~Examination prepared by the National Conference of Bar Examiners and successful completion of the State-Specific Component prescribed ~~administered~~ by the North Carolina Board of Law Examiners, no more than nine months before filing the petition, and taken voluntarily by the petitioner, shall be conclusive evidence on the issue of the petitioner's competence to practice law.

(5) Bar Exam Required for Petitions Filed Seven Years or More ~~than Seven Years~~ After Disbarment - If the petition is filed seven years or more ~~have elapsed between~~ after the effective date of disbarment, ~~and the filing of the petition for reinstatement,~~ reinstatement will be conditioned upon: ~~the petitioner's attaining a passing grade on a regularly scheduled written bar examination administered by the North Carolina Board of Law Examiners~~.

(A) attainment of a passing score, within nine months following an order conditionally granting the petition, on a regularly-scheduled Uniform Bar Examination prepared by the National Conference of Bar Examiners;

(B) attainment of a passing score, within nine months following an order conditionally granting the petition, on a regularly-scheduled Multistate Professional Responsibility Examination administered by the National Conference of Bar Examiners; and

(C) successful completion, within nine months following an order conditionally granting the petition, of the State-Specific Component prescribed by the North Carolina Board of Law Examiners.

(6) Petition, Service, and Hearing - The petitioner shall file a verified petition for reinstatement with the secretary and shall contemporaneously serve a copy upon the counsel. The petition must identify each requirement for reinstatement and state how the petitioner has met

each requirement. The petitioner shall attach supporting documentation establishing satisfaction of each requirement. ~~Verified petitions for reinstatement of disbarred attorneys will be filed with the secretary.~~ Upon receipt of the petition, the secretary will transmit the petition to the chairperson of the commission. ~~and serve a copy on the counsel.~~ The chairperson will within 14 days appoint a hearing panel as provided in Rule .0108(a)(2) of this Subchapter and schedule a time and place for a hearing to take place within 60 to 90 days after the filing of the petition with the secretary. The chairperson will notify the counsel and the petitioner of the composition of the hearing panel and the time and place of the hearing, which will be conducted ~~in accordance with the North Carolina Rules of Civil Procedure for nonjury trials insofar as possible and the rules of evidence applicable in superior court.~~ pursuant to the procedures set out in Rules .0114 to .0118 of this subchapter. The secretary shall transmit to the counsel and to the petitioner any notices in opposition to or concurrence with the petition filed with the secretary pursuant to .0129(a)(3)(A) or (B).

(7) Report of Findings - As soon as possible after the conclusion of the hearing, the hearing panel will file a report containing its findings, conclusions, and recommendations with the secretary. The order may tax against the petitioner such costs and administrative fees as it deems appropriate for the necessary expenses attributable to the investigation and processing of the petition.

(8) Review by the Council ~~Appeal~~ - ~~If A petitioner in whose case~~ the hearing panel recommends that reinstatement be denied, the petitioner may file notice of appeal to the council. The notice of appeal must be filed with the secretary within 30 days after service of the panel report upon the petitioner. ~~Appeal from the report of the hearing panel must be taken within 30 days after service of the panel report upon the petitioner and shall be filed with the secretary.~~ If no appeal is timely filed, the recommendation of the hearing panel to deny reinstatement will become ~~be deemed~~ a final order denying the petition. All cases in which the hearing panel recommends reinstatement of a disbarred ~~attorney's~~ lawyer's license shall be heard by the council and no notice of appeal need be filed by the ~~N.C~~ North Carolina. State Bar.

(A)~~(9)~~ Transcript of Hearing ~~Committee~~ Panel Proceedings ~~- -~~ Within 60 days of entry of the hearing panel's report, the petitioner shall produce a transcript of the proceedings before the hearing panel. ~~The petitioner will have 60 days following the filing of the notice of appeal in which to produce a transcript of the trial proceedings before the hearing panel.~~ The chairperson of the hearing panel, may, for good cause shown, extend the time to produce the ~~record~~ transcript.

~~(10) Record to the Council~~

(B~~A~~) Composition of the Record- The petitioner will provide a record of the proceedings before the hearing panel, including a legible copy of the complete transcript, all exhibits introduced into evidence, and all pleadings, motions, and orders, unless the petitioner and the counsel agree in writing to shorten the record. The petitioner will provide the proposed record to the counsel not later than 90 days after the hearing before the hearing panel, unless an extension of time is granted by the ~~secretary~~ chairperson of the hearing panel for good cause shown. Any agreement regarding the record will be in writing and will be included in the record transmitted to the council.

(C~~B~~) Settlement of the Record

. . . .

(D~~C~~) Filing and Service of the ~~Copy of~~ Settled Record ~~to Each Member -~~ No later than 30 days before the council meeting at which the petition is to be considered, ~~T~~the petitioner will file the settled record with the secretary, will make arrangements with the secretary for a copy of the settled record to be transmitted to each member of the council, and will transmit a copy of the settled record to the counsel. ~~transmit a copy of the settled record to each member of the council and to the counsel no later than 30 days before the council meeting at which the petition is to be considered.~~

(E~~D~~) Costs - The petitioner will bear the costs of transcribing, copying, and transmitting a copy of the settled record to each member of the council.

~~(E) Failure to Comply with Rule .0129(a)(10) - If the petitioner fails to comply with any of the subsections of Rule .0129(a)(10) above, the counsel may petition the secretary to dismiss the petition.~~

(~~F~~11) Determination ~~Review~~ by the Council - The council will review the report of the hearing panel and the record and determine whether, and upon what conditions, the petitioner will be reinstated. The council may tax against the petitioner such costs and administrative fees as it deems appropriate for the necessary expenses attributable to the investigation and processing of the petition.

(9) Failure to Comply with Rule .0129(a) - If the petitioner fails to comply with any provisions of this Rule .0129(a), the counsel may file a motion to dismiss the petition. The motion to dismiss shall specify the alleged deficiencies of the petition. The counsel shall serve the motion to dismiss upon the petitioner. The petitioner shall have ten days in which to file a response to the motion to dismiss.

(10~~12~~) Reapplication - No person who has been disbarred and has unsuccessfully petitioned for reinstatement may reapply until the expiration of one year from the date of the last order denying reinstatement.

(b) After Suspension

(1) Restoration - No ~~attorney~~ lawyer who has been suspended may have his or her license restored but upon order of the commission or the secretary after the filing of a verified petition as provided herein.

(2) Eligibility ~~Suspension of 120 Days or Less~~ - No ~~attorney~~ lawyer who has been suspended for a period of 120 days or less is eligible for reinstatement until the expiration of the period of suspension and, in no event, until 10 days have elapsed from the date of filing the petition for reinstatement. No ~~attorney~~ lawyer whose license has been suspended for a period of more than 120 days is eligible for reinstatement until the expiration of the period of suspension and, in no event, until 30 days have elapsed from the date of the filing of the petition for reinstatement.

(3) If the petition is filed seven years or more after the effective date of suspension, reinstatement will be conditioned upon:

(A) attainment of a passing score, within nine months following an order conditionally granting the petition, on a regularly-scheduled Uniform Bar Examination prepared by the National Conference of Bar Examiners;

(B) attainment of a passing score, within nine months following an order conditionally granting the petition, on a regularly-scheduled Multistate Professional Responsibility Examination administered by the National Conference of Bar Examiners; and

(C) successful completion, within nine months following an order conditionally granting the petition, of the State-Specific Component prescribed by the North Carolina Board of Law Examiners.

(43) Reinstatement Requirements - Any suspended ~~attorney~~ lawyer seeking reinstatement must file a verified petition with the secretary, a copy of which the secretary will transmit to the counsel. The petitioner will have the burden of proving the following by clear, cogent, and convincing evidence:

(A) compliance with Rule .0128 of this subchapter;

. . .

~~(D) attainment of a passing grade on a regularly scheduled North Carolina bar examination, if the suspended attorney applies for reinstatement of his or her license more than seven years after the effective date of the suspension;~~

(DE) . . . ;

(EF) Reimbursement of the Client Security Fund - reimbursement of the Client Security Fund of the North Carolina State Bar for all sums, including costs other than overhead expenses, disbursed by the Client Security Fund as a result of the petitioner's misconduct. ~~This section shall not be deemed to permit the petitioner~~ The petitioner is not permitted to collaterally attack the decision of the Client Security Fund Board of Trustees regarding whether to reimburse losses occasioned by the misconduct of the petitioner. This provision shall apply to petitions for reinstatement submitted by ~~attorneys~~ lawyers who

were suspended ~~disciplined~~ after August 29, 1984; ~~the effective date of this amendment~~;

(F~~G~~) . . . ;

(G~~H~~) Satisfaction of Pre-Suspension CLE Requirements - satisfaction of the minimum continuing legal education requirements, as set forth in Rule ~~.1517~~ .1518 of Subchapter 1D of these rules, for the two calendar years immediately preceding the year in which the petitioner was suspended, which shall include the satisfaction of any deficit recorded in the petitioner's State Bar CLE transcript for such period; provided that the petitioner may attend CLE programs after the effective date of the suspension to make up any unsatisfied requirement. These requirements shall be in addition to any continuing legal education requirements imposed by the Disciplinary Hearing Commission;

(H~~I~~) . . . ;

(I~~J~~) Payment of Fees and Assessments - payment of all membership fees, Client Security Fund assessments, and late fees due and owing to the North Carolina State Bar, including any reinstatement fee due under Rule .0904 or Rule .1524 of Subchapter 1D of these rules, as well as all attendee fees and late penalties due and owing to the Board of Continuing Legal Education at the time of suspension~~.~~;

(J) if a trustee was appointed by the court to protect the interests of the petitioner's clients, the petitioner has reimbursed the State Bar all sums expended by the State Bar to compensate the trustee and to reimburse the trustee for any expenses of the trusteeship; and

(K) the petitioner has properly reconciled all trust or fiduciary accounts, and all entrusted funds of which the petitioner took receipt have been disbursed to the beneficial owner(s) of the funds or the petitioner has taken all necessary steps to escheat the funds.

(5~~4~~) . . . .

(6~~5~~) . . . .

(7~~6~~) . . . .

(87) Reinstatement Hearing - The secretary will, upon the filing of a response to the petition, refer the matter to the chairperson of the commission. The chairperson will within 14 days appoint a hearing panel as provided in Rule .0108(a)(2) of this Subchapter, schedule a time and place for a hearing, and notify the counsel and the petitioner of the composition of the hearing panel and the time and place of the hearing. The hearing will be conducted ~~in accordance with the North Carolina Rules of Civil Procedure for nonjury trials insofar as possible and the rules of evidence applicable in superior court.~~ pursuant to the procedures set out in Rules .0114 to .0118 of this subchapter.

(98) Reinstatement Order - The hearing panel will determine whether the petitioner's license should be reinstated and enter an appropriate order which may include additional sanctions in the event violations of the petitioner's order of suspension are found. In any event, the hearing panel must include in its order findings of fact and conclusions of law in support of its decision and may tax against the petitioner such costs and administrative fees as it deems appropriate for the necessary expenses attributable to the investigation and processing of the petition. ~~against the petitioner.~~

(10) Failure to Comply with Rule .0129(b) - If the petitioner fails to comply with any provision of this Rule .0129(b), the counsel may file a motion to dismiss the petition. The motion to dismiss shall specify the alleged deficiencies of the petition. The counsel shall serve the motion to dismiss upon the petitioner. The petitioner shall have ten days in which to file a response to the motion to dismiss.

(c) After Transfer to Disability Inactive Status

(1) . . . .

. . .

(3) Burden of Proof - The ~~member~~ petitioner will have the burden of proving by clear, cogent, and convincing evidence that he or she is no longer disabled within the meaning of Rule .0103(19) of this subchapter and that he or she is fit to resume the practice of law.

(4) Medical Records - Within 10 days of filing the petition for reinstatement, the ~~member~~ petitioner will deliver

to ~~provide~~ the secretary ~~with~~ a list of the names and addresses of every psychiatrist, psychologist, physician, hospital, and other health care provider by whom or in which the ~~member~~ petitioner has been examined or treated or sought treatment while disabled and~~. At the same time, the member will also furnish to the secretary~~ a written consent to release all information and records relating to the disability. The secretary will deliver to the counsel all information and records relating to the disability received from the petitioner.

. . .

(6) Costs - The hearing panel may direct the ~~member~~ petitioner to pay the costs of the reinstatement hearing, including the cost of any medical examination ordered by the panel.

(7) Failure to Comply with Rule .0129(c) - If the petitioner fails to comply with any provision of this Rule .0129(c), the counsel may file a motion to dismiss the petition. The motion to dismiss shall specify the alleged deficiencies of the petition. The counsel shall serve the motion to dismiss upon the petitioner. The petitioner shall have ten days in which to file a response to the motion to dismiss.

(8) Reimbursement of Trustee Fees and Expenses - If a trustee was appointed to protect the interests of the petitioner's clients, the hearing panel may require the petitioner, as a condition of reinstatement, to reimburse the State Bar sums expended by the State Bar to compensate the trustee and to reimburse the trustee for any expenses of the trusteeship.

(9) Entrusted Funds - The hearing panel may require the petitioner, as a condition of reinstatement, to demonstrate that the petitioner has properly reconciled all trust or fiduciary accounts and has taken all steps necessary to ensure that all entrusted funds of which the petitioner took receipt are disbursed to the beneficial owner(s) of the funds or are escheated.

(d) Conditions of Reinstatement - The hearing panel, and the council in petitions for reinstatement from disbarment, may impose reasonable conditions on a lawyer's reinstatement from disbarment, suspension, or disability inactive status in any case in which the hearing panel concludes that such conditions are necessary for the protection of the public. Such conditions may include, but are not limited to, a requirement

that the petitioner complete specified hours of continuing legal education, a requirement that the petitioner participate in medical, psychological, or substance use treatment, and a requirement that the petitioner attain a passing score on a regularly-scheduled Multistate Professional Responsibility Examination administered by the National Conference of Bar Examiners within nine months following entry of an order conditionally granting the petition.

(e) . . . .

History Note: *Authority G.S. 84-23; 84-28.1; 84-29; 84-30;*
Readopted Eff. December 8, 1994;
Amendments Approved by the Supreme Court: February 20, 1995; March 6, 1997; October 2, 1997; December 30, 1998; July 22, 1999; August 24, 2000; March 6, 2002; February 27, 2003; October 8, 2009; March 10, 2011; September 22, 2016; December 14, 2021.

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR:

RULES GOVERNING THE PROCEDURES FOR THE ADMINISTRATIVE COMMITTEE

The following amendments to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on July 16, 2021.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar as set forth in 27 N.C.A.C. 1D, Section .0900, *Procedures for the Administrative Committee*, be amended as shown on the following attachments:

ATTACHMENT E-1: 27 N.C.A.C. 1D, Section .0900, Rule .0902, *Reinstatement from Inactive Status*

ATTACHMENT E-2: 27 N.C.A.C. 1D, Section .0900, Rule .0904, *Reinstatement from Suspension*

NORTH CAROLINA
WAKE COUNTY

I, Alice Neece Mine, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on July 16, 2021.

Given over my hand and the Seal of the North Carolina State Bar, this the 9th day of September, 2021.

s/Alice Neece Mine
Alice Neece Mine, Secretary

After examining the foregoing amendments to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same are not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 14th day of December, 2021.

s/Paul M. Newby
Paul M. Newby, Chief Justice

On this date, the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were entered upon the minutes of the Supreme Court. The amendments shall be published in the forthcoming volume of the Advance Sheets as provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 14th day of December, 2021.

s/Berger, J.
For the Court

SUBCHAPTER 01D – RULES OF THE STANDING COMMITTEES OF THE NORTH CAROLINA STATE BAR

SECTION .0900 – PROCEDURES FOR THE ADMINISTRATIVE COMMITTEE

27 NCAC 01D .0902 REINSTATEMENT FROM INACTIVE STATUS

(a) Eligibility to Apply for Reinstatement
Any member who has been transferred to inactive status may petition the council for an order reinstating the member as an active member of the North Carolina State Bar.

. . .

(c) Requirements for Reinstatement

(1) Completion of Petition.

. . . .

. . .

(5) Bar Exam and MPRE Requirement If Inactive Seven or More Years.
~~[Effective for all members who are transferred to inactive status on or after March 10, 2011.]~~

(A) If seven years or more have elapsed between the date of the entry of the order transferring the member to inactive status and the date that the petition is filed, the member must ~~obtain a passing grade on a regularly scheduled North Carolina bar examination. A member subject to this requirement does not have to~~ satisfy the following requirements in lieu of the CLE requirements in paragraphs (c)(2) and (c)(4)~~.~~:

(1) attainment of a passing score, within nine months following an order conditionally granting the petition, on a regularly-scheduled Uniform Bar Examination prepared by the National Conference of Bar Examiners;

(2) successful completion, within nine months following an order conditionally granting the petition, of the State-Specific Component prescribed by the North Carolina Board of Law Examiners; and

(3) attainment of a passing score, within nine months following an order conditionally granting the petition, on a regularly-scheduled Multistate Professional Responsibility Examination administered by the National Conference of Bar Examiners.

(B) A member may offset the inactive status period for the purpose of calculating the seven years necessary to actuate the requirements of paragraph (A) as follows:

___ (~~A~~1) Active Licensure in Another State. Each year of active licensure in another state during the period of inactive status shall offset one year of inactive status for the purpose of calculating the seven years necessary to actuate ~~this provision~~ the requirements of paragraph (A). If the member is not required to ~~pass the bar examination~~ satisfy the requirements of paragraph (A) as a consequence of offsetting, the member shall satisfy the CLE requirements set forth in paragraph (c)(4) for each year that the member was inactive up to a maximum of seven years.

___ (~~B~~2) Military Service. Each calendar year in which an inactive member served on full-time, active military duty, whether for the entire calendar year or some portion thereof, shall offset one year of inactive status for the purpose of calculating the seven years necessary to actuate the requirement**s** of ~~this~~ paragraph (A). If the member is not required to ~~pass the bar examination~~ satisfy the requirements of paragraph (A) as a consequence of offsetting, the member shall satisfy the CLE requirements set forth in paragraph (c)(4) for each year that the member was inactive up to a maximum of seven years.

(6) Payment of Fees, Assessments and Costs.

. . . .

(d) Service of Reinstatement Petition

. . . .

. . .

(f) Recommendation of Administrative Committee
After any investigation of the petition by the counsel is complete, the Administrative Committee will consider the petition at its next meeting and shall make a recommendation to the council regarding whether the petition should be granted. The chair of the Administrative Committee may appoint a panel composed of at least three members of the committee to consider any petition for reinstatement and, on behalf of the Administrative Committee, to make a recommendation to the council regarding whether the petition should be granted.

(1) Conditions Precedent to Reinstatement. Upon a determination that the petitioner has failed to demonstrate competence to return to the practice of law, the committee may require the petitioner to complete a specified number of hours of continuing legal education, which shall be in addition to the requirements set forth in Rule .0902(c) (2) and (4) above, as a condition precedent to the committee's recommendation that the petition be granted,

(2) . . . .

(3) Failure of Conditions Subsequent to Reinstatement. In the event the petitioner fails to satisfy the conditions of the reinstatement order, the committee shall issue a notice directing the petitioner to show cause, in writing, why the petitioner should not be suspended from the practice of law. Notice shall be served and the right to request a hearing shall be as provided in Rule .0902(g) below. The hearing shall be conducted as provided in Section .1000 of this subchapter provided, however, the burden of proof shall be upon the petitioner to show by clear, cogent, and convincing evidence that he or she has satisfied the conditions of the reinstatement order.

(g) Hearing Upon Denial of Petition for Reinstatement

. . .

(h) Reinstatement by Secretary of the State Bar

Notwithstanding paragraph (**f**) of this rule, an inactive member may petition for reinstatement pursuant to paragraphs (a) and (b) of this rule and may be reinstated by the secretary of the State Bar upon a finding that the inactive member has complied with or fulfilled the conditions for reinstatement set forth in this rule; there are no issues relating to

the inactive member's character or fitness; and the inactive member has paid all fees owed to the State Bar including the reinstatement fee. Reinstatement by the secretary is discretionary. If the secretary declines to reinstate a member, the member's petition shall be submitted to the Administrative Committee at its next meeting and the procedure for review of the reinstatement petition shall be as set forth in paragraph (f) of this rule.

(i) Denial of Petition
When a petition for reinstatement is denied by the council in a given calendar year, the member may not petition again until the following calendar year. The reinstatement fee, costs, and any fees paid pursuant to paragraph (c)(6) shall be retained. However, the State Bar membership fee, Client Security Fund assessment, and district bar membership fee assessed for the year in which the application is filed shall be refunded.

History Note: *Authority G.S. 84-23;*
Readopted Eff. December 8, 1994;
Amendments Approved by the Supreme Court: September 7, 1995; March 7, 1996; March 5, 1998; March 3, 1999; February 3, 2000; March 6, 2002; February 27, 2003; March 3, 2005; March 10, 2011; August 25, 2011; March 8, 2012; March 8, 2013; March 6, 2014; October 2, 2014; September 22, 2016; September 20, 2018; September 25, 2020; December 14, 2021.

SUBCHAPTER 01D – RULES OF THE STANDING COMMITTEES OF THE NORTH CAROLINA STATE BAR

SECTION .0900 – PROCEDURES FOR THE ADMINISTRATIVE COMMITTEE

27 NCAC 01D .0904 REINSTATEMENT FROM SUSPENSION

(a) Compliance Within 30 Days of Service of Suspension Order.

. . . .

. . .

(d) Requirements for Reinstatement

(1) Completion of Petition

. . . .

(2) CLE Requirements Before Suspended
Unless the member was exempt from such requirements pursuant to Rule .1517 of this subchapter or is subject to the requirements in paragraph (d)(4) of this rule, the member must satisfy the minimum continuing legal education (CLE) requirements, as set forth in Rule .1518 of this subchapter, for the calendar year in which the member was suspended (the "subject year") if such transfer occurred on or after July 1 of the subject year, including any deficit from a prior year that was carried forward and recorded in the member's CLE record for the subject year. The member shall also sign and file any delinquent CLE annual report form.

(3) Additional CLE Requirements
If more than one year has elapsed between the effective date of the suspension order and the date upon which the reinstatement petition is filed, the member must complete 12 hours of approved CLE for each year that the member was suspended up to a maximum of seven years. The CLE must be completed within two years prior to filing the petition. For each 12-hour increment, 2 hours must be earned by attending courses in the areas of professional responsibility and/or professionalism. If during the period of suspension the member complied with mandatory CLE requirements of another state where the member is licensed, those CLE credit hours may be applied to the requirements under this provision without

regard to whether they were taken during the two years prior to filing the petition.

(4) Bar Exam and MPRE Requirement If Suspended Seven or More Years
~~[Effective for all members who are administratively suspended on or after March 10, 2011.]~~

(A) If seven years or more have elapsed between the effective date of the suspension order and the date that the petition is filed, the member must ~~obtain a passing grade on a regularly scheduled North Carolina bar examination. A member subject to this requirement does not have to~~ satisfy the following requirements in lieu of the CLE requirements in paragraphs (d)(2) and (d)(3~~).~~):

(1) attainment of a passing score, within nine months following an order conditionally granting the petition, on a regularly-scheduled Uniform Bar Examination prepared by the National Conference of Bar Examiners;

(2) successful completion, within nine months following an order conditionally granting the petition, of the State-Specific Component prescribed by the North Carolina Board of Law Examiners; and

(3) attainment of a passing score, within nine months following an order conditionally granting the petition, on a regularly-scheduled Multistate Professional Responsibility Examination administered by the National Conference of Bar Examiners.

(B) A member may offset the suspended status period for the purpose of calculating the seven years necessary to actuate the requirements of paragraph (A) as follows:

____ (~~A~~1) Active Licensure in Another State. Each year of active licensure in another state during the period of suspension shall offset one year of suspension for the purpose of calculating the seven years necessary to actuate ~~this provision~~ the requirements of paragraph (A). If the member is not required to ~~pass the bar examination~~ satisfy the requirements of paragraph (A)

as a consequence of offsetting, the member shall satisfy the CLE requirements set forth in paragraph (d)(3) for each year that the member was suspended up to a maximum of seven years.

____(~~B~~2) Military Service. Each calendar year in which a suspended member served on full-time, active military duty, whether for the entire calendar year or some portion thereof, shall offset one year of suspension for the purpose of calculating the seven years necessary to actuate the requirements of ~~this~~ paragraph (A). If the member is not required to ~~pass the bar examination~~ satisfy the requirements of paragraph (A) as a consequence of offsetting, the member shall satisfy the CLE requirements set forth in paragraph (d)(3) for each year that the member was suspended up to a maximum of seven years.

(5) Character and Fitness to Practice

. . . .

(6) Payment of Fees, Assessments and Costs

The member must pay all of the following:

(A) a reinstatement fee in an amount to be determined by the Council or a $250.00 reinstatement fee if suspended for failure to comply with CLE requirements;

(B) all membership fees, Client Security Fund assessments, and late fees owed at the time of suspension and owed for the year in which the reinstatement petition is filed;

(C) all district bar annual membership fees owed at the time of suspension and owed for the year in which the reinstatement petition is filed;

(D) all attendee fees, fines and penalties owed the Board of Continuing Legal Education at the time of suspension and attendee fees for CLE courses taken to satisfy the requirements of paragraphs (d)(2) and (3) above;

(E) any costs assessed against the member by the chairperson of the Grievance Committee, the Disciplinary

Hearing Commission, and/or the secretary or council of the North Carolina State Bar; and

(F) all costs incurred by the North Carolina State Bar in suspending the member, including the costs of service, and in investigating and processing the application for reinstatement.

(7) Pro Hac Vice Registration Statements

. . . .

(8) IOTLA Certification

. . . .

(9) Wind Down of Law Practice During Suspension

. . . .

(e) Procedure for Review of Reinstatement Petition.

. . . .

(f) Reinstatement by Secretary of the State Bar.

. . . .

(g) Reinstatement from Disciplinary Suspension.

. . . .

(h) Denial of Petition.

. . . .

History Note: *Authority G.S. 84-23;*
Readopted Eff. December 8, 1994;
Amendments Approved by the Supreme Court: September 7, 1995, March 7, 1996, March 5, 1998, February 27, 2003, October 1, 2003; March 2, 2006; November 16, 2006; October 8, 2009; March 11, 2010; March 10, 2011; March 8, 2012; March 8, 2013; August 27, 2013; March 6, 2014; October 2, 2014; September 22, 2016; September 20, 2018; September 25, 2020; December 14, 2021.

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR:

RULES AND REGULATIONS GOVERNING THE ADMINISTRATION OF THE CONTINUING LEGAL EDUCATION PROGRAM

The following amendments to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on July 16, 2021.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar as set forth in 27 N.C.A.C. 1D, Section .1500, *Rules Governing the Administration of the Continuing Legal Education Program*; and .1600, *Regulations Governing the Administration of the Continuing Legal Education Program*, be amended as shown on the following attachments:

ATTACHMENT F-1: 27 N.C.A.C. 1D, Section .1500, Rule .1519, *Accreditation Standards*

ATTACHMENT F-2: 27 N.C.A.C. 1D, Section .1600, Rule .1606, *Fees*

NORTH CAROLINA
WAKE COUNTY

I, Alice Neece Mine, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on July 16, 2021.

Given over my hand and the Seal of the North Carolina State Bar, this the 9th day of September, 2021.

s/Alice Neece Mine
Alice Neece Mine, Secretary

After examining the foregoing amendments to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same are not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 14th day of December, 2021.

s/Paul M. Newby
Paul M. Newby, Chief Justice

On this date, the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were entered upon the minutes of the Supreme Court. The amendments shall be published in the forthcoming volume of the Advance Sheets as provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 14th day of December, 2021.

s/Berger, J.
For the Court

SUBCHAPTER 01D – RULES OF THE STANDING COMMITTEES OF THE NORTH CAROLINA STATE BAR

SECTION .1500 – RULES GOVERNING THE ADMINISTRATION OF THE CONTINUING LEGAL EDUCATION PROGRAM

27 NCAC 01D .1519 ACCREDITATION STANDARDS

The board shall approve continuing legal education programs that meet the following standards and provisions.

(a) . . . .

. . .

(g) A sponsor of an approved program must timely remit fees as required in Rule .1606 and keep and maintain attendance records of each continuing legal education program sponsored by it, which shall be furnished to the board in accordance with regulations. Participation in an online program must be verified as provided in Rule .1601(d).

. . . .

History Note: *Authority - Order of the North Carolina Supreme Court, October 7, 1987, 318 N.C. 711;*
Readopted Eff. December 8, 1994;
Amendments Approved by the Supreme Court: March 1, 2001; October 1, 2003; February 5, 2009; March 11, 2010; April 5, 2018; September 25, 2019; December 14, 2021.

SUBCHAPTER 01D – RULES OF THE STANDING COMMITTEES OF THE NORTH CAROLINA STATE BAR

SECTION .1600 – REGULATIONS GOVERNING THE ADMINISTRATION OF THE CONTINUING LEGAL EDUCATION PROGRAM

27 NCAC. 01D .1606 FEES

(a) Sponsor Fee - The sponsor fee, a charge paid directly by the sponsor, shall be paid by all sponsors of approved programs presented in North Carolina and by registered sponsors located in North Carolina for approved programs wherever presented, except that no sponsor fee is required where approved programs are offered without charge to attendees. In any other instance, payment of the fee by the sponsor is optional. The amount of the fee, per approved CLE hour per active member of the North Carolina State Bar in attendance, is $3.50. This amount shall be allocated as follows: $1.25 to the Board of Continuing Legal Education to administer the CLE program; $1.00 to the Chief Justice's Commission on Professionalism; $1.00 to the North Carolina Equal Access to Justice Commission; and $.25 to the State Bar to administer the funds distributed to the commissions. The fee is computed as shown in the following formula and example which assumes a 6-hour program attended by 100 North Carolina lawyers seeking CLE credit:

Fee: $3.50 x Total Approved CLE Hours (6) x Number of NC Attendees (100) = Total Sponsor Fee ($2,100)

(b) . . . .

. . .

(e) Failure to Timely Pay Sponsor Fee - A sponsor's failure to pay sponsor fees within ninety (90) days following the completion of a program will result in the denial of that sponsor's subsequent program applications until fees are paid.

History Note: *Authority - Order of the North Carolina Supreme Court, October 7, 1987, 318 N.C. 711;*
Readopted Eff. December 8, 1994;
Amendments Approved by the Supreme Court: December 30, 1998; October 1, 2003; February 5, 2009; October 8, 2009; November 5, 2015; April 5, 2018; September 25, 2019; December 14, 2021.

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR:

RULES GOVERNING THE PRACTICAL TRAINING OF LAW STUDENTS

The following amendments to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on October 23, 2020.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar as set forth in 27 N.C.A.C. 1C, Section .0200, *Rules Governing the Practical Training of Law Students*, be amended as shown on the following attachment:

ATTACHMENT G: 27 N.C.A.C. 1C, Section .0200, Rule .0202, *Definitions*

NORTH CAROLINA
WAKE COUNTY

I, Alice Neece Mine, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on October 23, 2020.

Given over my hand and the Seal of the North Carolina State Bar, this the 9th day of September, 2021.

s/Alice Neece Mine
Alice Neece Mine, Secretary

After examining the foregoing amendments to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same are not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 14th day of December, 2021.

s/Paul M. Newby
Paul M. Newby, Chief Justice

On this date, the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were entered upon the minutes of the Supreme Court. The amendments shall be published in the forthcoming

volume of the Advance Sheets as provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 14th day of December, 2021.

s/Berger, J.
For the Court

SUBCHAPTER 01C RULES GOVERNING THE BOARD OF LAW EXAMINERS AND THE TRAINING OF LAW STUDENTS

SECTION .0200 – RULES GOVERNING THE PRACTICAL TRAINING OF LAW STUDENTS

27 NCAC 01C .0202 DEFINITIONS

The following definitions shall apply to the terms used in this section:

(a) Clinical legal education program - . . . .

(b) Eligible persons - . . . .

(c) Field placement - Practical training opportunities that place students in legal practice settings external to the law school. Students in a field placement represent clients or perform other lawyering roles under the supervision of practicing lawyers or other qualified legal professionals. Supervising attorneys provide direct feedback and guidance to the students. Site supervisors have administrative responsibility for the legal intern program at the field placement. Such practical training opportunities include the following:

(1) Externships - Courses within a law school's clinical legal education program in which the law school places students in legal practice settings external to the law school. Faculty have overall responsibility for assuring the educational value of the learning in the field.

(2) Government internships - Practical training opportunities in which students are placed in government agencies. No law school credit is earned for such placements. A government internship may be facilitated by the student's law school or obtained by the student independently. Although not required, faculty oversight is encouraged to ensure the educational value of the placement.

(3) Internships - Practical training opportunities in which students are placed in legal practice settings external to the law school. No law school credit is earned for such placements. An internship may be facilitated by the student's law school or obtained by the student independently. Some faculty oversight through the law school's clinical legal education program is required.

(ed) Certified law student - . . . .

. . .

(~~j~~k) Site supervisor - The attorney at a student practice placement who assumes administrative responsibility for the certified law student program at the placement and provides the statements to the State Bar and the certified law student's law school required by Rule .0205(b) of this subchapter. A site supervisor may also be a supervising attorney at a student practice placement.

~~(1) Externship - A course within a law school's clinical legal education program in which the law school places the student in a legal practice setting external to the law school. An externship may include placement at a government agency.~~

~~(2) Government internship - A practical training opportunity in which the student is placed in a government agency and no law school credit is earned. A government internship may be facilitated by the student's law school or obtained by the student independently.~~

~~(3) Internship - A practical training opportunity in which the student is placed in a legal practice setting external to the law school and no law school credit is earned. An internship may be facilitated by the student's law school or obtained by the student independently.~~

(~~k~~l) Supervising attorney - . . . .

History Note: *Authority G.S. 84-7.1; 84-23;*
Readopted Eff. December 8, 1994;
Amendments Approved by the Supreme Court: June 7, 2001; March 6, 2002; March 6, 2008; September 25, 2019; April 21, 2021; December 14, 2021.

HEADNOTE INDEX

TOPICS COVERED IN THIS INDEX

TERMINATION OF PARENTAL RIGHTS—Continued

and rejected by the trial court—that would require written findings on that issue. **In re K.A.M.A., 424.**

Best interests of the child—statutory factors—probability of reunification within reasonable amount of time—bond between child and parent—The trial court did not abuse its discretion by determining that termination of both parents' rights to their daughter was in the daughter's best interests, based on unchallenged findings of fact addressing the dispositional factors in N.C.G.S. § 7B-1110(a). The parents' lack of progress on various aspects of their case plans—including lack of visitation with their daughter and failing to complete drug screens and mental health evaluations—supported the court's conclusion that there was no reasonable probability that reunification with the parents could be achieved in a reasonable amount of time. Further, the court's conclusion that the child had no bond with her parents was supported by evidence from the social worker and the guardian ad litem. **In re S.C.C., 303.**

Best interests of the child—statutory factors—proposed placement with relatives—The trial court did not abuse its discretion in concluding that termination of a mother's parental rights to her two sons was in the children's best interests, where the court properly considered and made sufficient factual findings regarding the statutory dispositional factors, including the relationship between the children and the proposed permanent placements (N.C.G.S. § 7B-1110(a)(5)). The court properly rejected the maternal grandmother and the maternal great-grandparents as permanent placements for the children based on findings supported by competent evidence, and—although the availability of a relative placement can be a "relevant consideration" under section 7B-1110(a)(6)—section 7B-1110 did not require the court to prioritize placing the children with relatives over non-relatives. **In re N.C.E., 283.**

Best interests of the child—weighing of statutory factors—parent-child bond—alternatives to termination—The trial court did not abuse its discretion in concluding that termination of a mother's parental rights was in her minor daughter's best interests where, contrary to the mother's argument, the court was not required to delay the termination hearing—which the court appropriately fast tracked after finding aggravated circumstances existed under N.C.G.S. § 7B-901(c)(1)(b) and (e)—so respondent could try to improve the tenuous bond with her child. Furthermore, the court properly considered each dispositional factor under N.C.G.S. § 7B-1110(a) in making its best interests determination, and the record evidence did not support continued visitation between the mother and her child or any other dispositional alternatives to termination of parental rights. **In re N.B., 441.**

Findings of fact—challenges—recitation of testimony and reports—independent determination of evidence—A father's numerous challenges to the findings of fact in the trial court's order terminating his parental rights—arguing that the findings were nothing more than recitations of witness testimony, reports, or the trial court's beliefs—were for the most part rejected where the trial court did refer to prior orders and reports from earlier proceedings but heard live testimony and made an independent determination regarding the evidence presented. However, the findings that simply recited witness testimony were disregarded in the appellate court's evaluation of whether grounds existed to terminate the father's parental rights. **In re A.E., 177.**

TERMINATION OF PARENTAL RIGHTS—Continued

Findings of fact—challenges—sufficiency of evidence—pattern of neglect— A father's numerous challenges to the findings of fact in the trial court's order terminating his parental rights—arguing that the findings were overbroad or lacked evidentiary support—resulted in some findings being disregarded on appeal because of a lack of evidentiary support, while other findings, including those related to the father's continuation of the pattern of neglect, remained undisturbed because they were sufficiently supported by record evidence. **In re A.E., 177.**

Findings of fact—challenges—sufficiency of evidence—stipulation—A father's numerous challenges to the findings of fact in the trial court's order terminating his parental rights—arguing that the findings lacked sufficient evidentiary support or were excessively imprecise—were rejected where portions of the challenged findings were based on the father's own stipulation and portions regarding a psychologist's evaluation and testimony were supported by record evidence. **In re A.E., 177.**

Grounds for termination—aiding and abetting—murder of other child in home—The trial court properly terminated a mother's parental rights in her newborn son under N.C.G.S. § 7B-1111(a)(8) and ceased reunification efforts in the underlying neglect action, where clear, cogent, and convincing evidence supported a finding that she aided and abetted her boyfriend in the second-degree murder of her nineteen-month-old son. Although the mother knew for months that her boyfriend was hitting her children, observed scalding injuries on the children after her boyfriend left them in a hot bathtub, and found patterned linear bruising on her son's back the day before he died (in large part because of the burns and blunt force injuries), she continued to leave the children in her boyfriend's care, did not seek medical care for the children, and actively concealed the injuries from her parents and anyone else who could have offered help. **In re C.B.C.B., 392.**

Grounds for termination—failure to make reasonable progress—progress made post-petition—no misapprehension of the law—The trial court did not act under a misapprehension of the law when terminating a mother's parental rights in her daughter for failure to make reasonable progress to correct the conditions leading to the child's removal (N.C.G.S. § 7B-1111(a)(2)). Specifically, the mother failed to show that the court operated on the erroneous belief that evidence of any progress she made after the filing of the termination petition was irrelevant, where the court not only overruled a relevance-based objection to testimony describing events occurring after the petition filing but also admitted a substantial amount of evidence concerning those post-petition events. **In re I.E.M., 221.**

Grounds for termination—failure to make reasonable progress—sufficiency of findings—An order terminating a mother's parental rights to her daughter was affirmed where the trial court's findings—that the mother failed to complete the programs required by her out-of-home family services agreement to address her domestic violence and parenting issues—supported the conclusion that the mother had failed to make reasonable progress under the circumstances to correct the conditions that led to the child's removal, pursuant to N.C.G.S. § 7B-1111(a)(2). **In re T.T., 317.**

Grounds for termination—neglect—best interests—sufficiency of findings— The findings of fact in an order terminating a father's parental rights to his son contained sufficient differences from the petition allegations to demonstrate that the trial court conducted an independent evaluation of the evidence. Although certain

TERMINATION OF PARENTAL RIGHTS—Continued

findings were not supported by the evidence and were therefore disregarded on appeal, the remainder of the findings were supported by evidence that the son was neglected and that the father's failure to correct the conditions which led to the son's removal indicated a likelihood of future neglect. The trial court properly terminated the father's rights based on neglect after conducting a best interests analysis in accordance with the factors contained in N.C.G.S. § 7B-1110(a). **In re R.G.L., 452.**

Grounds for termination—neglect—findings—sufficiency of evidence—In a private termination of parental rights matter filed by the child's grandparents, the trial court's findings of fact in its order terminating the father's parental rights to his son based on neglect (N.C.G.S. § 7B-1111(a)(1)) were supported by clear, cogent, and convincing evidence regarding the father's lengthy history of drug use and criminal conduct, continued drug use while incarcerated, failure to address his addiction despite the availability of services in prison, lack of a bond or relationship with his son, and lack of consistent interest in the welfare or health of his son (who had special medical needs). **In re W.K., 331.**

Grounds for termination—neglect—incarceration for abuse of another child—likelihood of future neglect—In a private termination of parental rights matter initiated by a mother after her son's father entered an *Alford* plea in another state to molesting a different child, the trial court properly terminated the father's rights to his son on the ground of neglect (N.C.G.S. § 7B-1111(a)(1)). The mother's testimony supported the trial court's findings that the father repeatedly molested his victim and that at least one incident occurred when the son was in the same bed. Further, the trial court's determination that there was a likelihood of future neglect was supported by evidence that the father made no effort to learn about his son's welfare in more than four years and would be unable to provide future care due to additional pending criminal charges. The father's incarceration and court-ordered prohibition from contacting his son did not absolve him of all parental responsibilities. **In re J.B., 233.**

Grounds for termination—neglect—likelihood of future neglect—conclusions—In a private termination of parental rights matter filed by the child's grandparents, the trial court's conclusions that there existed a high probability of future neglect if the child were returned to his father's care and that the father's rights should be terminated on the ground of neglect (N.C.G.S. § 7B-1111(a)(1)) were supported by the findings of fact detailing the father's lengthy history of drug use and criminal conduct, failure to address his substance abuse, and minimal interest in the health of his son (who had special medical needs). The father's argument that he lacked the ability to pay any support while incarcerated was undermined by the unchallenged finding that he paid support for his daughter, in whom he showed more interest and with whom he sought more of a relationship than with his son. **In re W.K., 331.**

Grounds for termination—neglect—likelihood of future neglect—no findings—In a private termination of parental rights action, the trial court's decision to terminate a mother's parental rights to her son on the ground of neglect (N.C.G.S. § 7B-1111(a)(1)) was not supported by any findings regarding the likelihood of repetition of neglect if the son were returned to his mother's care. The termination order was reversed and the matter remanded for further factual findings. **In re B.R.L., 15.**

Grounds for termination—neglect—likelihood of future neglect—sufficiency of findings—The trial court properly terminated a mother's parental rights in her

TERMINATION OF PARENTAL RIGHTS—Continued

son on grounds of neglect where competent evidence supported the court's factual findings, including that, at the time of the termination hearing, the mother had failed to maintain a safe home environment (she lived in the maternal grandmother's house, which was found covered in animal feces, moldy food, and piles of trash), routinely missed drug screens required under her case plan despite her methamphetamine and marijuana use disorders, attended only twenty-eight out of the seventy-seven visits she was offered with her son, and failed to correct any of those conditions while her son was in foster care. Further, these findings supported a conclusion that the child faced a high likelihood of future neglect if returned to the mother's care. **In re A.L.A., 383.**

Grounds for termination—neglect—likelihood of future neglect—sufficiency of findings—The trial court properly terminated respondents' parental rights to their three sons on grounds of neglect (N.C.G.S. § 7B-1111(a)(1)) where the court's findings of fact were supported by clear, cogent, and convincing evidence demonstrating that the children had been exposed to domestic violence, substance abuse, and pornography in the home; the children were diagnosed with post-traumatic stress disorder and exhibited behavioral issues, including sexualized behavior between the brothers; respondents completed most of their family case plans but failed to take responsibility for the children's traumas, to address the inappropriate incidents between the children (other than to fervently deny that they happened), or to understand why the children were removed from the home; and, therefore, there was a high likelihood of future neglect if the children were returned to respondents' care. **In re L.G.G., 258.**

Grounds for termination—neglect—sufficiency of findings—The trial court did not err by concluding that a father's parental rights were subject to termination on the grounds of neglect (N.C.G.S. § 7B-1111(a)(1)) where the conclusion was sufficiently supported by the findings of fact, including that both parents had stipulated to the children's neglect at the time the juvenile petitions were filed, the parents exhibited a pattern of neglect and failed to understand the importance of keeping the children and the home clean, and the father denied that the children had special needs despite evidence-based documentation of those needs. Further, the trial court properly considered circumstances up to and including the date of the termination hearing. **In re A.E., 177.**

Grounds for termination—neglect—sufficiency of findings—Where many of a mother's challenges to the findings of fact in the trial court's order terminating her parental rights overlapped with the father's challenges, her challenges were addressed in the same manner, resulting in some findings being disregarded and others being found to have ample evidentiary support. As with the father, the trial court did not err in determining that the mother's parental rights were subject to termination on the grounds of neglect (N.C.G.S. § 7B-1111(a)(1)). **In re A.E., 177.**

Grounds for termination—not stated in conclusion section of order—referenced in findings—harmless error—Where the trial court's order terminating a father's parental rights to his son referenced the statutory ground of neglect (N.C.G.S. § 7B-1111(a)(1)) in its findings of fact, the specific statutory grounds supporting termination did not have to be stated in the order's conclusion section. Any potential error was harmless given the court's extensive findings of fact, which were supported by ample evidence, demonstrating how the court reached its decision to terminate based on neglect. **In re W.K., 331.**

TERMINATION OF PARENTAL RIGHTS—Continued

Grounds for termination—willful abandonment—evidentiary support—The trial court properly terminated a father's parental rights to his daughter based on willful abandonment (N.C.G.S. § 7B-1111(a)(7)) where the majority of the challenged findings of fact were supported by evidence or based on the trial court's proper role in assessing credibility that, during the determinative six-month period, although the father sent one card with a gift, he otherwise had no contact with his daughter or the relatives caring for her, took no steps to seek visitation or assert his legal rights, provided no financial support, and did not attempt to show love, care, and affection for his daughter. In turn, the findings supported the court's conclusion that the father's conduct constituted willful abandonment. **In re L.M.M., 431.**

Grounds for termination—willful abandonment—sufficiency of findings—In a private termination of parental rights proceeding, the trial court properly terminated a father's parental rights to his daughter based on the ground of willful abandonment (N.C.G.S. § 7B-1111(a)(7)). Clear, cogent, and convincing evidence supported the court's findings that, prior to the filing of the termination petition and for far longer than the determinative six-month period, the father did not send any cards or gifts to his daughter or make any attempts to contact her directly or through other family members, he did not take any steps to modify a prior custody order in order to secure visitation rights, and he only paid a third of his monthly child support obligation. **In re M.E.S., 275.**

Grounds for termination—willful abandonment—sufficiency of findings—The trial court properly terminated a father's parental rights to his son on grounds of willful abandonment (N.C.G.S. § 7B-1111(a)(7)) where the court's findings of fact—supported by clear, cogent, and convincing evidence—demonstrated that, during the determinative six-month period, the father (who was serving a criminal sentence) had the ability to contact his son by telephone from prison and had the contact information for the child's foster family but, nevertheless, failed to check in on his son or to provide any child support. Further, the father did not send any gifts or letters to his son from prison, and any gifts that his fiancée sent to the child were not sent at the father's direction. **In re A.A.M., 167.**

Grounds for termination—willful abandonment—sufficiency of findings—The trial court's termination of a father's parental rights to his son based on willful abandonment (N.C.G.S. § 7B-1111(a)(7)) was supported by unchallenged findings of fact that the father had not seen his six-and-a-half-year-old son since he was a baby, he did not contact his son, he did not send money, gifts, cards, or letters, and he did not take any action to follow up on statements to the child's mother that he planned to become more involved with his son. The father's refusal to sign papers to allow the child's mother to change their son's last name was not sufficient to refute the ground of willful abandonment. **In re C.K.I., 207.**

Grounds for termination—willful abandonment—visitation requests by parent—In a private termination of parental rights action, the trial court's findings of fact did not support its conclusion that a mother willfully abandoned her son pursuant to N.C.G.S. § 7B-1111(a)(7), where the mother's actions—by requesting visits with her son multiple times, visiting with him twice, and filing a pro se motion for review seeking increased visitation—did not demonstrate an intent to forego all parental claims to her son. **In re B.R.L., 15.**

Grounds for termination—willful failure to pay a reasonable portion of the cost of care—sufficiency of evidence—The trial court properly terminated a

TERMINATION OF PARENTAL RIGHTS—Continued

mother's parental rights to her three children based on willfully failing to pay a reasonable portion of the cost of their care although physically and financially able to do so (N.C.G.S. § 7B-1111(a)(3)), where clear, cogent, and convincing evidence showed that the mother had entered into a voluntary support agreement that she never moved to modify, she was employed during at least part of the six-month determinative period, but she had not voluntarily paid any support for her children. **In re J.K.F., 247.**

Grounds for termination—willful failure to pay a reasonable portion of the cost of care—sufficiency of findings—The trial court properly terminated both parents' parental rights to their daughter on the ground that they willfully failed to pay a reasonable portion of the cost of care although physically and financially able to do so (N.C.G.S. § 7B-1111(a)(3)), based on unchallenged findings that the parents were obligated by court order to pay child support but, despite being employed and not under a disability, neither parent had paid any support. The Supreme Court declined to revisit the principle established in *In re J.M.*, 373 N.C. 352 (2020), that when a parent is subject to a valid child support order, the petitioner in a termination of parental rights case is not required to independently prove that a parent had the ability to pay support during the relevant time period. **In re S.C.C., 303.**

Ineffective assistance of counsel—failure to show prejudice—On appeal from an order terminating a mother's parental rights, the mother's ineffective assistance of counsel claim lacked merit because, even assuming her counsel's performance was deficient (where counsel may have failed to ensure the mother received notice of the date and time of the termination hearing, and where counsel did not cross-examine the department of social services' witnesses, offer any witnesses on the mother's behalf, or offer a closing argument at the termination hearing), the mother failed to demonstrate that she was prejudiced as a result. The mother neither challenged the trial court's findings and conclusions of law in the termination order nor argued on appeal that, but for counsel's deficient performance, there was a reasonable probability of a different result. **In re Z.M.T., 44.**

Motion in the cause—verification requirement—N.C.G.S. § 7B-1104—subject matter jurisdiction—The trial court lacked subject matter jurisdiction to terminate a father's parental rights to his son based on an unverified motion in the cause, which was filed pursuant to N.C.G.S. § 7B-1102 after the child was adjudicated dependent and neglected, because the requirement in N.C.G.S. § 7B-1104 that a petition or motion to terminate parental rights "shall be verified" was jurisdictional in nature—a result compelled by *In re T.R.P.*, 360 N.C. 588 (2006), which interpreted the same language in N.C.G.S. § 7B-403(a) to be jurisdictional. Nothing in section 7B-1104 distinguished between a petition and a motion in the cause, the statutory requirements served important constitutional interests, and a trial court could not derive its jurisdiction in a termination matter from a prior abuse, neglect, or dependency proceeding. **In re O.E.M., 27.**

No-merit brief—failure to legitimate—The termination of a father's parental rights to his son on the grounds of failure to legitimate was affirmed where his counsel filed a no-merit brief and the termination order was supported by clear, cogent, and convincing evidence and based upon proper legal grounds. **In re Z.J.M., 485.**

No-merit brief—failure to make reasonable progress—The trial court's order terminating a father's parental rights to his daughter on the grounds of failure to make reasonable progress was affirmed where his counsel filed a no-merit brief and

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