293 N.C. App.—No. 4 **Pages 474-649**

ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

NOVEMBER 27, 2024

MAILING ADDRESS: The Judicial Department
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OF

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APPEAL AND ERROR

Interlocutory orders—denial of motion to dismiss—collateral estoppel—no showing of a substantial right—In an action stemming from a custody dispute, a social worker's interlocutory appeal from the partial denial of her motion to dismiss the father's tort and civil conspiracy claims on collateral estoppel grounds was dismissed where the father's allegations concerned the social worker's acts outside the scope of her work and occurring after her professional involvement with the father's child had ended. Neither the same factual issues nor the possibility of inconsistent verdicts was shown, and accordingly, the social worker failed to demonstrate that a substantial right would be affected absent immediate review. **McMillan v. Faulk, 626.**

Interlocutory orders—denial of motion to dismiss—collateral estoppel—no showing of a substantial right—In an action stemming from a custody dispute, the mother's interlocutory appeal from the partial denial of her motion to dismiss the father's tort and civil conspiracy claims on collateral estoppel grounds was dismissed where the mother did not assert the presence of the same factual issues in both trials or the possibility of inconsistent verdicts and thus failed to show that a substantial right would be affected absent immediate review. **McMillan v. Faulk, 626.**

Interlocutory orders—dismissal of civil conspiracy claims—no argument of a substantial right—In an action stemming from a custody dispute, the father's interlocutory appeal from the dismissal of his civil conspiracy claims against the mother and a social worker was dismissed where the father made only a bare assertion that a substantial right would be affected absent immediate review because the appellate court does not construct such arguments for appellants. **McMillan v. Faulk, 626.**

Notice of appeal—timeliness—cross-appeal—action brought under Tort Claims Act —In an appeal filed by the Department of Public Safety challenging the Industrial Commission's award of damages to a former inmate (plaintiff) on his claim brought under the Tort Claims Act, plaintiff's cross-appeal—challenging some of the Commission's factual findings—was dismissed as untimely, since he failed to file his notice of cross-appeal within thirty days after the Commission entered its decision and order, as required under N.C.G.S. § 143-293 (governing appeals under the Tort Claims Act). Although section 143-293 specifically allows parties to appeal

a decision and order within thirty days of receiving it, nothing in the record showed that plaintiff received the decision and order later than the day that the Commission entered it. Further, plaintiff could not argue that Appellate Rule 3(c) governed the timeliness of his appeal where, under Appellate Rule 18 (governing the timing for appeals from administrative tribunal decisions "unless the General Statutes provide otherwise"), section 143-293 was controlling. **Jones v. N.C. Dep't of Pub. Safety, 611.**

Preservation of issues—permanency planning order—guardian ad litem duties—automatic preservation—In a grandmother's appeal from a permanency planning order ceasing reunification efforts with her and endorsing a primary plan of adoption for three children, although the grandmother did not argue before the trial court that the guardian ad litem (GAL) assigned to the case failed to fulfill its duties, the issue was automatically preserved for appellate review because, even though N.C.G.S. § 7B-601(a) (listing a GAL's duties in a juvenile case) does not explicitly direct a trial court to perform a specific act—such as making written findings regarding a GAL's performance—since the trial court is directed by statute (section 7B-906.1(c)) to consider a GAL's information at a permanency planning hearing, the relevant statutory sections in combination create a statutory mandate sufficient to automatically preserve an issue challenging a GAL's efforts. **In re M.G.B., 568.**

Preservation of issues—permanency planning—fitness and constitutional status as parent—issue not raised in trial court—At a permanency planning hearing for a dependent child, the child's mother failed to preserve for appellate review her argument that the trial court erred in granting guardianship to the child's foster parents without first finding that the mother was unfit or that she had acted inconsistently with her constitutionally protected status as a parent. The record showed that the mother had the opportunity to raise her constitutional argument before the trial court—because she had notice prior to the hearing that the court would be considering a recommendation to grant guardianship of the child—but that she failed to do so. **In re J.O., 556.**

Record—lack of transcript—duty of appellant to complete—It is the duty of the appellant to ensure that the record on appeal is complete, and because the appellant—here, the mother—failed to include a transcript of the proceedings in the record, the appellate court could not consider her argument that the district court's findings of fact were not supported by the evidence. **Scott v. Scott, 639.**

ATTORNEY FEES

Motion to compel discovery—motion allowed—fees disallowed—abuse of discretion analysis—In an action brought by plaintiff against his former employers (defendants) for wrongful termination, although plaintiff's motion to compel discovery was successful, the trial court did not abuse its discretion by denying plaintiff's motion for attorney fees concerning discovery where the trial court made its decision after considering arguments from counsel and conducting an in-depth in-camera review of the documents for which defendants had claimed privilege and, therefore, the decision was not arbitrary or manifestly unsupported by reason. **Hoaglin v. Duke Univ. Health Sys., Inc., 517.**

ATTORNEYS

Petition for reinstatement of law license—active sentence for felonies not completed—citizenship not restored—dismissal upheld—The final decision of

ATTORNEYS—Continued

the Disciplinary Hearing Commission granting the North Carolina State Bar's motion to dismiss a disbarred attorney's petition for reinstatement of his law license was affirmed where, because petitioner was still serving an active federal sentence for numerous felonies involving mail fraud and securities fraud, he failed to show that he had "complied with the orders and judgments of any court relating to the matters resulting in the disbarment" or that he had his citizenship restored as required by the governing administrative rules of the State Bar. **In re Bartko, 531.**

Petition for reinstatement of law license—declaratory relief requested—Administrative Procedures Act inapplicable—In a proceeding involving a disbarred attorney's petition for reinstatement of his law license, the Disciplinary Hearing Commission (DHC) did not err by dismissing petitioner's motion for declaratory relief, which he made pursuant to the Administrative Procedures Act (APA) seeking to declare a governing administrative rule of the North Carolina State Bar unconstitutional. The APA did not apply to disciplinary proceedings of attorneys, for which the legislature has provided a more specific administrative procedure, and the legislature has not delegated authority to the DHC to hear motions for declaratory relief under the APA. **In re Bartko, 531.**

Petition for reinstatement of law license—final decision of Disciplinary Hearing Commission—State Bar Council not appropriate appellate forum—In a proceeding involving a disbarred attorney's petition for reinstatement of his law license, where petitioner attempted to appeal the final decision of the Disciplinary Hearing Commission (DHC) dismissing his petition to the State Bar Council, the Council did not err by dismissing the purported appeal because it had no appellate jurisdiction over the DHC decision, from which appeal by right is to the North Carolina Court of Appeals. **In re Bartko, 531.**

CHILD ABUSE, DEPENDENCY, AND NEGLECT

Permanency planning order—guardianship granted to foster parents—visitation left to guardians' discretion—error—After the trial court awarded guardianship of a dependent child to his foster parents at a permanency planning hearing, the court abused its discretion by ordering that the mother's visitation with the child be left to the guardians' discretion. The order was vacated so that, on remand, the trial court could enter a new order specifying the duration and frequency of any visitation and stating whether such visitation would be supervised. **In re J.O., 556.**

Permanency planning order—waiving future hearings—clear, cogent, convincing evidence—recitation of standard required—After a minor child was adjudicated dependent, a permanency planning order granting guardianship to his foster parents and ceasing reunification efforts with his mother was vacated, where the trial court waived future permanency planning hearings pursuant to N.C.G.S. § 7B-906.1(n) but failed to state—either in open court or in the written order—that its findings were supported by clear, cogent, and convincing evidence as required under the statute. The matter fell under the Indian Child Welfare Act (ICWA), but because section 7B-906.1(n) also applied to the case and imposed the same high evidentiary standard for factual findings as ICWA, it was unnecessary to determine whether ICWA also required the court to recite that standard in its order. The matter was remanded for entry of a new order stating the correct standard for the court's findings of fact. **In re J.O., 556.**

Permanency planning—guardian ad litem's duties—sufficiency—In a grandmother's appeal from a permanency planning order ceasing reunification efforts with her and endorsing a primary plan of adoption for three children—one of whom tested positive for a sexually-transmitted disease that the trial court had previously determined was caused by the father sexually abusing the child, a determination the grandmother refused to accept—there was no merit to the grandmother's contention that the guardian ad litem (GAL) assigned to the case failed to fulfill its duties by not maintaining adequate communication with the grandmother and by not sufficiently investigating the case. The evidence demonstrated that the GAL conducted monthly visits with the children, spoke to their foster parents, asked the children about their wishes, submitted written reports at each hearing, and made a recommendation to the court regarding a permanent plan, all in an effort to determine the best interests of the children. Although the GAL only spoke to the grandmother twice after juvenile petitions were filed and the children were removed from her home, the GAL saw the grandmother interact with the children at several visits and there is no indication that additional communication would have changed the GAL's recommendation, particularly since the grandmother continued to insist that the father had not sexually abused one of the children. **In re M.G.B., 568.**

Permanency planning—refusal to acknowledge sexual abuse—lack of progress on case plan—findings—In a permanency planning matter involving three children, one of whom tested positive for a sexually-transmitted disease that the trial court previously determined was caused by the father sexually abusing the child—a fact that the children's paternal grandmother, who had custody of the children, refused to acknowledge—the trial court's findings of fact regarding the grandmother's lack of sufficient progress on her case plan—regarding mental health services, disengaging from her relationship with the father, sex abuse education, ability to see reality with regard to the sex abuse, and acting appropriately during visitation with the children—were supported by sufficient evidence. **In re M.G.B., 568.**

Permanency planning—reunification efforts ceased—burden shifting alleged—In a permanency planning matter involving three children, one of whom tested positive for a sexually-transmitted disease that the trial court previously determined was caused by the father sexually abusing the child—a fact that the children's paternal grandmother, who had custody of the children, refused to acknowledge—the trial court did not improperly place the burden of proof on the grandmother to show that she had made sufficient progress to warrant reunification, where its findings of fact reflected the grandmother's failure to obtain educational resources to parent vulnerable children and that the conditions that led to the children's removal had not been alleviated and, as a result of these findings, the court determined that the children would not be safe in the grandmother's home. **In re M.G.B., 568.**

Permanency planning—reunification efforts ceased—language mirroring ground for termination—no misapprehension of law—In a permanency planning matter involving three children, one of whom tested positive for a sexually-transmitted disease that the trial court previously determined was caused by the father sexually abusing the child—a fact that the children's paternal grandmother, who had custody of the children, refused to acknowledge—the trial court did not misapprehend the law or apply an inappropriate standard by including in one of its findings a reference to the definitions of neglect and abuse in N.C.G.S. § 7B-101 and by stating that the children would be at a substantial risk of repetition of that abuse and/or neglect if returned to the grandmother's care. Although the grandmother argued that the court improperly invoked a ground for termination of parental rights

before eliminating reunification as a permanent plan, the likelihood of further harm to the children was a relevant consideration to the permanency planning decision. Further, the trial court properly addressed the statutory factors regarding reunification contained in N.C.G.S. § 7B-906.2(d), and its findings were supported by sufficient evidence. **In re M.G.B., 568.**

Permanency planning—reunification efforts ceased—reasonableness of efforts by social services—In a permanency planning matter involving three children, one of whom tested positive for a sexually-transmitted disease that the trial court previously determined was caused by the father sexually abusing the child—a fact that the children's paternal grandmother, who had custody of the children, refused to acknowledge—there was sufficient evidence to support the trial court's determination that the department of social services (DSS) made reasonable efforts toward reunification with the grandmother, including offering assistance to obtain and pay for court-ordered mental health services, which the grandmother rejected. Where the court gave DSS discretion to expand the grandmother's visitation time beyond the minimum amount ordered by the court, the decision of DSS not to expand visitation was not unreasonable based on the grandmother's problematic behavior during existing visitation, including talking about the case in front of the children and asking if they wanted to come home. **In re M.G.B., 568.**

Permanency planning—reunification efforts ceased—refusal to acknowledge sexual abuse—lack of progress on case plan—In a permanency planning matter involving three children, one of whom tested positive for a sexually-transmitted disease that the trial court previously determined was caused by the father sexually abusing the child—a fact that the children's paternal grandmother, who had custody of the children, refused to acknowledge—the trial court did not abuse its discretion by ceasing reunification efforts with the grandmother after determining that she had failed to make sufficient progress on her case plan. Although the grandmother did complete some aspects of her case plan and mostly had positive visits with the children, she failed to complete specific therapy recommendations, to disengage from her relationship with the father, to obtain parenting education to assist her in supporting a child who is the victim of sexual abuse and, most importantly, she continued to insist that the father never sexually abused one of the children despite overwhelming evidence. **In re M.G.B., 568.**

CHILD CUSTODY AND SUPPORT

Change of circumstances—conclusions of law supported by findings of fact—In a proceeding to modify custody, where the district court's findings of fact were that the child was not able to stay with the mother on the joint custody schedule set by consent and experienced adverse personality and demeanor changes as a result of those living arrangements, the court's conclusions of law that there had been a substantial and material change in circumstances affecting the child's welfare warranting a custody modification were supported. **Scott v. Scott, 639.**

Modification of custody—consent order—statutory authority—child's best interests—A district court had subject matter jurisdiction to modify a consent order as to child custody despite the provision in that order requiring the parties to mediate or arbitrate any disagreement regarding "major decisions" before submitting it to the court because no agreement or contract can deprive the district court of its statutory authority to protect a child's best interests. Moreover, the appellant—here, the mother—did not seek mediation or arbitration in the district court, and thus she waived any appellate review of that issue. **Scott v. Scott, 639.**

Sole custody to mother—finding of adequate child care by all parties—insufficient basis for ruling—An order awarding sole custody of a minor child to her mother was vacated where the only finding of fact upon which the trial court based its decision stated that the child had been well cared for—initially by her mother during her first year of life and then jointly by her mother, her father, and her father's wife during the next six months. Although substantial evidence supported a finding that the mother took good care of the child, the full finding that all of the parties provided adequate care, absent other findings, did not support a conclusion that it was in the child's best interests to grant custody only to the mother. The matter was remanded for the trial court to make further findings or, in its discretion, to conduct a new hearing. **Aguilar v. Mayen, 474.**

CHILD VISITATION

Delegation of authority—surplusage—In an order modifying child custody, the district court did not improperly delegate its authority when it gave the children, both teenagers, sole discretion regarding potential visitation with their mother. Any such delegation was mere surplusage since the court had properly denied visitation with the mother after finding that it would not be in the children's best interests. **Carballo v. Carballo, 483.**

Denial of visitation to parent—best interests of child—statutorily required findings fact made—In an order modifying child custody, the district court did not err by denying a mother specified visitation with her two children, both teenagers, and instead allowing the children the option to determine—with guidance from their therapists—the amount of contact they should have with their mother, where the court complied with the provisions of N.C.G.S. § 50-13.5(i) by making detailed findings of fact that forced visitation with the mother would not be in the children's best interests. **Carballo v. Carballo, 483.**

CONSTITUTIONAL LAW

First Amendment—anti-threat statute—true threat exception—subjective and objective intent considered—In a juvenile delinquency proceeding for threatening mass violence on educational property (a criminal offense per N.C.G.S. § 14-277.6), the district court did not err in denying a motion to dismiss the petition on First Amendment grounds after determining that a juvenile's statement that he was "going to shoot up" his school constituted a true threat, thus falling into a limited exception to the constitutional prohibition on criminalizing the content of speech. A true threat, defined as an objectively threatening statement communicated with subjective intent to threaten, was shown by testimony from the juvenile's fellow students regarding the three pertinent but non-dispositive factors—the context, the language deployed, and the reaction of the listeners—in that the threat was made at school as students were leaving class for lunch; was explicit and made in a serious tone of voice; and caused fear among listeners, along with an offer from another student to "bring the guns." **In re D.R.F., 544.**

CONTEMPT

Civil—present ability to pay—findings sufficient—In finding defendant in contempt for failure to comply with a post-separation support order, the trial court's determination that he had the present means and ability to make the required

payments was supported by unchallenged findings of fact that defendant was and would continue to be employed as a nurse, had a monthly net income of over $4,000, and had received more than $80,000 in equitable distribution proceeds from the sale of the marital home. **Haythe v. Haythe, 497.**

CONTRACTS

Employment—incorporation of corrective action procedures—alleged breach of procedures—genuine issue of material fact—In an action brought by plaintiff against his former employers after he was fired from his medical residency, the trial court erred by granting summary judgment to defendants on plaintiff's breach of contract claim where there was a genuine issue of material fact regarding whether defendants breached their procedures for corrective action when terminating plaintiff. First, since the corrective-action procedures were expressly included in the contract (via a hyperlink and direct reference), they were incorporated into the employment contract; therefore, summary judgment could not be granted to defendants on the basis that the procedures were not part of the contract. Second, where the parties' competing evidence about whether the corrective action protocols were followed gave rise to genuine issues of material fact, defendants were not entitled to judgment as a matter of law on this claim. **Hoaglin v. Duke Univ. Health Sys., Inc., 517.**

CONVERSION

Estate dispute—ownership of lockbox—rental income from home—judgment notwithstanding the verdict—In a dispute between siblings over their parents' estates, in which several siblings (plaintiffs) asserted that two other siblings (defendants) converted the contents of a lockbox owned by their parents and rental income from the parents' home after their deaths, the trial court properly denied defendants' motion for judgment notwithstanding the verdict where the evidence, viewed in the light most favorable to plaintiffs, supported the jury's determination that one defendant converted the lockbox contents—because it had not been gifted to him as he asserted—and that both defendants converted the home's rental income—because the deed granting them the home was invalid. **Jones v. Corn, 596.**

DEEDS

Estate dispute—motion for new trial granted—trial court's discretion—lack of evidence—In a dispute between siblings over their parents' estates, in which various claims were raised regarding the parents' execution of two deeds (one for their home and the other for a separate tract of land), the trial court did not abuse its discretion by granting defendants' motion for a new trial where the court made a reasoned decision after determining that there was insufficient evidence to support several of the jury's verdicts (regarding mental capacity, undue influence, and conversion). **Jones v. Corn, 596.**

Grantor capacity—at time of signing the deeds—judgment notwithstanding the verdict—In a dispute between siblings over their parents' estates, in which several siblings (plaintiffs) asserted that their parents lacked capacity to execute two deeds concerning their home and a separate tract of land, the trial court properly denied defendants' judgment notwithstanding the verdict after the jury determined that the parents lacked capacity to execute the deeds. Although there was conflicting

evidence regarding whether the parents suffered from hallucinations at the time they signed the deeds, it was the jury's role to weigh the evidence, which, when viewed in the light most favorable to plaintiffs, supported the jury's verdict on capacity. **Jones v. Corn, 596.**

Reformation—mistake of draftsman—legal mistake—judgment notwithstanding the verdict—In a dispute between siblings over their parents' estates, in which two siblings (defendants) sought reformation of a deed concerning a tract of land based on their assertion that the deed did not reflect their parents' intention, the trial court did not err by denying defendants' motion for judgment notwithstanding the verdict after the jury determined that the deed did not require reformation. Despite defendants' contention that the drafting attorney made a scrivener's error, the evidence when viewed in the light most favorable to plaintiffs showed instead that the attorney made a legal error, for which reformation was not appropriate. **Jones v. Corn, 596.**

Undue influence—factors—judgment notwithstanding the verdict—In a dispute between siblings over their parents' estates, in which several siblings (plaintiffs) asserted that two other siblings (defendants) exerted undue influence over their parents regarding the execution of two deeds (for the parents' home and for a separate tract of land), the trial court properly denied defendants' motion for judgment notwithstanding the verdict after the jury determined that defendants unduly influenced their parents and benefitted from that influence. Resolving any contradictions in the evidence in plaintiffs' favor, evidence regarding the parents' age and weakness and the clear benefit to defendants of the effect of the deeds supported the jury's determination on this issue. **Jones v. Corn, 596.**

DISABILITIES

Employment termination—discrimination—"qualified individual"—no prima facie claim—In plaintiff's action alleging that his former employers violated the Americans with Disabilities Act (ADA) by terminating him from his medical residency after he sought a reasonable accommodation for his depression, the trial court properly granted summary judgment to defendants regarding plaintiff's discrimination claim because plaintiff was not a "qualified individual" for purposes of the claim. Where the terms of employment required plaintiff to work solely for his employer and nowhere else, the employment limitation was an "essential function" of participating in the residency program, and, where plaintiff violated his contract by working a second job as a driver-for-hire, there was no reasonable accommodation that defendants could provide that would enable plaintiff to perform that function. **Hoaglin v. Duke Univ. Health Sys., Inc., 517.**

Employment termination—failure to accommodate—request granted—In plaintiff's action alleging that his former employers violated the Americans with Disabilities Act (ADA) by terminating him from his medical residency after he sought a reasonable accommodation for his depression, the trial court properly granted summary judgment to defendants regarding plaintiff's failure-to-accommodate claim. Since defendants granted plaintiff's request by promising to adjust his schedule so he did not have to work more than five consecutive days, there was no genuine issue of material fact regarding whether defendants refused to provide reasonable accommodation, despite plaintiff's argument that the accommodation was never implemented since plaintiff was terminated soon afterward. **Hoaglin v. Duke Univ. Health Sys., Inc., 517.**

DISABILITIES—Continued

Employment termination—retaliation—termination soon after request for accommodation—genuine issue of material fact—In plaintiff's action alleging that his former employers violated the Americans with Disabilities Act (ADA) by terminating him from his medical residency less than a month after he sought a reasonable accommodation for his depression, the trial court erred by granting summary judgment to defendants regarding plaintiff's retaliation claim where there was a genuine issue of material fact regarding whether a "causal link" existed between plaintiff's protected action—his request for reasonable accommodation—and his termination shortly afterward. **Hoaglin v. Duke Univ. Health Sys., Inc., 517.**

DIVORCE

Alimony—attorney fees—additional findings required as to reasonableness of award—The trial court did not err in awarding attorney fees in an alimony action where it determined that plaintiff was a dependent spouse and entitled to receive alimony and then found that: plaintiff's monthly expenses exceeded her income, she had to borrow money to retain an attorney for her post-separation support hearing, the retainer was exhausted in that proceeding, and plaintiff represented herself in the equitable distribution hearing because she could not afford counsel. However, remand was necessary for entry of findings of fact supporting the amount of the award, including about the time expended and skill required by plaintiff's counsel, and whether the hourly rates charged were reasonable and customary for the type of work performed. **Haythe v. Haythe, 497.**

Alimony—discretion regarding award—additional findings required for amount—The trial court did not abuse its discretion in awarding plaintiff a lump sum alimony payment where unchallenged findings of fact stated that defendant had minimal money with which to make monthly payments but had received over $80,000 in equitable distribution proceeds from the sale of the marital home. However, remand for the entry of additional findings was necessary because the court failed to set forth its reasons for the amount of the award as required under N.C.G.S. § 50-16.3A(c). **Haythe v. Haythe, 497.**

Alimony—equitability—classification of dependent and supporting spouse—sufficiency of findings—In awarding alimony to plaintiff pursuant to N.C.G.S. § 50-16.3A(a), the trial court did not err in determining that plaintiff was a dependent spouse and defendant was a supporting spouse where unchallenged findings of fact stated that plaintiff would have a shortage of more than $3,000 per month without support while defendant had earned more money than plaintiff throughout their marriage and currently had income in excess of his own expenses. Likewise, the court's determination that an award of alimony to plaintiff would be equitable was supported by unchallenged findings that addressed relevant factors, including that plaintiff had depleted her retirement account during the marriage to cover defendant's taxes and purchase of a car. **Haythe v. Haythe, 497.**

Equitable distribution—share of marital home sale proceeds held in trust proper—The trial court did not err in ordering that defendant's portion of the proceeds from the sale of the marital home be held in trust in the interest of pending litigation pursuant to N.C.G.S. § 50-20(i) where the issue of alimony had been continued and plaintiff's civil contempt motion against defendant for nonpayment of post-separation support had not yet been resolved. **Haythe v. Haythe, 497.**

JUVENILES

Delinquency—disposition continued—secure custody pending disposition— Following the adjudication of a juvenile as delinquent for threatening mass violence on educational property (a criminal offense per N.C.G.S. § 14-277.6), the district court abused its discretion by continuing disposition under N.C.G.S. § 7B-2406 without good cause or extraordinary circumstances shown by the State and by holding the juvenile in secure custody pending disposition pursuant to N.C.G.S. § 7B-1903(c) without a legitimate purpose. As a result, that portion of the juvenile's adjudication order was vacated. **In re D.R.F., 544.**

Delinquency—petition—jurisdictional requirements—court counselor's approval for filing—court counselor's signature—The adjudication and disposition orders in a juvenile delinquency case were vacated where, because the section of the juvenile petition indicating whether the juvenile court counselor approved the petition for filing was left completely blank and did not contain the court counselor's signature, the trial court lacked subject matter jurisdiction to adjudicate the juvenile delinquent and to enter the subsequent disposition order. **In re D.J.Y., 538.**

STATUTES OF LIMITATION AND REPOSE

Foreclosure—ten years—from date of acceleration—action barred—The trial court properly concluded that petitioner's non-judicial foreclosure action was barred by the statute of limitations in N.C.G.S. § 1-47(3) where the action was filed more than ten years after the note holder exercised its right of acceleration, as evidenced by the affirmative invocation of the right in a notice to the borrower that stated the full amount of the note was due and payable in full unless the default was cured on or before a date certain. Where the trial court misidentified the year of the payable date in two of its findings (but related the correct year elsewhere in the order), the matter was remanded for correction of the clerical errors. **Real Time Resols., Inc. v. Cole, 632.**

THREATS

Anti-threat statute—true threat—sufficiency of the evidence—In a juvenile delinquency proceeding for threatening mass violence on educational property (a criminal offense per N.C.G.S. § 14-277.6), the district court did not err in denying a motion to dismiss the petition on sufficiency grounds where the State presented substantial evidence that the juvenile's statement that he was "going to shoot up" his school constituted a true threat, which requires proof of both objectively threatening content and a subjective intent to threaten. The juvenile verbally communicated his threat to a group of students waiting to go to lunch after class and was overheard by at least two students who took the threat seriously. The statute only requires that the threatening communication be made to a person or group—not that the person or group themselves be threatened. **In re D.R.F., 544.**

TORT CLAIMS ACT

Negligence—duty to protect from foreseeable harm—inmate assaulted in prison—In an action filed against the Department of Public Safety (defendant) by a former inmate (plaintiff) seeking damages under the Tort Claims Act for injuries he suffered after another inmate assaulted him in prison, the Industrial Commission's decision and order awarding damages to plaintiff was upheld on appeal because the Commission did not err in concluding that defendant had notice—and, therefore,

should have anticipated—that a violent altercation between plaintiff and the other inmate was likely to occur. Competent evidence supported the Commission's findings, including that: an officer overseeing plaintiff's cellblock overheard a heated verbal exchange between plaintiff and the other inmate, had a "bad feeling that something [was] go[ing] to happen," and asked her supervisor to assign an additional officer to her area because of the tension between the two inmates; and that the officer's supervisor did not take any action to investigate or otherwise address the situation after the officer raised her concerns. **Jones v. N.C. Dep't of Pub. Safety, 611.**

WITNESSES

Subpoenaed witnesses—virtual testimony permitted—due process—notice and opportunity to cross-examine—At a hearing before the Licensing Board of General Contractors regarding petitioners (two companies and their "qualifier" for licensing purposes) and their alleged violations of North Carolina general contracting law, the Board did not deprive petitioners of due process by allowing five subpoenaed witnesses to appear virtually rather than in person. Firstly, neither the Board's regulations nor the provisions governing subpoenas found in Civil Procedure Rule 45 prohibit subpoenaed witnesses from testifying virtually. Secondly, petitioners received advance notice of the hearing, including notice that several witnesses would appear virtually; had an opportunity to be heard at the hearing; and not only had the opportunity to cross-examine each witness, but did in fact cross-examine three of them. Furthermore, because each party bears the burden of subpoenaing witnesses that it wishes to make appear, petitioners themselves should have subpoenaed the virtual witnesses if they wanted these witnesses to testify in person. **Gabbidon Builders, LLC v N.C. Licensing Bd. for Gen. Contractors, 491.**

N.C. COURT OF APPEALS

2024 SCHEDULE FOR HEARING APPEALS

Cases for argument will be calendared during the following weeks:

January	8 and 22
February	5 and 19
March	4 and 18
April	1, 15, and 29
May	13 and 27
June	10
August	12 and 26
September	9 and 23
October	7 and 21
November	4 and 18
December	2

Opinions will be filed on the first and third Tuesdays of each month.

NOE ROSAS AGUILAR, Plaintiff
v.
DILCIA ROSIBEL CHIRINOS MAYEN, Defendant

No. COA23-700

Filed 7 May 2024

Child Custody and Support—sole custody to mother—finding of adequate child care by all parties—insufficient basis for ruling

An order awarding sole custody of a minor child to her mother was vacated where the only finding of fact upon which the trial court based its decision stated that the child had been well cared for—initially by her mother during her first year of life and then jointly by her mother, her father, and her father's wife during the next six months. Although substantial evidence supported a finding that the mother took good care of the child, the full finding that all of the parties provided adequate care, absent other findings, did not support a conclusion that it was in the child's best interests to grant custody only to the mother. The matter was remanded for the trial court to make further findings or, in its discretion, to conduct a new hearing.

Appeal by Plaintiff from an order entered 27 February 2023 by Judge William C. Farris in Edgecombe County District Court. Heard in the Court of Appeals 7 February 2024.

Miller & Audino, LLP, by Jay Anthony Audino, for Plaintiff-appellant.

Narron & Holdford, P.A., by I. Joe Ivey, for Defendant-appellee.

WOOD, Judge.

Noe Rosas Aguilar ("Father") appeals the trial court's order granting sole custody of the parties' minor child to Dilcia Rosibel Chirinos Mayen ("Mother"). For the reasons stated herein, we vacate and remand.

I. Factual and Procedural History

Mother and Father are the biological parents of a daughter, Mariana, who was born in June 2021. Father and Mother met after he employed Mother's husband to do drywall work in his house. Father learned Mother's husband had recently arrived in the United States from Honduras and needed help. Father gathered clothes for the family and

was planning to give them to Mother's husband when he learned Mother's husband had been "locked up" after an immigration appointment and detained for approximately three months. Although married since 2008, Father began an affair with Mother while her husband was detained by immigration authorities. During that time, Father gave Mother money and at least one bag of clothes, helped to pay her bills, and eventually bought her a house. After immigration authorities released Mother's husband, he returned to live with her, but became physically abusive to her, causing her to separate from him.

Approximately one month after their relationship began, Mother noticed Father drove luxury cars and asked him what he really did for work. According to Mother, he told her he sold drugs, and Mother told him she did not want to spend time with him anymore. However, Father continued to visit her every day. Father was arrested and went to prison for selling drugs some time in 2017. After Father's release from jail, he continued to financially provide for Mother. He visited her every day to provide money and food and continued to help pay her bills.

According to Mother, Father eventually became abusive to her. Specifically, she testified he once slapped her after she told him she wanted him to leave her house. She further testified he saw her talking to a neighbor, got jealous, grabbed a machete and threatened her with it, threw her on the ground, and hit her bottom with the machete.

Father's wife, Brittany, discovered his affair with Mother in May 2021, approximately one month before Mariana was born. Father then ended the affair. The last time Father saw Mother prior to Mariana's birth was at the baby shower, approximately three weeks prior to Mariana's birth. After her birth, Mother told Father he should do what he can to see his daughter. She testified he said he did not want his name on the birth certificate because it would cause problems with Brittany.

In addition to Mariana, Mother's two children from a prior relationship lived in the home with her, a ten-year-old daughter, and a seventeen-year-old son. Mother worked at a bar called Jazmin on Thursday, Friday, Saturday, and sometimes Sunday nights, going to work approximately between 7 p.m. and 9 p.m. and returning home between 1:00 a.m. and 3:00 a.m. Father testified Mother drank heavily at work and outside of work, brought different men home and drank with them, and would be hungover until at least lunch. He further testified Mother's son took care of Mariana and Mother's other daughter while she was not home. Following a report of neglect of the children in Mother's home, the Wilson County Department of Social Services filed a

safety assessment on 20 April 2022 in which it reported no safety issues existed in Mother's home and closed the case.

Mother filed for child support in 2022 and submitted to DNA testing for Mariana to prove Father's paternity. Mother testified Father called her from a private number and told her if she tried to get child support from him, he would do everything he could to take custody of Mariana.

On 7 June 2022, approximately two weeks after Mother filed for child support, Father filed a complaint, requesting temporary custody of Mariana, an *ex parte* custody order, and drug testing of Mother. Father alleged Mother was involved in illegal substance use and trafficking as well as prostitution. Along with his complaint, Father attached three exhibits which were affidavits from three of Mother's coworkers generally reaffirming Father's allegations that Mother was involved in illegal drug- and sex-related activities. The same day, the trial court entered an *ex parte* order granting custody of Mariana to Father.

A law enforcement officer accompanied Father to serve the custody complaint and to take custody of Mariana from Mother. Mother "became irate" and yelled at them. The officer served her with the complaint but left Mother's home without Mariana. On 8 June 2022, Father filed a motion to show cause for Mother's alleged contempt of court for refusing to give him custody and for a warrant directing law enforcement to take physical custody of Mariana. The trial court entered an order requiring Mother to appear for a show cause hearing and issued the requested warrant that same day. Father and law enforcement officers returned to Mother's home with the warrant and took custody of Mariana from Mother.

On 27 June 2022, Mother filed an answer to Father's complaint and a counterclaim for custody of Mariana. The return hearing on the *ex parte* order was set for the same day. The parties entered a consent order granting Father temporary custody of Mariana and granting Mother supervised visitation for two hours per week pending a hearing on the *ex parte* order. On 11 July 2022, the parties entered a consent order whereby they would share legal and physical custody of Mariana on a temporary basis until a hearing on permanent custody.

On 13 September 2022, Mother obtained an *Ex Parte* Domestic Violence Protective Order against Father. On 20 September 2022, Father filed another motion for an *ex parte* emergency custody order and motion for modification of custody of Mariana. On 26 September 2022, the trial court entered an order directing Father and Mother to sign up for and only communicate through Our Family Wizard, jointly

attend Mariana's medical appointment scheduled for 10 October 2022, follow all medical recommendations, and inform each other of all medical appointments. The trial court further ordered Mother to provide a Medicaid card for Mariana to Father. The trial also modified the existing *Ex Parte* Domestic Violence Protective Order to allow the parties to exchange the minor child with each other, provided Father's wife was not present. On 6 October 2022, the parties entered a consent order restricting Father's and Mother's contact with each other and allowing contact only during their exchanges of Mariana and also dismissing Mother's pending domestic violence action against Father.

The permanent custody trial was held on 30 and 31 January 2023. Father and Mother both presented testimony and evidence at the hearing. Father testified that when he first gained custody of Mariana, she was pale and had very dark coloration around her eyes. However, both symptoms improved after Father put her to bed earlier and on a more regular schedule. Father also admitted photos into evidence depicting Mariana: facing forward in a car seat while in Mother's custody despite her doctor's notes recommending, she have a rear-facing car seat; lying in a crib with a blanket, pillow, and stuffed animals despite her doctor's notes recommending "no soft bedding in crib"; drinking sugary drinks such as Capri Sun and holding screens close to her face. Father testified he limited Mariana's screen time to thirty minutes per day, causing Mariana to throw tantrums, and he made sure screens were farther away from her face. He further testified he gave her water and limited the juice content in her drinks.

Mariana's medical records showed that Mother had taken Mariana to her nine-month checkup during which she was evaluated for diaper rash and given a prescription cream. The nurse practitioner told Mother she could refer Mariana to a dermatologist if she switched the primary care provider on her Medicaid card. Brittany testified Mother never sent the cream to Father after he gained custody of Mariana in June 2022. Brittany testified the diaper rash healed when Mariana was with Father and her but worsened when she was with Mother. To the contrary, however, Mother testified it was Father and Brittany who contributed to the diaper rash because the rash always appeared when Mariana was returned to her.

On 9 June 2022, the day after Father obtained custody of Mariana, Father took her to a doctor, where he learned Mother had not taken Mariana to a doctor's appointment between her two-week checkup and nine-month checkup. Mother had missed an appointment that was scheduled for 2 September 2021. Mariana was behind on her immunizations

and received five during this appointment. Mariana's medical notes from an appointment on 13 July 2022 disclosed she was well-developed, well-nourished, and had good hygiene and normal grooming.

Father testified he formed a positive relationship with Mariana. Father plays with her and helps with changing her diapers, feeding her, and putting her to bed; and she waits for him at the door when he returns from work. Father converted his dining room into a playroom for Mariana. Brittany testified that Father has a supportive extended family who help and are involved with taking care of Mariana.

Mother testified she rents a two-bedroom home for herself and her three children. Mother is from Honduras, has a fourth-grade education, and does not speak, read, or write English. She is not in the United States legally, does not have a Social Security number, and drives her car without a license.

Mother testified she loves Mariana, has a good relationship with her, and knows how to treat her. Mother took her to an emergency room regarding the much talked about diaper rash shortly after she received Mariana back from Father, after him having had exclusive physical custody of Mariana for one month. Mother also testified she has an adult babysitter who is always able to take care of her children. According to Mother, she was the primary caretaker, and Father was not involved in Mariana's life from the day she was born until he filed for custody a year later. She believes Father only filed for custody because she filed for child support. According to Mother, Brittany constantly interferes with her relationship with Father and Mariana. Mother conceded she did not sign up for Our Family Wizard or provide Father with a copy of the Medicaid card despite the trial court's order requiring her to do so.

Maria Perez, a friend and coworker of Mother, testified Mother never engaged in prostitution or selling drugs. She further testified Mariana is a healthy and happy baby who loves her mother and is always happy when Father returns her to Mother. Jennifer Hernandez, Mariana's babysitter, testified Mother was always very good to Mariana and takes very good care of her. She further testified Mother is fully capable of caring for Mariana by herself.

At the end of the two-day permanent custody trial, the trial court verbally stated its findings and ruling on the record:

> I do find that the child is in good health and has been properly cared for all of her life, comma, solely by her mother for the first year of her life, and jointly by her mother and father and his wife for the next six months of her life. I

> do include, as a matter of law and order, that custody of Marianna be awarded to the mother and that the father be awarded visitation every other Friday from 6 p.m. until Monday at 6 p.m. All exchange is to take place at the Wilson County Sheriff's Department.
>
> When the child starts school, prekindergarten or kindergarten, the father may pick up the child from her school every other Friday and return the child to school on Monday. If the father is unable to use his weekend visitation, he shall then notify the mother as far in advance as possible. Neither parent may remove Marianna from North Carolina without written permission from the other parent.
>
> Counsel, I'm not going to order any holiday visitation. If you two lawyers and your clients agree, you can make such things a part of the order; otherwise, they'll just have to celebrate when they have her. We got to start cooperating in this world.

The trial court entered its written order on 27 February 2023. The order contained two findings of fact relevant to its decision:

> 3. That the minor child has been well cared for through her life, solely by Mother for the first year of her life, then jointly by the Mother, Father, and Father's wife for the next 6 months.
>
> 4. That it would be in the minor child's best interest that her care, custody and control be placed with the Mother with the Father having substantial visitation.

The trial court ordered:

> 1. That the Mother shall have sole custody of the minor child.
>
> 2. That the Father shall have visitation with the minor child every other Friday at 6:00 p.m. until Monday at 6:00 p.m.
>
> 3. . . . When the child starts pre-K or kindergarten, the Father may pick the minor child up from school every other Friday and return the child to school on Monday morning. The Father shall notify the Mother as far in advance as possible if he is not able to exercise his visitation.

Father entered a written notice of appeal on 28 March 2023.

II. Analysis

On appeal, Father argues: (1) the evidence does not support Finding of Fact 3 because Mariana was not well cared for by Mother; (2) the findings of fact do not support the trial court's conclusion that it is in Mariana's best interest for Mother to have sole custody of her; (3) the trial court's failure to grant custody to Father was manifestly unsupported by reason; and (4) the trial court's failure to establish a holiday schedule for Mariana was manifestly unsupported by reason. We address each issue in turn.

A. Standard of Review

"[T]he trial court's findings of fact are conclusive on appeal if supported by substantial evidence, even if there is sufficient evidence to support contrary findings. . . . Whether the trial court's findings of fact support its conclusions of law is reviewable *de novo*." *Scoggin v. Scoggin*, 250 N.C. App. 115, 118, 791 S.E.2d 524, 526 (2016) (brackets omitted). If the trial court's uncontested findings of fact support its conclusions of law, we must affirm the trial court's order. *Id.*

B. Finding of Fact 3

Father argues the trial court erred when it made Finding of Fact 3 because he contends Mother did not take good care of Mariana because of issues with her health, physical safety, and emotional wellbeing.

A careful review of the record reveals substantial evidence supporting the trial court's finding that Mariana is well taken care of by Mother. Mother testified she was the primary caretaker for Mariana and knew how to take care of her. The Wilson County Department of Social Services had investigated Mother's home after receiving a report of neglect and found no safety issues in Mother's home. Mariana's medical records were introduced into evidence and showed she was well-developed, well-nourished, and had good hygiene and normal grooming. Two witnesses for Mother, a coworker and former babysitter, testified Mother loved Mariana, takes good care of her, and does not engage in illegal activity related to drugs or prostitution. Although Father raises potential concerns such as a photo depicting Mariana in a forward-facing car seat and in a bed with a blanket, pillows, and stuffed animals despite doctor's recommendations to the contrary, "the trial court's findings of fact are conclusive on appeal if supported by substantial evidence, even if there is sufficient evidence to support contrary findings." *Scoggin*, 250 N.C. App. at 118, 791 S.E.2d at 526. We hold substantial evidence supports the trial court's finding that Mariana was well taken care of by Mother.

C. Mother's Sole Custody of Mariana

We now address Father's next two arguments that the trial court erred together: the trial court's conclusion that it is in Mariana's best interest to grant Mother sole custody and its failure to grant custody to Father.

It is a "fundamental principle that in a contest between parents over the custody of a child the welfare of the child at the time the contest comes on for hearing is the controlling consideration." *Hardee v. Mitchell*, 230 N.C. 40, 42, 51 S.E.2d 884, 885 (1949). N.C. Gen. Stat. § 50-13.2 provides in pertinent part:

> An order for custody of a minor child entered pursuant to this section shall award the custody of such child to such person, agency, organization or institution as will best promote the interest and welfare of the child. In making the determination, *the court shall consider all relevant factors* including acts of domestic violence between the parties, the safety of the child, and the safety of either party from domestic violence by the other party. *An order for custody must include written findings of fact that reflect the consideration of each of these factors* and that support the determination of what is in the best interest of the child. Between the parents, whether natural or adoptive, no presumption shall apply as to who will better promote the interest and welfare of the child. Joint custody to the parents shall be considered upon the request of either parent."

N.C. Gen. Stat. § 50-13.2(a). "The tender years doctrine was a legal presumption that benefitted mothers in custody disputes by giving mothers custody all other factors being equal, simply based on the fact that a mother is the natural custodian of her young." *Dixon v. Gordon*, 223 N.C. App. 365, 369, 734 S.E.2d 299, 302 (2012) (quotation marks omitted) (noting the tender years doctrine has been abolished and quoting N.C. Gen. Stat. § 50-13.2(a)). N.C. Gen. Stat. § 50-13.2 further provides:

> An order for custody of a minor child may grant joint custody to the parents, exclusive custody to one person, agency, organization, or institution, or grant custody to two or more persons, agencies, organizations, or institutions. Any order for custody shall include such terms, including visitation, as will best promote the interest and welfare of the child.

N.C. Gen. Stat. § 50-13.2(b).

Here, Finding of Fact 4, stating it is in Mariana's "best interest that her care, custody and control be placed with the Mother" is essentially a conclusion of law. *In re M.R.D.C.*, 166 N.C. App. 693, 697, 603 S.E.2d 890, 893 (2004) ("[I]f a finding of fact is essentially a conclusion of law[,] it will be treated as a conclusion of law which is reviewable on appeal.") (quotation marks, brackets, and ellipsis omitted). That leaves only Finding of Fact 3 as the sole finding of fact upon which the court based its decision to grant Mother sole custody. Although substantial evidence supports the trial court's finding that Mariana was well cared for by Mother, the trial court further found that Father and Brittany also took good care of Mariana. In other words, the trial court found that Mother, Father, and Brittany *all* provided good care for Mariana: "[T]he minor child has been well cared for through her life, solely by Mother for the first year of her life, then jointly by the Mother, Father, and Father's wife for the next 6 months." This finding of fact does not explain why it is in Mariana's best interests that Mother be granted sole custody of Mariana. We do not express an opinion on whether sole or joint custody is appropriate or even on which party is the best-suited to exercise sole custody if the trial court sees fit to order sole custody. We do, however, hold that the trial court's finding that all parties provided adequate care for Mariana, in the absence of other findings, does not support its conclusion that Mother should be granted sole custody.

The transcript is replete with evidence from which findings could be made regarding whether sole or joint custody is appropriate and a visitation schedule that is in Mariana's best interest. The trial court indeed may have *considered* all relevant factors as required by N.C. Gen. Stat. § 50-13.2(a), but it failed to "include written findings of fact that reflect the consideration of each of these factors and that support the determination of what is in the best interest of the child" as required by the statute. Accordingly, we vacate the trial court's order and remand the matter to the trial court for it to make sufficient findings of fact to support its conclusion of law that it is in Mariana's best interest to grant Mother sole care, custody, and control. Due to the length of time that has passed since the entry of the custody order, the circumstances of the parties and the minor child may have changed, and the trial court may, in its discretion, conduct a hearing to take additional evidence.

D. Holiday Schedule

Father argues the trial court's failure to establish a holiday schedule was manifestly unsupported by reason. Instead of entering a holiday schedule, the trial court allowed the parties to agree on a holiday schedule or, alternatively, celebrate the holidays when they had physical

custody of the child. Because we are vacating the trial court's order and remanding for entry of a new order, we need not address this issue.

III. Conclusion

While the trial court's finding that Mariana was well cared for by Mother is supported by substantial evidence, its sole finding does not support its conclusion that Mariana's best interest is served by granting Mother sole custody of the minor child. We vacate the trial court's custody order and remand the matter to the trial court to make written findings of fact in accordance with N.C. Gen. Stat. § 50-13.2(a). In its discretion, the trial court may hold a hearing to receive additional evidence to aid in making its custody determination. It is so ordered.

VACATED AND REMANDED.

Judges COLLINS and GORE concur.

DARLA MARIE CARBALLO, Plaintiff
v.
CHRISTIAN WEBER CARBALLO, Defendant

No. COA23-796

Filed 7 May 2024

1. Child Visitation—denial of visitation to parent—best interests of child—statutorily required findings fact made

In an order modifying child custody, the district court did not err by denying a mother specified visitation with her two children, both teenagers, and instead allowing the children the option to determine—with guidance from their therapists—the amount of contact they should have with their mother, where the court complied with the provisions of N.C.G.S. § 50-13.5(i) by making detailed findings of fact that forced visitation with the mother would not be in the children's best interests.

2. Child Visitation—delegation of authority—surplusage

In an order modifying child custody, the district court did not improperly delegate its authority when it gave the children, both teenagers, sole discretion regarding potential visitation with their mother. Any such delegation was mere surplusage since the court

had properly denied visitation with the mother after finding that it would not be in the children's best interests.

Appeal by Plaintiff from order entered 20 December 2022 by Judge Tracy H. Hewett in Mecklenburg County District Court. Heard in the Court of Appeals 20 March 2024.

Robinson & Lawing, LLP, by Christopher M. Watford, for Plaintiff-Appellant.

Dozier Miller Law Group, by Allison P. Holstein, Kelly A. Nash, and James R. Pennacchia, for Defendant-Appellee.

COLLINS, Judge.

Plaintiff Darla Carballo appeals from the trial court's order granting Defendant Christian Carballo permanent primary legal and physical custody of their minor children and denying her visitation. Plaintiff argues that the trial court denied her visitation without making the requisite findings of fact pursuant to N.C. Gen. Stat. § 50-13.5(i), and that the trial court improperly delegated its judicial authority by allowing the children discretion to determine whether to have visitation with her. Because the trial court found that visitation with Plaintiff was not in the children's best interests and any delegation of discretion to the children to determine whether to have visitation with Plaintiff was mere surplusage, we affirm.

I. Background

Plaintiff and Defendant were married in 1999, were separated in 2016, and are now divorced. Plaintiff and Defendant share three children together: Easter, born in October 2003; Owen, born in July 2006; and James, born in October 2009.[1] The trial court entered a consent order for permanent child custody ("Consent Order") on 4 December 2018 granting Plaintiff and Defendant joint legal and physical custody of the children. The trial court entered an order appointing a parenting coordinator that same day.

Defendant filed a motion for ex parte emergency custody or, in the alternative, a temporary parenting arrangement on 17 November 2020, alleging that Plaintiff "has committed acts of physical and emotional

1. We use pseudonyms to protect the identity of the children. *See* N.C. R. App. P. 42. Easter is no longer a minor and is not subject to the custody order.

abuse against the minor children," and that "[t]he children are presently refusing to go to [Plaintiff's] house, refusing to call, or participate in the visitation/custody schedule with her or at her home." Defendant also filed a motion to modify the Consent Order, seeking sole permanent legal and physical custody of the children. In support of his motions, Defendant specifically alleged:

> On November 6, 2020, [Plaintiff] yelled at [James] about his homework such that [James] started crying, shaking, and put his fist in his mouth. When [Owen] tried to intervene, [Plaintiff] pushed her down forcefully. [Plaintiff] then told her boyfriend to call the police. A police officer responded, and during the call for service the officer said that there wasn't enough evidence to charge anyone because there was no "immediate threat". [Plaintiff] became smug and was heard laughing and taunting [Easter] while the children were crying. The next day she said it was her "right to punish" the children.

The trial court entered an order the next day granting Defendant emergency custody of the children, limiting Plaintiff's visitation to FaceTime and phone calls, and scheduling a return hearing.

Plaintiff filed an answer and objection to Defendant's motion for ex parte emergency custody or a temporary parenting arrangement and motion to modify the Consent Order on 23 November 2020. Plaintiff subsequently filed an amended answer and objection on 8 December 2020. The trial court appointed the Council for Children's Rights as Guardian ad Litem and Custody Advocate for the children on 14 December 2020.

Plaintiff filed a motion to modify the Consent Order on 22 December 2020, alleging that "[Defendant] continuously puts [Plaintiff] in a negative light to the children to a point where it has alienated the children from [her,] causing her to have an extremely strained relationship with the minor children[,]" and that "[t]he children have repeatedly refused to visit with [her]." Plaintiff also filed a motion for contempt, alleging that "[Defendant] refuses to allow [Plaintiff] to have reasonable communication with the minor children when they are in his care."[2] Defendant filed a response to Plaintiff's motions.

At the request of the parenting coordinator, the trial court entered an order appointing a family therapist on 10 March 2021.

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2. Plaintiff also filed various other motions, which are not relevant to this appeal.

Plaintiff filed a motion on 12 April 2021 for ex parte emergency custody or, in the alternative, a temporary parenting arrangement. Plaintiff alleged that "[t]he children have become more resistant, hostile, angry and entitled against [her,]" and that "[t]his sense of entitlement has been fostered and generated from [Defendant's] constant apathetic and complacent attitude against [Plaintiff] and [Plaintiff's] relationship with the children." The trial court denied the motion without a hearing, finding that Plaintiff had failed to allege facts that met the criteria for ex parte emergency custody.

After a return hearing on the emergency custody order and Defendant's motion for a temporary parenting arrangement, the trial court entered a temporary custody order on 5 May 2021 granting Defendant primary physical custody of the children and Plaintiff visitation every other weekend. The order also allowed the parties "reasonable telephone and/or video contact with the children while in the other parent's care." The family therapist resigned by email on 10 September 2021 on the grounds that "[Defendant] stated that the children are unwilling to continue facilitated visits with [Plaintiff] and he did not believe he could make them comply[,]" and that the case plan was "non-workable without everyone's commitment." Plaintiff filed motions for contempt on 8 April 2022 and 9 August 2022, alleging that "[Defendant] has failed to facilitate reasonable telephone contact as required."

After several hearings, the trial court entered an order modifying the Consent Order on 20 December 2022, granting Defendant permanent primary legal and physical custody of the children and denying Plaintiff "specific visitation with the children[,]" but allowing the children "to determine, with the assistance of their therapists, what contact and/or visitation they should have with [Plaintiff], if any." Plaintiff appealed.

II. Discussion

Plaintiff argues that the trial court denied her visitation without making the requisite findings of fact pursuant to N.C. Gen. Stat. § 50-13.5(i), and that the trial court improperly delegated its judicial authority by allowing the children discretion to determine whether to have visitation with her.

A. Standard of Review

When reviewing a trial court's decision to modify an existing custody order, we determine whether the trial court's findings of fact are supported by substantial evidence. *Malone-Pass v. Schultz*, 280 N.C. App. 449, 463, 868 S.E.2d 327, 339 (2021). "Substantial evidence is such

relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Shipman v. Shipman*, 357 N.C. 471, 474, 586 S.E.2d 250, 253 (2003) (quotation marks and citation omitted). "[T]he trial court's findings of fact are conclusive on appeal if supported by substantial evidence, even if there is sufficient evidence to support contrary findings." *Peters v. Pennington*, 210 N.C. App. 1, 12-13, 707 S.E.2d 724, 733 (2011) (citation omitted). "Unchallenged findings of fact are binding on appeal." *Scoggin v. Scoggin*, 250 N.C. App. 115, 118, 791 S.E.2d 524, 526 (2016). "In addition to evaluating whether a trial court's findings of fact are supported by substantial evidence, this Court must determine if the trial court's factual findings support its conclusions of law." *Shipman*, 357 N.C. at 475, 586 S.E.2d at 254 (citation omitted). Conclusions of law are reviewed de novo. *Padilla v. Whitley de Padilla*, 271 N.C. App. 246, 247, 843 S.E.2d 650, 651 (2020).

"It is a long-standing rule that the trial court is vested with broad discretion in cases involving child custody." *Pulliam v. Smith*, 348 N.C. 616, 624, 501 S.E.2d 898, 902 (1998) (citation omitted). "[The trial court] has the opportunity to see the parties in person and to hear the witnesses, and [its] decision ought not be upset on appeal absent a clear showing of abuse of discretion." *Id.* at 625, 501 S.E.2d at 902 (quotation marks and citation omitted). "An abuse of discretion is shown only when the court's decision is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *Paynich v. Vestal*, 269 N.C. App. 275, 278, 837 S.E.2d 433, 436 (2020) (quotation marks and citation omitted).

B. N.C. Gen. Stat. § 50-13.5(i)

[1] Plaintiff argues that "the trial court's order vesting Owen and James sole discretion over visitation is a *de facto* order for no visitation for which the trial court failed to make the required findings under [N.C. Gen. Stat.] § 50-13.5(i)." (capitalization altered).

"A noncustodial parent's right of visitation is a natural and legal right which should not be denied unless the parent has by conduct forfeited the right or unless the exercise of the right would be detrimental to the best interest and welfare of the child." *Johnson v. Johnson*, 45 N.C. App. 644, 646-47, 263 S.E.2d 822, 824 (1980) (quotation marks and citation omitted). "In awarding visitation privileges the court should be controlled by the same principle which governs the award of primary custody, that is, that the best interest and welfare of the child is the paramount consideration." *Id.* (citation omitted).

N.C. Gen. Stat. § 50-13.5(i) provides:

> In any case in which an award of child custody is made in a district court, the trial judge, prior to denying a parent the right of reasonable visitation, shall make a written finding of fact that the parent being denied visitation rights is an unfit person to visit the child or that such visitation rights are not in the best interest of the child.

N.C. Gen. Stat. § 50-13.5(i) (2023). "Thus, before the trial court may completely deprive a custodial parent of visitation, the statute requires a specific finding either (1) that the parent is an unfit person to visit the child or (2) that such visitation rights are not in the best interest of the child." *Paynich*, 269 N.C. App. at 279, 837 S.E.2d at 436 (citations omitted).

Here, the trial court made the following findings of fact:

> 76. This is [a] very unusual case, in that the adult nature of the children and their vehemently expressed desire outweighs the conventional wisdom and research that the children should have a relationship with both parents. The [c]ourt, with this order, does not preclude a relationship with [Plaintiff] and also believes that to be in the children's best interest but not forced visitation.
>
> . . . .
>
> 78. As best interest attorneys for the children, [the Council for Children's Rights] registered concerns for the children's mental health if visitation is forced, and formally recommended that [Plaintiff] be awarded no specific visitation at this time unless requested and agreed upon by the children.
>
> 79. The [c]ourt cannot make a finding that [Plaintiff] is not a fit and proper parent; however, it is not in the children's best interests to have forced visitation or contact with [Plaintiff] at this time.
>
> 80. Rather, it is in the children's best interests for them to have no specified visitation with [Plaintiff], but that they may have reasonable visitation and/or contact with [Plaintiff] at the discretion of the children and their therapists' recommendations.
>
> 81. It is in the best interest of these children that they determine, with the assistance of their therapists, what, if any, visitation or contact they have with [Plaintiff].

The trial court made detailed findings, including that "it is in the children's best interests for them to have no specified visitation with [Plaintiff]," and thus complied with N.C. Gen. Stat. § 50-13.5(i) prior to denying Plaintiff visitation. In support of these findings of fact, the trial court also made the following unchallenged findings of fact:

> 51. The middle child [Owen] shows symptoms of PTSD, at least in part, as a result of the dysfunctional relationship with [Plaintiff].
>
> 52. [James], the youngest child, has shown signs of distress, which is manifested in him chewing on his shirts, not being able to sleep alone (even at [Defendant's] home), and the cessation of funny, happy behavior. After visitation ceased with [Plaintiff] in August 2021, [James] has ceased chewing on his shirts, is able to sleep in his own room by himself, and has resumed his silly, happy behavior (like playing the kazoo).
>
> 53. The children have been exposed to hyper-derogatory comments about their father from [Plaintiff] and her parents.
>
> 54. The children have repeatedly complained about racist and homophobic comments made by [Plaintiff] and her family, and these issues were repeatedly addressed in therapy and with the parent coordinator. [Defendant] is Filipino, and the children are bi-racial, such that they internalize [Plaintiff's] comments personally. Additionally, [Plaintiff] texted [Easter] on their 18th birthday about a cake she had bought and the following: "*I transfer money into your account and you can use that however you woukd [sic] like- donate to queer organization, use for senior trip-whatever you would like*". Unfortunately, this message, which the [c]ourt believes was meant to be a sincere show of acknowledgement and interest in [Easter's] life, was not received as such which further demonstrates a tone-deafness on [Plaintiff's] part.
>
> . . . .
>
> 56. The children are very close to one another and to [Defendant]. This is a result of the stressors from [Plaintiff] and not from any intentional manipulation.
>
> . . . .

> 65. [Plaintiff] has been more aggressive and argumentative with professionals than most parents in those professionals' experience, which leads the court to believe that she also communicates, or has in the past with her children in a similar manner.

The trial court's findings of fact support its conclusions of law that "[i]t is not in the children's best interest for [Plaintiff] to have specific visitation with the children at this time"; "[i]t is not in the children's best interest to be forced to visit with [Plaintiff]"; and "[i]t is reasonable in this case for the children to determine, with the assistance of their therapists, what contact and/or visitation they should have with [Plaintiff], if any."

As the trial court made the requisite findings of fact prior to denying Plaintiff visitation, and the findings of fact and conclusions of law are supported by the unchallenged findings of fact, the trial court did not abuse its discretion by denying Plaintiff visitation.

C. Delegation of Judicial Authority

[2] Plaintiff also argues that "the trial court improperly delegated its judicial authority over visitation by allowing the minor children the sole discretion to determine whether they would have any contact with [Plaintiff]." (capitalization altered). However, the trial court denied Plaintiff visitation after finding that visitation was not in the children's best interests. In light of the trial court's authority to deny visitation pursuant to N.C. Gen. Stat. § 50-13.5(i), any delegation of discretion to the children to determine whether to have visitation with Plaintiff is "mere surplusage[.]" *Routten v. Routten*, 374 N.C. 571, 579, 843 S.E.2d 154, 159 (2020). As the trial court denied Plaintiff visitation pursuant to N.C. Gen. Stat. § 50-13.5(i), the trial court did not improperly delegate its judicial authority by allowing the children discretion to determine whether to have visitation with Plaintiff.

III. Conclusion

For the foregoing reasons, we affirm.

AFFIRMED.

Chief Judge DILLON and Judge GORE concur.

GABBIDON BUILDERS, LLC and LEONARD GABBIDON, Qualifier, Petitioners,
GABBIDON CONSTRUCTION, LLC and LEONARD GABBIDON, Qualifier, Petitioners
v.
NORTH CAROLINA LICENSING BOARD FOR GENERAL CONTRACTORS, Respondent

No. COA23-1010

Filed 7 May 2024

Witnesses—subpoenaed witnesses—virtual testimony permitted—due process—notice and opportunity to cross-examine

At a hearing before the Licensing Board of General Contractors regarding petitioners (two companies and their "qualifier" for licensing purposes) and their alleged violations of North Carolina general contracting law, the Board did not deprive petitioners of due process by allowing five subpoenaed witnesses to appear virtually rather than in person. Firstly, neither the Board's regulations nor the provisions governing subpoenas found in Civil Procedure Rule 45 prohibit subpoenaed witnesses from testifying virtually. Secondly, petitioners received advance notice of the hearing, including notice that several witnesses would appear virtually; had an opportunity to be heard at the hearing; and not only had the opportunity to cross-examine each witness, but did in fact cross-examine three of them. Furthermore, because each party bears the burden of subpoenaing witnesses that it wishes to make appear, petitioners themselves should have subpoenaed the virtual witnesses if they wanted these witnesses to testify in person.

Appeal by petitioners from order entered 24 May 2023 by Judge Karen E. Eady-Williams in Mecklenburg County Superior Court. Heard in the Court of Appeals 5 March 2024.

Banks Law, PLLC, by F. Douglas Banks, for petitioners-appellants.

Hedrick Gardner Kincheloe & Garofalo, LLP, by A. Grant Simpkins and Anna Baird Choi, for respondent-appellee.

ZACHARY, Judge.

This case arises from various complaints submitted to the North Carolina Licensing Board for General Contractors ("the Board") regarding Petitioners Gabbidon Builders, LLC, Gabbidon Construction, LLC, and Leonard Gabbidon, which are alleged to have acted in violation

of the North Carolina General Statutes regulating general contractors in this State. Petitioners appeal from the superior court's order (1) affirming the Board's final decisions revoking the building licenses of Petitioners Gabbidon Builders, LLC, and Gabbidon Construction, LLC, and (2) revoking Petitioner Leonard Gabbidon's ability to act as a qualifying party. After careful review, we affirm.

I. Background

Gabbidon Builders, LLC, is a South Carolina limited liability company registered to do business in North Carolina; Leonard Gabbidon "is the [r]egistered [a]gent and corporate member" of Gabbidon Builders. Gabbidon Construction, LLC, is a North Carolina limited liability company; Leonard Gabbidon "is the registered agent and member" of Gabbidon Construction. In order to be licensed to engage in general contracting in the State of North Carolina, an applicant must identify an associated individual who has passed the general contractor examination; this individual is referred to as a "qualifier" or a "qualifying party[.]" N.C. Gen. Stat. § 87-10(b) (2023). Leonard Gabbidon is the qualifying party for Gabbidon Builders and Gabbidon Construction.

On 22 December 2021, the Board issued a notice of hearing against Gabbidon Builders and Leonard Gabbidon in which it alleged "gross negligence, incompetency and/or misconduct in the practice of general contracting" in violation of N.C. Gen. Stat. § 87-11(a). On 1 February 2022, the Board issued an amended notice of hearing against Petitioners Gabbidon Construction and Leonard Gabbidon, again alleging "gross negligence, incompetency and/or misconduct in the practice of general contracting" as well as "fraud or deceit in obtaining a license" in violation of N.C. Gen. Stat. § 87-11(a). Both matters were scheduled to come on for a single hearing before the Board on 20 April 2022.

Prior to the hearing, the Board subpoenaed a number of witnesses to "appear and testify" before the Board at the hearing. On 14 April 2022, the Board notified counsel for Petitioners that "[s]everal of the Board's witnesses" would be "appearing virtually." Upon Petitioners' request, on 18 April 2022, the Board identified five of its subpoenaed witnesses who would be making virtual appearances.

On 19 April 2022, Petitioners moved to exclude virtual testimony in both matters. Petitioners' motions were heard by the Board at the commencement of the hearing on 20 April 2022. The Board denied the motions, and proceeded with the hearing.

On 27 April 2022, the Board entered its final decisions, in which it (1) revoked the licenses of Petitioners Gabbidon Builders, LLC, and

Gabbidon Construction, LLC; (2) revoked Petitioner Leonard Gabbidon's ability to act as a qualifying party for an applicant for a license to practice general contracting; and (3) assessed costs of $30,000 against Petitioners in each matter.

On 26 May 2022, Petitioners filed petitions for judicial review of both final decisions with the Mecklenburg County Superior Court. In each case, Petitioners raised various arguments challenging the admission of virtual testimony, among other issues. On 18 July 2022, the Board filed a motion to consolidate the matters, which the superior court granted on 29 September 2022.

On 12 April 2023, the consolidated matters came on for hearing in Mecklenburg County Superior Court. On 24 May 2023, the superior court entered an order affirming the Board's final decisions. Petitioners timely filed notice of appeal.

II. Discussion

Petitioners advance several arguments on appeal, all of which stem from the same basic concern: that the Board committed reversible error by "allowing the virtual testimony of witnesses who failed to comply with subpoenas." We disagree.

A. Standard of Review

Under the Administrative Procedure Act ("APA"), the superior court's scope of review of an agency final decision is limited:

> The court reviewing a final decision may affirm the decision or remand the case for further proceedings. It may also reverse or modify the decision if the substantial rights of the petitioners may have been prejudiced because the findings, inferences, conclusions, or decisions are:
>
> (1) In violation of constitutional provisions;
>
> (2) In excess of the statutory authority or jurisdiction of the agency or administrative law judge;
>
> (3) Made upon unlawful procedure;
>
> (4) Affected by other error of law;
>
> (5) Unsupported by substantial evidence admissible under [N.C. Gen. Stat. §] 150B-29(a), 150B-30, or 150B-31 in view of the entire record as submitted; or

(6) Arbitrary, capricious, or an abuse of discretion.

N.C. Gen. Stat. § 150B-51(b).

The APA also provides two different standards of review, depending on the type of error asserted:

> In reviewing a final decision in a contested case, the court shall determine whether the petitioner is entitled to the relief sought in the petition based upon its review of the final decision and the official record. With regard to asserted errors pursuant to subdivisions (1) through (4) of subsection (b) of this section, the court shall conduct its review of the final decision using the de novo standard of review. With regard to asserted errors pursuant to subdivisions (5) and (6) of subsection (b) of this section, the court shall conduct its review of the final decision using the whole record standard of review.

Id. § 150B-51(c).

"A party to a review proceeding in a superior court may appeal to the appellate division from the final judgment of the superior court as provided in [N.C. Gen. Stat. §] 7A-27." *Id.* § 150B-52. "The scope of review to be applied by the appellate court under this section is the same as it is for other civil cases." *Id.* "Appellate review of a judgment of the superior court entered upon review of an administrative agency decision requires that the appellate court determine whether the [superior] court utilized the appropriate scope of review and, if so, whether the [superior] court did so correctly." *Ingram v. N.C. State Bd. of Plumbing, Heating & Fire Sprinkler Contr'rs*, 269 N.C. App. 476, 480, 839 S.E.2d 74, 77 (2020) (citation omitted).

In this appeal, Petitioners assert only errors of law.[1] Accordingly, the de novo standard of review is appropriate. N.C. Gen. Stat. §§ 150B-51(c); -52.

When conducting de novo review, "the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *Herron v. N.C. Bd. of Exam'rs for Eng'rs & Surveyors*, 248 N.C. App. 158, 165, 790 S.E.2d 321, 327 (2016) (cleaned up). "In cases reviewed under [N.C. Gen. Stat. §] 150B-51(c), the [superior] court's

1. Petitioners asserted additional fact-based errors below, but they do not raise these issues in their brief on appeal, and those issues are therefore abandoned. *See* N.C. R. App. P. 28(b)(6).

findings of fact shall be upheld if supported by substantial evidence." N.C. Gen. Stat. § 150B-52.

B. Analysis

As a threshold matter, we recognize that the superior court properly utilized the de novo standard of review when considering Petitioners' law-based challenges to the Board's final decision. We therefore proceed to our de novo review of the superior court's order for the asserted errors of law.

Petitioners argue on appeal that the Board deprived them of due process by allowing subpoenaed witnesses to appear virtually. "The fundamental premise of procedural due process protection is notice and the opportunity to be heard. Moreover, the opportunity to be heard must be at a meaningful time and in a meaningful manner." *Peace v. Emp. Sec. Comm'n*, 349 N.C. 315, 322, 507 S.E.2d 272, 278 (1998) (cleaned up). Further, "the exact nature and mechanism of the required procedure will vary based upon the unique circumstances surrounding the controversy." *Id.*

The APA provides that "[i]n preparation for, or in the conduct of, a contested case subpoenas may be issued and served in accordance with" Rule 45 of the Rules of Civil Procedure. N.C. Gen. Stat. § 150B-39(c). Rule 45, in turn, provides that a subpoena shall contain "[a] command to each person to whom it is directed to attend and give testimony[.]" *Id.* § 1A-1, Rule 45(a)(1)(b). In addition, the Board's regulations provide procedures for the issuance of "subpoenas for the attendance and testimony of witnesses[.]" 21 N.C. Admin. Code 12A.0827(a) (2023). Petitioners thus argue that "the Board's procedures required the subpoenaed witnesses to appear" and that Petitioners "clearly had the right to confront and cross-examine each witness in person."

However, Petitioners provide no citation to authority in support of their contention that a subpoenaed appearance must be "in person." The superior court correctly recognized that, while "there are no procedures for virtual testimony[,]" the Board's regulations and Rule 45 neither provide for *nor prohibit* witnesses from testifying virtually.

The APA also provides:

> Hearings shall be conducted in a fair and impartial manner. At the hearing, the agency and the parties shall be given an opportunity to present evidence on issues of fact, examine and cross-examine witnesses, including the author of a document prepared by, on behalf of or for

> the use of the agency and offered into evidence, submit rebuttal evidence, and present arguments on issues of law or policy.

N.C. Gen. Stat. § 150B-40(a). "In the case at bar, there is no dispute that the Board complied with the above-stated statutory requirements, providing proper notice and an opportunity for [Petitioners] to be heard at the formal hearing." *Farber v. N.C. Psychology Bd.*, 153 N.C. App. 1, 7, 569 S.E.2d 287, 293 (2002), *appeal withdrawn*, 357 N.C. 163, 579 S.E.2d 577 (2003).

The superior court found as fact that "Petitioners received notice of the hearings before the Board and the opportunity to be heard" and that "Petitioners had the opportunity to cross-examine every witness[ ] and indeed did cross-examine [three of the] witnesses who appeared virtually[.]" Petitioners even acknowledge in their brief that they "were still afforded the opportunity to cross-examine the witnesses[.]"

Nonetheless, Petitioners posit that the fact that they had "the opportunity to cross-examine the witnesses" cannot serve as the basis for "excus[ing] the Board's willingness to allow its own witnesses to avoid lawfully issued subpoenas and the corresponding disregard of the required procedures that govern the hearings of the Board." In response, the Board correctly observes that "[t]here is no provision in [Rule 45], North Carolina statute, or case law, that allows a party to challenge the validity of, or compliance with, a subpoena for witnesses that were not subpoenaed for the complaining party's case-in-chief." Indeed, our Supreme Court has occasionally reminded appellants that each party bears the burden of subpoenaing witnesses that it wishes to make appear and testify. *See, e.g.*, *Hamlin v. Hamlin*, 302 N.C. 478, 482, 276 S.E.2d 381, 385 (1981) ("If [the] plaintiff desired to call [the] defendant as a witness she should have had a subpoena issued for him or asked for an order of the court requiring him to be present."); *Fed. Reserve Bank v. Whitford*, 207 N.C. 267, 269, 176 S.E. 584, 585 (1934) ("If the plaintiff desired the testimony of the Federal Reserve Agent, it should have subpœnaed him as a witness or have taken his deposition.").

So, too, here: if Petitioners' case were so reliant upon the *in-person* testimony of these virtual witnesses—each of which Petitioners had the opportunity to cross-examine at the hearing—then Petitioners themselves should have subpoenaed these witnesses. This is particularly so if, as Petitioners assert, allowing witnesses to testify virtually would prejudice Petitioners to the point of a due-process deprivation. As counsel for the Board argued to the superior court, the Board could have

released its witnesses from its subpoenas, or "told witnesses they don't have to come or appear virtually at all," and Petitioners would have had "no redress" in that event.

As previously stated, it is beyond dispute that Petitioners had sufficient notice and opportunity to be heard at the hearing before the Board. That the Board did not compel its witnesses to appear in the manner that Petitioners preferred is not a concern that rises to the level of a deprivation of Petitioners' right to due process. Petitioners' argument is overruled.

III. Conclusion

In its order on appeal, the superior court utilized the appropriate standard of review, and did so properly. Therefore, we affirm the superior court's order affirming the final decisions of the Board.

AFFIRMED.

Judges WOOD and THOMPSON concur.

DEBBIE HAYTHE, Plaintiff
v.
JAMES HAYTHE, JR., Defendant

No. COA23-792

Filed 7 May 2024

1. Divorce—alimony—equitability—classification of dependent and supporting spouse—sufficiency of findings

In awarding alimony to plaintiff pursuant to N.C.G.S. § 50-16.3A(a), the trial court did not err in determining that plaintiff was a dependent spouse and defendant was a supporting spouse where unchallenged findings of fact stated that plaintiff would have a shortage of more than $3,000 per month without support while defendant had earned more money than plaintiff throughout their marriage and currently had income in excess of his own expenses. Likewise, the court's determination that an award of alimony to plaintiff would be equitable was supported by unchallenged findings that addressed relevant factors, including that plaintiff had depleted her retirement account during the marriage to cover defendant's taxes and purchase of a car.

2. Divorce—alimony—discretion regarding award—additional findings required for amount

The trial court did not abuse its discretion in awarding plaintiff a lump sum alimony payment where unchallenged findings of fact stated that defendant had minimal money with which to make monthly payments but had received over $80,000 in equitable distribution proceeds from the sale of the marital home. However, remand for the entry of additional findings was necessary because the court failed to set forth its reasons for the amount of the award as required under N.C.G.S. § 50-16.3A(c).

3. Divorce—alimony—attorney fees—additional findings required as to reasonableness of award

The trial court did not err in awarding attorney fees in an alimony action where it determined that plaintiff was a dependent spouse and entitled to receive alimony and then found that: plaintiff's monthly expenses exceeded her income, she had to borrow money to retain an attorney for her post-separation support hearing, the retainer was exhausted in that proceeding, and plaintiff represented herself in the equitable distribution hearing because she could not afford counsel. However, remand was necessary for entry of findings of fact supporting the amount of the award, including about the time expended and skill required by plaintiff's counsel, and whether the hourly rates charged were reasonable and customary for the type of work performed.

4. Divorce—equitable distribution—share of marital home sale proceeds held in trust proper

The trial court did not err in ordering that defendant's portion of the proceeds from the sale of the marital home be held in trust in the interest of pending litigation pursuant to N.C.G.S. § 50-20(i) where the issue of alimony had been continued and plaintiff's civil contempt motion against defendant for nonpayment of post-separation support had not yet been resolved.

5. Contempt—civil—present ability to pay—findings sufficient

In finding defendant in contempt for failure to comply with a post-separation support order, the trial court's determination that he had the present means and ability to make the required payments was supported by unchallenged findings of fact that defendant was and would continue to be employed as a nurse, had a monthly net income of over $4,000, and had received more than $80,000 in equitable distribution proceeds from the sale of the marital home.

Judge TYSON concurring in part and dissenting in part.

Appeal by defendant from order entered 17 January 2023 by Judge Joseph Williams in District Court, Union County. Heard in the Court of Appeals 6 March 2024.

No brief filed for pro se plaintiff-appellee.

Plumides, Romano & Johnson, PC, by Richard B. Johnson, for defendant-appellant.

ARROWOOD, Judge.

James Haythe, Jr. ("defendant") appeals from the trial court's order on alimony, contempt, and attorney's fees. Defendant contends the trial court erred by ordering defendant to pay a lump sum alimony award and $12,625.00 in attorney's fees, and the trial court abused its discretion by enjoining defendant's equitable distribution award and finding defendant in contempt. We decide the issues as follows.

I. Background

Defendant and Debbie Haythe ("plaintiff") were married on 25 December 2008 and separated on 16 March 2020. Plaintiff initiated this action by filing a complaint on 14 October 2020, including claims for post-separation support ("PSS"), alimony, equitable distribution, and attorney's fees. On 7 December 2020, defendant filed an answer, including affirmative defenses and a counterclaim.

The trial court conducted a hearing on plaintiff's complaint on 3 June 2021. The trial court entered an order on 4 June 2021 requiring defendant to pay plaintiff $850.00 per month in PSS and an additional $100.00 per month towards PSS arrears of $6,800.00. The trial court determined that defendant had a surplus each month and was able to pay PSS.

On 1 October 2021, defendant filed a motion for interim distribution and injunctive relief due to plaintiff's failure to pay the monthly mortgage on the marital home. On 15 December 2021, the trial court entered an order for interim distribution and injunctive relief, requiring the immediate sale of the marital home with any proceeds to be placed in defendant's attorney's trust account pending further order. The marital home was subsequently sold, and the parties netted $165,852.11 in proceeds plus a $5,000.00 deposit, which were placed in the trust account.

Plaintiff's claim for alimony and both parties' claims for equitable distribution came on for trial on 5 April 2022. The trial court denied defendant's motion to dismiss plaintiff's alimony claim, and because plaintiff was not prepared to continue on the alimony claim, the trial court proceeded with the parties' equitable distribution claims. After the trial but before the trial court issued an order, plaintiff filed a motion for order to show cause alleging that defendant failed to comply with the 4 June 2021 order requiring defendant to pay plaintiff PSS.

The trial court issued an order on 11 July 2022 on equitable distribution of the parties' property. The trial court concluded that the net value of the marital residence would be equitably distributed between the parties, and the order specified that plaintiff's $85,426.06 share should be released to her from defendant's attorney's trust account. However, the trial court also instructed that defendant's attorney was to hold defendant's $85,426.05 share in trust until plaintiff's contempt motion for nonpayment of PSS was resolved.

Defendant filed a financial affidavit and notice of hearing on 20 July 2022. The trial court filed a notice of hearing on 8 August 2022, setting the hearing date for 25 August 2022. Plaintiff filed a motion to continue on 17 August 2022, to which defendant filed an objection. On 18 August 2022, the trial court allowed plaintiff's motion and filed an order to continue the case to 23 September 2022. The trial court filed notices of the hearing on 22 August 2022 and 8 September 2022. Plaintiff filed a financial affidavit on 14 September 2022, including attachments concerning her income tax returns, property interests in Texas, bank statements, and the marital residence.

The trial court conducted a hearing on 23 September 2022. Plaintiff testified that defendant's income was higher than hers during their marriage, and his income paid for their marital expenses. Plaintiff described her role and duties as a housewife and pastor's wife, and she testified that defendant did not ask her to seek employment, though she on occasion held temporary jobs. Plaintiff further told the court that she used her retirement savings and annuities to help defendant pay off his debt, and when defendant left their home, she had only $600.00 left in those accounts. She explained that she was not eligible for Social Security from her previous employment as a teacher, so she would have to collect Social Security through defendant. Plaintiff testified that defendant had paid only a total of $1,050.00 in PSS, and she had accrued $16,130.00 in attorney's fees throughout the litigation.

Defendant testified that plaintiff used some of her retirement funds to support their marital expenses, such as paying his church's taxes and

for a car, and plaintiff assumed his credit card debt for purchases he'd made during the marriage. Defendant confirmed he had not paid plaintiff more than $1,050.00 in PSS. Evidence regarding the parties' incomes was introduced, showing that defendant made a range of approximately $62,000.00 to $77,000.00 each year from 2019 through 2021, and plaintiff made $7,359.00 in 2019 and $3,554.00 in 2020. Defendant told the trial court that plaintiff was certified as a teacher and had previously worked at Walmart, but plaintiff had refused to find employment during the marriage. Defendant also testified that he was in the negative each month, but on cross-examination, he admitted he did not have a negative balance on his bank statements in evidence.

On 22 November 2022, Judge Williams sent a letter to the parties summarizing the trial court's decision and reasoning.

The trial court filed an order on alimony, contempt, and attorney fees on 17 January 2023. The trial court found the following relevant findings of fact:

> 16. That just prior to the parties' separation, Defendant left the marital residence and was gone for weeks.
>
> 17. That Defendant abandoned Plaintiff and withdrew his love and affection from Plaintiff without just cause.
>
> 18. That Defendant, shortly after the parties' separation, and while Plaintiff was still living in the marital residence, shut off the utilities (lights, water, cable, and sanitation) to the marital residence without notice to Plaintiff. This was during the middle of a pandemic.
>
> . . . .
>
> 22. That Plaintiff was a faithful and dutiful wife.
>
> 23. That Plaintiff cleaned the house, washed the parties' clothes, and prepared Defendant's dinners.
>
> . . . .
>
> 25. That Plaintiff assisted Defendant in his work as a minister.
>
> . . . .
>
> 27. That Plaintiff brought into the marriage some savings from a job she performed in Texas as a teacher and used those monies in the marriage to help support the family,

purchase vehicles for Defendant and pay off some church taxes that belonged to Defendant.

28. That Plaintiff only had $600 in her retirement account on the date of separation.

. . . .

30. That Plaintiff did not work for some years after she married Defendant.

. . . .

34. That Plaintiff is currently unemployed.

. . . .

37. That Plaintiff was and is substantially dependent on Defendant to maintain the lifestyle to which she was accustomed.

38. That Defendant was employed as a nurse on the parties' date of separation.

39. That at all times during the marriage, Defendant earned more money than Plaintiff.

. . . .

49. . . . Defendant has minimal money with which to pay alimony on a monthly basis.

50. That each party received over $80,000 in equitable distribution proceedings.

51. That Defendant, thus, has the means and ability to pay Plaintiff alimony as a lump sum.

. . . .

59. That Plaintiff is a dependent spouse within the meaning of N.C. Gen. Stat. § 50-16.1A, and Defendant is a supporting spouse within the meaning of that statute.

60. That during the course of the parties' marriage, Defendant was the primary means of financial support for Plaintiff.

61. That Defendant has the ability to pay support and the resources of Plaintiff are not adequate to meet her

> reasonable needs considering the factors set forth in N.C. Gen. Stat. § 50-16.2A(b).
>
> 62. That Defendant has willfully failed to provide Plaintiff sustenance according to his means and ability and has rendered Plaintiff's condition intolerable and life burdensome and thus he owes an obligation to pay alimony to Plaintiff.
>
> 63. That Defendant will continue being employed as a nurse and Plaintiff's ability to start teaching, again after long periods of not being a teacher, is probably not likely.
>
> . . . .
>
> 65. That since the entry of the Order on Post Separation Support, Defendant has only paid $1,050 to Plaintiff.
>
> . . . .
>
> 68. That Defendant is in willful contempt of the Court's Post-separation Order as he had the means and ability to comply with the order but has willfully refused to do so.
>
> 69. That Defendant currently owes $13,580 in post-separation support to Plaintiff.
>
> . . . .
>
> 73. That Plaintiff was unable to pay for Mrs. McBeth's continued legal services, and due to her non-payment, she had to represent herself in an equitable distribution proceeding.
>
> 74. That after she received an award from the proceeding, Plaintiff paid Mrs. McBeth to be her lawyer for the alimony hearing.
>
> 75. That Mrs. McBeth charged Plaintiff at the rate of $300 an hour. The total fees incurred by Plaintiff was $12,625.
>
> 76. That the fees incurred were reasonable and necessary for Plaintiff to present her claim and meet Defendant on an equal basis.

The trial court also made the following relevant conclusions of law:

> 3. That the Defendant is the supporting spouse within the meaning of N.C. Gen. Stat. § 50-16.1A(5), and the Plaintiff

> is the dependent spouse within the meaning of N.C. Gen. Stat. § 50-16.1A(2).
>
> 4. That Plaintiff is actually and substantially dependent upon Defendant for her maintenance and support and is substantially in need of maintenance and support from Defendant.
>
> 5. That Defendant is able to pay the amount designated herein.
>
> 6. An award of alimony is equitable after considering all relevant factors.
>
> 7. The amount of alimony awarded is fair and just to all parties.
>
> 8. The Defendant is in willful civil contempt of Court as shown by clear, cogent and convincing evidence.
>
> 9. That Plaintiff is entitled to an order requiring Defendant to pay her reasonable attorney fees.
>
> 10. That Plaintiff is an interested party proceeding in good faith.
>
> 11. That Plaintiff had and still has insufficient means to defray the expense of meeting Defendant as a litigant on substantially even terms.
>
> 12. That the terms of this Order are fair and reasonable, and the Defendant is capable of complying with them.

The trial court ordered defendant to pay $40,000.00 in alimony, $13,580.00 to purge himself of contempt for non-payment of PSS, and $12,262.00 in attorney fees to plaintiff from the assets held in his attorney's trust account.

Defendant filed notice of appeal on 24 January 2023.

II. Discussion

Defendant contends the trial court erred by ordering defendant to pay lump sum alimony and $12,625.00 in attorney's fees, abused its discretion by restraining defendant's equitable distribution award, and erred by finding defendant in contempt. We disagree but remand for further findings of fact to support the amount of the lump sum alimony payment.

A. Alimony

The trial court's determination of whether a spouse is entitled to alimony is reviewed de novo. *Barrett v. Barrett*, 140 N.C. App. 369, 371 (2000) (citing *Rickert v. Rickert*, 282 N.C. 373, 379 (1972)). The trial court's determination of the amount, duration, and manner of payment of alimony is reviewed for abuse of discretion. *Id.* (citing *Quick v. Quick*, 305 N.C. 446, 453 (1982)). "[W]hen the trial court sits without a jury, the standard of review on appeal is whether . . . competent evidence . . . support[s] the trial court's findings of fact and whether its conclusions of law were proper in light of such facts." *Collins v. Collins*, 243 N.C. App. 696, 699 (2015) (citation omitted). "Where no exception is taken to a finding of fact by the trial court, the finding is presumed to be supported by competent evidence and is binding on appeal." *Koufman v. Koufman*, 330 N.C. 93, 97 (1991) (citations omitted).

[1] In an action brought pursuant to Chapter 50 of the General Statutes, either party may move for alimony, and "[t]he court shall award alimony to the dependent spouse upon a finding that one spouse is a dependent spouse, that the other spouse is a supporting spouse, and that an award of alimony is equitable after considering all relevant factors[.]" N.C.G.S. § 50-16.3A(a) (2023).

"The court shall exercise its discretion in determining the amount, duration, and manner of payment of alimony[,]" and the court must consider "all relevant factors," including

> [t]he relative earnings and earning capacities of the spouses . . . [t]he ages and the physical, mental, and emotional conditions of the spouses . . . [t]he amount and sources of earned and unearned income of both spouses; . . . [t]he standard of living of the spouses established during the marriage; . . . [t]he duration of the marriage; . . . [t]he relative assets and liabilities of the spouses and the relative debt service requirements of the spouses[;] . . . [t]he contribution of a spouse as homemaker; . . . [t]he relative needs of the spouses; . . . [and any] other factor relating to the economic circumstances of the parties that the court finds to be just and proper.

N.C.G.S. § 50-16.3A(b).

On appeal, defendant challenges findings of fact 51, 59, 61, and 62 as well as conclusions of law 3 through 7, 11, and 12 regarding the alimony award. Defendant challenges the trial court's finding that plaintiff was a

dependent spouse. To be a dependent spouse, one must be either "actually substantially dependent upon the other spouse" or "substantially in need of maintenance and support from the other spouse." N.C.G.S. § 50-16.1A(2) (2023). Defendant does not challenge the trial court's findings regarding plaintiff's income and monthly expenses, and thus, the trial court's finding that "Plaintiff would have a shortage of $3,319.02 per month" is binding on appeal. "This in and of itself supports the trial court's classification of her as a dependent spouse." *Barrett*, 140 N.C. App. at 372 (citing *Phillips v. Phillips*, 83 N.C. App. 228, 230 (1986) ("The trial court found that plaintiff had monthly expenses of $1,300 and a monthly salary of $978. That leaves her with a deficit of $322 a month. From these facts, the trial court could have found that plaintiff was both actually substantially dependent on defendant and substantially in need of defendant's support.")).

However, "[j]ust because one spouse is a dependent spouse does not automatically mean the other spouse is a supporting spouse." *Barrett*, 140 N.C. App. at 373 (citation omitted). "A surplus of income over expenses is sufficient in and of itself to warrant a supporting spouse classification." *Id.* (citing *Beaman v. Beaman*, 77 N.C. App. 717, 723 (1985)). Unchallenged findings 37 through 49 pertain to defendant's income and expenses, and they are binding on appeal. The trial court's findings that "Plaintiff was and is substantially dependent on Defendant to maintain the lifestyle to which she was accustomed[,]" defendant earned more money than plaintiff during the marriage, and his current monthly income exceeded his expenses, even if only slightly, adequately support its classification of defendant as the supporting spouse.

The trial court clearly considered relevant factors in its determination that an alimony award for plaintiff was equitable. Along with considering the previous marital lifestyle, unchallenged findings 11 through 36 show that the trial court considered the earned and unearned incomes of the parties, their assets and needs, plaintiff's contribution as homemaker, the marital dynamics, and the parties' ability to earn money. Specifically, plaintiff depleted her retirement account throughout the marriage, using the funds to pay defendant's church's taxes and purchase him a car. Plaintiff had only $600.00 remaining in her retirement account upon the parties' separation. These findings support the trial court's decision that an alimony award for plaintiff was equitable.

[2] Defendant also challenges the lump sum alimony award of $40,000.00 and finding of fact 51 that he has the means and ability to pay the alimony as a lump sum. In determining the amount of alimony, "[c]onsideration must be given to the needs of the dependent spouse,

but the estates and earnings of both spouses must be considered. It is a question of fairness and justice to all parties." *Kelly v. Kelly*, 167 N.C. App. 437, 441 (2004) (citations and internal quotation marks omitted). The trial court exercised its discretion in its decision by considering the relevant factors as described above. Although the trial court found that defendant "has minimal money with which to pay alimony on a monthly basis[,]" the trial court also found that he received over $80,000.00 in equitable distribution proceedings that remained in his attorney's trust account. Thus, this unchallenged finding supports the trial court's determination that defendant had the ability to pay a lump sum for alimony.

Defendant further contends that the trial court did not provide any reasoning for how it determined a $40,000.00 lump sum award. We agree. "The court shall set forth the reasons for its award or denial of alimony and, if making an award, the reasons for its amount, duration, and manner of payment." N.C.G.S. § 50-16.3A(c); *see also Hartsell v. Hartsell*, 189 N.C. App. 65, 76 (2008) ("With respect to the $650.00, the trial court made only a finding that plaintiff had the ability to pay that amount, but provided no explanation as to why it had concluded that defendant was entitled to that specific amount."). While it may be possible to deduce the trial court's reasoning for the $40,000.00 award from the order and record, it is not up to us to do so; therefore, we remand for further findings as to how the court determined the specific amount it ordered to be paid. In sum, the trial court did not err in awarding alimony to plaintiff, nor did it abuse its discretion in determining defendant was able to pay a lump sum. However, we remand for additional findings on how the trial court reached its $40,000.00 award.

B. Attorney Fees

[3] Whether a spouse is entitled to attorney's fees is reviewed de novo. *See Barrett*, 140 N.C. App. at 374 (citing *Clark v. Clark*, 301 N.C. 123, 136 (1980)). "The amount awarded will not be overturned on appeal absent an abuse of discretion." *Id.* at 375 (citing *Spencer v. Spencer*, 70 N.C. App. 159, 169 (1984)). "A spouse is entitled to attorney's fees if that spouse is (1) the dependent spouse, (2) entitled to the underlying relief demanded (e.g., alimony and/or child support), and (3) without sufficient means to defray the costs of litigation." *Id.* at 374 (citing *Clark*, 301 N.C. at 135–36).

Our holding regarding alimony satisfies the first two requirements: plaintiff is a dependent spouse and is entitled to receive alimony. We now must determine whether plaintiff had the means to defray the costs of litigation. Defendant challenges findings of fact 73 through 76 that plaintiff was unable to continue to pay attorney's fees and represented

herself in the equitable distribution case, plaintiff received the funds from equitable distribution and paid her attorney, and the $300.00 per hour rate for a total of $12,625.00 was reasonable and necessary for plaintiff's representation. The trial court found, and defendant does not challenge, that plaintiff was unemployed, her monthly expenses exceeded her income, and that she had to borrow money from family members to retain her attorney for the PSS hearing. The findings of fact show that plaintiff depleted her retainer on the PSS hearing, and after the PSS hearing, the record is clear that plaintiff represented herself in the equitable distribution proceeding because she could not afford to continue to pay her attorney. Viewed together, these findings support that plaintiff was unable to pay the costs of litigation, and the trial court did not err in awarding plaintiff attorney's fees.

Defendant argues that there was not competent evidence to support the amount of fees awarded because the fee affidavit was not admitted into evidence and thus the breakdown of the fees is unknown. We believe the record supports the amount of fees awarded. Plaintiff testified regarding invoices she had received for her attorney's work; she stated that she received separate invoices for $3,080.00, $4,025.00, $525.00, and $4,999.00, billed at $300.00 per hour. These amounts total $12,629.00. The trial court found plaintiff incurred $12,625.00 in attorney fees and ordered defendant to pay the same. However, "in order for the appellate court to determine if the statutory award of attorneys' fees is reasonable, the record must contain findings of fact as to the time and labor expended, the skill required, the customary fee for like work, and the experience or ability of the attorney." *Cotton v. Stanley*, 94 N.C. App. 367, 369 (1989). Because the trial court did not include these findings of fact in its order, we remand for further findings in accordance with this opinion.

C. Restraining Equitable Distribution

[4] Defendant next contends that the trial court erred in restraining the funds he received through equitable distribution. We disagree.

The trial court continued the issue of alimony at the 5 April 2022 hearing for equitable distribution, and the trial court acknowledged that plaintiff had a right to enforce the delinquent PSS payments. On 25 May 2022, plaintiff filed her motion for order to show cause, alleging that defendant should be held in contempt for his non-payment of PSS. The trial court's 11 July 2022 order instructed that defendant's attorney "is to continue to hold in his trust account Mr. Haythe's $85,426.05 in proceeds until Mrs. Haythe's Contempt Motion for nonpayment of [PSS] is

resolved." The trial court had the authority to order such a restraint in the interest of pending litigation. *See* N.C.G.S. § 50-20(i) (2023) ("The court, in lieu of granting an injunction, may require a bond or other assurance of sufficient amount to protect the interest of the other spouse in the property."). This instruction ensured that defendant would be able to comply with any future orders requiring defendant to make payments to plaintiff. Therefore, we hold that the trial court did not err in ordering defendant's portion of the proceeds from the sale of the marital home to be held in trust.

D. Contempt

[5] An aggrieved party may initiate a proceeding for civil contempt pursuant to N.C.G.S. § 5A-23 by motion

> giving notice to the alleged contemnor to appear before the court for a hearing on whether the alleged contemnor should be held in civil contempt. A copy of the motion and notice must be served on the alleged contemnor at least five days in advance of the hearing unless good cause is shown. The motion must include a sworn statement or affidavit by the aggrieved party setting forth the reasons why the alleged contemnor should be held in civil contempt. The burden of proof in a hearing pursuant to this subsection shall be on the aggrieved party.

N.C. Gen. Stat. § 5A-23(a1) (2023). "When reviewing a trial court's contempt order, the appellate court is limited to determining whether there is competent evidence to support the trial court's findings and whether the findings support the conclusions." *Shumaker v. Shumaker*, 137 N.C. App. 72, 77 (2000) (citing *Adkins v. Adkins*, 82 N.C. App. 289 (1986)).

Our statutes describe civil contempt as "[f]ailure to comply with an order of a court" as long as

> (1) [t]he order remains in force;
>
> (2) [t]he purpose of the order may still be served by compliance with the order;
>
> (2a) [t]he noncompliance by the person to whom the order is directed is willful; and
>
> (3) [t]he person to whom the order is directed is able to comply with the order or is able to take reasonable measures that would enable the person to comply with the order."

N.C.G.S. § 5A-21(a) (2023). "Willfulness constitutes: (1) an ability to comply with the court order; and (2) a deliberate and intentional failure to do so." *Watson v. Watson*, 187 N.C. App. 55, 66 (2007) (quoting *Sowers v. Toliver*, 150 N.C. App. 114, 118 (2002)).

Defendant challenges the court's finding that "he had the means and ability to comply with the order but has willfully refused to do so." Here, the trial court's unchallenged findings show that defendant was employed as a nurse when the parties separated, he will continue to be employed as a nurse, he has a net income of $4,100.79 per month, and he received over $80,000.00 in equitable distribution proceedings. The trial court also found that since the order on PSS entered 4 June 2021, defendant has paid only $1,050.00 to plaintiff. These findings indicate that defendant had the means to comply or take reasonable measure to enable him to comply with the order, and the finding that defendant was in contempt of the order is supported by competent evidence. Thus, the trial court did not err in finding defendant was in contempt.

III. Conclusion

For the foregoing reasons, we affirm the trial court's order and remand for additional findings regarding the reasoning for the $40,000.00 alimony award as well as additional findings regarding the time and labor expended, the skill required, the customary fee for like work, and the experience or ability of the attorney in the $12,625.00 award of attorney fees. In doing so the trial court may rely upon the record before it or in its discretion take additional evidence necessary to make the additional required findings.

AFFIRMED IN PART AND REMANDED FOR ADDITIONAL FINDINGS IN PART.

Judge COLLINS concurs.

Judge TYSON concurs in result in part and dissents in part.

TYSON, Judge, concurring in result in part and dissenting in part.

I concur with the majority's conclusion to remand: (1) the unsubstantiated $40,000 lump sum award for additional findings of fact and for the reasoning to support the specific amount and basis for the award, and (2) the reasons for denying Defendant any access to his equitable

distribution marital home proceeds. N.C. Gen. Stat. § 50-16.3A(c) (2023). I also concur in the result with the majority's opinion to vacate the award of attorney's fees and remand.

I. N. C. Gen. Stat. § 50-16.3A(b)

"The court *shall* exercise its discretion in determining the amount, duration, and manner of payment of alimony[,]" and the court *must* consider "all relevant factors," including, *inter alia*:

> (2) The relative earnings and *earning capacities* of the spouses;
>
> (3) The *ages and the physical, mental, and emotional conditions of the spouses*;
>
> (4) The amount and sources of earned *and unearned income* of both spouses, including, but not limited to, earnings, dividends, and benefits such as medical, retirement, insurance, social security, or others;
>
> (5) *The duration of the marriage*;
>
> . . .
>
> (8) The standard of living of the spouses established during the marriage;
>
> (9) The relative education of the spouses and the time necessary to acquire sufficient education or training to enable the spouse seeking alimony to find employment to meet his or her reasonable economic needs;
>
> (10) The relative assets and liabilities of the spouses and the relative debt service requirements of the spouses, including legal obligations of support;
>
> . . .
>
> (12) The contribution of a spouse as homemaker;
>
> (13) The *relative needs* of the spouses;
>
> . . .
>
> (15) *Any other factor* relating to the economic circumstances of the parties that the court finds to be just and proper.

N.C. Gen. Stat. § 50-16.3A(b) (2023) (emphasis supplied).

Plaintiff is a college graduate with over seventeen years of teaching experience in Texas. She retains a 4,000 square feet home as separate property in Texas, occupied by her brother, whose "rent" does not cover the mortgage, taxes, insurance, and maintenance expenses. The trial court found Plaintiff used marital funds to pay these expense shortfalls on this home, while exclusively occupying the martial home for over eighteen months, allowing the mortgage to go into default and not paying for utilities she solely consumed. She incurred significant credit card debt in her own name that was considered martial debt.

Plaintiff was born in 1957 and married Defendant in 2008. Their childless marriage continued for approximately eleven years. The record evidence shows Plaintiff abandoned Defendant and the marital home to return to Texas to care for an ailing relative, while Defendant suffered significant health issues himself, yet he returned to school to gain certification and employment as a nurse.

Uncontradicted evidence and testimony shows, despite the shortage of and full-time teaching positions remaining vacant in the Charlotte metro area, and even substitute teaching jobs available paying $150.00 per day, Plaintiff chose to work part-time at Walmart at $11.00 per hour.

Admitted evidence shows Defendant testified Plaintiff was certified as a teacher and had previously worked at Walmart, but Plaintiff had refused to find employment during the marriage. Defendant also testified his income was negative against expenses each month.

Defendant has no home of his own and rents an apartment. The trial court denied Defendant any deductions from his paycheck as allowed expenses, except mandated taxes and deductions.

The majority's opinion improperly affirms the district court's finding of fact asserting Defendant was in willful contempt for not fully paying post separation support. No evidence supports either his ability or willful refusal to pay, after the trial court ordered his share of funds from the sale of the marital residence to be withheld in trust, yet incredibly finding, as the majority's opinion agrees, he had access to those same funds to pay. While "[c]onsideration must be given to the needs of the dependent spouse, . . . the estates and earnings of both spouses must be considered. It is a question of fairness and justice to all parties." *Kelly v. Kelly*, 167 N.C. App. 437, 441, 606 S.E.2d 364, 368 (2004) (citations and internal quotation marks omitted). I respectfully dissent.

II. Amount of Attorney's Fees

North Carolina follows the "American Rule" with regard to awarding attorney's fees against an opposing party. *Ehrenhaus v. Baker*, 243 N.C. App. 17, 23-25, 776 S.E.2d 699, 704-05 (2015). Applying the "American Rule", our Supreme Court held over 50 years ago that each litigant is required to pay its own attorney's fees, unless a statute or express agreement between the parties provides otherwise. *In re King*, 281 N.C. 533, 540, 189 S.E.2d 158, 162 (1972); *Stillwell Enterprises, Inc. v. Interstate Equip. Co.*, 300 N.C. 286, 294, 266 S.E.2d 812, 817-18 (1980) (personal property lease agreement); *see also WRI/Raleigh, L.P. v. Shaikh*, 183 N.C. App. 249, 258, 644 S.E.2d 245, 250 (2007) (a commercial real property lease agreement); N.C. Gen Stat. § 42-46(i)(3) (2023) (allows recovery of reasonable attorney's fees in connection with residential rental agreements).

The majority's opinion cites the standard to support an award of attorney's fees in alimony cases. "A spouse is entitled to attorney's fees if that spouse is (1) the dependent spouse, (2) entitled to the underlying relief demanded (e.g. alimony and/or child support), and (3) without sufficient means to defray the costs of litigation." *Barrett v. Barrett*, 140 N.C. App. 369, 374, 536 S.E.2d 642, 646 (2000) (citing *Clark v. Clark*, 301 N.C. 123, 135-36, 271 S.E.2d 58, 67 (1980)).

"Just because one spouse is a dependent spouse does not automatically mean the other spouse is a supporting spouse." *Id.* at 373, 536 S.E.2d at 645 (citation omitted). It is undisputed Plaintiff received over $85,000 in untaxed martial home sales proceeds through Defendant's efforts and expenses and used portions of her equally awarded proceeds to pay her attorney, while Defendant continues to be denied *any* access to his rightful share.

The majority's opinion errs and accepts Plaintiff's testimony as sufficient evidence to approve an award of attorney's fees. *Id.* Here, and unlike the facts in *Barrett*, the trial court failed to receive or admit the attorney's fee affidavit into evidence. *Id.* at 375, 536 S.E.2d at 647. The district court merely relied upon Plaintiff's unsupported testimony regarding invoices for fees she had purportedly received from her withdrawn attorney. From this unsupported testimony, the trial court purported to find and conclude: "That the fees incurred were reasonable and necessary for Plaintiff to present her claim and meet Defendant on an equal basis." Yet, and despite the absence of the required fee affidavit and remand for findings, the majority's opinion, baldly, and without basis, erroneously concludes: "We believe the record supports the amount of fees awarded."

This Court has listed the required findings "in order for the appellate court to determine if the statutory award of attorneys' fees is reasonable[,] the record must contain findings of fact as to the time and labor expended, the skill required, the customary fee for like work, and the experience or ability of the attorney." *Cotton v. Stanley*, 94 N.C. App. 367, 369, 380 S.E.2d 419, 421 (1989) (citation omitted).

The trial court failed to make any mandated findings: (1) of counsel's rates, as should be set forth in a sworn affidavit; (2) whether those rates were comparable and reasonable for the work done by others in the legal market; (3) the subject matter of the case; (4) the experience of the attorney; (5) whether the specific work done and the amounts charged by counsel was reasonable and necessary; and, (6) whether the fees and costs incurred by Plaintiff were reasonable and necessary for the case. *Id.*

Plaintiff submitted insufficient evidence of all these factors. There was no affidavit submitted or admitted to evidence. The trial court used Plaintiff's unsupported testimony regarding her purported attorney's bills. The district court erred by not making required findings of necessity and reasonableness "as to the time and labor expended, the skill required, the customary fee for like work, and the experience or ability of the attorney." *Id.*

Additional evidence must be presented and received to support these findings and conclusions.

III. Contempt

The district court improperly held Defendant to be in willful contempt. The majority's opinion errs by affirming this unsupported finding and conclusion.

A. Standard of Review

The majority's opinion correctly states: "When reviewing a trial court's contempt order, the appellate court is limited to determining whether there is competent evidence to support the trial court's findings and whether the findings support the conclusions." The majority's opinion impermissibly omits the complete standard of review. This Court "review[s] the trial court's conclusions of law in a civil contempt order *de novo*." *Walter v. Walter*, 279 N.C. App. 61, 66, 864 S.E.2d 534, 537 (2021) (citation omitted).

B. Analysis

Our General Statutes permit a trial court to hold a party in civil contempt if the "noncompliance by the person to whom the [civil contempt]

order is directed is *willful*." N.C. Gen. Stat. § 5A-21(a)(2a) (2023) (emphasis supplied). "With respect to contempt, willfulness connotes knowledge of, and stubborn resistance to, a court order." *Blevins v. Welch*, 137 N.C. App. 98, 103, 527 S.E.2d 667, 671 (2000) (citation omitted). "Willfulness in matters of this kind involve[ ] more than deliberation or conscious choice; it also imports a bad faith disregard for authority and the law." *Forte v. Forte*, 65 N.C. App. 615, 616, 309 S.E.2d 729, 730 (1983) (citations omitted).

Defendant challenges the following finding of fact: "That Defendant is in willful contempt of the Court's Post-Separation Order as he had the means and ability to comply with the order but has willfully refused to do so." The majority's opinion then affirms the willful contempt because "the unchallenged findings of fact show that [D]efendant was employed as a nurse when the parties separated, he will continue to be employed as a nurse, he has a net income of $4,100.79 per month, and he received over $80,000.00 in equitable distribution proceedings."

The undisputed evidence and findings show Defendant initially made the ordered post separation support payments to Plaintiff. Also, Plaintiff had sole access and exclusive use of the marital home and failed to make mortgage payments or to pay utilities for over eighteen months, until the lender threated to foreclose after expiration of a COVID-19 forbearance.

Defendant had initially made the mortgage payments, while Plaintiff was in exclusive possession. Defendant's motion to sell the martial residence to protect over $170,000.00 in accrued equity from foreclosure was continued three times on Plaintiff's counsel's motions for continuance, opposed by Defendant. After these delays, Plaintiff's counsel then abruptly moved and was allowed to withdraw the same day by the district court.

Plaintiff was provided immediate access to all of her one-half equitable distribution share of the martial residence sale's proceeds, accrued through Defendant's motion and efforts. The trial court ordered the entirety of Defendant's one-half share of equitable distribution proceeds held in trust while Plaintiff's continued motions were pending in the district court. The evidence shows and the district court further found: "That given the aforementioned figures, Defendant has minimal money with which to pay alimony on a monthly basis."

Defendant did not have the present means or ability to pay, and his partial failures to pay cannot be construed as willful. N.C. Gen. Stat. § 5A-21(a)(2a). "Willfulness constitutes: (1) an ability to comply with the court order; and (2) a deliberate and intentional failure to do so."

Watson v. Watson, 187 N.C. App. 55, 66, 652 S.E.2d 310, 318 (2007) (citation omitted); *Blevins* 137 N.C. App. at 103, 527 S.E.2d at 671 ("With respect to contempt, willfulness connotes knowledge of, and stubborn resistance to, a court order."). "Willfulness . . . imports a bad faith disregard for authority and the law." *Forte*, 65 N.C. App. at 616, 309 S.E.2d at 730. The willful civil contempt finding is unsupported, erroneous, and properly reversed. *Id*.

IV. Conclusion

I concur in the result to vacate and remand the attorney's fees award. Plaintiff's unsupported testimony about her attorney's bills, who had previously sought to withdraw representation only to remain on the case, and larded attorney's fees does not provide sufficient evidence to support the award in the absence of an affidavit and supported findings. *Cotton*, 94 N.C. App. at 369, 380 S.E.2d at 421.

The district court's holding Defendant in willful contempt is wholly unsupported, properly vacated, and remanded to the trial court in the face of its ordered denial of Defendant's access to any of his own funds, and its other supported findings holding "Defendant has minimal money with which to pay alimony on a monthly basis." *Blevins*, 137 N.C. App. at 103, 527 S.E.2d at 671; *Forte*, 65 N.C. App. at 616, 309 S.E.2d at 730. I respectfully dissent.

MICHAEL C. HOAGLIN, M.D., Plaintiff
v.
DUKE UNIVERSITY HEALTH SYSTEM, INC. d/b/a DUKE UNIVERSITY HOSPITAL and JOSHUA SETH BRODER, M.D., Defendants

No. COA23-546

Filed 7 May 2024

1. Contracts—employment—incorporation of corrective action procedures—alleged breach of procedures—genuine issue of material fact

In an action brought by plaintiff against his former employers after he was fired from his medical residency, the trial court erred by granting summary judgment to defendants on plaintiff's breach of contract claim where there was a genuine issue of material fact regarding whether defendants breached their procedures for corrective action when terminating plaintiff. First, since the corrective-action procedures were expressly included in the contract (via a hyperlink and direct reference), they were incorporated into the employment contract; therefore, summary judgment could not be granted to defendants on the basis that the procedures were not part of the contract. Second, where the parties' competing evidence about whether the corrective action protocols were followed gave rise to genuine issues of material fact, defendants were not entitled to judgment as a matter of law on this claim.

2. Disabilities—employment termination—discrimination—"qualified individual"—no prima facie claim

In plaintiff's action alleging that his former employers violated the Americans with Disabilities Act (ADA) by terminating him from his medical residency after he sought a reasonable accommodation for his depression, the trial court properly granted summary judgment to defendants regarding plaintiff's discrimination claim because plaintiff was not a "qualified individual" for purposes of the claim. Where the terms of employment required plaintiff to work solely for his employer and nowhere else, the employment limitation was an "essential function" of participating in the residency program, and, where plaintiff violated his contract by working a second job as a driver-for-hire, there was no reasonable accommodation that defendants could provide that would enable plaintiff to perform that function.

3. Disabilities—employment termination—failure to accommodate—request granted

In plaintiff's action alleging that his former employers violated the Americans with Disabilities Act (ADA) by terminating him from his medical residency after he sought a reasonable accommodation for his depression, the trial court properly granted summary judgment to defendants regarding plaintiff's failure-to-accommodate claim. Since defendants granted plaintiff's request by promising to adjust his schedule so he did not have to work more than five consecutive days, there was no genuine issue of material fact regarding whether defendants refused to provide reasonable accommodation, despite plaintiff's argument that the accommodation was never implemented since plaintiff was terminated soon afterward.

4. Disabilities—employment termination—retaliation—termination soon after request for accommodation—genuine issue of material fact

In plaintiff's action alleging that his former employers violated the Americans with Disabilities Act (ADA) by terminating him from his medical residency less than a month after he sought a reasonable accommodation for his depression, the trial court erred by granting summary judgment to defendants regarding plaintiff's retaliation claim where there was a genuine issue of material fact regarding whether a "causal link" existed between plaintiff's protected action—his request for reasonable accommodation—and his termination shortly afterward.

5. Attorney Fees—motion to compel discovery—motion allowed—fees disallowed—abuse of discretion analysis

In an action brought by plaintiff against his former employers (defendants) for wrongful termination, although plaintiff's motion to compel discovery was successful, the trial court did not abuse its discretion by denying plaintiff's motion for attorney fees concerning discovery where the trial court made its decision after considering arguments from counsel and conducting an in-depth in-camera review of the documents for which defendants had claimed privilege and, therefore, the decision was not arbitrary or manifestly unsupported by reason.

Appeal by Plaintiff from order entered 27 October 2022 by Judge Michael J. O'Foghludha in Durham County Superior Court. Heard in the Court of Appeals 28 November 2023.

Bailey & Dixon, LLP, by J. Heydt Philbeck, Sr., BrennerBondourant, by Lawrence H. Brenner, & Brown, Goldstein & Levy, LLP, by Gregory P. Care, admitted pro hac vice, & Anthony May, admitted pro hac vice, for Plaintiff-Appellant.

Ogletree, Deakins, Nash, Smoak & Stewart, P.C., by Robert A. Sar, Jefferson Palmer Whisenant, Savannah Singletary, & Vanessa Nicole Garrido, for Defendant-Appellee.

CARPENTER, Judge.

Michael C. Hoaglin, M.D. ("Plaintiff") appeals from the trial court's grant of summary judgment to Duke University Health System, Inc., ("Duke") and Joshua Seth Broder, M.D. (collectively, "Defendants"). On appeal, Plaintiff argues the trial court erred by: (1) granting Defendants summary judgment; and (2) denying his request for attorneys' fees concerning his successful motion to compel. After careful review, we affirm in part and reverse in part.

I. Factual & Procedural Background

This case concerns a hospital's decision to terminate a resident from the hospital's emergency-medicine residency program, an educational program for medical doctors. Defendant Duke is the hospital, and Plaintiff is the terminated resident. On 3 July 2018, Plaintiff sued Defendants for breach of contract and violations of the Americans with Disabilities Act (the "ADA").

On 16 November 2020, Plaintiff moved to compel Defendants to produce documents for which Defendants claimed privilege. On 31 March 2021, the trial court granted Plaintiff's motion. On 26 August 2021, Plaintiff filed a motion for sanctions and attorneys' fees concerning discovery. After conducting an in-camera review of the documents for which Defendants claimed privilege, the trial court denied Plaintiff's request for attorneys' fees.

On 30 June 2022, both parties moved for summary judgment. The evidence presented at the summary-judgment hearing tended to show the following. In April 2016, Plaintiff signed a contract outlining the terms of his employment with Duke (the "Contract"). Among other things, the Contract states that Plaintiff's sole source of compensation must be the program stipend, and not from other unapproved work: "this shall be the Trainee's sole source of compensation." The Contract also states that:

> During the term of this Agreement, the Trainee's appointment is conditional upon satisfactory performance of all Program elements by the Trainee. If the actions, conduct, or performance, professional, academic, or otherwise, of the Trainee are deemed by the Hospital, Office of Graduate Medical Education or Program Director to be inconsistent with the terms of this Agreement, the Hospital's standards of patient care, patient welfare, or the objectives of the Hospital or Program educational expectations, or if such actions, conduct, or performance reflects adversely on the Program or Hospital or disrupts operations at the Program or Hospital, corrective action may be taken by the Hospital, Director of Graduate Medical Education and/or Program Director as set forth in the Corrective Action and Hearing Procedures for Associate Medical Staff (a copy of which is available online at www.gme.duke.edu).

The parenthetical following the Corrective Action and Hearing Procedures for Associate Medical Staff (the "Procedures") includes a hyperlink to the Procedures. The Procedures include various protocols concerning notices, hearings, and appeals within Duke's corrective-action process.

By January of 2017, Defendants received several grievances concerning Plaintiff, including the following: "[Plaintiff] did not listen to concerns, was rude, and discharged a patient too soon"; Plaintiff made perceived racist comments concerning hairstyle; Plaintiff asked a patient questions deemed too personal; Plaintiff performed a pelvic exam that a patient described as an "absolutely unacceptable" experience; and Plaintiff exhibited "unprofessional behavior."

Plaintiff, however, points to several instances in which Defendants spoke highly of Plaintiff's performance, including: "[Plaintiff] is doing very well"; "[Plaintiff] has all of the skills he will ultimately need"; and Plaintiff is on track to "graduate the program." Duke employees made these last two statements thirty-one days and sixteen days, respectively, before Plaintiff's termination.

In February 2017, Plaintiff saw a counselor at Duke for depression. On 1 March 2017, Plaintiff completed Duke's Reasonable Accommodation Request Form concerning his depression. After receiving Plaintiff's request, Defendants agreed to "ensure that this need is observed." Specifically, Defendants committed to Plaintiff that he would not be "scheduled for more than 5 days in a row." Plaintiff does not allege that Defendants failed to meet this assurance.

On 22 March 2017, Defendants documented additional concerns about Plaintiff's behavior, including: Plaintiff having a "second job driving for Uber"; Plaintiff sleeping in hospital call rooms while "rent[ing] his apartment out on AirBnB"; and Plaintiff "rent[ing] his car out online" and using the hospital fatigue cab for regular transportation. When asked about his alleged other incomes, Plaintiff responded, "[n]o, this is all I do. It's not like I have a secret job or something."

On 30 March 2017, Defendants terminated Plaintiff's employment because of "institutional policy violations." Plaintiff appealed his termination to a hearing panel, and on 1 May 2017, the panel unanimously voted to uphold the termination. On 23 May 2017, Defendants notified Plaintiff of the final determination. Plaintiff and Defendants offer competing evidence as to whether Defendants complied with the Procedures when they terminated Plaintiff.

On 27 October 2022, the trial court granted Defendants summary judgment, dismissing Plaintiff's claims. On 23 November 2022, Plaintiff filed written notice of appeal.

II. Jurisdiction

This Court has jurisdiction under N.C. Gen. Stat. § 7A-27(b)(1) (2023).

III. Issues

The issues on appeal are whether the trial court erred by: (1) granting Defendants summary judgment; and (2) denying Plaintiff's request for attorneys' fees concerning his successful motion to compel.

IV. Analysis

A. Summary Judgment

We review appeals from summary judgment de novo. *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008). Under a de novo review, " 'the court considers the matter anew and freely substitutes its own judgment' for that of the lower tribunal." *State v. Williams*, 362 N.C. 628, 632–33, 669 S.E.2d 290, 294 (2008) (quoting *In re Greens of Pine Glen, Ltd. P'ship*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003)).

Summary judgment is appropriate when "there is no genuine issue as to any material fact," and a party is "entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2023). Concerning summary judgment, courts "must view the presented evidence in a light most favorable to the nonmoving party." *Dalton v. Camp*, 353 N.C. 647, 651, 548 S.E.2d 704, 707 (2001). "Since this rule provides a somewhat drastic

remedy, it must be used with due regard to its purposes and a cautious observance of its requirements in order that no person shall be deprived of a trial on a genuine disputed factual issue." *Kessing v. Nat'l Mortg. Corp.*, 278 N.C. 523, 534, 180 S.E.2d 823, 830 (1971).

Indeed, receiving summary judgment has the same effect as winning at trial—without going to trial. *See id.* at 533, 180 S.E.2d at 829 ("The purpose of summary judgment can be summarized as being a device to bring litigation to an early decision on the merits without the delay and expense of a trial where it can be readily demonstrated that no material facts are in issue.").

1. Breach of Contract Claims

[1] In his first argument, Plaintiff asserts that the trial court erred by granting Defendants summary judgment concerning his breach-of-contract claims. To support this, Plaintiff argues that (1) the Contract incorporated the Procedures, and (2) he presented evidence that Defendants breached the Procedures. After careful review, we agree with Plaintiff.

a. Incorporation

"The elements of a claim for breach of contract are (1) existence of a valid contract and (2) breach of the terms of that contract." *Poor v. Hill*, 138 N.C. App. 19, 26, 530 S.E.2d 838, 843 (2000) (citing *Jackson v. Cal. Hardwood Co.*, 120 N.C. App. 870, 871, 463 S.E.2d 571, 572 (1995)). Contract "construction is a question of law for the court." *Story v. Stokes*, 178 N.C. 409, 411, 100 S.E. 689, 690 (1919). Incorporation, the idea that a document referenced in a contract can become part of the contract, *see Incorporation by Reference*, Black's Law Dictionary (11th ed. 2019), is a question of construction and thus, a question of law, *see Walker v. Westinghouse Elec. Corp.*, 77 N.C. App. 253, 259, 335 S.E.2d 79, 83–84 (1985).

We considered contract incorporation in *Walker*, where an employee received a "handbook" from his employer. 77 N.C. App. at 259, 335 S.E.2d at 84. The handbook "apparently promised" that it would "become more than a handbook . . . it w[ould] become an understanding . . . ." *Id.* at 260, 335 S.E.2d at 84 (quoting the handbook). The *Walker* Court was "aware that a growing number of jurisdictions recognize that employee manuals purporting to set forth causes for termination may become part of the employment contract even in the absence of an express agreement." *Id.* at 259, 335 S.E.2d at 83.

Nonetheless, we stated that "the law of North Carolina is clear that unilaterally promulgated employment manuals or policies do not

become part of the employment contract unless expressly included in it." *Id.* at 259, 335 S.E.2d at 83–84. Therefore, the "contract did not, under our law, include the Handbook." *Id.* at 260, 335 S.E.2d at 84.

We again considered contract incorporation in *Supplee v. Miller-Motte Business College, Inc.*, 239 N.C. App. 208, 211, 768 S.E.2d 582, 587 (2015). There, the plaintiff signed a program-enrollment agreement that was "subject to all terms and conditions set forth in the Catalog." *Id.* at 211, 768 S.E.2d at 587. We held that the enrollment agreement "incorporated the terms and conditions set forth in the . . . student catalog," which therefore "became a part of the contract between defendants and [the plaintiff]." *Id.* at 219–20, 768 S.E.2d at 592.

Here, the Contract states that "corrective action may be taken . . . as set forth in the [Procedures.]" Because the "conditions set forth in the Catalog" were incorporated into the *Supplee* contract, *see id.* at 219–20, 768 S.E.2d at 592, likewise, the requirements "set forth in the [Procedures]" were incorporated into the Contract.

The Contract could have incorporated the Procedures with more force: For example, the Contract could have stated that "the procedures are incorporated into this contract," or "the procedures are part of this contract." Nonetheless, the Contract incorporated the Procedures because under *Supplee*, the Procedures were "expressly included" in the Contract. *See id.* at 219–20, 768 S.E.2d at 592. Accordingly, concerning Plaintiff's breach-of-contract claims, failure to incorporate the Procedures was not a basis upon which the trial court could grant Defendants judgment, as a matter of law. *See* N.C. Gen. Stat. § 1A-1, Rule 56(c).

b. Breach of the Procedures

Next, we must discern whether there are any genuine issues of material fact concerning Plaintiff's breach-of-contract claims. *See id.* A breach-of-contract claim requires a material breach, *see Fletcher v. Fletcher*, 123 N.C. App. 744, 752, 474 S.E.2d 802, 807–08 (1996), and whether a breach is material is a question of fact, *see Charlotte Motor Speedway, Inc. v. Tindall Corp.*, 195 N.C. App. 296, 302, 672 S.E.2d 691, 695 (2009).

Here, the Procedures include various protocols concerning notices, hearings, and appeals within Duke's corrective-action process. And concerning Plaintiff's breach-of-contract claims, Plaintiff and Defendants offer competing evidence as to whether Defendants followed the Procedures when they terminated Plaintiff. For example, Plaintiff

offered evidence that Defendants denied him an impartial appeals panel, as guaranteed by the Procedures, and Defendants offered evidence that Plaintiff's appeals panel was indeed impartial.

Because we "must view the presented evidence in a light most favorable to the nonmoving party," *see Dalton*, 353 N.C. at 651, 548 S.E.2d at 707, genuine issues of material fact remain in this case—specifically, whether Defendants breached the Procedures and, if so, whether the breaches were material, *see Charlotte Motor Speedway*, 195 N.C. App. at 302, 672 S.E.2d at 695. Therefore, the trial court erred when it granted Defendants the "drastic remedy" of summary judgment concerning Plaintiff's breach-of-contract claims, as Defendants were not entitled to "judgment as a matter of law" because genuine issues of material fact remain. *See Kessing*, 278 N.C. at 534, 180 S.E.2d at 830; N.C. Gen. Stat. § 1A-1, Rule 56(c).

2. ADA Claims

Next, Plaintiff challenges the trial court's grant of summary judgment concerning his three ADA claims: one alleging discrimination, one alleging failure to accommodate, and one alleging retaliation. We disagree with Plaintiff concerning the first two claims, but we agree with him concerning his final claim of retaliation.

The ADA prohibits certain employers from discriminating against disabled employees because of their disabilities. *See* 42 U.S.C. 12112(a). Courts analyze ADA claims under the *McDonnell Douglas* burden-shifting framework. *See Haynes v. Waste Connections, Inc.*, 922 F.3d 219, 223 (4th Cir. 2019); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802–03, 93 S. Ct. 1817, 1824, 36 L. Ed. 2d 668, 677–78 (1973).

Under *McDonnell Douglas*, a plaintiff must first show a prima-facie ADA claim. *Ennis v. Nat'l Ass'n of Bus. & Educ. Radio, Inc.*, 53 F.3d 55, 58 (4th Cir. 1995). If the plaintiff is successful, the burden shifts to the defendant to show a "legitimate, nondiscriminatory explanation which, if believed by the trier of fact, would support a finding that unlawful discrimination was not the cause of the employment action." *Id.* If the defendant is then successful, "the plaintiff bears the ultimate burden of proving that [the plaintiff] has been the victim of intentional discrimination." *Id.*

a. Discrimination Claim

[2] A prima-facie discrimination claim under the ADA requires: (1) a disabled plaintiff; (2) who was a "qualified individual"; (3) who suffered an adverse employment action because of a disability. *See Jacobs v. N.C.*

Admin. Off. of the Cts., 780 F.3d 562, 572 (4th Cir. 2015). Here, there is no dispute about whether Plaintiff is disabled or whether he suffered an adverse employment action. The parties only dispute whether Plaintiff is a "qualified individual."

A qualified individual is "an individual who, with or without reasonable accommodation, can perform the essential functions of the employment position." *Wilson v. Dollar Gen. Corp.*, 717 F.3d 337, 345 (4th Cir. 2013) (quoting 42 U.S.C. § 12111(8)). To establish that he is qualified, Plaintiff must show "(1) that he could satisfy the essential eligibility requirements of the program, i.e., those requirements 'that bear more than a marginal relationship to the [program] at issue, and (2) if not, whether any reasonable accommodation by [Defendants] would enable' [P]laintiff to meet these requirements." *Halpern v. Wake Forest Univ. Health Scis.*, 669 F.3d 454, 462 (4th Cir. 2012) (quoting *Tyndall v. Nat'l Educ. Ctrs., Inc.*, 31 F.3d 209, 213 (4th Cir. 1994)) (first alteration in original). In making these determinations, courts give deference to medical schools. *See id.* at 463 (noting that courts are in poor position to assess academic performance). We are in an equally poor position to assess medical practice, so similar deference applies in a medical-residency context. *See id.*

A qualified-individual analysis is a two-part question: (1) Are the employee's obligations "essential"? And (2) can the employee satisfy the obligations, regardless of employer accommodation? *See id.* at 462. We will begin Plaintiff's qualified-individual inquiry by analyzing his contractual obligations, specifically, his obligation to work solely for Duke.

i. Essential Function

"Under the ADA, '[a]n essential function is a fundamental job duty of the position at issue. The term does not include marginal tasks, but may encompass individual or idiosyncratic characteristics of the job.' " *Allen v. City of Raleigh*, 140 F. Supp. 3d 470, 482 (E.D.N.C. 2015) (quoting *Jones v. Nationwide Life Ins. Co.*, 696 F.3d 78, 88 (1st Cir. 2012)) (alteration in original). "[C]onsideration shall be given to the employer's judgment as to what functions of the job are essential, and if an employer has prepared a written job description before advertising or interviewing applicants for the job, the description shall be considered evidence of the essential functions of the job." 42 U.S. C. § 12111(8). "[C]ourt[s] give[] a 'significant degree' of deference to an employer's business judgment about the necessities of a job." *Jones*, 696 F.3d at 88 (quoting *Jones v. Walgreen Co.*, 679 F.3d 9, 14 (1st Cir. 2012)).

Here, the Contract states that Plaintiff's stipend from Duke "shall be the Trainee's sole source of compensation. Except for approved and authorized extracurricular activities, the Trainee shall not accept from any other fee of any kind for service." First, Plaintiff argues that this is a limit on Defendant's responsibility to pay, rather than a limit on Plaintiff's ability to work outside of the Program. We disagree.

If Plaintiff's reading was correct, the second sentence would be superfluous; if the stipend language is simply a limit on Duke, there is no need to double down and state that "*Trainee* shall not accept from any other fee of any kind for service." *See United States v. Butler*, 297 U.S. 1, 65, 56 S. Ct. 312, 319, 80 L. Ed. 477, 488 (1936) ("These words cannot be meaningless, else they would not have been used."); *Kungys v. United States*, 485 U.S. 759, 778, 108 S. Ct. 1537, 1550, 99 L. Ed. 2d 839, 857 (1988) (plurality opinion) (stating that "no provision should be construed to be entirely redundant"). Therefore, the Contract's compensation language limited Plaintiff's ability to work outside of the Program because otherwise, the second sentence would be redundant.

Second, we think adherence to this limitation was an "essential function" of Plaintiff's job. Defendants distilled this limitation to a contractual clause, which tends to show the essential nature of the limitation. *See* 42 U.S.C. § 12111(8). Indeed, if Plaintiff's obligation to work solely for Duke was merely marginal, why include it in the Contract? *See id.* Asked another way, would Defendants have allowed Plaintiff into the Program if Plaintiff's participation was contingent on his ability to simultaneously work elsewhere? That Plaintiff lied to Defendants about driving for Uber and renting his apartment is instructive. Because Plaintiff's work limitation was contractual, *see id.*, and because we give "a 'significant degree' of deference to an employer's business judgment about the necessities of a job," *see Jones*, 696 F.3d at 88, we think Plaintiff's obligation to work solely for Duke was an essential function of participating in the Program.

ii. Ability to Perform

Under the second prong of the qualified-individual analysis, we must discern "whether any reasonable accommodation by [Defendants] would enable [P]laintiff" to perform his essential functions. *See Halpern*, 669 F.3d at 462. The Fourth Circuit has noted that "[a]n employee may be qualified when hired, but could fail either to maintain his qualifications or, more commonly, to meet his employer's legitimate expectations for job performance." *Warch v. Ohio Cas. Ins. Co.*, 435 F.3d 510, 514 (4th Cir. 2006). So in cases where an employee is fired, "the prima facie case requires the employee to demonstrate 'that he was

"qualified" in the sense that he was doing his job well enough to rule out the possibility that he was fired for inadequate job performance, absolute or relative.' " *Id.* at 514–15 (quoting *Loeb v. Textron, Inc.*, 600 F.2d 1003, 1013 (1st Cir. 1979)).

Here, Plaintiff may have initially satisfied the essential function of working solely for Duke while in the Program; because Defendants admitted Plaintiff into the Program, Defendants must have thought so. But that is not the only inquiry. *See id.* at 514. The inquiry is also whether Plaintiff "maintain[ed] his qualifications," i.e., continued to honor his obligation to only work for Duke while in the Program.

The parties offer competing evidence concerning Plaintiff's performance in the Program—but the parties do not dispute that Plaintiff drove for Uber and rented his apartment through AirBnB while working at Duke. Then Plaintiff lied to Defendants about it. And relevant to our analysis, Defendants' reasonable accommodation—easing Plaintiff's workload—would not "enable [P]laintiff to meet" his sole-income commitment. *See Halpern*, 669 F.3d at 462. On the contrary, because Plaintiff's work hours were limited as an accommodation, he potentially had more time to drive for Uber.

Because we defer to medical professionals to determine when a person is "qualified," *see id.* at 463, we agree with Defendants concerning Plaintiff's ability, "with or without reasonable accommodation, [to] perform the essential functions of the employment position," *see Wilson*, 717 F.3d at 345. Put differently: Plaintiff did not perform the essential function of working solely for Duke while in the Program, and Defendants' accommodation had no bearing on Plaintiff's ability to do so. *See id.* at 345.

Therefore, Plaintiff cannot establish an element a prima-facie discrimination claim because he is not a "qualified individual." *See Jacobs*, 780 F.3d at 572. As Plaintiff cannot establish an element of prima-facie discrimination claim, the trial court did not err by granting Defendants summary judgment because Defendants were "entitled to a judgment as a matter of law." *See* N.C. Gen. Stat. § 1A-1, Rule 56(c); *Jacobs*, 780 F.3d at 572.

b. Failure to Accommodate Claim

[3] To establish a prima-facie failure-to-accommodate claim under the ADA, Plaintiff must show: "(1) that he was an individual who had a disability within the meaning of the statute; (2) that [Defendants] had notice of his disability; (3) that with reasonable accommodation he could perform the essential functions of the position . . . ; and (4) that

[Defendants] refused to make such accommodations." *Wilson*, 717 F.3d at 345 (quoting *Rhoads v. Fed. Deposit Ins. Corp.*, 257 F.3d 373, 387 n.11 (4th Cir. 2001)).

The ADA does not provide an all-inclusive definition of the term "reasonable accommodation." Rather, it gives examples of what a " 'reasonable accommodation' may include," like "job restructuring, part-time or modified work schedules, reassignment to a vacant position . . . and other similar accommodations." 42 U.S.C. § 12111(9)(B). "[T]he range of reasonable accommodations is broad . . . ." *Elledge v. Lowe's Home Ctrs., LLC*, 979 F.3d 1004, 1011 (4th Cir. 2020).

The Fourth Circuit has explained that "what counts as a reasonable accommodation is not an *a priori* matter but one that is sensitive to the particular circumstances of the case." *Id.* "[W]hat will serve as a reasonable accommodation in a particular situation may not have a single solution, but rather, many possible solutions." *Id.* As long as the employer's chosen accommodation is reasonable, "not even a well-intentioned court may substitute its own judgment for the employer's choice." *Id.* at 1012.

Here, Defendants granted Plaintiff's accommodation request before terminating his employment. Specifically, Defendants committed to Plaintiff that he would not be "scheduled for more than 5 days in a row." Plaintiff does not allege that Defendants failed to meet their assurance, and "modified work schedules" are one of the codified examples of a reasonable accommodation. *See* 42 U.S.C. § 12111(9)(B).

Plaintiff does not argue that Defendants' accommodation was unreasonable. Rather, Plaintiff argues that Defendants' accommodation "was inconsequential . . . because [they] intended to fire" him. Indeed, Plaintiff argues that Defendants "never implemented the accommodations because they intended to terminate plaintiff instead."

But if we accept Plaintiff's argument, every employer who fires a qualified individual after granting an accommodation is subject to a failure-to-accommodate suit if the employee claims the employer ultimately intended to fire him. This cannot be so. *See Wilson*, 717 F.3d at 345 (stating that the fourth element of a failure-to-accommodate claim requires a *refusal* to make the accommodation). In our view, Plaintiff's argument may support a retaliation claim, but not failure to accommodate. *See id.* Concerning Plaintiff's failure-to-accommodate claim, the facts are clear: Defendants granted Plaintiff's accommodation request by promising not to schedule him to work more than five consecutive days. Plaintiff does not allege that Defendants broke this promise.

Accordingly, there is "no genuine issue" concerning the last element of Plaintiff's failure-to-accommodate claim. *See id.*; N.C. Gen. Stat. § 1A-1, Rule 56(c). Therefore, the trial court appropriately granted Defendants summary judgment concerning Plaintiff's failure-to-accommodate claim because Defendants were "entitled to a judgment as a matter of law." *See* N.C. Gen. Stat. § 1A-1, Rule 56(c).

c. Retaliation Claim

[4] To establish a prima-facie retaliation claim under the ADA, Plaintiff must show: "(1) he engaged in protected conduct, (2) he suffered an adverse action, and (3) a causal link exists between the protected conduct and the adverse action." *Reynolds v. Am. Nat'l Red Cross*, 701 F.3d 143, 154 (4th Cir. 2012) (citing *A Soc'y Without a Name v. Virginia*, 655 F.3d 342, 350 (4th Cir. 2011)). Here, there is no dispute about whether Plaintiff engaged in protected conduct by seeking accommodations or whether he suffered an adverse employment action when Defendants terminated him from the Program. The parties only dispute whether there is a genuine issue concerning a "causal link" between the two.

"A temporal connection between the protected conduct and the adverse employment action may be sufficient to present a genuine factual issue on retaliation." *Lamb v. Qualex, Inc.*, 33 F. App'x 49, 60 (4th Cir. 2002) (citing *Kiel v. Select Artificials, Inc.*, 169 F.3d 1131, 1136 (8th Cir. 1999)). "Indeed, '[a] close temporal connection between the two events is generally enough to satisfy the third element of the prima facie test.' " *Id.* (quoting *McClendon v. Ind. Sugars, Inc.*, 108 F.3d 789, 796–97 (7th Cir. 1997)).

Here, on 1 March 2017, Plaintiff completed Duke's Reasonable Accommodation Request Form concerning his depression. On 30 March 2017, Defendants terminated Plaintiff's employment because of "institutional policy violations." In other words, there was less than one month between "the protected conduct and the adverse employment action," which is usually "sufficient to present a genuine factual issue on retaliation." *See id.* Because we "must view the presented evidence in a light most favorable to the nonmoving party," *see Dalton*, 353 N.C. at 651, 548 S.E.2d at 707, we believe the "causal link" element of Plaintiff's prima-facie case is satisfied, *see Reynolds*, 701 F.3d at 154.

Therefore, the burden shifts to Defendants to show a "legitimate, nondiscriminatory explanation which, if believed by the *trier of fact*, would support a finding that unlawful discrimination was not the cause of the employment action." *See Ennis*, 53 F.3d at 58 (emphasis added). Accordingly, a question of material fact remains, and the trial court

erred by granting Defendants summary judgment concerning Plaintiff's retaliation claim. *See* N.C. Gen. Stat. § 1A-1, Rule 56(c).

B. Attorneys' Fees

[5] In his final argument, Plaintiff asserts that the trial court erred by denying Plaintiff's request for attorneys' fees concerning his successful motion to compel. We disagree.

We review a trial court's decision to award or deny attorneys' fees under Rule 37 for abuse of discretion. *Graham v. Rogers*, 121 N.C. App. 460, 465, 466 S.E.2d 290, 294 (1996). "Abuse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988).

Normally when a motion to compel is granted under Rule 37, the trial court should award attorneys' fees to the moving party. N.C. Gen. Stat. § 1A-1, Rule 37(a)(4) (2023). But a trial court need not award attorneys' fees if "the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust." *Id.*

Here, there is nothing in the record to suggest that the trial court acted arbitrarily by denying Plaintiff's request for attorneys' fees concerning his successful motion to compel. The trial court "considered arguments of counsel" and conducted an in-depth, in-camera review of the documents for which Defendants claimed privilege, and the trial court decided, in its discretion, not to award attorneys' fees to Plaintiff. The trial court's decision was not "manifestly unsupported by reason," and therefore, the trial court did not abuse its discretion. *See Hennis*, 323 N.C. at 285, 372 S.E.2d at 527.

V. Conclusion

We conclude that the trial court erred in granting Defendants summary judgment concerning Plaintiff's breach-of-contract and ADA retaliation claims, but the trial court did not err concerning the remainder of the summary-judgment order. And the trial court did not err by declining to award Plaintiff attorneys' fees concerning his motion to compel. Accordingly, we reverse the trial court's order in part, affirm in part, and remand.

AFFIRMED in part, REVERSED in part, and REMANDED.

Judges COLLINS and WOOD concur.

[293 N.C. App. 531 (2024)]

IN RE THE MATTER OF THE PETITION FOR REINSTATEMENT
OF GREGORY BARTKO, Petitioner

No. COA23-980

Filed 7 May 2024

1. Attorneys—petition for reinstatement of law license—active sentence for felonies not completed—citizenship not restored—dismissal upheld

The final decision of the Disciplinary Hearing Commission granting the North Carolina State Bar's motion to dismiss a disbarred attorney's petition for reinstatement of his law license was affirmed where, because petitioner was still serving an active federal sentence for numerous felonies involving mail fraud and securities fraud, he failed to show that he had "complied with the orders and judgments of any court relating to the matters resulting in the disbarment" or that he had his citizenship restored as required by the governing administrative rules of the State Bar.

2. Attorneys—petition for reinstatement of law license—declaratory relief requested—Administrative Procedures Act inapplicable

In a proceeding involving a disbarred attorney's petition for reinstatement of his law license, the Disciplinary Hearing Commission (DHC) did not err by dismissing petitioner's motion for declaratory relief, which he made pursuant to the Administrative Procedures Act (APA) seeking to declare a governing administrative rule of the North Carolina State Bar unconstitutional. The APA did not apply to disciplinary proceedings of attorneys, for which the legislature has provided a more specific administrative procedure, and the legislature has not delegated authority to the DHC to hear motions for declaratory relief under the APA.

3. Attorneys—petition for reinstatement of law license—final decision of Disciplinary Hearing Commission—State Bar Council not appropriate appellate forum

In a proceeding involving a disbarred attorney's petition for reinstatement of his law license, where petitioner attempted to appeal the final decision of the Disciplinary Hearing Commission (DHC) dismissing his petition to the State Bar Council, the Council did not err by dismissing the purported appeal because it had no appellate jurisdiction over the DHC decision, from which appeal by right is to the North Carolina Court of Appeals.

Appeal by defendant from orders entered 13 September 2023 by the Disciplinary Hearing Commission of the North Carolina State Bar. Heard in the Court of Appeals 2 April 2024.

The North Carolina State Bar, by Deputy Counsels J. Cameron Lee and Kathryn H. Shields, for the respondent-appellee.

Gregory Bartko, pro se for the petitioner-appellant.

TYSON, Judge.

Gregory Bartko ("Petitioner") appeals from orders dismissing his petition for reinstatement to the North Carolina State Bar (the "State Bar"). We affirm.

I. Background

Petitioner was licensed to practice law and admitted to the State Bar on 29 June 1988. Petitioner was convicted in the United States District Court for the Eastern District of North Carolina of one count of: conspiracy to commit mail fraud, selling unregistered securities, laundering money instruments, engaging in unlawful monetary transactions, making false statements, aiding and abetting the sale of unregistered securities, and obstructing the Securities and Exchange Commission's proceedings and four counts of: mail fraud and aiding and abetting mail fraud on 18 November 2010. *See United States of America v. Gregory Bartko*, 728 F.3d 327 (2013).

Petitioner tendered an affidavit and surrendered his license to practice law to the Wake County Superior Court on 4 January 2011. Petitioner was disbarred by order entered on 8 February 2011. Petitioner was sentenced to an active term of 23 years in the United States Bureau of Prisons, to be followed by a three-year term of supervised release with the United States Probation Office. He was ordered to pay restitution of $885,946.89 to more than 170 victims.

Petitioner was incarcerated at a United States Bureau of Prisons facility until 9 September 2020 when he was transferred to home confinement during the COVID-19 pandemic to serve out the remainder of his sentence. Petitioner is scheduled for release to the United States Probation Office on 21 June 2029.

Petitioner filed a verified petition seeking reinstatement of his license to practice law in North Carolina, along with a supporting memorandum with the Disciplinary Hearing Commission ("DHC") on 12 May 2023.

The State Bar moved to dismiss the petition pursuant to 27 N.C.A.C. 1B § .0129(a)(9). Petitioner also filed a motion for declaratory relief under the North Carolina Administrative Procedures Act seeking the DHC to declare, *inter alia*, 27 N.C.A.C. 1B § .0129(a)(3)(E) was unconstitutionally vague in violation of the Due Process clauses of the Fifth and Fourteenth Amendments of the Constitution of the United States.

The DHC granted the State Bar's motion to dismiss the petition on 17 July 2023. The same day the DHC entered an order denying Petitioner's motion for a declaratory ruling. Petitioner appealed both orders to the State Bar Council. The State Bar Council rejected all appeals.

Petitioner appealed.

II. Jurisdiction

Jurisdiction lies in this Court pursuant to N.C. Gen. Stat. §§ 7A-27(b)(1); 84-28(h) (2023) ("There shall be an appeal of right by either party from any final order of the Disciplinary Hearing Commission to the North Carolina Court of Appeals.").

III. Issues

Petitioner argues the DHC erred by: (1) granting the State Bar's motion to dismiss; (2) failing to convert the State Bar's Rule 12(b)(6) motion to dismiss to a Rule 56 motion for summary judgment; (3) failing to address Petitioner's constitutional challenges; and, (4) refusing to consider Petitioner's verified statements on his ability and competence to carry out the responsibilities of a practicing lawyer. Petitioner further argues the N. C. State Bar Council erred in refusing to hear his appeal of the DHC orders.

IV. Standard of Review

"A Rule 12(b)(6) motion tests the legal sufficiency of the pleading." *Kemp v. Spivey*, 166 N.C. App. 456, 461, 602 S.E.2d 686, 690 (2004) (citation and quotation marks omitted). "When considering a [Rule] 12(b)(6) motion to dismiss, the [reviewing authority] need only look to the face of the [pleading] to determine whether it reveals an insurmountable bar to plaintiff's recovery." *Carlisle v. Keith*, 169 N.C. App. 674, 681, 614 S.E.2d 542, 547 (2005) (citation and quotation marks omitted).

"On appeal from a motion to dismiss under Rule 12(b)(6) this Court reviews *de novo* whether, as a matter of law, the allegations of the complaint . . . are sufficient to state a claim upon which relief may be granted[.]" *Christmas v. Cabarrus Cty.*, 192 N.C. App. 227, 231, 664 S.E.2d 649, 652 (2008) (citation and quotation marks omitted). This Court

"consider[s] the allegations in the complaint [as] true, construe[s] the complaint liberally, and only reverse[s] the trial court's denial of a motion to dismiss if [the] plaintiff is entitled to no relief under any set of facts which could be proven in support of the claim." *Id.* (citation omitted).

V. The State Bar's Motion to Dismiss

[1] Petitioner argues the DHC erred in granting the State Bar's Rule 12(b)(6) motion to dismiss his petition for reinstatement. Our Administrative Code articulates the content of a petitioner's reinstatement petition to the State Bar and requires:

> (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. Upon receipt of the petition, the secretary will transmit the petition 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 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 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).

27 N.C.A.C. 1B.0129(a)(6).

The requirements Petitioner carries the burden to meet by "clear, cogent, and convincing evidence" are also set forth in our Administrative Code:

> (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 opposition to or concurrence with the petition 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 petition;

(C) the petitioner has reformed and presently possesses the moral qualifications required for admission to practice law in this state taking into account the gravity of the misconduct which resulted in the order of disbarment;

(D) permitting the petitioner to resume the practice of law within the state will not be detrimental to the integrity and standing of the bar, to the administration of justice, or to the public interest, taking into account the gravity of the misconduct which resulted in the order of disbarment;

(E) *the petitioner's citizenship has been restored if the petitioner has been convicted of or sentenced for the commission of a felony*;

(F) the petitioner has complied with Rule .0128 of this subchapter;

(G) the petitioner has complied with all applicable orders of the commission and the council;

(H) *the petitioner has complied with the orders and judgments of any court relating to the matters resulting in the disbarment*;

(I) the petitioner has not engaged in the unauthorized practice of law during the period of disbarment;

(J) the petitioner has not engaged in any conduct during the period of disbarment constituting grounds for discipline under G.S. 84-28(b);

(K) the petitioner understands the current Rules of Professional Conduct. Participation in continuing legal

> education programs in ethics and professional responsibility for each of the three years preceding the petition date may be considered on the issue of the petitioner's understanding of the Rules of Professional Conduct. Such evidence creates no presumption that the petitioner has met the burden of proof established by this section;
>
> (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. 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 petitioners who were disbarred after August 29, 1984;
>
> (M) the petitioner has reimbursed all sums which the Disciplinary Hearing Commission found in the order of disbarment were misappropriated by the petitioner and which have not been reimbursed by the Client Security Fund;
>
> (N) the petitioner paid all dues, Client Security Fund assessments, and late fees owed to the North Carolina State Bar as well as all attendee fees and late penalties due and owing to the Board of Continuing Legal Education at the time of disbarment.
>
> (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.

27 N.C.A.C. 1B.0129(3) (A)-(P) (emphasis supplied).

The DHC granted the State Bar's motion to dismiss on the grounds Petitioner failed to have "complied with the orders and judgments of any court relating to the matters resulting in the disbarment." 27 N.C.A.C.

1B.0129(a)(3)(H). Petitioner alleged he could comply with this provision. Petitioner failed to carry his burden to show he has completed his federal active and probationary sentences under "judgments of any court relating to the matters resulting in the disbarment." *Id.* Petitioner's argument is overruled.

The State Bar also alleged Petitioner has failed to comply with 27 N.C.A.C. 1B.0129(3)(E), which requires a petitioner to have had their citizenship restored if they have been convicted of a felony in support of its motion to dismiss. Petitioner was convicted of multiple felonies and is still serving his active federal sentence, to be followed by three years of mandatory probation, and his citizenship has not been restored.

The DHC did not err in granting the State Bar's motion to dismiss. In light of our holding, we need not address Petitioner's remaining arguments relating to the State Bar's motion to dismiss. Petitioner's allegations are insufficient "to state a claim upon which relief may be granted[,]" *Christmas*, 192 N.C. App. at 231, 664 S.E.2d at 652 (citation omitted), or to assert any grounds to carry his burden by "clear, cogent, and convincing evidence" to meet the requirements for reinstatement as forth in our Administrative Code. 27 N.C.A.C. 1B.0129(3).

VI. Constitutional Challenges Before the DHC

[2] Petitioner argues the DHC erred in dismissing his motion seeking a declaratory ruling concluding 27 N.C.A.C. 1B.0129(a)(3iE) is unconstitutional. Petitioner's argument is misplaced. "The Legislature has expressly and specifically delegated to the State Bar Council and DHC the power to regulate and handle disciplinary proceedings of the State Bar." *N.C. State Bar v. Rogers*, 164 N.C. App. 648, 654, 596 S.E.2d 337, 341 (2004) (citations omitted).

The Administrative Procedures Act "is a statute of general applicability, and does not apply where the Legislature has provided for a more specific administrative procedure to govern a state agency." *Id.* (citation omitted). Petitioner asserts the DHC was required to apply N.C. Gen. Stat. § 150B-4(a) (2023). The Administrative Procedures Act is not applicable to the DHC in Petitioner's motion for a declaratory ruling. The Legislature has not delegated authority to the DHC to hear motions for declaratory relief under the Administrative Procedures Act. *Id.*

VII. Appellate Jurisdiction of the State Bar Council

[3] Petitioner argues the State Bar Council erred in dismissing his appeal of the dismissal of his motion for a declaratory ruling. Our General Statutes provide: "There shall be an appeal of right by either

party from any final order of the Disciplinary Hearing Commission to the North Carolina Court of Appeals." N.C. Gen. Stat. § 84-28(h). The State Bar Council did not err in dismissing Petitioner's purported appeal. *Id.*

VIII. Conclusion

Petitioner has not complied with execution and terms of the judgment and completed his federal sentence, and he has not had his citizenship restored following serving his sentence. The DHC does not have jurisdiction to hear motions for declaratory relief under the Administrative Procedures Act. The DHC did not err in dismissing Petitioner's petition and motion. The State Bar Council did not have appellate jurisdiction over a final order of the DHC. *Id.* The orders of the DHC and State Bar Council are affirmed. *It is so ordered.*

AFFIRMED.

Judges STROUD and GORE concur.

IN RE D.J.Y.

No. COA23-1079

Filed 7 May 2024

Juveniles—delinquency—petition—jurisdictional requirements—court counselor's approval for filing—court counselor's signature

The adjudication and disposition orders in a juvenile delinquency case were vacated where, because the section of the juvenile petition indicating whether the juvenile court counselor approved the petition for filing was left completely blank and did not contain the court counselor's signature, the trial court lacked subject matter jurisdiction to adjudicate the juvenile delinquent and to enter the subsequent disposition order.

Appeal by the juvenile from orders entered 30 August 2023 by Judge Chris Sease in Rowan County District Court. Heard in the Court of Appeals 3 April 2024.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Kimberly D. Potter, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Jillian C. Franke, for the juvenile-appellant.

WOOD, Judge.

The juvenile ("Dawson")[1] appeals the order of the trial court adjudicating him delinquent and its subsequent disposition order. Because the juvenile court counselor did not approve the juvenile petition for filing and did not sign the relevant portion of the juvenile petition, the trial court lacked subject matter jurisdiction to adjudicate the juvenile delinquent and, consequently, lacked jurisdiction to enter a disposition order.

I. Factual and Procedural History

On 1 June 2023, a juvenile petition was filed alleging Dawson committed the offense of injury to personal property in violation of N.C. Gen. Stat. § 14-160(b) (classifying wanton and willful injury to personal property of another causing damage in excess of $200.00 as a Class 1 misdemeanor) with an offense date of 16 May 2023. The section of the juvenile petition titled "decision of court counselor regarding the filing of the petition" was left blank. Therefore, the box indicating "approved for filing" and the box for the court counselor's signature were blank as well. The trial court held the adjudication and disposition hearings on 25 August 2023. The court counselor was not present at the hearings.

On 16 May 2023, as Sarah Terry ("Terry") was leaving the school where her daughter attends, Dawson pulled up behind her driving erratically and "giving [her] the finger." Terry followed Dawson home and asked to speak with his parents, and Dawson began swearing at her. Dawson offered to give Terry his phone to speak to his mother, but Terry did not want to speak with her at that moment because there was too much "yelling" and "chaos." Terry testified she gave his phone back[2] to him and that Dawson then punched the passenger side rear door of her vehicle causing $1,300.00 of damage. Following the hearing, the trial court adjudicated Dawson delinquent for having committed the Class 1 misdemeanor offense of injury to personal property. Dawson gave oral notice of appeal in open court.

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1. A pseudonym is used to protect the identity of the juvenile pursuant to N.C. R. App. P. 42(b).

2 Dawson testified he was not screaming at her, and that Terry threw his phone, breaking it.

On 30 August 2023, the trial court entered a written adjudication order finding Dawson delinquent. The same day, the trial court entered the disposition order placing Dawson on supervised probation for six months, requiring him to cooperate with the Youth Development Initiatives Life Skills Academy for six months, and ordering that he pay $200.00 in restitution.

II. Analysis

Dawson argues the trial court lacked subject matter jurisdiction over the petition because the court counselor did not approve the juvenile petition for filing in accordance with N.C. Gen. Stat. § 7B-1702. Dawson argues that therefore, the adjudication and disposition orders are void. We agree.

"It is well-established that the issue of a court's jurisdiction over a matter may be raised at any time, even for the first time on appeal." *State v. Webber*, 190 N.C. App. 649, 650, 660 S.E.2d 621, 622 (2008). "The sufficiency of a juvenile petition is a jurisdictional issue that this Court reviews *de novo*." *In re J.F.*, 237 N.C. App. 218, 221, 766 S.E.2d 341, 344 (2014).

"When a petition is fatally deficient, it is inoperative and fails to evoke the jurisdiction of the court." *In re B.D.W.*, 175 N.C. App. 760, 761, 625 S.E.2d 558, 560 (2006). "An order is void *ab initio* only when it is issued by a court that does not have jurisdiction." *State v. Sams*, 317 N.C. 230, 235, 345 S.E.2d 179, 182 (1986).

First, a juvenile court counselor must conduct a preliminary inquiry analyzing whether "the facts contained in the [juvenile] complaint . . . state a case within the jurisdiction of the court," whether the complaint is legally sufficient, and whether "the matters alleged are frivolous." N.C. Gen. Stat. § 7B-1701(a). Next, "[t]he juvenile court counselor shall decide . . . whether a complaint shall be filed as a juvenile petition, handled as a juvenile consultation for a vulnerable juvenile, or handled in some other manner authorized by this Article." N.C. Gen. Stat. § 7B-1703(a). One option the juvenile court counselor has is to "divert the juvenile pursuant to a diversion plan." N.C. Gen. Stat. § 7B-1706(a). If the juvenile court counselor decides to divert the juvenile, he or she may refer "the juvenile to any of the following resources: (1) An appropriate public or private resource; (2) Restitution; (3) Community service; (4) Victim-offender mediation; (5) Regimented physical training; (6) Counseling; (7) A teen court program, as set forth in subsection (c) of this section." *Id.* The juvenile court counselor also "may enter into a diversion contract with the juvenile and the juvenile's parent, guardian, or custodian," provided that

the juvenile court counselor made "a finding of legal sufficiency" of the juvenile complaint and with the "the consent of the juvenile and the juvenile's parent, guardian, or custodian." N.C. Gen. Stat. § 7B-1706(a)–(b). Successful completion of the diversion contract ensures that the juvenile complaint will not proceed before the court as a juvenile petition. *See* N.C. Gen. Stat. § 7B-1706(b).

If the juvenile complaint is to proceed as a petition to an adjudication hearing, the juvenile court counselor must approve it for filing. "[I]f the juvenile court counselor determines that a complaint should be filed as a petition," then he or she "*shall include on it . . . the words 'Approved for Filing', shall sign it*, and shall transmit it to the clerk of superior court." N.C. Gen. Stat. § 7B-1703(b) (emphasis added). The court counselor "*shall* complete evaluation of a complaint within 15 days of receipt of the complaint, with an extension for a maximum of 15 additional days at the discretion of the chief court counselor." N.C. Gen. Stat. § 7B-1703(a) (emphasis added).

Side two of the AOC-J-323 form, the standardized juvenile delinquency petition form, contains a section titled "decision of court counselor regarding the filing of the petition." The court counselor can check box one, "approved for filing," or box two, "not approved for filing." This Court has held "that a petition alleging delinquency that does not include the signature of a juvenile court counselor, or other appropriate representative of the State, and the language 'Approved for Filing,' . . . fails to invoke the trial court's jurisdiction in the subject matter." *In re T.K.*, 253 N.C. App. 443, 448, 800 S.E.2d 463, 467 (2017). In so holding, this Court reasoned that finding a juvenile court counselor's approval for filing to be a jurisdictional prerequisite would promote the purposes of the juvenile delinquency system enumerated in Juvenile Code Section 7B-1500:

> (1) To protect the public from acts of delinquency.
>
> (2) To deter delinquency and crime, including patterns of repeat offending:
>
> > a. By providing swift, effective dispositions that emphasize the juvenile offender's accountability for the juvenile's actions; and
> >
> > b. By providing appropriate rehabilitative services to juveniles and their families.
>
> (3) *To provide an effective system of intake services for the screening and evaluation of complaints* and, in appropriate cases, where court intervention is not

> necessary to ensure public safety, to refer juveniles to community-based resources.
>
> (4) To provide uniform procedures that assure fairness and equity; that protect the constitutional rights of juveniles, parents, and victims; and that encourage the court and others involved with juvenile offenders to proceed with all possible speed in making and implementing determinations required by this Subchapter.

Id. at 447–48, 800 S.E.2d at 467 (emphasis in original) (quoting N.C. Gen. Stat. § 7B-1500).

Here, the section of the juvenile petition to indicate the juvenile court counselor's approval or disapproval for filing was left completely blank. There was no box checked, and the court counselor did not include his signature in this section. Thus, on its face, the juvenile petition was fatally deficient and did not vest subject matter jurisdiction in the trial court. Accordingly, the adjudication and disposition orders are void *ab initio* because the trial court lacked jurisdiction to enter them. Moreover, it is impossible to determine whether the juvenile court counselor intended to approve the filing of a petition or to divert the juvenile pursuant to N.C. Gen. Stat. § 7B-1706(a).

The State argues this Court should review the entire record to determine whether it reveals the court counselor approved the petition for filing. The State cites *In re Register*, 84 N.C. App. 336, 352 S.E.2d 889 (1987) for the proposition that there must be a total absence of evidence in the record that the court counselor conducted the initial assessment of the petition. In that case, this Court stated, "There is nothing in the record to indicate that the intake counselor made any preliminary inquiry or evaluation." *In re Register*, 84 N.C. App. at 346, 352 S.E.2d at 894. However, this Court analyzed the juveniles' claim of selective prosecution, noting that the proper intake process was not conducted because there was no evidence an "intake counselor" conducted the required preliminary evaluation. Thus, this Court determined, the district attorney improperly "injected" himself into the case because the intake counselor did not initially disapprove of the filing of the petition. *Id*. at 343–44, 352 S.E.2d at 892–93. Therefore, this Court's holding in *In re Register* is not relevant to the question of whether the absence of a court counselor's approval of a juvenile petition for filing is necessary for a district court to obtain subject matter jurisdiction.

Moreover, subsequent to *In re Register*, this Court in *In re T.K.* held that the "juvenile court counselor's role in signing and approving

a petition for delinquency *is the only indication on the face of a petition* that a complaint against a juvenile has been screened and evaluated by an appropriate authority." 253 N.C. App. at 448, 800 S.E.2d at 467 (emphasis added). Here, the State requests we determine whether the court counselor approved a petition for filing based on his or her signature in the verification section of the petition. First, the verification requirement is separate and distinct from the requirement that a court counselor approve a juvenile petition for filing, and it appears in a separate portion of statute. N.C. Gen. Stat. § 7B-1803(a). Second, the court report, which in this case indicates the court counselor conducted a Youth Assessment & Screening Instrument assessment and gang assessment, among other assessments, is also a separate requirement of the court counselor's intake responsibilities pursuant to N.C. Gen. Stat. § 7B-1702 (requiring that the court counselor consider certain criteria and "conduct a gang assessment for juveniles who are 12 years of age or older"). Furthermore, the court report was introduced at disposition, as is the proper time to introduce the court report, and not considered at adjudication. Notwithstanding, a court counselor's court report does not satisfy the requirement that, if a court counselor "determines that a complaint should be filed as a petition," he or she "shall include on it . . . the words 'Approved for Filing' [and] shall sign it." N.C. Gen. Stat. § 7B-1703(b).

Accordingly, the State's arguments fail.

III. Conclusion

Because the court counselor did not approve the juvenile petition for filing by signing the relevant portion of the juvenile petition, the trial court lacked subject matter jurisdiction over the petition. Accordingly, the adjudication and disposition orders are void *ab initio*. Thus, the adjudication and disposition orders are vacated, and the juvenile petition is dismissed. It is so ordered.

VACATED AND DISMISSED.

Judges ARROWOOD and FLOOD concur.

IN THE MATTER OF D.R.F., JR.

No. COA23-473

Filed 7 May 2024

1. Constitutional Law—First Amendment—anti-threat statute —true threat exception—subjective and objective intent considered

In a juvenile delinquency proceeding for threatening mass violence on educational property (a criminal offense per N.C.G.S. § 14-277.6), the district court did not err in denying a motion to dismiss the petition on First Amendment grounds after determining that a juvenile's statement that he was "going to shoot up" his school constituted a true threat, thus falling into a limited exception to the constitutional prohibition on criminalizing the content of speech. A true threat, defined as an objectively threatening statement communicated with subjective intent to threaten, was shown by testimony from the juvenile's fellow students regarding the three pertinent but non-dispositive factors—the context, the language deployed, and the reaction of the listeners—in that the threat was made at school as students were leaving class for lunch; was explicit and made in a serious tone of voice; and caused fear among listeners, along with an offer from another student to "bring the guns."

2. Threats—anti-threat statute—true threat—sufficiency of the evidence

In a juvenile delinquency proceeding for threatening mass violence on educational property (a criminal offense per N.C.G.S. § 14-277.6), the district court did not err in denying a motion to dismiss the petition on sufficiency grounds where the State presented substantial evidence that the juvenile's statement that he was "going to shoot up" his school constituted a true threat, which requires proof of both objectively threatening content and a subjective intent to threaten. The juvenile verbally communicated his threat to a group of students waiting to go to lunch after class and was overheard by at least two students who took the threat seriously. The statute only requires that the threatening communication be made to a person or group—not that the person or group themselves be threatened.

3. Juveniles—delinquency—disposition continued—secure custody pending disposition

Following the adjudication of a juvenile as delinquent for threatening mass violence on educational property (a criminal offense per

N.C.G.S. § 14-277.6), the district court abused its discretion by continuing disposition under N.C.G.S. § 7B-2406 without good cause or extraordinary circumstances shown by the State and by holding the juvenile in secure custody pending disposition pursuant to N.C.G.S. § 7B-1903(c) without a legitimate purpose. As a result, that portion of the juvenile's adjudication order was vacated.

Appeal by Juvenile from Orders entered 28 November 2022 by Judge David V. Byrd in Yadkin County District Court. Heard in the Court of Appeals 31 October 2023.

Attorney General Joshua H. Stein, by Deputy Solicitor General Lindsay Vance Smith, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender John F. Carella, for Juvenile-Appellant.

HAMPSON, Judge.

Juvenile D.R.F., Jr. (Daniel[1]) appeals from a Juvenile Adjudication Order finding he committed the offense of Communicating a Threat to Commit Mass Violence on Educational Property and adjudicating him as a delinquent juvenile and a Juvenile Level 2 Disposition Order placing him on 12 months of probation and committing him in secure custody for seven days. The Record before us tends to reflect the following:

On 26 May 2022—after two prior Juvenile Petitions in the case alleging similar facts had previously been filed and dismissed in the case—a Deputy with the Yadkin County Sheriff's Office filed a verified Juvenile Petition. The Petition alleged Daniel had threatened to commit an act of mass violence on educational property in violation of N.C. Gen. Stat. § 14-277.6. The Petition was heard by the trial court on 2 June 2022.

At the outset of this hearing, the trial court, with consent of the parties, conducted a consolidated first appearance, probable cause, and adjudication hearing. The parties agreed the trial court could record and consider the evidence presented in support of the State's showing of probable cause as the State's evidence for adjudication. At this hearing, the State presented testimony from three other students: Samantha, Jillian, and Gerald.[2]

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1. A pseudonym for the Juvenile stipulated to by the parties.

2. Pseudonyms employed by the parties.

Samantha, Jillian, and Gerald each testified that they were in a chorus class with Daniel at a local high school during the spring semester of 2022. Samantha testified there were approximately 15 to 17 students in the class. On 6 January 2022, the students were gathered near the exit of the auditorium after the chorus class waiting to go to lunch. Samantha saw Daniel talking with a group of other students. She heard Daniel say "that he was going to shoot up the school." Samantha could not identify any of the other students. Samantha testified the statement made her feel "[f]rightened like I was really scared." She reported Daniel's statement to the School Resource Officer.

Jillian testified she "heard someone say, 'I will bring the guns.' " Jillian further testified Samantha told her she heard Daniel "say that he was going to shoot up the school[.]" Jillian "was scared because I don't want to be in the next school to get shot up." She made a report to the School Resource Officer after lunch.

Gerald testified he heard Daniel state: "that they was going to shoot up the school." Like Samantha, he did not know the other students. He testified that hearing the statement made him feel "sick to my stomach[,]" meaning scared. Over Daniel's objection, Gerald testified about a separate incident with Daniel where Daniel had threatened Gerald by text message and told Gerald he was going to make a "diss track." Gerald further testified Daniel then made "a video about blowing my brains out and others." This was why Gerald's sense of fear was heightened when he heard Daniel's comment. Gerald described Daniel's tone of voice as "serious." Gerald did not see anyone's reaction to the statement but did not hear anyone laugh.

Following this testimony, the trial court found there was probable cause to proceed to adjudication. Daniel, through counsel, denied the allegations in the Petition. The State rested on the evidence presented through the testimony of Samantha, Jillian, and Gerald.

At the close of the State's evidence, Daniel, through counsel, moved to dismiss the Petition for insufficient evidence. The trial court denied the motion and the parties presented arguments. Daniel's trial counsel argued there was insufficient evidence Daniel communicated a threat to commit mass violence on educational property. Daniel's trial counsel also argued there was no evidence Daniel's statement constituted a true threat and, as such, was protected speech under the First Amendment to the United States Constitution.

Following trial counsel's argument, the trial court rendered its adjudication finding beyond a reasonable doubt Daniel had committed

the offense of Communicating a Threat to Commit Mass Violence on Educational Property. The State requested the trial court continue disposition for seven days while Daniel was held in secure custody. Daniel's trial counsel objected to Daniel being held in secure custody. The trial court continued disposition and required Daniel to be held in secure custody for seven days pending disposition.

The disposition hearing was held on 9 June 2022. The trial court orally ordered Daniel placed on juvenile probation for 12 months. The trial court further ordered Daniel to intermittent detention of an additional seven days suspended upon Daniel's completion of 50 hours of community work. The trial court also noted Daniel's oral Notice of Appeal.

On 28 November 2022, the trial court entered its written Juvenile Adjudication Order and Juvenile Level 2 Disposition Order. In the written Juvenile Adjudication Order, the trial court found:

> The juvenile made a "true threat" to shoot up the school. Each student witness who heard the juvenile's threat testified that they took the threat seriously. One witness testified that it made him "sick to his stomach" with fear. Although one witness did not believe that the threat would be carried out immediately, she believed that it would be carried out. The Court finds that a reasonable hearer would objectively construe the statement as an actual threat causing fear. The Court further finds the juvenile subjectively intended the statement to be construed as a threat. Indeed, another student told the juvenile that he "would bring the gun." There is no evidence that there was any laughter or joking at the time that the threat was made. Further, the juvenile's prior making of a video threatening a fellow student tends to show his intent that the statement be construed as a threat.

The trial court's Adjudication Order also noted the continuance of disposition and placement of Daniel in secure custody for seven days pending disposition. The trial court's Juvenile Level 2 Disposition Order was entered consistent with its prior orally-rendered ruling. Daniel timely filed written Notice of Appeal from both the Juvenile Adjudication Order and the Juvenile Level 2 Disposition Order on 8 December 2022.

Issues

The issues on appeal are whether: (I) there was sufficient evidence Daniel's statement that he was going to shoot up the school constituted a true threat to survive dismissal on constitutional grounds; (II) there was

sufficient evidence Daniel committed the offense of Communicating a Threat of Mass Violence on Educational Property to survive a motion to dismiss; and (III) the trial court abused its discretion by continuing disposition and placing Daniel in secure custody pending disposition.

Analysis

I. True Threat

[1] Daniel first argues the trial court's failure to dismiss the Petition and its adjudication of him as delinquent based on his statement he was going to shoot up the school constitutes a violation of his First Amendment right of free speech. Specifically, Daniel argues there was insufficient evidence his statement was objectively threatening to his listeners or that he had the subjective intent to threaten violence. As such, Daniel contends the State presented insufficient evidence his statement constituted a true threat. He asserts, then, the State failed to establish his statement was not protected speech under the First Amendment.

" 'The standard of review for alleged violations of constitutional rights is de novo.' " *State v. Shackelford*, 264 N.C. App. 542, 551, 825 S.E.2d 689, 695 (2019) (quoting *State v. Roberts*, 237 N.C. App. 551, 556, 767 S.E.2d 543, 548 (2014)). "Under the de novo standard, this Court 'considers the matter anew and freely substitutes its own judgment for that of the lower tribunal.' " *Id.* (quoting *State v. Williams*, 362 N.C. 628, 632-33, 669 S.E.2d 290, 294 (2008)). " '[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.' " *State v. Taylor*, 379 N.C. 589, 608, 866 S.E.2d 740, 755 (2021) (quoting *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 499, 104 S. Ct. 1949, 1958, 80 L. Ed. 2d 502 (1984)). "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.' " *Id.* (quoting *Desmond v. News and Observer Publ'g Co.*, 375 N.C. 21, 44, n.16, 846 S.E.2d 647, 662, n.16 (2020)).

"Under the First Amendment, the State may not punish an individual for speaking based upon the contents of the message communicated." *Id.* at 605, 866 S.E.2d at 753. Our Supreme 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." *Id.* One such limited exception is when the criminalized speech constitutes a "true threat." *See id.* at 598-599, 866 S.E.2d at 748.

The United States Supreme Court appears to have first applied the term "true threat" in its per curiam opinion in *Watts v. United States*, 394 U.S. 705, 708, 89 S. Ct. 1399, 1401, 22 L. Ed. 2d 664 (1969). It later explained: " '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." *Virginia v. Black*, 538 U.S. 343, 359, 123 S. Ct. 1536, 1548, 155 L. Ed. 2d 535 (2003) (citations omitted). "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.' " *Id.* at 359-60, 123 S. Ct. 1536, 1548, 115 L. Ed. 2d 535 (citations omitted).

Here, the Petition alleged Daniel had communicated a threat of mass violence on educational property in violation of N.C. Gen. Stat. § 14-277.6. This Court has specifically recognized the true threat analysis is applicable to this anti-threat statute to guard against the use of Section 14-277.6 to infringe upon First Amendment rights. *In re Z.P.*, 280 N.C. App. 442, 445, 868 S.E.2d 317, 319 (2021). We observed: "The United States Supreme Court has concluded that an anti-threat statute requires the government to prove a 'true threat.' " *Id.* (citing *Watts*, 394 U.S. at 708, 89 S.Ct. at 1401. We further noted: "That Court has explained that a true threat, for purposes of criminal liability, depends on both how a reasonable hearer would objectively construe the statement and how the perpetrator subjectively intended her statement to be construed." *Id.* (citing *Elonis v. United States*, 575 U.S. 723, 737-38, 135 S.Ct. 2001, 2010, 192 L. Ed. 2d 1 (2015)).

Our Supreme Court defines "a true threat as an objectively threatening statement communicated by a party which possesses the subjective intent to threaten a listener or identifiable group." *Taylor*, 379 N.C. at 605, 866 S.E.2d at 753. "[I]n 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 deployed, and (3) the reaction of the listeners upon hearing the statement, although no single factor is dispositive." *Id.* at 600-01, 866 S.E.2d at 750.

More recently, in *Counterman v. Colorado*, the United States Supreme Court has expounded further on the true threats analysis. The Court again acknowledged: "True threats of violence are outside the bounds of First Amendment protection and punishable as crimes." *Counterman v. Colorado*, 600 U.S. 66, 69, 143 S. Ct. 2106, 2111, 216

L. Ed. 2d 775 (2023). The Court first held under a true threats analysis, the First Amendment "requires proof that the defendant had some subjective understanding of the threatening nature of his statements." *Id.* Second, it held that "a mental state of recklessness is sufficient." *Id.* As such, "[t]he State must show that the defendant consciously disregarded a substantial risk that his communications would be viewed as threatening violence." *Id.* at 69, 143 S. Ct. at 2111-12.

In this case, Daniel argues the State failed to present any evidence of the context in which Daniel made the alleged threat. Daniel contends the State was required to prove the exact contents of the alleged threat, the context in which Daniel was speaking, and identify or call as witnesses the students to whom Daniel was directly speaking. Daniel asserts the trial court could thus only speculate as to whether the alleged threat constituted a true threat.

In *In re Z.P.*, this Court analyzed whether a student's alleged threat "to blow up the school" objectively constituted a true threat for purposes of a delinquency petition alleging a threat of mass violence on educational property. *Z.P.*, 280 N.C. App. at 446, 868 S.E.2d at 319. This Court summarized the evidence in that case:

> Three of Sophie's classmates (Madison, Tyler, and Caleb) each testified to hearing Sophie threaten to blow up the school, though none of them testified that they thought she was serious when she made the threat.
>
> Madison testified that Sophie talked about bombing the school. Madison testified that she did not think Sophie was serious when making the statement, and Madison did not report the threat to any adult.
>
> Tyler testified that Sophie "said something about a bomb" and said "she was going to blow up the school." Tyler offered in a joking manner to help her build the bomb and stated that he "thought it was just a joke."
>
> Caleb also heard Sophie's threat about blowing up the school but was equivocal about his perception of Sophie's seriousness, stating that her statement was "either [ ] a joke or it could be serious."

Id.

Ultimately, this Court concluded the evidence there did not rise to sufficient objective evidence of a true threat. Instead, we determined:

> The State's evidence may create a suspicion that it would be objectively reasonable for Sophie's classmates to think Sophie was serious in making her threat. But we do not believe that the evidence is enough to create an inference to satisfy the State's burden. Indeed, none of Sophie's classmates who heard her statement believed that Sophie was serious, with most of them convinced that she was joking. She had made outlandish threats before, never carrying out any of them.

Id. at 446, 868 S.E.2d at 319-20.

While the facts of *Z.P.* are somewhat similar to those in this case, they differ in key aspects. Indeed, the State's evidence did provide evidence of the context in which Daniel's alleged threat was made. The evidence showed a group of students was gathered waiting to leave their chorus class to go to lunch when Daniel made the statement that he was "going to shoot up the school." Two student-bystanders—Samantha and Gerald—testified consistent with each other that they heard the statement. Samantha was scared enough to report the threat right away. Gerald testified it made him sick to his stomach. He further testified Daniel's tone sounded serious. Although Gerald did not see any reaction from other students, he did not hear any laughter. Indeed, to the contrary, a third bystander—Jillian—who did not hear Daniel's statement, testified she heard another student respond that they would "bring the guns." When she told Samantha about that statement and learned of Daniel's, she too was scared.

Unlike the student-witnesses in *Z.P.*, who all heard the alleged threat to blow up the school and believed it to be a joke or were at least equivocal, the student-witnesses in this case did not testify they thought Daniel was joking or that his statement might have been perceived as a joke. To the contrary, the evidence was that Daniel sounded serious. The evidence further demonstrated Daniel's comment elicited the further comment from a student offering to "bring the guns," which was overheard by the third student-witness and, itself, caused her alarm. Applying the factors set out in *Taylor*, the evidence tended to reflect that, in the context of a school setting, Daniel threatened to conduct a school shooting in a serious tone and students overhearing the threat took it seriously and were scared. *See Taylor*, 379 N.C. at 600-01, 866 S.E.2d at 750. The response to Daniel's statement was not laughter but another student's offer to bring the guns. Thus, there was evidence that Daniel's statement was objectively threatening. *See id.*

Moreover, there was evidence Daniel had "some subjective understanding of the threatening nature of his statements." *Counterman*, 600 U.S. at 69, 143 S. Ct. at 2111. The evidence showed Daniel directed his statement that he was going to shoot up the school while in a group of 15 to 17 other students during school hours. The statement was able to be overheard by Samantha and Gerald and made in a serious tone. Gerald also testified to a prior incident in which Daniel directed threats toward him, including a video of Daniel blowing Gerald's brains out. At a minimum, this evidence meets the *Counterman* standard of a conscious disregard by Daniel of a substantial risk that his communications would be viewed as threatening violence.[3] *Id.*

Thus, there was sufficient evidence of a true threat presented by the State in this case. Therefore, the trial court's proceeding on the Petition was not an infringement of Daniel's First Amendment rights. Consequently, the trial court did not err by denying Daniel's Motion to Dismiss the Petition on this basis.

II. Sufficiency of the Evidence

[2] Daniel makes a separate argument that the State failed to present sufficient evidence he directed a threat at any specific person or persons. Thus, Daniel contends the trial court erred in failing to dismiss the Petition for insufficiency of the evidence to meet the elements of Communicating a Threat to Commit Mass Violence on Educational Property. We disagree.

> This Court reviews de novo a trial court's denial of a motion to dismiss for insufficiency of the evidence to determine "whether there is substantial evidence of each essential element of the offense charged and of the defendant being the perpetrator of the offense." *In re T.T.E.*, 372 N.C. 413, 420, 831 S.E.2d 293 (2019) (quoting *State v. Turnage*, 362 N.C. 491, 493, 666 S.E.2d 753 (2008)). "Substantial evidence is relevant evidence that a reasonable person might accept as adequate, or would consider necessary to support a particular conclusion." *State v. Hunt*, 365 N.C. 432, 436, 722 S.E.2d 484 (2012) (quoting *State v. Abshire*, 363 N.C. 322, 327–328, 677 S.E.2d 444 (2009)). All evidence is

3. *Counterman* was decided after Daniel's appellate counsel filed their Appellant's Brief in this Court. In Reply Briefing, Daniel's appellate counsel provides a thoughtful discussion of *Counterman* and its impact on this case. However, appellate counsel does not dispute the applicability of the *Counterman* standard to this case.

> viewed "in the light most favorable to the State and the State receives the benefit of every reasonable inference supported by that evidence." *Id.*

Matter of J.D., 376 N.C. 148, 155, 852 S.E.2d 36, 42 (2020).

Here, the Petition alleged Daniel threatened to commit an act of mass violence on educational property in violation of N.C. Gen. Stat. § 14-277.6. N.C. Gen Stat. § 14-277.6 provides: "A person who, by any means of communication to any person or groups of persons, threatens to commit an act of mass violence on educational property or at a curricular or extracurricular activity sponsored by a school is guilty of a Class H felony." N.C. Gen. Stat. § 14-277.6(a) (2021). The State's evidence reflected Daniel verbally communicated his threat to shoot up the school to a group of students as they waited to go to lunch after class, which was overheard by Samantha and Gerald, who both took the threat seriously. This evidence is sufficient to meet each of the elements of N.C. Gen. Stat. § 14-277.6.

Defendant contends the State was required to present evidence the person or persons to whom the threat was directed were, themselves, threatened. Defendant posits that because there was no evidence as to the identity of the individuals in the group of students with Daniel and no testimony from those students, the State cannot prove anyone was threatened. Daniel further argues as there was no evidence Daniel specifically intended to threaten Samantha or Gerald, the evidence does not support a finding Daniel willfully threatened them with shooting up the school.

However, nothing in the statute requires a threat of mass violence to be directed only at the person or persons threatened. To the contrary, the statute requires only the communication of the threat to a person or group—not that the person or group themselves be threatened. Daniel made the threat to a group of students in a manner that could be overheard by other students. Moreover, the fact that Samantha and Gerald were bystanders who overheard the threat is of no moment. As students at the school, they would reasonably believe they were among those under threat of a school shooting.

Thus, the State presented sufficient evidence that Daniel committed the offense of Communicating a Threat to Commit Mass Violence on Educational Property in violation of N.C. Gen. Stat. § 14-277.6. Therefore, the trial court did not err in denying Daniel's Motion to Dismiss. Consequently, the trial court did not err in adjudicating Daniel as a delinquent juvenile.

III. Secure Custody Pending Disposition

[3] Daniel contends the trial court abused its discretion by continuing disposition and placing Daniel in secure custody pending disposition. Specifically, Daniel contends there was no good cause shown to continue disposition and no articulated valid basis to hold him in secure custody pending disposition. We agree.

For its part, the State offers no substantive argument to counter Daniel's. Rather, the State first argues Daniel failed to preserve this issue for appeal because Daniel did not designate this ruling in his Notice of Appeal. However, the trial court's written Juvenile Adjudication Order expressly contains the ruling continuing disposition and placing Daniel in secure custody for seven days. Daniel filed written Notice of Appeal from this Juvenile Adjudication Order. Thus, Daniel's Notice of Appeal necessarily included the trial court's ruling continuing disposition and placing Daniel in secure custody. The State's argument is entirely without merit. The State further argues that this issue is moot as Daniel has served the seven days in secure custody prior to disposition. The State's argument is, again, baseless. We have previously held a similar temporary secure custody order is reviewable on appeal even after its expiration and is properly before us on the grounds that it "is capable of repetition, yet evading review." *In re Z.T.W.*, 238 N.C. App. 365, 373, 767 S.E.2d 660, 666 (2014).

We review the trial court's ruling continuing the disposition hearing and placing Daniel in temporary secure custody pending disposition for an abuse of discretion. *See id.* at 374, 767 S.E.2d at 667. An abuse of discretion occurs "in the event that a court's actions are manifestly unsupported by reason, or so arbitrary that it could not have been the result of a reasoned decision." *Id.* (citations and internal quotations omitted).

Under N.C. Gen. Stat. § 7B-2406:

> The court for good cause may continue the hearing for as long as is reasonably required to receive additional evidence, reports, or assessments that the court has requested, or other information needed in the best interests of the juvenile and to allow for a reasonable time for the parties to conduct expeditious discovery. Otherwise, continuances shall be granted only in extraordinary circumstances when necessary for the proper administration of justice or in the best interests of the juvenile.

N.C. Gen. Stat. § 7B-2406 (2021). Further, under N.C. Gen. Stat. § 7B-1903(c): "When a juvenile has been adjudicated delinquent, the

court may order secure custody pending the dispositional hearing . . ." N.C. Gen. Stat. § 7B-1903(c) (2021).

In this case, after adjudicating Daniel delinquent, the trial court announced it was moving to disposition. The State requested disposition be continued:

> Your Honor, the State will request that the disposition be delayed and hold the juvenile in custody for seven days prior to disposition and I will tell the Court there is a reason for that. He has been adjudicated delinquent on three prior communicating threats. One being another count of disorderly conduct at school. He was on probation for communicating threats when this happened. Obviously, if it was alluded to, I didn't want to allude to it since we are now in a disposition or prior to disposition. Obviously, if there is any time to take this serious it is now. Unlike other ones, there is no history, but this there is history. I will show you the proof. He is a level II with four points. I will show you the approved complaints. Again, this is a pattern of conduct that needs to be stipend [sic], so I will ask Your Honor to waive disposition for seven days in order for the juvenile to be held in secure custody. Thank you.

Defense counsel indicated they were ready to proceed with disposition and while they did not object to the continuance if the State was not ready to proceed, they objected to secure custody pending disposition.

There was no indication by the State that additional time was required to receive additional evidence, reports, assessments, or other information needed in the best interests of the juvenile or to allow for a reasonable time for the parties to conduct expeditious discovery. Thus, there was no good cause for a continuance under N.C. Gen. Stat. § 7B-2406. Moreover, neither the State nor the trial court identified any extraordinary circumstance justifying the continuance. To the contrary, the continuance of the disposition hearing was for the sole purpose of placing Daniel in secure custody as punishment *prior* to any disposition hearing and not for any legitimate purpose in aid of disposition. On appeal, the State has offered no rationale for holding Daniel in secure custody pending disposition. *Compare In re Z.T.W.*, 238 N.C. App. at 375, 767 S.E.2d at 667 (justification for secure custody pending out of home placement justified by juvenile's school suspension, anger-related difficulties, and his disobedience while living at home and trial court's

reasoning juvenile would receive education, medication, and treatment while in secure custody).

Thus, there was no valid basis demonstrated to continue disposition and place Daniel in secure custody pending disposition. Therefore, the trial court abused its discretion by continuing disposition and placing Daniel in secure custody pending disposition. Consequently, we vacate that limited part of the trial court's Juvenile Adjudication Order.

Conclusion

Accordingly, for the foregoing reasons, we affirm the trial court's adjudication of Daniel as delinquent. However, we vacate that portion of the trial court's Juvenile Adjudication Order continuing disposition and placing Daniel in secure custody for seven days pending disposition. As Daniel makes no argument on appeal regarding the Juvenile Level 2 Disposition Order, we also affirm the disposition.

AFFIRMED IN PART; VACATED IN PART.

Judges STROUD and GORE concur.

IN THE MATTER OF J.O.

No. COA23-744

Filed 7 May 2024

1. Child Abuse, Dependency, and Neglect—permanency planning order—waiving future hearings—clear, cogent, convincing evidence—recitation of standard required

After a minor child was adjudicated dependent, a permanency planning order granting guardianship to his foster parents and ceasing reunification efforts with his mother was vacated, where the trial court waived future permanency planning hearings pursuant to N.C.G.S. § 7B-906.1(n) but failed to state—either in open court or in the written order—that its findings were supported by clear, cogent, and convincing evidence as required under the statute. The matter fell under the Indian Child Welfare Act (ICWA), but because section 7B-906.1(n) also applied to the case and imposed the same high evidentiary standard for factual findings as ICWA, it was unnecessary to determine whether ICWA also required the court to recite that

standard in its order. The matter was remanded for entry of a new order stating the correct standard for the court's findings of fact.

2. Appeal and Error—preservation of issues—permanency planning—fitness and constitutional status as parent—issue not raised in trial court

At a permanency planning hearing for a dependent child, the child's mother failed to preserve for appellate review her argument that the trial court erred in granting guardianship to the child's foster parents without first finding that the mother was unfit or that she had acted inconsistently with her constitutionally protected status as a parent. The record showed that the mother had the opportunity to raise her constitutional argument before the trial court—because she had notice prior to the hearing that the court would be considering a recommendation to grant guardianship of the child—but that she failed to do so.

3. Child Abuse, Dependency, and Neglect—permanency planning order—guardianship granted to foster parents—visitation left to guardians' discretion—error

After the trial court awarded guardianship of a dependent child to his foster parents at a permanency planning hearing, the court abused its discretion by ordering that the mother's visitation with the child be left to the guardians' discretion. The order was vacated so that, on remand, the trial court could enter a new order specifying the duration and frequency of any visitation and stating whether such visitation would be supervised.

Appeal by respondent from order entered 28 April 2023 by Judge Tessa Shelton Sellers in District Court, Graham County. Heard in the Court of Appeals 2 April 2024.

Leo Phillips for petitioner-appellee Graham County Department of Social Services.

Richard Croutharmel for respondent-appellant.

STROUD, Judge.

Respondent appeals from a permanency planning order ceasing reunification efforts with her minor child and placing the minor child in guardianship with his foster parents. Because the trial court's order waived future review hearings and granted guardianship of the child

without making findings by clear, cogent, and convincing evidence as required by North Carolina General Statute Section 7B-906.1(n) and left Mother's visitation entirely in the Guardians' discretion, we vacate the order and remand for further proceedings and entry of a new order consistent with this opinion.

I. Background

Josh[1] was born in Graham County, North Carolina in March of 2021. On or about 3 March 2021, the Graham County Department of Social Services ("DSS") filed a juvenile petition alleging Josh as neglected and dependent. DSS alleged Josh did not "receive proper care, supervision, or discipline" from Mother and "lives in an environment injurious to" his welfare. While no drug screen was conducted on Mother or Josh at birth, Josh showed signs of drug withdrawal, such as fever and he was "very jittery." DSS identified Mother's felony charge of assault by strangulation and misdemeanor charge of child abuse as to one of her other children in the petition in support of its argument for obtaining custody of Josh. On or about 3 March 2021, the trial court entered an Order for Nonsecure Custody (capitalization altered), finding Josh "is an Indian Child and a member of or eligible for membership in the Eastern Band of Cherokee tribe" and placed Josh with DSS.

After an 18 August 2021 hearing, the trial court entered an adjudication order on 16 November 2021 adjudicating Josh as dependent, keeping Josh in the custody of DSS, and allowing Mother "up to 8 hours of unsupervised visitation with [Josh] on Tuesdays of each week." The trial court concluded that "the Indian Child Welfare Act [("ICWA")] applies in this matter." The disposition hearing was continued to and heard on 7 December 2021, and on 31 January 2022 Josh was ordered to remain in the custody of DSS, with Mother's unsupervised visitation to continue.

On 2 August 2022, the trial court held a review hearing and entered an order allowing Mother to continue exercising visitation with Josh and requiring Mother to allow DSS and the Eastern Band of Cherokee Indians ("EBCI") to observe her home to determine its "fitness for visitation." The order required Mother to "allow [DSS] and EBCI into the home every week thereafter until September 6, 2022 to continue to assess the home's fitness[.]" Visitation would continue at DSS until Mother provided her new address to DSS. Further, the visitations between Josh and Mother were to "take place between . . . [M]other and [Josh] only. The maternal great grandfather . . . may be present when visits are occurring in Graham County." The trial court also required Mother to enroll in the

1. A pseudonym is used for the minor child.

"parents as teachers program" and not to "transport [Josh], unless she is in a safe vehicle, with appropriate child safety seats, and the vehicle has passed a safety inspection[.]"

On 5 October 2022, the trial court entered a "Visitation Hearing Order" (capitalization altered), to determine "whether . . . [M]other's visitation should be expanded[,]" but ordered visitation remain the same. Throughout the case, the cleanliness and safety of Mother's home were central issues, as indicated by the exhibits and Mother's own testimony. The trial court found that "Melody Turner, a tendered expert in Indian Culture and Child Rearing" "attempted to inspect [Mother's] trailer a number of times" and during a 25 January 2022 home inspection, found Mother's home "stacked up with boxes and trash filling the living room, kitchen, and the bedroom." Additionally, "[t]he floors were dirty and covered with trash and bags of stuff from stores where trash was spilling out of the trash cans." Mother was then "provided with a list of things that needed to be cleaned up and addressed" and Mother "failed to comply with the list[.]" DSS and EBCI then attempted to conduct an inspection on 11 May 2022, but Mother cancelled the appointment; on 20 May 2022 an inspection occurred, but Mother "had made little progress on correcting the safety concerns provided to . . . Mother in February." Mother eventually moved to a new apartment after she was evicted from her trailer for reasons which included the major damage she had caused to the trailer. Mother "took a long time to set the apartment up with furniture" and "over time [the apartment] continued to deteriorate" with "clutter and trash . . . continu[ing] to pile up and fill the apartment" and "[t]he kitchen . . . full of things that a busy toddler could find and place that toddler in danger" and "mountains of laundry and trash from food items."

In addition to the housing issues, Mother was ordered "[t]hat visitation shall take place between . . . [M]other and [Josh] only. The maternal great grandfather . . . may be present when visits are occurring in Graham County." Also, the trial court had ordered that Mother's older son, age 18, not to be in contact with Josh, due to the trial court's concern that the other child "has a violent past with a number of concerns by [DSS] for inappropriate behavior including to sexual proclivities toward animals and violent assaults." One of Josh's custodians testified that on at least one occasion she saw Mother, Josh, and Mother's older son together despite the court order prohibiting the older son's presence.

Finally, the condition of Mother's car was another factor the trial court considered in determining guardianship. Specifically, Mother had "an expired tag and malfunctioning brake lights" and, more relevant to

this case, had "massive amounts of trash and food in the car almost covering the child's safety seat in both the front and back portions of the car." While there were other parts of Mother's case plan discussed in the trial court's order, the condition of Mother's housing, concerns involving her older child, and safety and health concerns of her car were the main issues.

On 21 February 2023, the court ordered a continuance for the next permanency planning hearing, which set the new hearing for 8 March 2023. DSS submitted a Court Report prior to the 8 March 2023 hearing which recommended the primary plan be changed to guardianship, and EBCI submitted a report on 2 March 2023 agreeing with the guardianship recommendation.

The matter came for hearing on 8 March 2023, and the trial court entered an order on 28 April 2023 which decreed:

> [T]hat the primary permanent plan be changed to guardianship.
>
> That a guardianship be granted to [Guardians].
>
> That [Guardians] shall be granted the authority to authorize medical, dental, psychiatric, psychological and educational services for [Josh].
>
> That . . . Mother shall have visitation with [Josh] at the discretion of the Guardians.
>
> No further review shall be scheduled at this time.

Mother appeals.

II. Indian Child Welfare Act

[1] Mother first argues "[t]he trial court reversibly erred by failing to comply with the procedural requirement of the [ICWA] to make findings of fact by the clear and convincing evidentiary standard." As Mother contends the trial court failed to make findings by clear and convincing evidence, as required by ICWA, she is arguing the trial court failed to follow a statutory mandate. Thus, "the error is preserved and is a question of law reviewed *de novo*." *In re E.M.*, 263 N.C. App. 476, 479, 823 S.E.2d 674, 676 (2019). "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *Id.*

ICWA is a federal law which establishes "minimum Federal standards for the removal of Indian children from their families and the

placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture." *In re E.G.M.*, 230 N.C. App. 196, 199, 750 S.E.2d 857, 860 (2013) (citing 25 U.S.C. § 1902 (2012) (quotation marks and brackets omitted)). North Carolina statutes and caselaw set specific standards for permanency planning orders. *See In re A.P.W.*, 378 N.C. 405, 410, 861 S.E.2d 819, 825 (2021) ("This Court's review of a permanency planning review order is limited to whether there is competent evidence in the record to support the findings of fact and whether the findings support the conclusions of law." (citation, quotation marks, and brackets omitted)). But if ICWA also applies to the case, and ICWA sets a higher standard than the North Carolina statutes, the higher standard prevails:

> where the [ICWA] provides a higher standard of protection to the Indian family than is otherwise provided by state law, the ICWA standard prevails. Where applicable state law provides a higher standard of protection to the rights of the parent or Indian custodian of an Indian child than the rights provided under the ICWA, the state law prevails.

In re E.G.M., 230 N.C. App. at 199, 750 S.E.2d at 860 (citations, quotation marks, and brackets omitted). Mother argues that ICWA sets a higher standard for this case, based upon its requirement for a specific finding supported by "clear and convincing" evidence:

> No foster care placement may be ordered in such proceeding in the absence of a determination, *supported by clear and convincing evidence*, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

25 U.S.C. § 1912(e) (2023) (emphasis added).

The trial court did not state, either in open court or in the written order, whether its findings were supported by clear and convincing evidence. The only finding addressing the standard was "[t]he court makes these findings in the best interest of the juvenile."

DSS argues the trial court must state that it has applied the standard of clear and convincing evidence in an adjudication hearing but need not apply the same standard to a permanency planning hearing, and the trial court had previously entered an adjudication order based upon clear, cogent, and convincing evidence. DSS is correct that an adjudication order must be based upon clear and convincing evidence, and the order must so state. *See* N.C. Gen. Stat. § 7B-805 (2023) ("The allegations

in a petition alleging that a juvenile is abused, neglected, or dependent shall be proved by clear and convincing evidence."). "Pursuant to N.C. Gen. Stat. § 7B-807 (2007), the court is required to recite the standard of proof the court relied on in its determination of neglect." *In re A.S.*, 190 N.C. App. 679, 688, 661 S.E.2d 313, 319 (2008), *aff'd per curiam*, 363 N.C. 254, 675 S.E.2d 361 (2009). In contrast, the findings in a disposition order or permanency planning order may be based upon a preponderance of the evidence, *unless* the order waives additional hearings required by North Carolina General Statute Section 7B-906.1(n) and if so, the trial court must then make certain findings by "clear, cogent, and convincing evidence." *See* N.C. Gen. Stat. § 7B-906.1(n) (2023).

But we need not address whether ICWA requires the trial court to state in the order that it made the finding as required by 25 United States Code Section 1912(e) by clear, cogent, and convincing evidence, as North Carolina General Statute Section 7B-906.1(n) requires the findings in the order on appeal to be made by clear, cogent, and convincing evidence as well. *See id.* The trial court's order waived future hearings under North Carolina General Statute Section 7B-906.1(n) and ordered "guardianship be granted to [Guardians]" and "[n]o further review shall be scheduled at this time." Because the trial court's order waived future hearings, the trial court was required to make specific findings by "clear, cogent, and convincing" evidence under North Carolina General Statute Section 7B-906.1(n):

> (n) Notwithstanding other provisions of this Article, the court may waive the holding of hearings required by this section, may require written reports to the court by the agency or person holding custody in lieu of permanency planning hearings, *or order that permanency planning hearings be held less often than every six months if the court finds by clear, cogent, and convincing evidence each of the following*:
>
> (1) The juvenile has resided in the placement for a period of at least one year or the juvenile has resided in the placement for at least six consecutive months and the court enters a consent order pursuant to G.S. 7B-801(b1).
>
> (2) The placement is stable and continuation of the placement is in the juvenile's best interests.
>
> (3) Neither the juvenile's best interests nor the rights of any party require that permanency planning hearings be held every six months.

> (4) All parties are aware that the matter may be brought before the court for review at any time by the filing of a motion for review or on the court's own motion.
>
> (5) The court order has designated the relative or other suitable person as the juvenile's permanent custodian or guardian of the person.
>
> The court may not waive or refuse to conduct a hearing if a party files a motion seeking the hearing. However, if a guardian of the person has been appointed for the juvenile and the court has also made findings in accordance with subsection (n) of this section that guardianship is the permanent plan for the juvenile, the court shall proceed in accordance with G.S. 7B-600(b).

Id. (emphasis added).

Although the trial court's order did not make the findings required by North Carolina General Statute Section 7B-906.1(n), the trial court ordered that "no further review shall be scheduled at this time," effectively waiving permanency planning review hearings every six months as required by North Carolina General Statute Section 7B-906.1(a). *See* N.C. Gen. Stat. § 906.1(a) (2023) ("Review or permanency planning hearings shall be held at least every six months thereafter [the initial permanency planning hearing]."). In addition, the trial court granted guardianship to Guardians and left visitation with Mother entirely to their discretion. Based upon the evidence and record before the trial court, the trial court could have made findings as required by North Carolina General Statute Section 7B-906.1(n), but we cannot determine from the order exactly what the trial court intended to do.

Therefore, as the trial court was required to use the clear and convincing standard under North Carolina General Statute Section 7B-906.1(n), and the trial court did not recite the standard in open court or in its written order, we must vacate and remand for the trial court to make appropriate findings under the clear and convincing evidence standard.

III. Constitutionally Protected Status as a Parent

[2] Mother next argues that "[t]he trial court reversibly erred by placing Josh in the guardianship of the foster parents without making a finding that . . . Mother was unfit or that her conduct had been inconsistent with her constitutionally protected status as a parent."

"Parents have a constitutionally protected right to the custody, care and control of their child, absent a showing of unfitness to care for the child." *In re R.P.*, 252 N.C. App. 301, 304, 798 S.E.2d 428, 430 (2017) (citation, quotation marks, and brackets omitted). Further, "[p]rior to granting guardianship of a child to a nonparent, a district court must clearly address whether the respondent is unfit as a parent or if his conduct has been inconsistent with his constitutionally protected status as a parent." *Id.* (citation, quotation marks, and brackets omitted). Finally, "a parent's right to findings regarding her constitutionally protected status is waived if the parent does not raise the issue before the trial court." *Id.* at 304, 798 S.E.2d at 430-31 (citation omitted). "We review a conclusion that the natural parent's conduct was inconsistent with her constitutionally protected right de novo, and determine whether it is supported by clear and convincing evidence." *In re B.R.W.*, 278 N.C. App. 382, 392, 863 S.E.2d 202, 211, *aff'd*, 381 N.C. 61, 871 S.E.2d 764 (2022) (citation, quotation marks, and brackets omitted).

While Mother did not explicitly raise a constitutional objection at the permanency planning hearing, she argues (1) she was not afforded an opportunity to raise an objection at the hearing, citing *In re R.P.*, 252 N.C. App. 301, 798 S.E.2d 428 (2017), or (2) "Mother did object with her testimony and arguments requesting the trial court return custody of Josh to her." In *R.P.*, this Court held the father's failure to object did not waive his right to challenge the constitutional finding since "the trial court determined at the 9 February 2016 permanency planning review hearing that it would 'proceed with guardianship at the *next* date.' " *Id.* at 305, 798 S.E.2d at 431 (emphasis in original). Despite this determination, "[a]t the next hearing, on 17 March 2016, the trial court would not allow any evidence to be presented concerning guardianship, stating that guardianship had been determined at the prior hearing" and the 17 March hearing was "strictly limited to the issue of visitation." *Id.* But here, Mother was not prevented from presenting evidence concerning guardianship and she had notice of the recommendations from DSS and EBCI to grant guardianship to Guardians prior to the hearing.

Our Supreme Court has recently addressed the issue of preservation of a constitutional argument as to the parent's right to custody of a child. *See In re J.N.*, 381 N.C. 131, 133-34, 871 S.E.2d 495, 497-98 (2022); *see also In re J.M.*, 384 N.C. 584, 603-04, 887 S.E.2d 823, 835-36 (2023). In *In re J.N.*, the respondent argued his constitutional argument was automatically preserved. *See In re J.N.*, 381 N.C. at 133, 871 S.E.2d at 497. The Court held the issue was not automatically preserved for appellate review and the respondent had notice the hearing was for the purpose of changing the primary plan from reunification to guardianship since

"DSS filed a court report in which it stated that reunification was not possible" and recommended guardianship; DSS also specifically argued at the hearing guardianship was proper. *Id.* at 133, 871 S.E.2d at 498. Finally, the Court held

> [i]n turn, respondent's argument focused on the reasons reunification would be a more appropriate plan. Despite having the opportunity to argue or otherwise assert that awarding guardianship to the maternal grandparents would be inappropriate on constitutional grounds, respondent failed to do so. Therefore, respondent waived the argument for appellate review.

Id.

In *In re J.M.*, our Supreme Court similarly held

> the guardian ad litem filed a report prior to the permanency planning hearing recommending that reunification be removed as the primary plan inasmuch as the cause of Nellie's injuries remained unexplained. When the trial court announced at the hearing that it was contemplating eliminating reunification from the permanent plan, it gave the parties a thirty-minute recess to consider their responses. Notwithstanding the pre-hearing notice that reunification would be on the table and the 30-minute recess, respondents at no point during the permanency planning hearing argued that the proposed changes to the permanent plan would be improper on constitutional grounds. Consequently, they did not preserve the issue for appellate review.

In re J.M., 384 N.C. at 604, 887 S.E.2d at 836 (citation, quotation marks, and brackets omitted).

Here, DSS filed a Court Summary for the scheduled 21 February 2023 court date with the following "Summary and Recommendations"[2]:

> 1. That the Permanent Plan be changed to Guardianship with a Concurrent Plan of Custody at this time;
>
> 2. That Guardianship be granted to the current placement providers . . . at this time;

2. The hearing date was continued by order of the trial court and the hearing was ultimately held on 8 March 2023.

> 3. That [Guardians] shall be responsible for the placement and care of the juvenile and shall provide or arrange for the physical placement of the juvenile in their discretion;
>
> 4. That [Guardians] be granted the authority to authorize necessary medical, dental, psychiatric, psychological, and educational or assessment services for the juvenile;
>
> 5. That . . . [DSS] has made reasonable and active efforts to return the juvenile to the home;
>
> 6. That the return of the juvenile to the home at this time would be contrary to his best interest;
>
> 7. That if Guardianship is granted at this time, that visitation with . . . Mother occur at the discretion of Guardians and that . . . Mother comply with orders of the court.

In addition, EBCI presented a report dated 2 March 2023 for the hearing and stated in its "Summary and Recommendations" (capitalization altered) that "[t]he Tribe agrees with [DSS] recommendations to change the permanency plan to Guardianship with [Guardians]."

Mother had an opportunity to raise her constitutional argument for the same reasons as the respondents in *In re J.N.* and *In re J.M.* since DSS and EBCI both filed court reports recommending Josh be placed in guardianship with the foster parents and specifically argued in support of this recommendation at the hearing. *See In re J.N.*, 381 N.C. at 133-34, 871 S.E.2d at 497-98; *see also In re J.M.*, 384 N.C. at 603-04, 887 S.E.2d at 835-36. Further, while Mother testified extensively, presented her own witnesses, and her counsel argued during closing arguments "I believe that changing the plan [from reunification to guardianship] at this point in time based on all of her progress would, would be a miscarriage of justice for her when she has worked so hard to . . . get this child back in her life[,]" she did not contend guardianship would be improper on constitutional grounds or that Mother was a fit and proper parent. While this Court has previously considered these actions by Mother as sufficient to preserve her constitutional argument, *see In re B.R.W.*, 278 N.C. App. 382, 397, 863 S.E.2d 202, 214, *aff'd*, 381 N.C. 61, 871 S.E.2d 764, our Supreme Court's most recent cases hold that where the respondent-parent has notice prior to the hearing that the trial court will be considering a recommendation to grant guardianship of the child, the respondent-parent must make a specific constitutional argument regarding her parental rights before the trial court to preserve a constitutional argument on appeal. *See In re J.N.*, 381 N.C. at 133-34,

871 S.E.2d at 497-98; *see also In re J.M.*, 384 N.C. at 603-04, 887 S.E.2d at 835-36. Thus, we hold Mother failed to preserve her argument as to her constitutionally protected status as a parent and decline to address this issue.

IV. Visitation

[3] Finally, Mother argues "[t]he trial court abused its discretion by ordering . . . Mother's visits with Josh be in the discretion of the guardians." DSS concedes Mother is correct, and we agree.

A dispositional order is reviewed for an abuse of discretion. *See In re S.G.*, 268 N.C. App. 360, 374, 835 S.E.2d 479, 489 (2019). Under North Carolina General Statute Section 7B-905.1,

> (a) An order that removes custody of a juvenile from a parent, guardian, or custodian or that continues the juvenile's placement outside the home shall provide for visitation that is in the best interests of the juvenile consistent with the juvenile's health and safety, including no visitation. The court may specify in the order conditions under which visitation may be suspended.
>
> . . . .
>
> (c) If the juvenile is placed or continued in the custody or guardianship of a relative or other suitable person, any order providing for visitation shall specify the minimum frequency and length of the visits and whether the visits shall be supervised. The court may authorize additional visitation as agreed upon by the respondent and custodian or guardian.

N.C. Gen. Stat. § 7B-905.1 (2023).

Here, the trial court ordered Mother to have "visitation with the juvenile at the discretion of the Guardians." As the trial court provided no conditions as to visitation, including the frequency and length of visitations, and whether they will be supervised or unsupervised, we remand this issue to the trial court. *See id.*; *see also In re J.D.R.*, 239 N.C. App. 63, 76, 768 S.E.2d 172, 180 (2015) ("In the present case, we find that the trial court impermissibly delegated its judicial function to [the f]ather. . . . Therefore, we remand in order that the trial court can make findings and conclusions relating to visitation rights that comport with this opinion.").

V. Conclusion

Mother also raised other arguments on appeal, including that the trial court failed to make the statutorily required findings to place Josh in guardianship and to cease reunification efforts. Since we have already determined we must vacate the trial court's order and remand for entry of a new order as discussed above, we need not address Mother's arguments regarding cessation of reunification efforts. On remand, the trial court shall enter a new order stating the standard of clear and convincing evidence for any findings as required by ICWA under 25 United States Code 1912(e), and North Carolina General Statute Section 7B-906.1(n). In addition, the trial court shall set out the specific frequency and duration of any visitation and whether visitation will be supervised or unsupervised. On remand, the trial court shall hold a hearing prior to entry of the new order to receive evidence as to the current circumstances as relevant to the new order.

VACATED AND REMANDED.

Judges TYSON and GORE concur.

IN THE MATTER OF M.G.B., T.J.B., H.E.D., JUVENILES

No. COA23-853

Filed 7 May 2024

1. Child Abuse, Dependency, and Neglect—permanency planning—refusal to acknowledge sexual abuse—lack of progress on case plan—findings

In a permanency planning matter involving three children, one of whom tested positive for a sexually-transmitted disease that the trial court previously determined was caused by the father sexually abusing the child—a fact that the children's paternal grandmother, who had custody of the children, refused to acknowledge—the trial court's findings of fact regarding the grandmother's lack of sufficient progress on her case plan—regarding mental health services, disengaging from her relationship with the father, sex abuse education, ability to see reality with regard to the sex abuse, and acting appropriately during visitation with the children—were supported by sufficient evidence.

2. Child Abuse, Dependency, and Neglect—permanency planning —reunification efforts ceased—language mirroring ground for termination—no misapprehension of law

In a permanency planning matter involving three children, one of whom tested positive for a sexually-transmitted disease that the trial court previously determined was caused by the father sexually abusing the child—a fact that the children's paternal grandmother, who had custody of the children, refused to acknowledge—the trial court did not misapprehend the law or apply an inappropriate standard by including in one of its findings a reference to the definitions of neglect and abuse in N.C.G.S. § 7B-101 and by stating that the children would be at a substantial risk of repetition of that abuse and/or neglect if returned to the grandmother's care. Although the grandmother argued that the court improperly invoked a ground for termination of parental rights before eliminating reunification as a permanent plan, the likelihood of further harm to the children was a relevant consideration to the permanency planning decision. Further, the trial court properly addressed the statutory factors regarding reunification contained in N.C.G.S. § 7B-906.2(d), and its findings were supported by sufficient evidence.

3. Child Abuse, Dependency, and Neglect—permanency planning —reunification efforts ceased—burden shifting alleged

In a permanency planning matter involving three children, one of whom tested positive for a sexually-transmitted disease that the trial court previously determined was caused by the father sexually abusing the child—a fact that the children's paternal grandmother, who had custody of the children, refused to acknowledge—the trial court did not improperly place the burden of proof on the grandmother to show that she had made sufficient progress to warrant reunification, where its findings of fact reflected the grandmother's failure to obtain educational resources to parent vulnerable children and that the conditions that led to the children's removal had not been alleviated and, as a result of these findings, the court determined that the children would not be safe in the grandmother's home.

4. Child Abuse, Dependency, and Neglect—permanency planning —reunification efforts ceased—refusal to acknowledge sexual abuse—lack of progress on case plan

In a permanency planning matter involving three children, one of whom tested positive for a sexually-transmitted disease that the trial court previously determined was caused by the father sexually abusing the child—a fact that the children's paternal grandmother,

who had custody of the children, refused to acknowledge—the trial court did not abuse its discretion by ceasing reunification efforts with the grandmother after determining that she had failed to make sufficient progress on her case plan. Although the grandmother did complete some aspects of her case plan and mostly had positive visits with the children, she failed to complete specific therapy recommendations, to disengage from her relationship with the father, to obtain parenting education to assist her in supporting a child who is the victim of sexual abuse and, most importantly, she continued to insist that the father never sexually abused one of the children despite overwhelming evidence.

5. Appeal and Error—preservation of issues—permanency planning order—guardian ad litem duties—automatic preservation

In a grandmother's appeal from a permanency planning order ceasing reunification efforts with her and endorsing a primary plan of adoption for three children, although the grandmother did not argue before the trial court that the guardian ad litem (GAL) assigned to the case failed to fulfill its duties, the issue was automatically preserved for appellate review because, even though N.C.G.S. § 7B-601(a) (listing a GAL's duties in a juvenile case) does not explicitly direct a trial court to perform a specific act—such as making written findings regarding a GAL's performance—since the trial court is directed by statute (section 7B-906.1(c)) to consider a GAL's information at a permanency planning hearing, the relevant statutory sections in combination create a statutory mandate sufficient to automatically preserve an issue challenging a GAL's efforts.

6. Child Abuse, Dependency, and Neglect—permanency planning—guardian ad litem's duties—sufficiency

In a grandmother's appeal from a permanency planning order ceasing reunification efforts with her and endorsing a primary plan of adoption for three children—one of whom tested positive for a sexually-transmitted disease that the trial court had previously determined was caused by the father sexually abusing the child, a determination the grandmother refused to accept—there was no merit to the grandmother's contention that the guardian ad litem (GAL) assigned to the case failed to fulfill its duties by not maintaining adequate communication with the grandmother and by not sufficiently investigating the case. The evidence demonstrated that the GAL conducted monthly visits with the children, spoke to their foster parents, asked the children about their wishes, submitted written reports at each hearing, and made a recommendation to the

court regarding a permanent plan, all in an effort to determine the best interests of the children. Although the GAL only spoke to the grandmother twice after juvenile petitions were filed and the children were removed from her home, the GAL saw the grandmother interact with the children at several visits and there is no indication that additional communication would have changed the GAL's recommendation, particularly since the grandmother continued to insist that the father had not sexually abused one of the children.

7. Child Abuse, Dependency, and Neglect—permanency planning—reunification efforts ceased—reasonableness of efforts by social services

In a permanency planning matter involving three children, one of whom tested positive for a sexually-transmitted disease that the trial court previously determined was caused by the father sexually abusing the child—a fact that the children's paternal grandmother, who had custody of the children, refused to acknowledge—there was sufficient evidence to support the trial court's determination that the department of social services (DSS) made reasonable efforts toward reunification with the grandmother, including offering assistance to obtain and pay for court-ordered mental health services, which the grandmother rejected. Where the court gave DSS discretion to expand the grandmother's visitation time beyond the minimum amount ordered by the court, the decision of DSS not to expand visitation was not unreasonable based on the grandmother's problematic behavior during existing visitation, including talking about the case in front of the children and asking if they wanted to come home.

Appeal by Respondent Grandmother from Order entered 2 June 2023 by Judge Larry D. Brown, Jr., in Alamance County District Court. Heard in the Court of Appeals 2 April 2024.

Jamie L. Hamlett for Petitioner-Appellee Alamance County Department of Social Services.

Parent Defender Wendy C. Sotolongo, by Assistant Parent Defender Jacky L. Brammer, for Respondent-Appellant Grandmother.

Matthew D. Wunsche for Guardian ad Litem.

HAMPSON, Judge.

Factual and Procedural Background

This case arises from Respondent-Grandmother's (Grandmother) appeal from the trial court's Permanency Planning Order ceasing reunification efforts and endorsing a primary plan of adoption with a secondary plan of guardianship. The record reveals the following:

In 2020 Holly, Thomas, and Mary,[1] respectively four years old, three years old, and an infant at that time, were originally adjudicated neglected due to their mother's substance abuse and domestic violence between their parents. Grandmother is the paternal grandmother of the children. Following the original adjudication, the trial court granted Grandmother full legal and physical custody of Thomas. In 2021, the trial court granted Grandmother and the children's father (Father) joint custody of Holly and Mary. When granting custody, the trial court found that Grandmother had been essentially the children's parent for the majority of their lives and had a strong bond with her grandchildren. The children lived in Grandmother's home with Father and their paternal great uncle (Uncle).

In July 2021, Holly began experiencing discomfort and itching around her stomach, vaginal discharge, and the frequent need to urinate. On 4 August 2021, Holly tested positive for gonorrhea. Father subsequently tested positive for gonorrhea. Father denied allegations of sexual abuse, attempting to explain Holly's infection by speculating that transmission could have occurred through a towel or toilet seat. On 7 August 2021, the Alamance County Department of Social Services (DSS) received the report of Holly's positive test and gave Grandmother the option for the children to stay in the family home only if Father and Uncle would not be present. Grandmother had the children placed with a family friend because she did not want Father or Uncle to be "without entertainment" and "without cable."

Grandmother denied the possibility of sexual abuse. On 9 August 2021, without consulting DSS, Grandmother picked the children up from the family friend and took them to UNC Hospital for medical testing. She told medical staff she wanted the children tested for "venereal diseases" because she believed Holly's gonorrhea test was inaccurate and she wanted to clear the names of the men in the household.

During this examination, Holly presented with "redness, swelling, and abnormal discharge" in the vaginal area and again tested positive for gonorrhea. Mary also presented with abnormal discharge, but neither

1. The juveniles are referred to by the parties' stipulated pseudonyms.

she nor Thomas tested positive for any sexually transmitted diseases. After the examinations, DSS instructed hospital staff to release the children to the family friend, not Grandmother, who had become uncooperative and was detained by UNC police.

On 10 August 2021, DSS filed petitions alleging the children were neglected juveniles and Holly was an abused juvenile. The petitions alleged Grandmother was "persistent that nobody hurt the children and was in denial regarding [Holly] having [g]onorrhea." The petitions further detailed DSS's concerns that Grandmother was "not placing the physical or emotional well-being of the juveniles first" and that the children were "at risk of significant emotional and/or physical harm" if they were returned to Grandmother's care.

Holly submitted to a forensic interview in August and a subsequent Child Medical Evaluation in September 2021. During these interviews, she stated "Daddy hit me" and pointed to her vaginal area when asked where he hit her. She also stated that her father had touched her with his "ding ding," and that he had touched her genitals.

The trial court adjudicated all three children neglected and Holly abused in an order filed 16 February 2022.[2] Grandmother testified at the adjudication hearing that she believed that Holly had contracted gonorrhea from a toilet seat or towel and that she did not believe that Father had abused Holly. Based on expert testimony the trial court rejected Grandmother's explanations for Holly's contraction of gonorrhea, finding that Holly had been sexually abused by Father.

The trial court placed the children in DSS custody. It ordered monthly visitation with Grandmother and instructed her not to speak with the children about the issues involved with the case. The trial court did not at this time order Grandmother to participate in treatment or parental education.

That same month DSS developed a case plan and visitation plan for Grandmother. In the case plan, DSS requested that Grandmother obtain a mental health assessment, refrain from using illicit substances, and attend sex abuse classes. Grandmother signed the visitation plan but refused to sign her case plan as she did not believe she had done anything wrong. She completed the Darkness to Light online sexual abuse

2. The previous appeal in this case, *In re M.G.B.*, 287 N.C. App. 694, 883 S.E.2d 226, 2023 WL 2126139 (2023) (unpublished) addressed Father's appeal of the adjudications of Thomas and Mary. We affirmed the trial court's adjudication that they were neglected.

class on 22 March 2022, but she told social workers she had not learned anything because the course did not contain information that was new to her. Grandmother's visitation with the children during this period went well. The social workers noted that she brought them food and gifts, that she interacted well with the children, and the children seemed to love Grandmother.

On 30 March 2022, Grandmother received a psychological assessment, performed by her own therapist at the UNC Health Pain Management Center. As part of this assessment, the therapist addressed various questions provided by DSS. The assessment notes that Grandmother suffers from depression and anxiety and, though she has a history of sexual trauma and was likely triggered by Holly's diagnosis, the therapist did not believe her psychological disorders impacted her ability to care for the children. However, she did note her belief that Grandmother's trust in her son impacted her ability to examine facts. The report also notes that Grandmother was "defensive," felt that she was the victim in this situation, and continued to believe that Holly had contracted gonorrhea through contact with a toilet seat. The therapist recommended that Grandmother continue working with her via outpatient therapy sessions.

The trial court held a permanency planning hearing on 13 April 2022. It found that Grandmother "continues to deflect and minimize," "support[s] her son's narrative" and "assert[s] herself as the victim." At the hearing she "verbally attacked and blamed" the social worker involved with the children's removal, stating that he was the reason the children were removed.

The trial court reviewed the psychological examination report and found concerns regarding its usefulness. Among the trial court's concerns were that the report had been conducted by a pain management clinician, focused primarily on pain management, and was performed by a clinician who had a longstanding relationship with Grandmother. The trial court was also concerned that the therapist did not have sufficient information to make the assessment: she only spoke with Grandmother and did not indicate that she had reviewed any documentary evidence regarding the case. Grandmother did not inform the therapist that her son had been criminally charged or that the trial court had found that Holly had contracted gonorrhea through sexual contact and, instead, allowed her to believe an investigation was pending, possibly impacting her ability to make an educated diagnosis and treatment plan given Grandmother's continuing denial that sexual contact had occurred.

The trial court found that Grandmother was acting in a manner inconsistent with the health and safety of the juveniles, but was making sufficient progress under her plan.[3] It endorsed a primary plan of reunification and a secondary plan of guardianship, and ordered that Grandmother attend sex abuse classes or support groups, "receive an assessment to address issues of sexual abuse concerns," receive therapy on how to parent a child who has been sexually abused, and that she receive a new psychological evaluation.

Between this and the next permanency planning hearing, Grandmother received two psychological evaluations, each recommending, among other things, that Grandmother incorporate Dialectical Behavioral Therapy ("DBT") into her treatment. She visited the children monthly, as allowed by the trial court, bringing them food and toys. She continued to deny that sexual abuse had occurred, including reporting to a social worker that she did not believe her son had done anything wrong.

A second permanency planning hearing was held on 30 November 2022. The court found that Grandmother remained an unsafe caretaker for the children because she continued to refuse to acknowledge the likelihood that her son assaulted Holly. The court ordered a primary plan of adoption and a secondary plan of reunification. The trial court ordered Grandmother cooperate with the recommendations of the two new evaluations and again ordered her to attend sex abuse classes or support groups.

Between that hearing and the permanency planning hearing from which this appeal arises, held on 26 April 2023,[4] Grandmother did not undergo DBT as ordered. She testified that she contacted numerous providers but was unable to pay for their services as they did not accept her health insurance. She initially rejected offers from DSS to assist in paying for her treatment before ultimately attending two intake sessions with a therapist. This therapist determined that Grandmother did not require DBT services, but made that assessment without reviewing prior assessments, documentation, or court filings, relying only on information provided by Grandmother.

At the hearing, Grandmother testified that she continued to believe Holly had contracted gonorrhea through contact with a toilet seat

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3. Mother and Father remained parties to the juvenile case and at this and subsequent permanency planning hearings were found to have made insufficient progress until their parental rights were terminated in April 2023. Neither are party to this appeal.

4. Mother's and Father's parental rights were terminated on 21 April 2023.

and that if a jury convicted her son she would still not believe he had harmed Holly.

The trial court found that Grandmother failed to obtain DBT services, had not participated in educational training, parenting courses, or support groups to help her parent a child who had been neglected or sexually abused, and that her refusal to accept that Father had abused Holly restricts her ability to render safe and appropriate decisions on behalf of the minor children. The court found that Grandmother had failed to make progress in a reasonable period of time and ordered a primary plan of adoption and secondary plan of guardianship, ceased reunification efforts with Grandmother, and eliminated visitation. Grandmother filed timely written notice of appeal.

Issues

Grandmother identifies a number of issues for our review. Accordingly we address: (I) the trial court's findings of fact regarding aspects of Grandmother's progress on her case plan; (II) the trial court's alleged misapprehensions of law in finding an inapplicable ground for termination and placing the burden of proof upon Grandmother; (III) the trial court's conclusion that reunification should be removed from the permanent plan; (IV) whether the guardian ad litem properly discharged its duties; and (V) whether DSS made reasonable efforts toward reunification.

Analysis

Following a juvenile adjudication and initial disposition, the trial court holds a permanency planning hearing within 90 days and then subsequent hearings at least every six months. N.C. Gen. Stat. § 7B-906.1(a) (2023). At each permanency planning hearing, the trial court must adopt concurrent primary and secondary permanent plans, most commonly selecting from among reunification of the juvenile with their parents, adoption, guardianship with relatives or others, or custody to a relative or other suitable person. *In re J.M.*, 384 N.C. 584, 593, 887 S.E.2d 823, 829 (2023); N.C. Gen. Stat. § 7B-906.2. Reunification must be the primary or secondary plan unless the permanent plan has been achieved or the trial court (1) made written findings specified by N.C. Gen. Stat. § 7B-901(c) at the initial disposition hearing; (2) made written findings under 7B-906.1(d)(3) at a review hearing or earlier permanency planning hearing; or, as in this case, (3) makes written findings in the permanency planning order that "reunification efforts clearly would be unsuccessful or would be inconsistent with the juvenile's health or safety." N.C. Gen. Stat. § 7B-906.2(b). The written findings are not required to track the

statutory language verbatim, but they "must make clear that the trial court considered the evidence in light of whether reunification would be [clearly unsuccessful] or would be inconsistent with the juvenile's health, safety, and need for a safe, permanent home within a reasonable period of time." *J.M.*, 384 N.C. at 594, 887 S.E.2d at 830 (quoting *In re H.A.J.*, 377 N.C. 43, 49, 855 S.E.2d 464, 470 (2021)).

In this case, the trial court found that reunification efforts with Grandmother "clearly would be unsuccessful and would be inconsistent with the juveniles' health or safety." In support of this conclusion, it found that Grandmother had failed to meet the children's needs by not participating in services to help her address Holly's sexual abuse, refusing to believe abuse had taken place, failing to cooperate with or follow recommendations of her psychological evaluations, and engaging in inappropriate conversations in the presence of the children.

Grandmother argues that she made sufficient progress on her case plan such that the trial court's conclusion that reunification would clearly be unsuccessful is unsupported. In doing so she challenges the trial court's conclusions, as well as a number of individual factual findings.

When reviewing a permanency planning order, we examine "whether there is competent evidence in the record to support the findings [of fact] and whether the findings support the conclusions of law." *In re A.P.W.*, 378 N.C. 405, 410, 861 S.E.2d 819, 825 (2021) (citing *In re H.A.J.*, 377 N.C. at 49, 855 S.E.2d at 469). "The trial court's findings of fact are conclusive on appeal if supported by any competent evidence." *Id.* Uncontested findings of fact are binding on appeal. *Id.* "The trial court's dispositional choices—including the decision to eliminate reunification from the permanent plan—are reviewed for abuse of discretion." *Id.* at 410, 861 S.E.2d at 825-26.

I. Factual findings

[1] Grandmother contests a significant portion of the trial court's findings of fact but groups her arguments into five primary categories. She argues that the evidence does not support the trial court's findings that she: (1) did not complete DBT therapy or mental health services; (2) did not complete a sex abuse education class; (3) cannot see reality, cannot admit her son abused Holly, and prioritizes herself and her son over her grandchildren; (4) has not disengaged from her son; and (5) acted inappropriately during visitation. Grandmother argues that she "basically complied" with the court's orders to complete a mental health evaluation, attend therapy, and attend a sex abuse education class. Our review of the record on appeal shows that the trial court's relevant findings of

fact were supported by testimony and other evidence and support its conclusion that Grandmother has failed to make reasonable progress and its elimination of reunification as a permanent plan.

A. Therapy

Grandmother argues that the evidence did not support a finding that she did not complete mental health services as directed in the court's previous permanency planning orders. She argues that she continued to engage in therapy with her regular therapist and that while she never engaged in Dialectical Behavior Therapy (DBT), her failure to do so was not willful. A review of the obligations imposed by the trial court's orders and Grandmother's efforts to fulfill those obligations is helpful in evaluating the trial court's findings.

In its 16 February 2022 order adjudicating the children abused and neglected, the trial court declined to order Grandmother to participate in mental health treatment. However, DSS developed a case plan in which it requested that Grandmother, among other tasks, obtain a mental health assessment. Though she refused to sign the case plan, she submitted to her first psychological assessment on 30 March 2022, performed by her regular therapist at the UNC Health Pain Management Center. The trial court reviewed this assessment at the 13 April 2022 permanency planning hearing, finding that she had withheld key information from the assessor and ordering that she undergo another evaluation.

Grandmother underwent two subsequent evaluations. The first was conducted in sessions throughout July and August 2022. She underwent a second evaluation in October 2022 as she requested to have her own assessment completed. Each of these evaluations included interviews, psychological testing, and the review of documentary records including court documents from this case. The first evaluation recommended that Grandmother initiate counseling services with a provider experienced in working with personality disorders and noted that Grandmother may benefit from incorporating DBT into her treatment "to help her learn how to perceive things accurately and regulate strong emotions." The second recommended that Grandmother engage in DBT "to improve her interpersonal effectiveness, emotion regulation, distress tolerance, and ability to focus on current environment." Each recommended that the DBT therapist be given a copy of the respective assessments. The trial court reviewed these evaluations during the 30 November 2022 permanency planning hearing and ordered that Grandmother cooperate with the recommendations made in both reports.

Grandmother testified that she attempted to secure DBT, contacting "probably over 40 different people, institutions," but was unable to secure treatment because none of those providers accepted her health insurance. She ultimately located a DBT provider and underwent an assessment. In an email to DSS, this DBT provider explained that she was not qualified to conduct a "clinical forensic evaluation," which would involve examining past assessments and evaluating the subject over time. Instead, she conducted a "clinical mental health assessment," which did not involve a review of outside documents and was meant to establish "a picture of the client as they present at the time of the assessment." Under these parameters, the provider found that Grandmother did not meet criteria for any diagnosis in the DSM-5 and did not recommend follow-up DBT treatment.

While Grandmother's argument touches on several of the trial court's enumerated factual findings, she ultimately contests the trial court's finding that she "knowingly, willfully and intentionally refused to get DBT services designed to assist her." It is undisputed that Grandmother never obtained DBT as recommended in both evaluations. However, Grandmother argues that her failure to undergo DBT was not willful, but rather the result of financial difficulties.

At the hearing, the DSS supervisor acknowledged that Grandmother's insurance and financial resources had been an obstacle to obtaining DBT, but detailed the department's efforts to help her arrange therapy. In particular, DSS located a provider who offered services at $40 per session. Grandmother testified that she could not afford this provider for two sessions per month, even with DSS paying half the cost.

The trial court considered Grandmother's testimony and rejected her claim that she could not afford these services. It noted that these costs were low with DSS assistance and that Grandmother continued to pay for cable television. Additionally, the DBT provider Grandmother chose for her assessment charged $100 per hour before DSS assistance. Because evidence supports the trial court's finding that Grandmother could afford DBT, we are bound by that finding. *In re P.O.*, 207 N.C. App. 35, 41, 698 S.E.2d 525, 530 (2010) ("If the trial court's findings of fact are supported by any competent evidence, they are conclusive on appeal.").

Nor did Grandmother's evaluation by the DBT provider satisfy her obligation. Both of Grandmother's evaluations recommending DBT explicitly recommended that the provider be given a copy of those evaluations, and the trial court ordered they be provided to give the DBT practitioner all information relevant to assessing and diagnosing

Grandmother. These assessments were made with the assistance of court filings and included information about Grandmother's denial of any sexual abuse by Father despite the trial court's finding that abuse had occurred—facts that Grandmother had previously failed to disclose in her first psychological evaluation that the trial court found insufficient. Receiving a DBT assessment that did not include a review of these evaluations did not discharge Grandmother's obligation to seek out DBT.[5]

B. Disengaging from Grandmother's relationship with Father

The trial court found that Grandmother had failed to disengage from her relationship with her son. The October 2022 psychological assessment recommended that Grandmother "disengage from [Father] in order to show that she is willing to put the needs of her grandchildren over her need to keep an open mind about [his] guilt or innocence." The recommendations of Grandmother's psychological evaluations were incorporated into the 26 January 2023 permanency planning order.

By her own admission, Grandmother has not disengaged from Father:

> Q: Do you have—do you have any kind of communication with your son?
>
> A: Yeah, I speak to him every now and then, yeah.
>
> Q: Okay. Do you talk about this case?
>
> A: He doesn't really like to talk about the case, because he hadn't seen his children in so long, and it's stressful.
>
> . . .
>
> Q: You have not disengaged from [Father,] have you?
>
> A: No, my son hasn't even been to criminal court yet. And I know this is a different court, but at this point, it's looking like we weren't even gonna get the kids anyway, so it didn't matter.

Grandmother argues that the directive is too vague, particularly because the court only ordered that she "cooperate with the

5. Grandmother argues "the evidence is clear that [the DBT provider] would not accept [outside documents]" and that Findings of Fact 69 and 76, finding that "[Grandmother] had not provided [the DBT provider] with the two psychological assessments that the Court had given permission to release to the provider" must therefore be struck. It is uncontested that Grandmother did not provide the DBT provider with outside documentation. We disagree that these findings imply that Grandmother refused to provide documents to a provider who would otherwise review them and decline to strike the findings.

recommendation of the Psychological evaluation[s]," rather than explicitly ordering that she disengage from Father, and only one of her evaluations included that recommendation. She cites caselaw addressing requirements of clarity in court orders. *Nw. Bank v. Robertson*, 39 N.C. App. 403, 411, 250 S.E.2d 727, 731 (1979); *Spears v. Spears*, 245 N.C. App. 260, 284, 784 S.E.2d 485, 500 (2016) (citing *Morrow v. Morrow*, 94 N.C. App. 187, 189, 379 S.E.2d 705, 706 (1989) ("A judgment must be complete and certain, indicating with reasonable clearness the decision of the court, so that such judgment may be enforced.")). But Grandmother does not appear to be confused by the trial court's directive: when asked if she had disengaged from her son she answered that she had not and testified as to the topics of their conversations.

Moreover, we do not believe these cases, which address final judgments being rendered void for uncertainty, are apposite to this context. Even if Grandmother were not ordered to disengage from her relationship with Father, choosing to maintain communication with the man who sexually abused a child is relevant to the trial court's decision to allow reunification with that child and her siblings. "In choosing an appropriate permanent plan . . . the juvenile's best interests are paramount." *In re J.H.*, 244 N.C. App. 255, 269, 780 S.E.2d 228, 238 (2015). "The court may consider any evidence . . . that the court finds to be relevant, reliable, and necessary to determine the needs of the juvenile and the most appropriate disposition." N.C. Gen. Stat. § 7B-906.1(c). Grandmother's admitted maintenance of an ongoing relationship with Father, despite the recommendation of her mental health evaluation, is relevant to the determination of the children's best interests.

This failure to disengage is particularly relevant given that the court's primary concern with returning the children to Grandmother is her refusal to accept that Father sexually abused Holly. Whether or not the trial court clearly ordered her to disengage, continuing to associate with Father is an important consideration in determining if Grandmother can safely parent the children. The trial court did not err in finding that Grandmother failed to disengage from her relationship with Father.

C. Sex abuse education

Grandmother argues that the trial court's findings related to her failure to complete sex abuse education are unsupported. The trial court found that Grandmother had failed to follow the recommendations of her psychological evaluations by refusing to seek educational opportunities to learn about parenting a child who has been the victim of sexual abuse. It also found that she had "never participated" in such parenting

courses or related support groups and that she failed to obtain education on parenting "children who have been exposed to other environmental chaos such as parents with a substance abuse problem by participating in support groups or non-offender's education."

Grandmother argues that her completion of the Darkness to Light online course renders these findings unsupported. We agree, to the extent that the trial court found that Grandmother had never participated in parenting courses. However, after her completion of that course, the trial court continued to order that she seek out additional educational opportunities, which she did not do.

Grandmother presented her certificate of completion of the Darkness to Light course on 22 March 2022, following the children's adjudication. In the following permanency planning order, the trial court recognized her completion of this class and noted that she was "compliant" with the DSS recommendation, but still ordered that she "attend sex abuse classes/support groups and receive an assessment to address issues of sexual abuse concerns." Both of Grandmother's psychological evaluations, each performed after her completion of the Darkness to Light course, recommended that she receive additional education regarding parenting a child who has been sexually abused. The next permanency planning order also recognized Grandmother's completion of Darkness to Light, but noted her as only partially compliant with this DSS recommendation and again ordered she attend sex abuse classes. It is clear that the trial court found Grandmother's completion of Darkness to Light insufficient, as she stated she did not gain any knowledge from the class, and it ordered her, as recommended by DSS and her psychological evaluators, to obtain additional education and counseling. Grandmother does not argue that she did so.

To the extent that the trial court found that Grandmother had completed no sex abuse education, those findings are struck. Its findings that she did not obtain additional education as ordered are, however, supported by competent evidence.

D. Ability to see reality

Grandmother contests the court's findings regarding her ability to see reality. The trial court found that Grandmother's refusal to believe that Father abused Holly "calls into question [her] ability to face reality." It found that she refused to believe "any problem exists in this case," that she would prioritize Father's needs over the children and allow him to have contact with the children, demonstrated a lack of rational

judgment, and generally that her testimony indicated she chose to see things as she would like them to be, rather than recognizing reality.

Grandmother argues that "there was no testimony at the hearing that [she] had problems seeing reality" and that one of Grandmother's psychological evaluations stated that she "appears to have good reality testing." This argument ignores the fact that the trial court's findings are based entirely on Grandmother's consistent refusal to accept the possibility that Father sexually abused Holly. From Holly's initial diagnosis through the final permanency planning hearing, where Grandmother testified that she believed Holly contracted the disease from a toilet seat, that she had gonorrhea "bacteria" but not an infection, and that she would not believe Father had abused Holly even if he were convicted by a jury, Grandmother has rejected the overwhelming evidence of Holly's abuse in favor of unsupported conjecture. The trial court's finding that Grandmother refuses to accept the reality of Holly's abuse is supported by the evidence.

Grandmother also argues that, because she testified that she would still keep Father away from the children despite this belief, the trial court could not have found she could not be a safe caregiver. The trial court's concerns on that front stem not only from Grandmother's inability to accept that Father abused Holly, but because she testified that she would only keep the children away from Father because of the risk of DSS taking custody of the children—not because of the danger represented by Holly's abuser. Additionally, she had prioritized Father's needs over those of the children in the past, most notably by sending the children to live with a relative rather than having Father leave the home.

Even assuming the trial court's belief that Grandmother would allow Father to have contact with the children is unsupported, the danger to the children comes not only from that contact, but from a sexually abused child being raised by a caretaker who does not believe that she was abused and refuses to seek out education or other assistance in parenting an abused child. The trial court's findings that Grandmother would not be a safe caregiver are supported by the evidence.

E. Visitation

Finally, Grandmother contests the trial court's findings regarding her visitation with the children. Grandmother's visitation with the children was indeed largely positive: DSS observed that Grandmother brought the children toys and food, and she got along with the children well. However, the trial court found that Grandmother engaged in conversations with the children about returning home and also spoke to the social worker about the unfairness of the case. These findings were

supported by the testimony of the DSS supervisor. The children were present on at least one occasion during which Grandmother asked the supervising social worker a question about the case.

Grandmother argues that the evidence does not support the trial court's finding that her visitation was inappropriate because the majority of the evidence shows that her interactions with the children were appropriate and enriching. But the trial court's findings were supported by evidence of specific inappropriate conversations with the children or the supervising social worker. The trial court did not err in making these findings.

II. Misapprehensions of law

Grandmother argues that the permanency planning order in this case was insufficient to support the cessation of reunification as a permanent plan because the trial court misapprehended the law. She argues first that the trial court erred by finding a ground for termination of parental rights, which is inapplicable to the permanency planning process, and second that the trial court inappropriately placed an evidentiary burden upon her.

A. Termination ground

[2] Grandmother's argument that the trial court erred by finding an inapplicable termination ground rests in the language used in one of its Findings of Fact. Finding of Fact 122 states:

> [Grandmother's] actions have resulted in the abuse and/or neglect of the minor children [within] the meaning of 7B-101. The children would be at a substantial risk of repetition of abuse and/or neglect if returned to her care now or in the foreseeable future. [Grandmother] has shown this Court her son is her main priority and not the well-being of these Minor Children.

Grandmother argues that this finding reflects the statutory language of the "neglect" ground for terminating parental rights. She seems to argue that the court in effect issued a ruling terminating her parental rights, in a misapprehension of its role at the time without safeguards inherent to the termination process, such as the application of a clear and convincing evidentiary standard. N.C. Gen. Stat. § 7B-1109(f).

It is unclear from Grandmother's briefing which part of this finding is "language directly related to the neglect termination ground," but there appear to be two possibilities.

The first is the trial court's citation of the statutory definitions of abuse and neglect under Section 7B-101, as those definitions are incorporated into our termination statute:

> The court may terminate the parental rights upon a finding . . . the parent has abused or neglected the juvenile. The juvenile shall be deemed to be abused or neglected if the court finds the juvenile to be an abused juvenile within the meaning of G.S. 7B-101 or a neglected juvenile within the meaning of G.S. 7B-101.

N.C. Gen. Stat. § 7B-1111(a). However, the use of Section 7B-101's definitions of abuse and neglect does not imply that the trial court was applying standards more appropriate for a termination context. Section 7B-101 provides definitions for terms used throughout the entirety of the Abuse, Neglect, and Dependency Subchapter of our Juvenile Code. N.C. Gen. Stat. § 7B-101 ("As used in this Subchapter, unless the context clearly requires otherwise, the following words have the listed meanings[.]"). Among other terms, this section defines "abused juvenile" and "neglected juvenile" for use throughout the entire Subchapter, including abuse, neglect, and dependency adjudications. *See*, *e.g.*, *In re K.L.*, 272 N.C. App. 30, 39, 845 S.E.2d 182, 190 (2020) (citing § 7B-101(1) to define "abused juvenile" when reviewing the adjudication of a minor).

It is also possible that Grandmother takes issue with the trial court's finding that "[t]he children would be at a substantial risk of repetition of abuse and/or neglect if returned to her care now or in the foreseeable future" as language too similar to that used in termination proceedings. In order to terminate parental rights upon the ground of neglect, a trial court must "consider any evidence of changed conditions in light of the evidence of prior neglect and the probability of a repetition of neglect" and may find the neglect ground if the evidence shows "a likelihood of future neglect by the parent." *In re M.S.E.*, 378 N.C. 40, 48, 859 S.E.2d 196, 205 (2021). But just because the likelihood of future neglect or abuse is relevant to the termination of parental rights does not render it *irrelevant* to a permanency planning ruling, nor does the trial court's consideration of such imply that the trial court is applying an improper standard to its analysis. During a permanency planning hearing, the task of the trial court is to adopt the permanent plans the court finds are in the juvenile's best interest. N.C. Gen. Stat. § 7B-906.2(a). The possibility that a neglected juvenile faces a substantial risk of future neglect upon reunification is a relevant consideration in determining whether reunification is appropriate.

In order to eliminate reunification as a permanent plan, the trial court was required to make written findings "that reunification efforts clearly would be unsuccessful or would be inconsistent with the juvenile's health or safety." N.C. Gen. Stat. § 7B-906.2(b) "As part of that process, the trial court is required to make written findings 'which shall demonstrate the degree of success or failure toward reunification[.]' " *In re L.E.W.*, 375 N.C. 124, 129, 846 S.E.2d 460, 465 (2020) (citing N.C. Gen. Stat. § 7B-906.2(d)). These findings include:

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

N.C. Gen. Stat. § 7B-906.2(d). The trial court does not need to make a verbal recitation of the statutory language, but "the order must make clear that the trial court considered the evidence in light of whether reunification would be futile or inconsistent with the juvenile's health, safety, and need for a safe, permanent home within a reasonable period of time." *In re L.M.T.*, 367 N.C. 165, 167-68, 752 S.E.2d 453, 455 (2013).

Here, the trial court's order reflects that it made this consideration. It found facts as to each of the Section 906.2(d) factors: that Grandmother remained available to the court, but that she was not participating or cooperating with the plan, nor was she making progress, and was acting in a manner inconsistent with the health and safety of the children. Each of these findings was supported by evidentiary findings, including those regarding her failure to undergo DBT, attend classes on parenting victims of sexual abuse and, most importantly, her refusal to acknowledge the fact that her son had sexually abused Holly. There is no indication the trial court applied an inappropriate standard to its analysis.

Grandmother's own briefing, in its argument on a separate issue, acknowledges the overlapping considerations between termination and permanency planning, identifying our Supreme Court's reliance on termination precedent to affirm an order ending reunification efforts because "[i]t stands to reason that evidence sufficient to support the

termination of parental rights is sufficient to support the less dramatic step of removing reunification from a permanent plan." *In re J.M.*, 384 N.C. at 602, 887 S.E.2d at 835. The trial court properly addressed the considerations required to end reunification efforts and did not err by considering the possibility of future neglect when determining the best interests of the children.

B. Burden shifting

[3] Grandmother also argues that the trial court impermissibly placed the burden of proof upon her at the permanency planning hearing. During a permanency planning hearing, the court is tasked with determining the best interest of the child. N.C. Gen. Stat. § 7B-906.2(a). Accordingly, "neither the parent nor the county department of social services bears the burden of proof in permanency planning hearings." *In re E.A.C.*, 278 N.C. App. 608, 617, 863 S.E.2d 433, 439 (2021).

In one of its Findings of Fact, the trial court found:

> [Grandmother] failed to obtain educational courses for parenting "children who have been exposed to other environmental chaos such as parents with a substance abuse problem by participating in support groups or non-offender's education." [Grandmother] is unable to provide this Court with any proof she is in a better position than she was over a year and a half ago concerning raising a child who has been sexually abused and how to provide them with the care and services "they need to ensure their emotional wellbeing." [Grandmother] has not provided any evidence to this Court that she is better positioned now, than a year ago, to help these minor children deal with the trauma they have faced in their lives.

We disagree that the trial court's language here implies that a burden of proof was placed on Grandmother. While the wording is perhaps inartful, it is clear from the context of this finding that the trial court did not place a burden on her. First, the trial court's finding that Grandmother had not provided evidence that she is "better positioned" is in the same paragraph as the finding that she had not obtained educational resources to enable her to parent vulnerable children. This is part of determining whether Grandmother "is making adequate progress within a reasonable period of time under the plan." N.C. Gen. Stat. § 7B-906.2(d)(1). The trial court ordered Grandmother in its two previous permanency planning orders to seek out additional educational

resources to assist her in parenting the children. This finding simply acknowledges that she has not done so.

Second, this paragraph is one of the trial court's 124 Findings of Fact detailing the history of the case and Grandmother's participation in it. These findings make clear that the trial court weighed the evidence before concluding that the reasons for the children's removal still existed and that Grandmother had not made sufficient progress in creating a safe environment such that reunification was in the children's best interest. Following each of the three previous hearings—the dispositional hearing and the two prior permanency planning hearings—the trial court determined that the children were not safe in Grandmother's home because of her unwillingness to accept that Holly had been abused or to participate in education or therapy that would aid in parenting abused or neglected children. The trial court is, in this finding and others, recognizing that sufficient improvement has not been made that would now render the home safe for the children where before it was not.

III. Removal of reunification from permanent plan

[4] Grandmother argues that she substantially complied with her case plan and that the trial court narrowly focused on a handful of issues, ignoring her overall progress, and erred in ordering the cessation of reunification efforts. We review the trial court's elimination of reunification from the permanent plan for abuse of discretion. *In re J.H.*, 373 N.C. 264, 267-68, 837 S.E.2d 847, 850 (2020). A trial court abuses its discretion when its ruling is so arbitrary it could not have been the result of a reasoned decision. *Id.*

The trial court's binding findings of fact show that Grandmother failed to make sufficient progress on her case plan. It is true that her visitation with the children was largely positive, she maintained her ongoing therapy sessions with the therapist at her pain management clinic, completed the Darkness to Light program, and took at least an initial step to be evaluated for DBT. However, she failed to make use of the DBT resources provided by DSS to find a provider in compliance with the trial court's orders, seek out adequate education or support in parenting a child who is the victim of sexual abuse, or disengage from her relationship with Father.

Most importantly, Grandmother continues to insist that Father never sexually abused Holly. This standing alone could be enough to support the trial court's order ceasing reunification. In *In re G.D.C.C.*, our Supreme Court reviewed a similar situation. 380 N.C. 37, 867 S.E.2d 628 (2022). In that case the mother refused to believe her older daughter,

Nadina, had been sexually abused by her father. 380 N.C. at 41-42, 867 S.E.2d at 631. The mother maintained that Nadina was making up the allegations, refused to believe she had been sexually abused, and consistently failed to acknowledge her children's special needs resulting from the abuse. *Id.* She also failed to demonstrate any ability to recognize threats to her younger daughter, Galena, despite completing her case plan in its entirety. *Id.* Much like Grandmother in this case, she "failed to acknowledge any concern with her ability to parent and protect the children, failed to accept any responsibility for her actions, and continued to deny that she had done anything wrong." *Id.* "After years of professional, court, and DSS involvement, the issues that led to Galena's removal remained: respondent still could not protect her children from threats and thus could not provide them an environment that was not injurious to their welfare." *Id.* at 42, 867 S.E.2d at 632. Our Supreme Court held this was sufficient for the trial court to find a probability of future neglect and terminate the mother's parental rights to Galena, regardless of the fact that she had completed her case plan. *Id. See also In re D.W.P.*, 373 N.C. 327, 339–40, 838 S.E.2d 396 (2020) (holding that the respondent-mother's inability to recognize and break patterns of abuse by her fiancé against her child supported a neglect determination, despite the progress made in her parenting plan).[6]

As in those cases, Grandmother refuses to recognize that Holly was the victim of abuse. Despite overwhelming evidence, she rejected the trial court's determination that sexual abuse had occurred and continued to assert, including in her testimony at the final permanency planning hearing, that Holly had contracted gonorrhea from a toilet seat and the misunderstanding that she "had the bacteria but not the infection." Although she claims she would not allow Father access to the children because of the risk DSS would retake custody of them, it is clear that she does not understand or admit the danger Father represents or the harm he has already caused. Like the respondents in *G.D.C.C.* and *D.W.P.*, whatever progress Grandmother has made on her case plan has not been sufficient to allow her to provide a safe home for the children. Additionally, Grandmother has failed to complete aspects of her plan, including obtaining DBT and sexual assault education, designed to help her do so.

The trial court did not abuse its discretion in ordering that reunification efforts be ceased.

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6. As discussed above, although both *G.D.C.C.* and *D.W.P.* are cases involving the termination of parental rights, evidence sufficient to support termination is also sufficient to support an order ceasing reunification efforts. *In re J.M.*, 384 N.C. at 602, 887 S.E.2d at 835.

IV. GAL Investigation

[5] Grandmother argues that the guardian ad litem ("GAL") failed to adequately perform its duties. Grandmother does not appear to have raised this issue before the trial court. "In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion[.]" N.C. R. App. P. 10(a)(1). In her reply brief, Grandmother does not argue that this issue was raised, but that it is automatically preserved because it stems from a statutory mandate.

"[W]hen a trial court acts contrary to a statutory mandate . . . the right to appeal the court's action is preserved." *State v. Ashe*, 314 N.C. 28, 39, 331 S.E.2d 652, 659 (1985). Such mandatory statutes are "legislative enactments of public policy which require the trial court to act, even without a request to do so[.]" *State v. Hucks*, 323 N.C. 574, 579, 374 S.E.2d 240, 244 (1988). This exception to the preservation requirement of Rule 10(a) is limited to mandates directed to the trial court either: "(1) by requiring a specific act by the trial judge; or (2) by requiring specific courtroom proceedings that the trial judge has authority to direct[.]" *In re E.D.*, 372 N.C. 111, 119, 827 S.E.2d 450, 456 (2019) (internal citations omitted) (rejecting respondent's argument that inpatient commitment statute's directive that respondent be examined by a physician upon arrival at 24-hour facility is an automatically preserved statutory mandate). In the second category, the statute must leave "no doubt that the legislature intended to place the responsibility on the judge presiding at the trial." *Id.* at 121, 827 S.E.2d at 457 (citing *Ashe*, 314 N.C. at 35, 331 S.E.2d at 657).

Under N.C. Gen. Stat. § 7B-601(a):

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

This is a directive to the GAL and does not appear to mandate that the trial judge perform a specific act or direct a courtroom proceeding. The trial court is directly tasked only with appointing the GAL to represent the juvenile. The statute narrates the GAL's responsibilities, rather than making an explicit command to the trial court such as mandating written findings as to the GAL's performance.

However, we have held previously the combination of N.C. Gen. Stat. § 7B-906.1(c), which requires the trial court at a permanency planning hearing to consider information from the GAL, and N.C. Gen. Stat. § 7B-601(a), which lists the GAL's duties, to create a statutory mandate automatically preserving the right of appeal on this issue. *In re J.C.-B.*, 276 N.C. App. 180, 192, 856 S.E.2d 883, 892 (2021). This is in keeping with the best interest of the children as the paramount goal of permanency planning and our observation that the best interest question is "more inquisitorial in nature than adversarial," rendering the production of any competent, relevant evidence ultimately the responsibility of the trial court. *Ramirez-Barker v. Barker*, 107 N.C. App. 71, 78, 418 S.E.2d 675, 679 (1992).

[6] Upon the filing of a petition alleging a juvenile is abused or neglected, the trial court must appoint a guardian ad litem to represent the juvenile. N.C. Gen. Stat. § 7B-601(a). The guardian ad litem "stands in the place of the minor who is not *sui juris*," *In re J.H.K.*, 365 N.C. 171, 175, 711 S.E.2d 118, 120 (2011), and is tasked with the duties under Section 7B-601(a) noted above, including investigating to determine the facts and the needs of the juvenile and protecting and promoting the juvenile's best interests. The GAL's representation of the juvenile's interests is integral to the process such that the failure to appoint a GAL creates a presumption of prejudice requiring reversal. *In re R.A.H.*, 171 N.C. App. 427, 431, 614 S.E.2d 382, 385 (2005). Failure by the GAL to fulfill their statutory duties may also require reversal. *See In re J.C.-B.*, 276 N.C. App. at 192, 856 S.E.2d at 892.

In this case, the GAL filed written reports with the trial court at the adjudication hearing and each of the three subsequent permanency planning hearings. These reports reflect that the GAL volunteer conducted monthly visits with the children at their foster home and additional monthly phone calls with their foster parents. They include detailed information concerning the health and well-being of the children, including their psychological and physical health, their educational development, their relationships with their foster parents and each other, and their wishes regarding remaining in the foster home. In its report to the court prior to the permanency planning hearing that is the subject of this appeal, the GAL recommended the court adopt a

primary permanent plan of adoption and a secondary permanent plan of guardianship.

Grandmother's criticism of the GAL's performance stems from two primary concerns: first, that the GAL did not maintain adequate communication with Grandmother, and second, that the GAL did not sufficiently investigate the children's wishes.

Grandmother notes that the GAL maintained contact with her following the initial adjudication and placement of the children in her home but argues that the GAL's contact with her was inadequate once the children were removed from her care following the filing of the petition in August 2021. After the petition was filed, the GAL spoke with Grandmother by telephone twice and had no other contact with her.

Beyond Section 7B-601(a)'s listing of the duties of the GAL, we have little guidance as to what constitutes sufficient investigation. Grandmother directs us to the GAL Attorney Practice Manual published by our Administrative Office of the Courts, which instructs GAL volunteers to "interview parents and family members." In *R.A.H.* we held there was a presumption of prejudice when a GAL was not appointed prior to a termination hearing as that meant no field investigation had been performed, and neither the child nor the respondent-mother had been interviewed prior to the hearing. 171 N.C. App. at 431, 614 S.E.2d at 385 (2005).

Unlike in that case, the GAL here not only had consistent contact with the children but spoke with Grandmother: twice by phone following the removal of the children from her home, and, as Grandmother describes, on numerous occasions prior to that. These included at least three home visits during which the GAL had the opportunity to see Grandmother interact with the children. The GAL also had access to DSS reports noting that Grandmother's visitation with the children was largely positive.

Moreover, Grandmother makes no argument as to the effect additional contact with her would have had on the GAL's determination of the children's best interests, and we cannot identify any way its recommendation was prejudiced by the lack of additional conversation. More contact would not have changed the fact that Grandmother, as the GAL flags for the trial court's attention, "continues to contest the allegations in the petition" and "stated under oath during the recent TPR hearing that she believed [Holly] contracted gonorrhea by sliding down a toilet seat that was contaminated."

Grandmother also argues that the GAL failed to adequately investigate the children's wishes as to where they would like to live, comparing

this case to our decision in *In re J.C.-B.* "One of the duties of a GAL is to ascertain from the child they represent what their wishes are and to convey those express wishes accurately and objectively to the court." *In re J.C.-B.*, 276 N.C. App. at 192, 856 S.E.2d at 892.

J.C.-B. is distinguishable from this case. In that case, the sixteen-year-old juvenile, Jacob's, visitation with his mother was at issue. The GAL provided the trial court with letters from therapists giving conflicting advice: two expressed the opinion that Jacob should not be allowed contact with his mother, while the most recent recommended Jacob be allowed to decide when he would like to resume visitation. *Id.* at 193-94, 856 S.E.2d at 892. The GAL did not communicate Jacob's wishes to the trial court, which ordered no visitation with the mother "until recommended by the juvenile's therapist." *Id.* at 183, 856 S.E.2d at 887. We held that the GAL had failed to adequately investigate Jacob's wishes and convey them to the trial court. *Id.* at 194, 856 S.E.2d at 893.

Rather than providing sufficient evidence for the trial court to determine whether visitation was in Jacob's best interest, the GAL simply provided the court with conflicting recommendations from therapists—including one that recommended deferring to Jacob's wishes—with no indication the GAL had asked his preference. The trial court then vested discretion in one of the therapists to determine when visitation was appropriate, meaning that not only did the GAL fail to properly investigate, but the trial court improperly delegated its authority. *Id.*

In this case, the GAL did investigate the children's wishes, finding that Holly and Thomas both loved their foster family and loved living in their foster home, and that Mary was too young to express her wishes. While Grandmother argues the GAL should have more granularly investigated whether the children wished to return to her care, we do not believe the GAL was required to do so nor do we believe that information was necessary to the trial court's decision. In *J.C.-B.* the juvenile was sixteen years old (as we note in that case, approaching the age of majority), the record reflected an expressed desire in the past to maintain contact with his mother, and one of his therapist's letters explicitly recommended that he be allowed to decide whether to resume visitation. 276 N.C. App. at 194, 856 S.E.2d at 892-93. The trial court did not have sufficient evidence to determine Jacob's visitation, information which the GAL should have conveyed.

Here, the children are significantly younger and have expressed their wishes regarding their current home. There are no conflicting recommendations by service providers requiring more detailed information from the children. The trial court had sufficient evidence to make its

ruling. Even if the children had expressed a desire to return to live with Grandmother, "[t]he expressed wish of a child of discretion is . . . never controlling upon the court, since the court must yield in all cases to what it considers to be for the child's best interests, regardless of the child's personal preference." *Clark v. Clark*, 294 N.C. 554, 576-77, 243 S.E.2d 129, 142 (1978). A statement from a 2-, 4-, or 6-year-old that they would like to live with Grandmother, who continues to deny that the oldest was sexually assaulted, would not have changed the trial court's decision as to the children's best interest in this case.

V. Reasonable efforts of DSS

[7] Grandmother last argues that DSS did not make reasonable efforts toward reunification in that it did not provide adequate visitation or help in obtaining DBT. Although DSS argues that Grandmother also failed to argue this issue before the trial court and preserve it for appeal, the trial court was required to make related findings and conclusions:

> Unless reunification efforts were previously ceased, at each permanency planning hearing the court shall make a finding about whether the reunification efforts of the county department of social services were reasonable. In every subsequent permanency planning hearing held pursuant to G.S. 7B-906.1, the court shall make written findings about the efforts the county department of social services has made toward the primary permanent plan and any secondary permanent plans in effect prior to the hearing. The court shall make a conclusion about whether efforts to finalize the permanent plan were reasonable to timely achieve permanence for the juvenile.

N.C. Gen. Stat. § 7B-906.2(c). Accordingly, we consider whether the trial court's findings of fact support its conclusion that "[t]he Alamance County Department of Social Services has made reasonable efforts to eliminate the need for removal of the juveniles[.]" *In re A.P.*, 281 N.C. App. 347, 354, 868 S.E.2d 692, 698 (2022).

"Our General Assembly requires social service agencies to undertake reasonable, not exhaustive, efforts towards reunification." *In re A.A.S.*, 258 N.C. App. 422, 430, 812 S.E.2d 875, 882 (2018). "Reasonable efforts" are the "diligent use of preventive or reunification services by a department of social services when a juvenile's remaining at home or returning home is consistent with achieving a safe, permanent home for the juvenile within a reasonable period of time." N.C. Gen. Stat. § 7B-101(18).

The trial court, in its Finding of Fact 21, found that DSS's reasonable efforts to achieve reunification included, among other services: assessing the children's needs, contacting providers, counseling and supporting the family, meeting with Grandmother to develop a service agreement and visitation plan, providing monetary assistance for the children's care, and making referrals to service providers. Grandmother does not contest this finding but argues that DSS failed to provide reasonable efforts in that it did not expand her visitation or provide adequate assistance in obtaining DBT.

In its adjudication and disposition order, filed 16 February 2022, the trial court ordered that DSS provide Grandmother with one hour of monthly visitation with the children. In its subsequent orders, filed 18 May 2022 and 26 January 2023, the trial court continued to order one hour of monthly visitation, but gave DSS discretion to increase visitation. Grandmother argues that the failure of DSS to do so, despite visitation going well was "insufficient reasonable effort toward [Grandmother's] visits with her grandchildren." Grandmother's argument ignores DSS's stated concerns about her behavior at visitation, including bringing the case up with the attending social worker and asking the children if they wanted to come home. It also ignores DSS testimony that Grandmother's visits were routinely allowed to last longer than the scheduled hour. While a failure to provide court-ordered visitation may impact a reasonable efforts determination, *see In re C.C.G.*, 380 N.C. 23, 35, 868 S.E.2d 38, 47 (2022), we do not hold that DSS exercising its discretion and declining to expand visitation beyond that required by the trial court amidst concerns about Grandmother's behavior during visits was a failure to exercise reasonable efforts toward reunification.

Grandmother's briefing also suggests offhand that the trial court improperly delegated control over visitation. However, allowing DSS to expand visitation beyond a minimum ordered by the trial court is not an impermissible delegation of judicial authority. *In re K.W.*, 272 N.C. App. 487, 495, 846 S.E.2d 584, 591 (2020).

Nor were DSS's efforts to assist Grandmother in obtaining DBT insufficient. As discussed above, DSS contacted multiple providers on Grandmother's behalf and offered to pay for half the cost of services. While Grandmother testified that she could not afford DBT sessions as none of the suggested providers accepted her insurance and would cost a hundred dollars or more each session, DSS located a provider that would cost $40 per session and offered to pay half of that fee. The trial court rejected Grandmother's testimony that she could not afford $40 per month to attend bi-weekly sessions and found that she willfully

refused to engage in mental health treatment. DSS made reasonable efforts to assist Grandmother, but she rejected its assistance.

Conclusion

For the foregoing reasons, we affirm the trial court's permanency planning order ceasing reunification efforts.

AFFIRMED.

Judges ZACHARY and THOMPSON concur.

KAREN JONES, JONATHAN WAYNE CORN, JAN FRANKLIN CORN, and JESSICA CORN as mother and guardian ad litem of V.E.C. and J.R.C. (minors), Plaintiffs
v.
ALBERT HOGAN CORN, JOYCE A. CORN, KENNETH GREGORY CORN, and GLENDA SUE CORN, Defendants

No. COA23-927

Filed 7 May 2024

1. Deeds—reformation—mistake of draftsman—legal mistake—judgment notwithstanding the verdict

In a dispute between siblings over their parents' estates, in which two siblings (defendants) sought reformation of a deed concerning a tract of land based on their assertion that the deed did not reflect their parents' intention, the trial court did not err by denying defendants' motion for judgment notwithstanding the verdict after the jury determined that the deed did not require reformation. Despite defendants' contention that the drafting attorney made a scrivener's error, the evidence when viewed in the light most favorable to plaintiffs showed instead that the attorney made a legal error, for which reformation was not appropriate.

2. Deeds—grantor capacity—at time of signing the deeds—judgment notwithstanding the verdict

In a dispute between siblings over their parents' estates, in which several siblings (plaintiffs) asserted that their parents lacked capacity to execute two deeds concerning their home and a separate tract of land, the trial court properly denied defendants' judgment notwithstanding the verdict after the jury determined that the parents lacked capacity to execute the deeds. Although there was

conflicting evidence regarding whether the parents suffered from hallucinations at the time they signed the deeds, it was the jury's role to weigh the evidence, which, when viewed in the light most favorable to plaintiffs, supported the jury's verdict on capacity.

3. Deeds—undue influence—factors—judgment notwithstanding the verdict

In a dispute between siblings over their parents' estates, in which several siblings (plaintiffs) asserted that two other siblings (defendants) exerted undue influence over their parents regarding the execution of two deeds (for the parents' home and for a separate tract of land), the trial court properly denied defendants' motion for judgment notwithstanding the verdict after the jury determined that defendants unduly influenced their parents and benefitted from that influence. Resolving any contradictions in the evidence in plaintiffs' favor, evidence regarding the parents' age and weakness and the clear benefit to defendants of the effect of the deeds supported the jury's determination on this issue.

4. Conversion—estate dispute—ownership of lockbox—rental income from home—judgment notwithstanding the verdict

In a dispute between siblings over their parents' estates, in which several siblings (plaintiffs) asserted that two other siblings (defendants) converted the contents of a lockbox owned by their parents and rental income from the parents' home after their deaths, the trial court properly denied defendants' motion for judgment notwithstanding the verdict where the evidence, viewed in the light most favorable to plaintiffs, supported the jury's determination that one defendant converted the lockbox contents—because it had not been gifted to him as he asserted—and that both defendants converted the home's rental income—because the deed granting them the home was invalid.

5. Deeds—estate dispute—motion for new trial granted—trial court's discretion—lack of evidence

In a dispute between siblings over their parents' estates, in which various claims were raised regarding the parents' execution of two deeds (one for their home and the other for a separate tract of land), the trial court did not abuse its discretion by granting defendants' motion for a new trial where the court made a reasoned decision after determining that there was insufficient evidence to support several of the jury's verdicts (regarding mental capacity, undue influence, and conversion).

Cross appeals by Plaintiffs and Defendants from order entered 6 June 2023 by Judge William H. Coward in Henderson County Superior Court. Heard in the Court of Appeals 14 March 2024.

James W. Lee, III, for Plaintiffs-Appellants-Appellees.

Barbour, Searson, Jones & Cash, PLLC, by W. Scott Jones & W. Bradford Searson, for Defendants-Appellees-Appellants.

CARPENTER, Judge.

Both parties appeal from the trial court's order denying Defendants' motion for judgment notwithstanding the verdict ("JNOV") and granting Defendants' motion for a new trial. After careful review, we affirm the trial court's order.

I. Factual & Procedural Background

This appeal is about siblings disputing their parents' estate. On 15 August 2019, brothers Albert Corn and Kenneth Corn sued their siblings, Karen Jones, Jonathan Corn, and Jan Corn, as well as V.E.C. and J.R.C.,[1] the grandchildren of their deceased brother, Chris Corn, for reformation of a deed. On 16 August 2019, in a separate case, Karen, Jonathan, Jan, V.E.C., and J.R.C. sued Albert and Kenneth for "lack of capacity/undue influence," "distribution of trust property," conversion, and breach of fiduciary duty. On 4 March 2022, the trial court consolidated the cases for trial.

Trial evidence tended to show the following. Albert Corn ("Father") and Jeanette Corn ("Mother") were married and had six children: Albert and Kenneth ("Defendants"), Karen, Jonathan, Jan, and Chris ("Plaintiffs").[2] On 14 March 2008, Father and Mother executed two trusts (the "Trusts"). Father was the grantor of one Trust, and Mother was the grantor of the other. Upon the death of Father and Mother, both Trusts named Defendants as co-trustees, and both Trusts mandated an equal distribution of Trust assets among Plaintiffs and Defendants.

Also on 14 March 2008, Father and Mother executed two wills (the "Wills"). Under both Wills, Father and Mother bequeathed their property to each other. Under both Wills, the surviving spouse bequeathed his or

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1. V.E.C. and J.R.C. are minors.

2. The trial court referred to Albert and Kenneth as the defendants and Karen, Jonathan, Jan, V.E.C., and J.R.C. as the plaintiffs. For consistency, we will do the same.

her “tangible personal property” to Plaintiffs and Defendants. And under both Wills, the surviving spouse bequeathed his or her residuary estate, meaning all undisposed “real and personal property,” to his or her Trust.

Father died 31 August 2015; Mother died 19 August 2016. But before their death, in 2014, Father and Mother hired attorney Nicole Engel to further advise them about estate planning and property ownership. Attorney Engel is a certified elder-law specialist. Defendants accompanied Mother and Father to their initial meeting with attorney Engel. After meeting with Father, Mother, and Defendants, attorney Engel instructed attorney Margaret Toms to prepare deeds (the “Deeds”) for Father and Mother concerning their home (the “Home”) and a separate tract of land (the “Tract”). Attorney Toms prepared the deeds.

In the Home Deed, Father and Mother granted themselves a 99% share of the Home, and they granted each Defendant a .5% share of the Home. Father, Mother, and Defendants held the Home as joint tenants with right of survivorship. In other words, if Defendants outlived Father and Mother, Defendants would own the Home upon the death of Father and Mother.

In the Tract Deed, on the other hand, Father and Mother granted each of their Trusts a 49.5% share of the Tract, and they granted each Defendant a .5% share of the Tract. Like the Home, the Tract was held in joint tenancy with right of survivorship. But unlike the Home, Father and Mother’s deaths would not change the Tract’s ownership: The Tract would remain titled 49.5% to Father’s Trust, 49.5% to Mother’s Trust, and 1% to Defendants. In other words, the Tract would not become the exclusive property of Defendants upon Father and Mother’s deaths.

After executing the Deeds, attorney Engel sent a “follow-up” letter to Father and Mother. In the letter, attorney Engel stated the following: “Thus, because you individually and as trustees of your revocable trusts have retained majority ownership interest in your real property, the [United States Department of Veterans Affairs] will consider that you have resources equal to the tax value of your ownership interest in your real property.”

Unhappy with the results of the Tract Deed, Defendants asked for reformation because the Tract Deed did not match Father and Mother’s intent. Defendants sought to reform the Tract Deed to reflect Father and Mother, individually, as grantees, rather than their Trusts as grantees. Put differently, Defendants sought to reform the Tract Deed to reflect Father and Mother’s intention for the Tract to be owned exclusively by Defendants after Father and Mother’s deaths.

On the other hand, unhappy with both Deeds, Plaintiffs contended that the Deeds were invalid because (1) Father and Mother lacked capacity to consent to the Deeds, and (2) Defendants procured the Deeds through undue influence. And because the Home Deed was invalid, Plaintiffs argued that Defendants necessarily converted rental income from the Home after the death of Father and Mother.

Attorney Engel testified that Father and Mother intended for the Tract to pass to Defendants after Father and Mother passed. Attorney Engel also testified that Father and Mother "probably would not have known, you know, the fact that if [the Tract] stayed in the trust[, it] would not accomplish that goal." Attorney Engel continued: "between Margaret and I, Margaret Toms, we did make a mistake in that deed. And that didn't accomplish what the Corns' intention was."

Dr. MaryShell Zaffino, Father's primary-care provider from 2014 through 2015, never noted concerns about Father's mental health. Dr. Jennifer Wilhelm was Mother's primary-care provider from 2012 through 2015, and she noted that Mother had anxiety and depression.

Plaintiff Jan stated that Father was more depressed towards the end of his life. Further, she stated that Father experienced hallucinations after his 2014 heart surgery. But Plaintiff Jan also stated that, until his death, Father knew what property he owned, where his property was, and who his relatives were. Plaintiff Jan stated that Mother suffered from anxiety.

Plaintiff John stated that Father lacked capacity to execute the Deeds, and he said that Mother had "a lot of depression." Plaintiff Karen also thought Father lacked capacity to execute the Deeds; she also said that Father sometimes hallucinated. But Plaintiff Karen stated that, until his death, Father knew what property he owned, where his property was, and who his relatives were. Plaintiff Karen said Mother was depressed, and that Mother took several medications, which could disorient her.

Plaintiffs could visit Father and Mother until their deaths; their access to Father and Mother was unmitigated. Attorney Engel did not suspect that Father and Mother were unduly influenced by anyone.

In addition to the Home and the Tract, the parties also disputed the contents of a lockbox (the "Lockbox"). Plaintiff Jonathan purchased the Lockbox for Father and Mother. Plaintiff Jonathan said that he put approximately $80,000 of Father and Mother's cash into the Lockbox, and he never saw the Lockbox again. Defendant Kenneth said that

Father, before his death, gifted him the Lockbox, so Defendant Kenneth did not report the Lockbox to Father's estate.

On 8 March 2022, at the close of Plaintiffs' case, Defendants moved for directed verdicts concerning all of Plaintiffs' claims. The trial court denied the motion. At the close of their case, Defendants renewed their directed-verdict motions concerning Plaintiffs' claims and moved for directed verdict concerning their reformation claim. The trial court denied Defendants' motions.

On 10 March 2022, the jury found the following: Father and Mother lacked capacity to execute the Deeds; Defendants unduly influenced Father and Mother to execute the Deeds; the Tract Deed did not require reformation; Defendants converted rental income from the Home; Defendant Kenneth, but not Defendant Albert, converted the Lockbox and its contents; and Defendants owed punitive damages to Plaintiffs.

On 16 March 2022, Defendants moved for JNOV "as to all claims and issues, except the issues of [Defendant Albert] and the [Lockbox], and, in the alternative, for a new trial." On 6 June 2023, the trial court denied Defendants' motion for JNOV and granted Defendants' motion for a new trial.

Orders granting or denying either JNOV or a new trial do not require the trial court to make findings of fact. *See Williams v. Allen*, 383 N.C. 664, 670–72, 881 S.E.2d 117, 121–22 (2022); N.C. Gen. Stat. §§ 1A-1, Rules 50, 59 (2023). Nonetheless, in its order denying JNOV and granting a new trial, the trial court found there was insufficient evidence to support the following jury verdicts: that Father lacked mental capacity to sign the Deeds; that Mother lacked mental capacity to sign the Deeds; that the Deeds were procured by Defendants' undue influence; and that Defendants converted property from Plaintiffs.

On 3 July 2023, Plaintiffs filed notice of appeal. On 11 July 2023, Defendants filed notice of appeal.

II. Jurisdiction

This Court has jurisdiction under N.C. Gen. Stat. § 7A-27(b)(3)(d) (2023) (providing this Court jurisdiction over appeals from orders in which a superior court "[g]rants or refuses a new trial").

III. Issues

The issues on appeal are whether the trial court erred by: (1) denying Defendants' motion for JNOV; or (2) granting Defendants' motion for a new trial.

IV. Analysis

A. Motion for JNOV

On appeal, Defendants argue that the trial court erred by denying its motion for JNOV. We disagree.

We review JNOV rulings de novo. *Hewitt v. Hewitt*, 252 N.C. App. 437, 441, 798 S.E.2d 796, 799 (2017). Under a de novo review, this Court " 'considers the matter anew and freely substitutes its own judgment' for that of the lower tribunal." *State v. Williams*, 362 N.C. 628, 632–33, 669 S.E.2d 290, 294 (2008) (quoting *In re Greens of Pine Glen, Ltd. P'ship*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003)).

"The jury is a central foundation of our justice system and our democracy. Whatever its imperfections in a particular case, the jury is a necessary check on governmental power." *Pena-Rodriguez v. Colorado*, 580 U.S. 206, 210, 137 S. Ct. 855, 860, 197 L. Ed. 2d 107, 115 (2017). The jury's role is to "weigh the evidence, determine the credibility of the witnesses, the probative force to be given to their testimony and determine what the evidence proved or did not prove. It [is] the province of the jury to believe any part or none of the evidence." *Daniels v. Hetrick*, 164 N.C. App. 197, 204, 595 S.E.2d 700, 704–05 (2004).

But under certain circumstances, a trial court may usurp the jury's role via JNOV. *See* N.C. Gen. Stat. § 1A-1, Rule 50(b)(1). A party can request JNOV by "mov[ing] to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict . . . ." *Id.* JNOV "shall be granted if it appears that the motion for directed verdict could properly have been granted." *Id.*

A motion for JNOV "is essentially a renewal of an earlier motion for directed verdict." *Bryant v. Nationwide Mut. Fire Ins. Co.*, 313 N.C. 362, 368–69, 329 S.E.2d 333, 337 (1985) (citing *Dickinson v. Pake*, 284 N.C. 576, 583, 201 S.E.2d 897, 902 (1974)). "Accordingly, if the motion for directed verdict could have been properly granted, then the subsequent motion for judgment notwithstanding the verdict should also be granted." *Id.* at 369, 329 S.E.2d at 337 (citing *Manganello v. Permastone, Inc.*, 291 N.C. 666, 670, 231 S.E.2d 678, 680 (1977)).

A directed verdict, and thus JNOV, "is appropriate only when the issue submitted presents a question of law based on admitted facts where no other conclusion can reasonably be reached." *Ferguson v. Williams*, 101 N.C. App. 265, 271, 399 S.E.2d 389, 393 (1991) (citing *Seaman v. McQueen*, 51 N.C. App. 500, 503, 277 S.E.2d 118, 120 (1981)). JNOV is a high hurdle:

> the trial court must view all the evidence that supports the non-movant's claim as being true and that evidence must be considered in the light most favorable to the non-movant, giving to the non-movant the benefit of every reasonable inference that may legitimately be drawn from the evidence with contradictions, conflicts, and inconsistencies being resolved in the non-movant's favor.

Bryant, 313 N.C. at 369, 329 S.E.2d at 337–38 (citing *Farmer v. Chaney*, 292 N.C. 451, 452–53, 233 S.E.2d 582, 584 (1977)).

Here, the trial court denied Defendants' JNOV motion concerning their claim for reformation and concerning Plaintiffs' claims for lack of capacity, undue influence, and conversion. We will address each claim in that order.

1. Reformation

[1] There are "three circumstances under which reformation could be available as a remedy: (1) mutual mistake of the parties; (2) mistake of one party induced by fraud of the other; and (3) mistake of the draftsman." *Janice D. Willis Revocable Tr. v. Willis*, 365 N.C. 454, 457, 722 S.E.2d 505, 507 (2012) (citing *Crawford v. Willoughby*, 192 N.C. 269, 271, 134 S.E. 494, 495 (1926)). Mistake of law is not a basis for reformation. *See Mims v. Mims*, 305 N.C. 41, 61, 286 S.E.2d 779, 792 (1982).

Here, Defendants asserted that the draftsman of the Tract Deed, attorney Toms, made a scrivener's error in drafting the Tract Deed by listing the Trusts as grantees. Rather than their Trusts, Father and Mother should have been listed as grantees. To support this assertion, Defendants offered testimony from attorney Engel, who stated that "between Margaret and I, Margaret Toms, we did make a mistake in that deed. And that didn't accomplish what the Corns' intention was."

Viewing the evidence in the light most favorable to Plaintiffs, however, attorney Toms' error can also be reasonably construed as a legal error. In her follow-up letter, attorney Engel stated that Father and Mother retained a majority ownership in the Home and the Tract, "individually and *as trustees of [their] revocable trusts*." In fact, the text of the Trust Deed lists the Trusts as grantees. Attorney Engel's letter, coupled with the text of the Trust Deed, signal that attorney Toms understood who she listed as grantees—but she, and attorney Engel, misunderstood the legal consequences of doing so.

Therefore, resolving inconsistencies in Plaintiffs' favor, *see Bryant*, 313 N.C. at 369, 329 S.E.2d at 337–38, it is reasonable to conclude that

attorney Toms made a legal error, *see Ferguson*, 101 N.C. App. at 271, 399 S.E.2d at 393, which does not support reformation, *see Mims*, 305 N.C. at 61, 286 S.E.2d at 792. Accordingly, the trial court did not err by denying Defendants' motion for JNOV concerning reformation because it is reasonable to conclude that reformation of the Tract Deed is inappropriate. *See* N.C. Gen. Stat. § 1A-1, Rule 50(b)(1).

2. Lack of Capacity

[2] A grantor of property must have capacity, and a grantor's capacity requirement is the same as a testator's. *See Gilliken v. Norcom*, 197 N.C. 8, 9, 147 S.E. 433, 433 (1929) ("The law recognizes the same standard of mental capacity for testing the validity of both deeds and wills, although it is suggested that perhaps a court would scrutinize a deed more closely than a will."); *In re Will of Jarvis*, 334 N.C. 140, 145, 430 S.E.2d 922, 925 (1993) (stating the capacity standard for wills).[3]

A grantor has capacity if he: "(1) comprehends the natural objects of his bounty, (2) understands the kind, nature and extent of his property, (3) knows the manner in which he desires his act to take effect, and (4) realizes the effect his act will have upon his estate." *See id.* at 145, 430 S.E.2d at 925 (citing *In re Will of Shute*, 251 N.C. 697, 699, 111 S.E.2d

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3. At oral argument, Plaintiffs pointed to *Woody v. Vickrey*, 276 N.C. App. 427, 857 S.E.2d 734 (2021) and asserted that grantors require a higher level of capacity than testators. They do not.

We recognize that we used slightly different language to define grantor capacity in *Woody*. *See id.* at 441, 857 S.E.2d at 744 (citing *Hendricks v. Hendricks*, 273 N.C. 733, 734, 161 S.E.2d 97, 98 (1968)) ("The capacity required to execute a deed includes: (1) understanding the nature and consequences of making a deed; (2) comprehending its scope and effect; and (3) knowing what land he is disposing of and to whom and how."). But in *Woody*, we merely paraphrased the applicable rule and applied it to a deed–grantor scenario. *See id.* at 441, 857 S.E.2d at 744.

We did not create a new rule; the rule for grantor capacity remains the same as the rule for testator capacity. *See Gilliken*, 197 N.C. at 9, 147 S.E. at 433. Understanding "the nature and consequences of making a deed" and the deed's "scope and effect," *see Woody*, 276 N.C. App. at 441, 857 S.E.2d at 744, is no different than "know[ing] the manner in which [the testator] desires his act to take effect" and "realiz[ing] the effect his act will have upon his estate," *see In re Will of Jarvis*, 334 N.C. at 145, 430 S.E.2d at 925; and "knowing what land he is disposing of and to whom and how," *see Woody*, 276 N.C. App. at 441, 857 S.E.2d at 744, is no different than "comprehend[ing] the natural objects of his bounty" and "understand[ing] the kind, nature and extent of his property," *see In re Will of Jarvis*, 334 N.C. at 145, 430 S.E.2d at 925.

Although our state Supreme Court hinted that "a court would scrutinize a deed more closely than a will," that scrutiny is in pursuit of "the same standard of mental capacity." *See Gilliken*, 197 N.C. at 9, 147 S.E. at 433. Our paraphrasing of an applicable rule should not be read as creating a new one. *See Dunn v. Pate*, 334 N.C. 115, 118, 431 S.E.2d 178, 180 (1993) (noting that we cannot overrule our state Supreme Court).

851, 853 (1960)). A lack of any element creates a lack of capacity, *see In re Will of Shute*, 251 N.C. at 699, 111 S.E.2d at 853, but grantors are presumed to have capacity, *see In re Will of Buck*, 130 N.C. App. 408, 412–13, 503 S.E.2d 126, 130 (1998).

A challenger cannot establish lack of capacity without evidence concerning the grantor's capacity when the grantor executed the deed. *In re Est. of Whitaker v. Holyfield*, 144 N.C. App. 295, 298, 547 S.E.2d 853, 856 (2001) (quoting *In re Will of Buck*, 130 N.C. App. at 413, 503 S.E.2d at 130). General statements about a grantor's deteriorating health, alone, are insufficient to show a lack of capacity. *In re Will of Buck*, 130 N.C. App. at 412–13, 503 S.E.2d at 130.

First, we must dispense with Plaintiffs' contention that Father and Mother misunderstood the result of signing the Deeds; a misunderstanding of legal consequences does not create a lack of capacity. *See In re Will of Farr*, 277 N.C. 86, 92, 175 S.E.2d 578, 582 (1970).

Next, we must wrestle with two competing presumptions: (1) the presumption of capacity, *see In re Will of Buck*, 130 N.C. App. at 412–13, 503 S.E.2d at 130; and (2) the presumption that the jury got the capacity question correct, *see Bryant*, 313 N.C. at 369, 329 S.E.2d at 337–38. To be sure, without more, Plaintiffs' statements concerning Father and Mother's deteriorating health do not refute the presumption of capacity. *See In re Will of Buck*, 130 N.C. App. at 412–13, 503 S.E.2d at 130. But Plaintiffs offered more: They testified that Father and Mother suffered from hallucinations.

Defendants and Plaintiffs both offered evidence that undermined the premise that Father and Mother hallucinated when they executed the Deeds. For example, Plaintiff Karen stated that until his death, Father knew what property he owned, where his property was, and who his relatives were. And as another example, Father's primary-care provider from 2014 through 2015 never noted any concerns about Father's mental health, and Mother's primary-care provider from 2012 through 2015 only noted that Mother had anxiety and depression.

Indeed, based on the evidence, the likelihood that Father and Mother both lacked capacity via hallucination seems slim. But we are reviewing a denial of JNOV; it was the jury's role to weigh the evidence—not ours. *See Daniels*, 164 N.C. App. at 204, 595 S.E.2d at 704–05 (noting that it is the jury's role to "weigh the evidence, determine the credibility of the witnesses, the probative force to be given to their testimony and determine what the evidence proved or did not prove").

Resolving every contradiction in Plaintiffs' favor, evidence of Father and Mother's declining health—coupled with evidence that they suffered from hallucinations—supports the trial court's denial of JNOV concerning capacity. *See Bryant*, 313 N.C. at 369, 329 S.E.2d at 337–38. In other words, the jury could have reasonably concluded that the parents hallucinated when they executed the Deeds, and the trial court was therefore correct in denying Defendants' motion for JNOV concerning capacity. *See* N.C. Gen. Stat. § 1A-1, Rule 50(b)(1).

3. Undue Influence

[3] "There are four general elements of undue influence: (1) a person who is subject to influence; (2) an opportunity to exert influence; (3) a disposition to exert influence; and (4) a result indicating undue influence." *In re Will of McNeil*, 230 N.C. App. 241, 245, 749 S.E.2d 499, 503 (2013) (quoting *In re Sechrest*, 140 N.C. App. 464, 469, 537 S.E. 2d 511, 515 (2000)). Undue influence is a high standard. *See In re Will of Jones*, 362 N.C. 569, 574, 669 S.E.2d 572, 577 (2008). It is:

> a fraudulent influence, or such an overpowering influence as amounts to a legal wrong. It is close akin to coercion produced by importunity, or by a silent, resistless power, exercised by the strong over the weak, which could not be resisted, so that the end reached is tantamount to the effect produced by the use of fear or force.

Id. at 574, 669 S.E.2d at 577 (quoting *In re Will of Turnage*, 208 N.C. 130, 131–32, 179 S.E. 332, 333 (1935)).

There is no bright-line test to spot undue influence. *In re Will of Andrews*, 299 N.C. 52, 54–55, 261 S.E.2d 198, 200 (1980). But the North Carolina Supreme Court has listed seven factors to consider when determining whether a person was unduly influenced:

> 1. Old age and physical and mental weakness.
>
> 2. That the person signing the paper is in the home of the beneficiary and subject to his constant association and supervision.
>
> 3. That others have little or no opportunity to see him.
>
> 4. That the will is different from and revokes a prior will.
>
> 5. That it is made in favor of one with whom there are no ties of blood.
>
> 6. That it disinherits the natural objects of his bounty.
>
> 7. That the beneficiary has procured its execution.

Id. at 55, 261 S.E.2d at 200 (quoting *In re Will of Mueller*, 170 N.C. 28, 30, 86 S.E. 719, 720 (1915)).

Here, similar to our capacity analysis, we must consider competing high standards: (1) the high standard for undue influence, *see id.* at 55, 261 S.E.2d at 200; and (2) the high standard for granting JNOV, *see Bryant*, 313 N.C. at 369, 329 S.E.2d at 337–38. Plaintiffs could visit Father and Mother until their deaths, and attorney Engel did not suspect that Father and Mother were unduly influenced. Plaintiffs, however, offered evidence concerning other *Andrews* factors. Concerning the first factor, Father and Mother were elderly and mentally weak. Concerning the sixth factor, both Deeds favored Defendants over Plaintiffs. And concerning the seventh factor, Defendants accompanied Father and Mother to their initial meeting with attorney Engel.

As we must give Plaintiffs the "benefit of every reasonable inference that may legitimately be drawn from the evidence," *see Bryant*, 313 N.C. at 369, 329 S.E.2d at 337–38, a jury could reasonably conclude that Defendants unduly influenced Father and Mother, and that Defendants benefitted from such influence, *see In re Will of McNeil*, 230 N.C. App. at 245, 749 S.E.2d at 503. Accordingly, the trial court did not err by denying Defendants' motion for JNOV concerning undue influence. See N.C. Gen. Stat. § 1A-1, Rule 50(b)(1).

4. Conversion

[4] Conversion is "an unauthorized assumption and exercise of the right of ownership over goods or personal chattels belonging to another, to the alteration of their condition or the exclusion of an owner's rights." *Lake Mary Ltd. P'ship v. Johnston*, 145 N.C. App. 525, 531–32, 551 S.E.2d 546, 552 (2001) (quoting *Peed v. Burleson's, Inc.*, 244 N.C. 437, 439, 94 S.E.2d 351, 353 (1956)). In short, conversion requires "(1) ownership in the plaintiff, and (2) a wrongful conversion by the defendant." *Bartlett Milling Co., L.P. v. Walnut Grove Auction & Realty Co.*, 192 N.C. App. 74, 86, 665 S.E.2d 478, 489 (2008).

a. The Lockbox

Here, under both Wills, Father and Mother bequeathed their property to each other. Under both Wills, the surviving spouse bequeathed his or her "tangible personal property" to Plaintiffs and Defendants. And under both Wills, the surviving spouse bequeathed his or her residuary estate, meaning all undisposed "real and personal property," to his or her Trust. Both Trusts provided for equal distribution of Trust assets among Plaintiffs and Defendants.

Plaintiffs offered no evidence that they owned the Lockbox before Father's death. If Father owned the Lockbox at his death, however, Plaintiffs were ultimately entitled to an equal distribution of the Lockbox and its contents after Mother's death. Arguing that Plaintiffs were not entitled to a portion of the Lockbox, Defendant Kenneth said that Father gifted him the Lockbox before Father died. So taking Defendant Kenneth's testimony as true, he could not convert the Lockbox from Plaintiffs because Plaintiffs never owned the Lockbox. *See Bartlett Milling*, 192 N.C. App. at 86, 665 S.E.2d at 489.

But in reviewing a JNOV denial, we do not take Defendants' testimony as true. *See Ferguson*, 101 N.C. App. at 271, 399 S.E.2d at 393. Rather, we must look to see if another "conclusion can reasonably be reached." *See id.* at 271, 399 S.E.2d at 393. Here, there was another reasonable conclusion: Defendant Kenneth lied; Father did not gift him the Lockbox. And that conclusion was for the jury to reach—not us. *See Daniels*, 164 N.C. App. at 204, 595 S.E.2d at 704–05.

Thus, giving Plaintiffs the "benefit of every reasonable inference that may legitimately be drawn from the evidence," *see Bryant*, 313 N.C. at 369, 329 S.E.2d at 337–38, a reasonable jury could conclude that Father did not gift the Lockbox to Defendant Kenneth, and thus the Lockbox, and its contents, should have been equally distributed among Plaintiffs and Defendants after Father and Mother's death. Accordingly, the trial court did not err by denying Defendants' motion for JNOV concerning conversion of the Lockbox. *See* N.C. Gen. Stat. § 1A-1, Rule 50(b)(1); *Bryant*, 313 N.C. at 369, 329 S.E.2d at 337–38.

b. Rental Income from the Home

As detailed above, the jury concluded the Home Deed was invalid due to lack of capacity and undue influence, and the trial court correctly upheld that conclusion. The jury also concluded that Defendants converted rental income from the Home after the death of Father and Mother. The trial court upheld that conclusion, too. Because it was correct for the trial court to uphold the jury's conclusion on the Home Deed, it was necessarily correct for the trial court to uphold the jury's conclusion concerning conversion of income from the Home.

In the Home Deed, Father and Mother ostensibly granted themselves, individually, a 99% share of the Home, and they granted each Defendant a .5% share of the Home. In their Wills, Father and Mother bequeathed their property to each other, with the surviving spouse bequeathing his or her residuary estate, meaning all undisposed "real and personal property," to his or her Trust. And both Trusts provided

for equal distribution of Trust assets among Plaintiffs and Defendants. Father died 31 August 2015, and Mother died 19 August 2016.

With an invalid Home Deed, the Home therefore remained in the grantors' name, i.e., with Father and Mother. Thus, after Father and Mother died, the Home eventually passed equally to Plaintiffs and Defendants: First, the Home passed to Mother after Father's death; second, the Home passed to Mother's Trust after Mother's death; third, and finally, the assets in Mother's Trust, including the Home, were to be equally distributed among Plaintiffs and Defendants.

Therefore, because there was enough evidence for the jury to invalidate the Home Deed, there was enough evidence for the jury to find that Defendants converted the Home income. *See Bryant*, 313 N.C. at 369, 329 S.E.2d at 337–38. More specifically, there was enough evidence to show that (1) Plaintiffs were entitled to a portion of the Home, including income from the Home, and (2) Defendants deprived Plaintiffs their share of the Home income. *See Bartlett Milling*, 192 N.C. App. at 86, 665 S.E.2d at 489. Accordingly, the trial court did not err by denying Defendants' motion for JNOV concerning conversion of the Home income. *See* N.C. Gen. Stat. § 1A-1, Rule 50(b)(1); *Bryant*, 313 N.C. at 369, 329 S.E.2d at 337–38.

B. Motion for New Trial

[5] We now move to Plaintiffs' argument on appeal. Plaintiffs contend that the trial court erred by granting Defendants' motion for a new trial. We disagree.

"It is impractical and would be almost impossible to have legislation or rules governing all questions that may arise on the trial of a case." *Shute v. Fisher*, 270 N.C. 247, 253, 154 S.E.2d 75, 79 (1967). Accordingly, unless bound by statutory obligation, "the presiding judge is empowered to exercise his discretion in the interest of efficiency, practicality and justice." *Id.* at 253, 154 S.E.2d at 79. Following these principles, Rule 59 of the North Carolina Rules of Civil Procedure allows a trial court to grant a new trial when the evidence is insufficient "to justify the verdict." N.C. Gen. Stat. § 1A-1, Rule 59(a)(7) (2023).

Unlike the usurping nature of JNOV, *see id.* § 1A-1, Rule 50(b)(1), a new trial gives the parties another chance to present their case—and it gives the jury another chance to resolve the case, *see id.* § 1A-1, Rule 59(a)(7). Thus, a new trial does not raise the same concerns as JNOV. *See Pena-Rodriguez*, 580 U.S. at 210, 137 S. Ct. at 860, 197 L. Ed. 2d at 115.

"Where no question of law or legal inference is involved," we review a trial court's decision to grant a new trial for abuse of discretion. *In re Will of Herring*, 19 N.C. App. 357, 359, 198 S.E.2d 737, 739 (1973); *see also In re Will of Buck*, 350 N.C. 621, 629, 516 S.E.2d 858, 863 (1999) (reaffirming that "the uniform standard for appellate review of rulings on Rule 59(a)(7) motions for a new trial for insufficiency of the evidence" is abuse of discretion).

Here, the trial court granted Defendants' motion for a new trial because it found there was insufficient evidence to support the jury verdicts. Therefore, we will review the trial court's order for abuse of discretion. *See In re Will of Herring*, 19 N.C. App. at 359, 198 S.E.2d at 739.

"An abuse of discretion occurs when the trial court's ruling is so arbitrary that it could not have been the result of a reasoned decision." *In re J.R.*, 250 N.C. App. 195, 201, 791 S.E.2d 922, 926 (2016) (quoting *In re Robinson*, 151 N.C. App. 733, 737, 567 S.E.2d 227, 229 (2002)). Indeed, "it is plain that a trial judge's *discretionary* order pursuant to [N.C. Gen. Stat. §] 1A-1, Rule 59 . . . may be reversed on appeal only in those exceptional cases where an abuse of discretion is clearly shown." *Worthington v. Bynum*, 305 N.C. 478, 484, 290 S.E.2d 599, 603 (1982).

A trial court's decision to grant a new trial on all issues, rather than a portion of the issues, is also discretionary. *Table Rock Lumber Co. v. Branch*, 158 N.C. 251, 253, 73 S.E. 164, 165 (1911). A trial court will typically grant a partial new trial "when the error, or reason for the new trial, is confined to one issue, which is entirely separable from the others, and it is perfectly clear that there is no danger of complication." *Id.* at 253, 73 S.E. at 165.

Here, in its order granting a new trial, the trial court found that there was insufficient evidence to support the following jury verdicts: that Father lacked mental capacity to sign the Deeds; that Mother lacked mental capacity to sign the Deeds; that the Deeds were procured by undue influence by Defendants; and that Defendants converted property from Plaintiffs.

Given the detailed de-novo analysis required to discern whether Defendants cleared the high JNOV hurdle, we cannot say that it was an abuse of discretion—that it was arbitrary—for the trial court to grant a new trial due to insufficient evidence. *See In re J.R.*, 250 N.C. App. at 201, 791 S.E.2d at 926; N.C. Gen. Stat. § 1A-1, Rule 59(a)(7). Our review of the record indicates a dearth of evidence supporting lack of capacity, undue influence, and conversion. Thus, the trial court's decision to grant a new trial was the result of a reasoned decision and, therefore, not

an abuse of discretion. *See In re J.R.*, 250 N.C. App. at 201, 791 S.E.2d at 926. And because capacity, undue influence, and conversion are not "entirely separable" from the other issues in this case, the trial court did not abuse its discretion by granting a new trial on all issues. *See Table Rock Lumber*, 158 N.C. at 253, 73 S.E. at 165.

Therefore, the trial court did not abuse its discretion by granting Defendants' motion for a new trial because this is not the "exceptional case[] where an abuse of discretion is clearly shown." *See Worthington*, 305 N.C. at 484, 290 S.E.2d at 603.

V. Conclusion

We conclude that the trial did not err by denying Defendants' motion for JNOV or by granting Defendants' motion for a new trial.

AFFIRMED.

Judges STROUD and COLLINS concur.

KELVIN J. JONES, Plaintiff
v.
NORTH CAROLINA DEPARTMENT OF PUBLIC SAFETY, Defendant

No. COA23-591

Filed 7 May 2024

1. Tort Claims Act—negligence—duty to protect from foreseeable harm—inmate assaulted in prison

In an action filed against the Department of Public Safety (defendant) by a former inmate (plaintiff) seeking damages under the Tort Claims Act for injuries he suffered after another inmate assaulted him in prison, the Industrial Commission's decision and order awarding damages to plaintiff was upheld on appeal because the Commission did not err in concluding that defendant had notice—and, therefore, should have anticipated—that a violent altercation between plaintiff and the other inmate was likely to occur. Competent evidence supported the Commission's findings, including that: an officer overseeing plaintiff's cellblock overheard a heated verbal exchange between plaintiff and the other inmate, had a "bad feeling that something [was] go[ing] to happen," and asked her supervisor to assign an additional officer to her area because of

the tension between the two inmates; and that the officer's supervisor did not take any action to investigate or otherwise address the situation after the officer raised her concerns.

2. Appeal and Error—notice of appeal—timeliness—cross-appeal —action brought under Tort Claims Act

In an appeal filed by the Department of Public Safety challenging the Industrial Commission's award of damages to a former inmate (plaintiff) on his claim brought under the Tort Claims Act, plaintiff's cross-appeal—challenging some of the Commission's factual findings—was dismissed as untimely, since he failed to file his notice of cross-appeal within thirty days after the Commission entered its decision and order, as required under N.C.G.S. § 143-293 (governing appeals under the Tort Claims Act). Although section 143-293 specifically allows parties to appeal a decision and order within thirty days of receiving it, nothing in the record showed that plaintiff received the decision and order later than the day that the Commission entered it. Further, plaintiff could not argue that Appellate Rule 3(c) governed the timeliness of his appeal where, under Appellate Rule 18 (governing the timing for appeals from administrative tribunal decisions "unless the General Statutes provide otherwise"), section 143-293 was controlling.

Judge TYSON concurring in part and dissenting in part.

Appeal by Defendant and cross-appeal by Plaintiff from Decision and Order entered 4 April 2023 by the North Carolina Industrial Commission. Heard in the Court of Appeals 12 February 2024.

Fidelity Law Group, by John B. Riordan, for Plaintiff-Appellee/ Cross-Appellant.

Attorney General Joshua H. Stein, by Assistant Attorneys General C. Douglas Green and Gregory L. Rouse, II, for Defendant-Appellant/ Cross-Appellee.

COLLINS, Judge.

The North Carolina Department of Public Safety ("Defendant") appeals from a Decision and Order entered by the North Carolina Industrial Commission awarding Kelvin Jones ("Plaintiff"), a former inmate at Maury Correctional Institution, damages for injuries he

sustained from being assaulted by another inmate. Defendant argues that "[t]he Industrial Commission erred when it concluded that Defendant had notice and should have anticipated that a violent attack on Plaintiff was likely to occur." (capitalization altered). Plaintiff cross appeals, arguing that certain findings of fact were erroneous. For the reasons stated below, we hold that the Commission did not err by concluding that Defendant "had notice, and reasonably should have anticipated, that a violent interaction between Plaintiff and [his assailant] was likely to occur." Accordingly, we affirm the Decision and Order. However, because Plaintiff's notice of appeal was untimely, we dismiss his cross-appeal.

I. Background

Plaintiff was an inmate in the Blue Unit at Maury Correctional Institution. The Blue Unit consists of six cell blocks, which are divided into two sides and connected by a hallway. There is a sliding door at the end of the hallway that allows access to a circular area, and there is a control booth within the circular area that operates the sliding door. Maury Correctional Institution's policy was to assign two officers to each side of the Blue Unit, except during mealtimes when one officer would monitor the cell blocks while the other officer would supervise the dining hall or hallway. A third officer would be assigned to the control booth and was required to remain in the control booth at all times.

On 24 May 2015, Officer Chiara Booker was assigned to the side of the Blue Unit where Plaintiff was held. Before dinner, Booker overheard Plaintiff and another inmate, Paul Thorton, speaking to each other in raised voices. After Plaintiff had spoken to a third inmate, Thorton appeared behind Plaintiff and said, "You wonder why I'm standing behind you. That's my brother. Anything go on with him, I'm involved." Plaintiff responded, "I don't f[**]k with you. Why you bothering me? Man, I don't have no dealings with you, period."

After this verbal altercation, Plaintiff and Thorton left the cell block to go to the dining hall. Although Booker did not overhear any specific threats, she had "a bad feeling that something [was] gonna happen[.]" Booker reported the verbal altercation to her supervisor, Sergeant Jocilyn Pryor, and requested additional officers to her side of the Blue Unit due to the tension between Plaintiff and Thorton. Pryor did not further investigate Booker's report, did not separate Plaintiff and Thorton, and did not assign additional officers to the area. Booker also approached the officer assigned to the control booth that day and asked him to switch positions with her because she "had not seen a situation

like that occur or anything," and "it was just a lot of tension and [she] didn't want to be the lone female in the middle of two men in a[n] altercation[.]" The officer did not do so.

As Plaintiff and Thorton were returning to the cell block from the dining hall, Booker saw Thorton strike Plaintiff in the face with a "homemade shank." Plaintiff turned around and began running into the hallway as Thorton chased him. Booker attempted to call for backup and pull out her pepper spray but fell to the ground in the process.

When Plaintiff and Thorton ran into the hallway, Officer Shaneka Hyman approached and instructed them to stop; however, Thorton continued to chase Plaintiff. Plaintiff fell to the ground, and Thorton struck him three or four times in the head with the shank. Hyman sprayed Thorton with pepper spray; Thorton struck Plaintiff once more before returning to the cell block. Plaintiff was taken to the hospital and treated for stab wounds to his forehead and left cheek, and positional vertigo.

Plaintiff filed a claim for damages under the Tort Claims Act. After a hearing, the deputy commissioner entered a decision and order denying Plaintiff's claim. Plaintiff appealed to the Full Commission, and the Commission entered a Decision and Order on 4 April 2023 concluding that Plaintiff had proven all the essential elements of negligence and awarding Plaintiff $15,000 in damages.

Defendant appealed to this Court, and Plaintiff cross appealed.

II. Discussion

A. Defendant's Appeal

[1] Defendant argues that "[t]he Industrial Commission erred when it concluded that Defendant had notice and should have anticipated that a violent attack on Plaintiff was likely to occur." (capitalization altered). Although Defendant frames this issue as a challenge to a conclusion of law, the arguments laid out in its brief effectively challenge the Commission's findings of fact as well as its conclusion that Defendant had notice and should have anticipated that a violent attack on Plaintiff was likely to occur. Accordingly, we will address both.

"[T]he findings of fact of the Commission shall be conclusive if there is any competent evidence to support them." N.C. Gen. Stat. § 143-293 (2023). "Appellate review is limited to two questions of law: (1) whether there was any competent evidence before the Commission to support its findings of fact; and (2) whether the findings of fact of the Commission justify its legal conclusion and decision." *Taylor v. N.C. Dep't of Corr.*, 88 N.C. App. 446, 448, 363 S.E.2d 868, 869 (1988) (citation

omitted). Unchallenged findings of fact are binding on appeal. *Gentry v. N.C. Dep't of Health & Hum. Servs.*, 242 N.C. App. 424, 426, 775 S.E.2d 878, 880 (2015). Conclusions of law are reviewed de novo. *Nunn v. N.C. Dep't of Pub. Safety*, 227 N.C. App. 95, 98, 741 S.E.2d 481, 483 (2013).

The Tort Claims Act permits recovery if the plaintiff can show that he sustained an injury that was proximately caused by a negligent act of a named State employee who was acting within the course and scope of his employment. N.C. Gen. Stat. § 143-291(a) (2023). "[T]he Tort Claims Act . . . waive[s] the sovereign immunity of the State in those instances in which injury is caused by the negligence of a State employee and the injured person is not guilty of contributory negligence, giving the injured party the same right to sue as any other litigant." *Williams v. N.C. Dep't of Just.*, 273 N.C. App. 209, 217, 848 S.E.2d 231, 238 (2020) (quotation marks and citation omitted). "Since the Tort Claims Act is in derogation of sovereign immunity it must be strictly construed, and its terms must be strictly adhered to." *Id.* (citations omitted).

"Actions to recover for the negligence of a State employee under the Tort Claims Act are guided by the same principles that are applicable to other civil causes of action." *Simmons v. N.C. Dep't of Transp.*, 128 N.C. App. 402, 406, 496 S.E.2d 790, 793 (1998) (citation omitted). To recover upon a claim for negligence under the Tort Claims Act, a plaintiff must prove that (1) defendant owed plaintiff a duty of care; (2) the actions or failure to act by the named employees of defendant constituted a breach of duty; (3) the breach was the actual and proximate cause of the injury; and (4) plaintiff suffered damages as a result. *Bryson v. N.C. Dep't of Corr.*, 169 N.C. App. 252, 253, 610 S.E.2d 388, 389 (2005).

"A duty is defined as an obligation, recognized by the law, requiring the person to conform to a certain standard of conduct, for the protection of others against unreasonable risks." *Davis v. N.C. Dep't of Hum. Res.*, 121 N.C. App. 105, 112, 465 S.E.2d 2, 6 (1995) (quotation marks and citation omitted). "A breach of the duty occurs when the person fails to conform to the standard required." Id. (quotation marks and citation omitted). The Department of Public Safety "is not an insurer of the safety of every inmate and will not be found liable for negligence every time one inmate assaults another." *Taylor*, 88 N.C. App. at 452, 363 S.E.2d at 871. However, the Department of Public Safety does owe a "duty of reasonable care" to protect inmates "from reasonably foreseeable harm." *Id.* at 451, 363 S.E.2d at 871.

Here, the Commission made the following unchallenged findings of fact:

> 6. While performing rounds on E Cellblock before dinner on 24 May 2015, Ms. Booker heard Plaintiff and Mr. Thorton speaking in raised voices. According to Plaintiff, Mr. Thorton appeared behind Plaintiff while walking to his cell after Plaintiff had spoken with another inmate. Mr. Thorton told Plaintiff that the other inmate Plaintiff had spoken with was Mr. Thorton's "brother," which Plaintiff believed indicated that Mr. Thorton and the other inmate were members of the same gang. As a result, Plaintiff told Mr. Thorton that Plaintiff and Mr. Thorton should stay out of each other's business. After the verbal altercation, Plaintiff and Mr. Thorton left the cellblock to go to the dining hall. Although Ms. Booker did not overhear any specific threats of violence during the verbal exchange between Plaintiff and Mr. Thorton, she had a "bad feeling that something [was] go[ing] to happen."
>
> 7. After overhearing the verbal exchange, Ms. Booker approached her supervisor, Sergeant Pryor, regarding her concerns. Specifically, Ms. Booker requested that backup be assigned to her area due to the tension between Plaintiff and Mr. Thorton. Sergeant Pryor took no action following the conversation with Ms. Booker, as she did not assign an additional officer, attempt to speak with Plaintiff or Mr. Thorton, or order that Plaintiff and Mr. Thorton be detained or separated.

As these findings are unchallenged, they are binding on appeal. *Gentry*, 242 N.C. App. at 426, 775 S.E.2d at 880. Nonetheless, these findings are supported by competent evidence. Booker testified to the following: Plaintiff and Thorton engaged in a "really loud" verbal altercation, and she had "a bad feeling that something [was] gonna happen[.]" Booker went to her supervisor, Pryor, and spoke to her "directly" about the altercation. Booker specifically requested additional officers to her side of the Blue Unit "[b]ecause [she] was gonna need some help just in case something happened." Pryor did not further investigate Booker's report, did not separate Plaintiff and Thorton, and did not assign additional officers to the area.

Defendant challenges the italicized portions of the following findings of fact:

> 12. Captain Brandon Connor—a lieutenant at [Maury Correctional Institution] was not present at the time of the assault but provided testimony regarding [Maury

> Correctional Institution's] policies and procedures. . . . According to Captain Connor, if one of his subordinates came to him indicating that they believed a credible threat had been made, he would "listen to [them] and go from there and make a determination," including personally looking into the matter. However, Captain Connor indicated that although he believed a superior officer should personally look into their subordinates' assertions that they believed an assault may occur, Sergeant Pryor did not violate [Maury Correctional Institution's] policies by taking no action after Ms. Booker reported her concerns. . . .
>
> . . . .
>
> 15. Based upon the preponderance of the evidence in view of the entire record, the Full Commission finds that *Defendant's staff were on notice that a violent altercation between Plaintiff and Mr. [Thorton] was likely to occur*. Specifically, Ms. Booker overheard a heated conversation between Plaintiff and Mr. Thorton, which she believed was likely to result in additional confrontation between the two. Ms. Booker's concerns were reported to her supervisor, at which time Ms. Booker requested additional staff to deal with a potential conflict.
>
> 16. Based upon the preponderance of the evidence in view of the entire record, the Full Commission finds that *although Defendant was on notice of the likelihood of a violent altercation*, Defendant took no actions to prevent such an altercation. Defendant, including through Sergeant Pryor, took no steps to separate Plaintiff and Mr. Thorton or to further investigate the situation, even though such action could have been taken between the time of the argument before dinner and the assault after dinner. The Full Commission finds Defendant's failure to take any action was a failure to safeguard Plaintiff from reasonably anticipated danger. The Full Commission assigns no weight to Captain Connor's opinion that Sergeant Pryor's failure to take any action was reasonable, as it was his opinion was contradicted by his testimony that superior officers should personally investigate concerns raised by subordinates.

The unchallenged portions of these findings—including that "Defendant's failure to take any action was a failure to safeguard

Plaintiff from reasonably anticipated danger"—are binding on appeal. *Gentry*, 242 N.C. App. at 426, 775 S.E.2d at 880. The challenged portions of these findings are supported by Findings of Fact 6 and 7 and the evidence supporting those findings. Booker also testified that she told the officer assigned to the control booth "to pay attention and look at what's going on because [she] just didn't feel right, like it just – [she] felt like it was a lot of tension." Booker asked that officer to switch positions with her because she "had not seen a situation like that occur or anything," and "didn't want to be the lone female in the middle of two men in a[n] altercation[,]" but the officer did not do so. As the challenged portions of Findings of Fact 15 and 16 that Defendant was on notice of the likelihood of a violent altercation are supported by competent evidence, those findings are binding on appeal.

Defendant specifically objects to the Commission giving no weight to Captain Connor's opinion that Pryor's failure to take action was reasonable. However, "[t]he Commission is the sole judge of the credibility of the witnesses and the weight to be given their testimony." *Wise v. Alcoa, Inc.*, 231 N.C. App. 159, 162, 752 S.E.2d 172, 174 (2013) (quotation marks and citation omitted). When asked what he would do if a subordinate officer "were to come to [him] and say that they have perceived what they believe to be a credible threat, that something bad may happen involving particular or specific inmates," Connor testified that he "would listen to 'em and go from there and make a determination." Connor further testified:

> [PLAINTIFF]. Would you further investigate the issue to determine if further action needs to be taken?
>
> [CONNOR]. If it needs to be, yes.
>
> [PLAINTIFF]. Okay. And would you, as a result of that, would you at least confirm whether the officer's request for backup is justified?
>
> [CONNOR]. Yes.
>
> [PLAINTIFF]. And would you personally see that the matter is looked into to assess whether further action needs to be taken?
>
> [CONNOR]. Yes.

Despite this testimony, Connor also testified that Pryor's failure to further investigate Booker's report, separate Plaintiff and Thorton, or assign additional officers to the area conformed with Maury Correctional Institution's policies and procedures. The Commission found that

Connor's contradictory testimony was not credible and assigned no weight to it, and "[i]t is not the role of this Court to make *de novo* determinations concerning the credibility to be given to testimony, or the weight to be given to testimony." *Id.* at 164, 752 S.E.2d at 175.

Defendant next challenges the Commission's conclusion of law that "Defendant had notice, and reasonably should have anticipated, that a violent interaction between Plaintiff and Mr. Thorton was likely to occur." Defendant distinguishes the facts in the present case with those in *Taylor*, arguing that "[t]he Industrial Commission erred in relying upon *Taylor* to draw its conclusions."

In *Taylor*, the plaintiff was placed into a cell with an inmate who was associated with two other inmates with whom the plaintiff had fought. 88 N.C. App. at 448, 363 S.E.2d at 869. The plaintiff asked the officer not to place him in the cell, but the officer refused. *Id.* The plaintiff was physically and sexually assaulted for approximately an hour following his placement in the cell. *Id.* The noise level on the cell block was above average because the plaintiff was "hollering for the [officer]" and other inmates were "boosting" or "agitating" the assailant. *Id.* at 450, 363 S.E.2d at 870. The officer assigned to the cell block failed to investigate the excessive noise level and failed to make his normal rounds during this time. *Id.* at 449, 363 S.E.2d at 870. This Court held that the "defendant had a duty of reasonable care to protect the plaintiff from reasonably foreseeable harm[,]" and that "the defendant was negligent in failing to exercise proper care in this case." *Id.* at 451, 363 S.E.2d at 871.

While the facts supporting the Commission's finding in *Taylor* that the defendant was on notice that the plaintiff was in danger are perhaps more cogent than the facts here, *Taylor* does not preclude a finding and conclusion in this case that Defendant had notice, and reasonably should have anticipated, that a violent interaction between Plaintiff and Mr. Thorton was likely to occur.

The Commission found as fact that Defendant was put on notice that a violent altercation was likely to occur; Defendant failed to heed that warning; and Defendant took no steps to further investigate the situation or to prevent such altercation. "Thus, while we recognize that the [Department of Public Safety] is not an insurer of the safety of every inmate and will not be found liable for negligence every time one inmate assaults another, the evidence below supported the Commission's findings and conclusions of negligence in this particular case." *Taylor*, 88 N.C. App. at 451-52, 363 S.E.2d at 871. Accordingly, the Commission did not err by awarding Plaintiff damages for the injuries he sustained from the assault.

B. Plaintiff's Appeal

[2] Plaintiff argues that the Commission erred by finding that Booker acted reasonably in response to the assault and that he failed to establish that Defendant had insufficient personnel assigned to the area in which the assault occurred. We first consider whether we have jurisdiction to consider Plaintiff's appeal.

Rule 18 of the North Carolina Rules of Appellate Procedure governs "[t]he times and methods for taking appeals from an administrative tribunal . . . unless the General Statutes provide otherwise, in which case the General Statutes shall control." N.C. R. App. P. 18(b)(1). N.C. Gen. Stat. § 143-293 governs appeals under the Tort Claims Act and provides, "Either the claimant or the State may, within 30 days after receipt of the decision and order of the full Commission, to be sent by registered, certified, or electronic mail, but not thereafter, appeal from the decision of the Commission to the Court of Appeals." N.C. Gen. Stat. § 143-293.

Here, the Commission entered its Decision and Order on 4 April 2023. Plaintiff filed his notice of appeal on 12 May 2023, after the thirty-day period had expired. Although the statute provides that a party may appeal within thirty days after *receipt* of the decision and order, there is nothing in the record indicating that Plaintiff received the Decision and Order later than 4 April 2023. *See Goins v. Sanford Furniture Co.*, 105 N.C. App. 244, 245, 412 S.E.2d 172, 173 (1992) (dismissing appeal as untimely where "[t]he record . . . [did] not indicate whether notice of the award was mailed" and therefore "the appellant was required to file notice within thirty days from the date of the award").

At oral argument, Plaintiff argued that under N.C. R. App. P. 3(c), he had ten days from when Defendant filed and served its notice of appeal to file his notice of appeal. However, an appeal from an administrative agency is governed by N.C. R. App. P. 18, not N.C. R. App. P. 3. Pursuant to N.C. R. App. P. 18(b)(1), the timeliness of Plaintiff's appeal is governed by N.C. Gen. Stat. § 143-293. Under N.C. Gen. Stat. § 143-293, Plaintiff's notice of appeal was untimely because it was filed more than thirty days after receipt of the Decision and Order. *See Strezinski v. City of Greensboro*, 187 N.C. App. 703, 710, 654 S.E.2d 263, 268 (2007) (dismissing cross-appeal as untimely because the timeliness of defendant's appeal was governed by N.C. Gen. Stat. § 97-86, not N.C. R. App. P. 3, as it was an appeal from an administrative agency).

Because Plaintiff's notice of appeal was untimely, this Court is without jurisdiction to consider his appeal.

III. Conclusion

The Commission did not err by concluding that Defendant "had notice, and reasonably should have anticipated, that a violent interaction between Plaintiff and Mr. Thorton was likely to occur." Accordingly, we affirm the Decision and Order. However, because Plaintiff's notice of appeal was untimely, we dismiss his cross-appeal.

AFFIRMED IN PART; DISMISSED IN PART.

Judge CARPENTER concurs.

Judge TYSON concurs in part and dissents in part by separate opinion.

TYSON, Judge, concurring in part and dissenting in part.

I concur in the majority's opinion to dismiss Plaintiff's cross-appeal due to Plaintiff's untimely notice of appeal. "[T]he appellant was required to file notice within thirty days from the date of the award." *Goins v. Sanford Furniture Co.*, 105 N.C. App. 244, 245, 412 S.E.2d 172, 173 (1992); *see Strezinski v. City of Greensboro*, 187 N.C. App. 703, 710, 654 S.E.2d 263, 268 (2007) (dismissing cross appeal as untimely because the timeliness of the defendant's appeal from an administrative agency was governed by N.C. Gen. Stat. § 97-86, not N.C. R. App. P. 3). Plaintiff's notice was filed more than thirty days after receipt of the Full Commission's Decision and Order. N.C. Gen. Stat. § 143-293 (2023); N.C. R. App. P. 18(b)(2).

I. Standard of Review

"[T]he Tort Claims Act is in derogation of [North Carolina's] sovereign immunity[,] it must be strictly construed, and its terms must be strictly adhered to." *Williams v. N.C. Dep't of Justice*, 273 N.C. App. 209, 217, 848 S.E.2d 231, 238 (2020) (citation omitted); *see* N. C. Gen. Stat. § 143-291(a) (2023).

The majority's opinion improperly reviews: "Defendant's failure to take any action was a failure to safeguard Plaintiff from reasonably anticipated danger" as a finding of fact and concludes this "finding of fact" is binding on appeal. The labels "findings of fact" and "conclusions of law" of a lower tribunal in a written order do not determine the nature of our standard of appellate review. *See Peters v. Pennington*, 210 N.C. App. 1, 15, 707 S.E.2d 724, 735 (2011).

"[A]ny determination requiring the exercise of judgment, or the application of legal principles, is more properly classified a conclusion of law. Any determination reached through logical reasoning from the evidentiary facts is more properly classified a finding of fact." *In re Helms*, 127 N.C. App. 505, 510, 491 S.E.2d 672, 675 (1997) (internal citations and quotation marks omitted). This finding of fact is actually a conclusion of law and is properly reviewed *de novo* by this Court.

The Industrial Commission's conclusions of law are reviewed *de novo*. *Nunn v. N.C. Dep't of Pub. Safety*, 227 N.C. App. 95, 98, 741 S.E.2d 481, 483 (2013) (citation omitted).

II. Sovereign Immunity-State Tort Claims Act

Our Supreme Court has held, "[i]t has long been established that an action cannot be maintained against the State of North Carolina *or an agency thereof* unless it consents to be sued or upon its waiver of immunity, and that *this immunity is absolute and unqualified*." *Guthrie v. N.C. State Ports Auth.*, 307 N.C. 522, 534, 299 S.E.2d 618, 625 (1983) (citations omitted) (emphasis in original).

The State Tort Claims Act is a specific and limited statutory waiver by the General Assembly of North Carolina's "*absolute and unqualified*" sovereign immunity. *Id*. The statute expressly limits cognizable and viable claims to those arising "as a result of the negligence of any . . . employee . . . of the State while acting within the scope of his office, employment, service, agency or authority, under circumstances where the State of North Carolina, *if a private person*, would be liable to the claimant in accordance with the laws of North Carolina." N.C. Gen. Stat. § 143-291(a) (2023) (emphasis supplied).

The General Assembly's inclusion of "if a private person would be liable" clause is a substantive statutory limiting requirement. *See Frazier v. Murray*, 135 N.C. App. 43, 48, 519 S.E.2d 525, 529 (1999) ("Tort liability for negligence attaches to the state and its agencies under the Tort Claims Act only where the State [], if a private person, would be liable to the claimant." (citation omitted)).

Our Supreme Court recently held and re-affirmed "the 'private person' language contained in N.C.G.S. § 143-291(a) imposes a substantive, rather than a procedural, limitation upon the types of claims that are cognizable under the State Tort Claims Act." *Cedarbrook Residential Ctr., Inc. v. N.C. Dep't of Health & Hum. Servs.*, 383 N.C. 31, 52, 881 S.E.2d 558, 574 (2022) (citation omitted).

The State, through the Department of Public Safety, "is not an insurer of the safety of every inmate and will not be found liable for negligence every time one inmate assaults another[.]" *Taylor v. N.C. Dep't of Correction*, 88 N.C. App. 446, 452, 363 S.E.2d 868, 871 (1988). Plaintiff must prove duty, breach thereof, proximate causation, and damages. *Parker v. Town of Erwin*, 243 N.C. App. 84, 110, 776 S.E.2d 710, 729-30 (2015) (citation omitted); *see Palsgraf v. Long Island R.R. Co.*, 248 N.Y. 339, 162 N.E. 99 (1928).

The State correctly argues: "The Industrial Commission erred when it concluded that Defendant had notice and should have anticipated that a violent attack on Plaintiff was likely to occur," when properly reviewed as a conclusion of law. I respectfully dissent.

III. Proximate Cause and Foreseeability

Any party asserting a negligence claim carries the burden to establish and prove duty, breach of duty, proximate cause, and damages, and absence of contributory negligence. Proximate cause is defined as "a cause which in natural and continuous sequence, unbroken by any new and independent cause, produced the plaintiff's injuries, and without which the injuries would not have occurred," and that it could be reasonably foreseen and probable under the circumstances. *Bolkhir v. N.C. State Univ.*, 321 N.C. 706, 710, 365 S.E.2d 898, 901 (1988) (citation omitted).

"The criminal acts of a third party are generally considered unforeseeable and independent, intervening causes absolving a defendant of liability. . . , For this reason, the law does not generally impose a duty to prevent the criminal acts of a third party." *Bridges v. Parrish*, 366 N.C. 539, 742 S.E.2d 794 (2013) (citations omitted).

Competent evidence supports the Commission's findings and correct conclusions that both: (1) Officer Booker had acted reasonably in response to the arguments and threats and also during the assault; and, (2) Plaintiff had failed to establish Defendant had assigned insufficient personnel for the conditions and to the area in which the assault occurred. These findings and conclusions are unchallenged and binding upon appeal.

IV. Plaintiff's Contributory Negligence

"[T]he Tort Claims Act . . . waive[s] the sovereign immunity of the State in those instances in which injury is caused by the negligence of a State employee *and the injured person is not guilty of contributory negligence*, giving the injured party the same right to sue as any

other litigant." *Williams*, 273 N.C. App. at 217, 848 S.E.2d at 238 (emphasis supplied).

While the State, by and through its employees, may owe a duty of reasonable care to protect non-contributory inmates from reasonably foreseeable harms, Plaintiff's negligence claim must be reviewed for alleged breach and proximate cause in light of Plaintiff's own participation, actions, and culpability as a bar to recovery. The State may be liable for negligence, through a prison employee, when he or she has notice an unprovoked assault is likely to occur and fails to take proper precautions to safeguard the non-contributory prisoner, Plaintiff is also responsible for his actions in provoking and bringing the assault about and to show he "*is not guilty of contributory negligence*." *Id.* (emphasis supplied). Plaintiff's undisputed participation and prolonged actions in arguing with and provoking Thorton, participating in and bringing about the assault and resulting injuries, is a contributory absolute bar and precludes any award in his favor. *Id.*

The Industrial Commission found and concluded Officer Booker had acted reasonably in response to the potential of an assault by reporting Plaintiff's and Thorton's behaviors she had observed, attempting to call for backup and pulling out and and discharging her pepper spray, as Plaintiff and Thorton persisted in their illegal affray. Officer Shaneka Hyman was also present, approached and instructed the inmates to stop. When Plaintiff fell to the ground, Hyman also sprayed Thorton with pepper spray.

Plaintiff purports to argue on appeal that the Industrial Commission erred by finding that Officers Booker and Hyman had acted reasonably in response to the prospect of and during the assault. We all agree Plaintiff did not timely appeal and this Court lacks jurisdiction to address this argument. The Full Commission's finding and conclusion on this issue is binding on appeal.

Plaintiff also failed to timely appeal, and we also all agree this Court lacks jurisdiction to address the issue of whether State had assigned insufficient personnel for the conditions and to the area in which the assault occurred, Nonetheless, the majority's opinion erroneously asserts Officer Booker's conduct and actions and the adequate staffing levels are separate issues from whether Sergeant Pryor had notice that an assault was likely to occur, which is the unsupported basis for the Industrial Commission's award.

The Commission erred by concluding the State, as Defendant through his actions, "had notice, and reasonably should have anticipated,

that a violent interaction between Plaintiff and Mr. Thorton was likely to occur. " The State, through its Department of Public Safety and its correctional facilities, "is not an insurer of the safety of every inmate and will not be found liable for negligence every time one inmate assaults another." *Taylor*, 88 N.C. App. at 452, 363 S.E.2d at 871. The award is properly reversed.

V. Damages

The Industrial Commission failed to consider and factor medical care and treatment Plaintiff received and expenses incurred by the State into its conclusion to award damages. The Full Commission found, "Plaintiff has experienced physical and emotional pain and suffering, ongoing bouts of intermittent vertigo, and scarring on his forehead and cheek." Based upon this finding, the Industrial Commission concluded, without setting forth any specificity or basis in support of its conclusion, "Plaintiff is entitled to a reasonable award of $15,000.00 for his injuries, pain and suffering, and scarring."

Plaintiff testified concerning his pain and suffering and showed his scars at the hearing. No competent medical evidence was admitted on the nature and extent, or prognosis of Plaintiff's injuries to support the conclusion of this specific award, which is solely based on Plaintiff's unsupported testimony.

VI. Conclusion

Plaintiff failed to show any breach of duty, proximate cause, or medical proof or enumeration of damages to support the Full Commission's conclusions underlying the award. The Full Commission also failed to consider Plaintiff's conduct, actions and role in contributing to and bringing about the assault and his resulting injuries, or whether his actions were consistent with the agency's and institution's rules and policies as a guest of the State and its taxpayers.

No competent medical evidence supports the extent, prognosis of Plaintiff injuries and no consideration of Plaintiff's care and treatment at State expense was adjudicated to support the Full Commission's award. This award is erroneous and is properly reversed. I respectfully dissent.

DOUGLAS HOYT McMILLAN, Plaintiff
v.
JANESHA A. FAULK, individually, and SHELLY D. McMILLAN, individually, Defendants

No. COA23-827

Filed 7 May 2024

1. Appeal and Error—interlocutory orders—denial of motion to dismiss—collateral estoppel—no showing of a substantial right

In an action stemming from a custody dispute, the mother's interlocutory appeal from the partial denial of her motion to dismiss the father's tort and civil conspiracy claims on collateral estoppel grounds was dismissed where the mother did not assert the presence of the same factual issues in both trials or the possibility of inconsistent verdicts and thus failed to show that a substantial right would be affected absent immediate review.

2. Appeal and Error—interlocutory orders—denial of motion to dismiss—collateral estoppel—no showing of a substantial right

In an action stemming from a custody dispute, a social worker's interlocutory appeal from the partial denial of her motion to dismiss the father's tort and civil conspiracy claims on collateral estoppel grounds was dismissed where the father's allegations concerned the social worker's acts outside the scope of her work and occurring after her professional involvement with the father's child had ended. Neither the same factual issues nor the possibility of inconsistent verdicts was shown, and accordingly, the social worker failed to demonstrate that a substantial right would be affected absent immediate review.

3. Appeal and Error—interlocutory orders—dismissal of civil conspiracy claims—no argument of a substantial right

In an action stemming from a custody dispute, the father's interlocutory appeal from the dismissal of his civil conspiracy claims against the mother and a social worker was dismissed where the father made only a bare assertion that a substantial right would be affected absent immediate review because the appellate court does not construct such arguments for appellants.

Appeal by Defendants and cross-appeal by Plaintiff from orders entered 31 January and 8 February 2023 by Judge Patrick T. Nadolski

in Forsyth County Superior Court. Heard in the Court of Appeals 23 January 2024.

Morrow, Porter Vermitsky & Fowler, PLLC, by John C. Vermitsky, for Plaintiff-Appellee/Cross-Appellant.

Constangy, Brooks, Smith & Prophete, LLP, by William J. McMahon, IV, and Robin E. Shea, for Defendant-Appellant/Cross-Appellee Janesha A. Faulk.

Christopher L. Beal for Defendant-Appellant Shelly D. McMillan.

COLLINS, Judge.

All parties appeal from an order granting in part and denying in part Defendants' motions to dismiss Plaintiff's complaint in an action stemming from a custody dispute that has spawned multiple appeals to this Court. Defendants Janesha A. Faulk ("Faulk") and Shelly D. McMillan ("Mother") argue that Plaintiff Douglas Hoyt McMillan ("Father") is collaterally estopped from asserting his claims and, therefore, the claims should have been dismissed.[1] Father argues that the trial court erred by dismissing his claim for civil conspiracy. As the order from which the parties appeal is interlocutory, and no party has demonstrated that the order affects a substantial right, the appeals are dismissed.

I. Background

Father and Mother met in 2007, married in 2009, and separated in 2010. Their daughter, "M,"[2] was born shortly before Father and Mother separated. M's custody arrangements have been intermittently contested since December 2010 and eventually became the subject of an appeal to this Court, which affirmed a March 2018 custody order awarding legal and primary physical custody to Mother and secondary physical custody to Father. *See McMillan v. McMillan*, 267 N.C. App. 537, 833 S.E.2d 692 (2019).

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1. Mother additionally noticed appeal from the trial court's order denying her motion for reconsideration. However, Mother does not argue any error arising from that order on appeal. Accordingly, Mother's appeal from that order is deemed abandoned. *See* N.C. R. App. P. 28(a).

2. Initials are used to protect the identity of the juvenile involved in this case. *See* N.C. R. App. P. 42(b).

On 1 February 2018, the Forsyth County Department of Social Services ("FCDSS") began an investigation after M reported concerns about visiting Father. As part of the investigation, Faulk, a social worker with FCDSS, interviewed Mother, Father, and M, and visited Mother's and Father's homes. FCDSS also obtained authorization for a Child and Family Evaluation, from which the evaluator opined that M "has chronically been subjected to conflict and disagreement between her parents," and that M's exposure to the conflict "reaches the level of emotional abuse." Faulk and an FCDSS social worker supervisor met with Mother and Father in early June 2018 to discuss the evaluation and develop an agreement to limit M's exposure to the harmful conditions. However, M reported that Father did not abide by the agreement and, in late June 2018, M's pediatrician reported to FCDSS that M was experiencing functional abdominal pain likely triggered by psychological distress.

On 3 July 2018, FCDSS filed a juvenile petition alleging that M was an abused and neglected juvenile. After hearing the parties' arguments, the juvenile court entered an order on 29 April 2019, concluding that M was an abused and neglected juvenile.[3] The juvenile court conducted permanency planning hearings on 20 November 2019, 24 February 2020, and 19 August 2020. After the August 2020 permanency planning hearing, the juvenile court terminated its jurisdiction and ordered that Mother's and Father's custodial rights shall revert to those specified in the March 2018 custody order.

On 6 April 2022, Father initiated this action by filing a complaint asserting claims for abuse of process against Faulk, malicious prosecution and negligent infliction of emotional distress against Mother, and intentional infliction of emotional distress and civil conspiracy against Faulk and Mother. Father alleged that Faulk and Mother worked together to undermine his relationship with M, and that Faulk acted outside the scope of her employment to assist Mother in securing custody of M.

Faulk and Mother each filed a motion to dismiss Father's claims pursuant to the doctrine of collateral estoppel and Rule 12(b)(6) of the North Carolina Rules of Civil Procedure for failure to state a claim upon which relief can be granted. The trial court heard Faulk's and Mother's motions to dismiss on 5 December 2022 and entered an order on 31 January 2023, granting the motions as to Father's claim for civil conspiracy against Faulk and Mother and denying the motions as to Father's other claims. All parties appealed.

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3. Father appealed the order adjudicating M abused and neglected, which this Court affirmed. *See In re M.M.*, 272 N.C. App. 55, 845 S.E.2d 888 (2020).

II. Discussion

A. Appellate Jurisdiction

The order on appeal granting in part and denying in part Defendants' motions to dismiss Plaintiff's complaint is interlocutory. *See Veazey v. City of Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950) ("An interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy." (citation omitted)). "Generally, there is no right of immediate appeal from interlocutory orders and judgments." *Goldston v. Am. Motors Corp.*, 326 N.C. 723, 725, 392 S.E.2d 735, 736 (1990). However, an interlocutory order is immediately appealable "where the order deprives the appellant of a substantial right which would be lost without immediate review." *Whitehurst Inv. Props., LLC v. NewBridge Bank*, 237 N.C. App. 92, 95, 764 S.E.2d 487, 489 (2014) (citations omitted). "To confer appellate jurisdiction in this circumstance, the appellant must include in its opening brief, in the statement of the grounds for appellate review, sufficient facts and argument to support appellate review on the ground that the challenged order affects a substantial right." *Denney v. Wardson Constr., Inc.*, 264 N.C. App. 15, 17, 824 S.E.2d 436, 438 (2019) (quotation marks and citation omitted).

For the reasons set forth below, the parties have failed to demonstrate that the challenged order affects a substantial right.

1. Mother's appeal

[1] Mother argues that the trial court's failure to address the issue of collateral estoppel affects a substantial right.

"[D]enial of a motion to dismiss premised on . . . collateral estoppel does not automatically affect a substantial right[.]" *Whitehurst*, 237 N.C. App. at 95, 764 S.E.2d at 489 (emphasis and citations omitted). The party seeking review must show that "(1) the same factual issues would be present in both trials and (2) the possibility of inconsistent verdicts on those issues exists." *Id.* at 96, 764 S.E.2d at 490 (citation omitted).

Mother's brief offers no facts or argument that the same factual issues would be present in both trials or that the possibility of inconsistent verdicts exists. Thus, Mother has failed to confer appellate jurisdiction to review the trial court's order. *See Denney*, 264 N.C. App. at 17, 824 S.E.2d at 438. Accordingly, Mother's appeal is dismissed.

2. Faulk's appeal

[2] Faulk also argues that the trial court's order affects a substantial right based on collateral estoppel. Specifically, Faulk argues that the reasonableness of her actions has already been judicially determined, and that there is a risk of inconsistent verdicts if this case proceeds to trial because the trial court might find that Faulk acted unreasonably.

In support of her assertion, Faulk focuses on several orders that were issued during the juvenile proceedings concerning M. In those orders, the juvenile court consistently found that FCDSS "made efforts to eliminate the need for placement, reunify the child and family and to obtain timely permanence for the child[,]" and that those efforts were reasonable. Faulk argues that the juvenile court's findings apply to her individually because she acted as FCDSS' principal agent for M's case. However, the juvenile court distinguished between Faulk as an individual social worker, other FCDSS employees, and FCDSS as an organization throughout those orders. Furthermore, the juvenile court cited multiple employees' actions in its findings that FCDSS made reasonable efforts to eliminate the need for placement, reunify the child and family, and to obtain permanence for the child. Thus, the juvenile court's findings that FCDSS' efforts were reasonable cannot be read as a judicial determination that Faulk's individual actions were reasonable.

Even if the juvenile court's findings applied to Faulk individually, Faulk has failed to show that there is a risk of inconsistent verdicts if the present case were allowed to proceed. The juvenile court's inquiry was limited to determining whether FCDSS' efforts "to eliminate the need for placement, reunify the child and family and to obtain timely permanence for the child" were reasonable; it was not tasked with evaluating whether all of Faulk's actions were reasonable while she was assigned to the case. Indeed, Father argues that his claims arise, at least in part, from Faulk acting outside the scope of her employment and from Faulk's actions after she was no longer the social worker assigned to M's case. Thus, even if this case proceeds to trial and the trial court finds that Faulk acted unreasonably, such a finding would not be inconsistent with the juvenile court's orders.

Because Faulk has failed to show that the same factual issues would be present in both trials, and that the possibility of inconsistent verdicts on those factual issues exists, Faulk has failed to show that the trial court's order affects a substantial right. *See Whitehurst*, 237 N.C. App. at 96, 764 S.E.2d at 490. Accordingly, Faulk's appeal is dismissed.

3. Father's cross-appeal

[3] Father argues that the dismissal of his civil conspiracy claim affects a substantial right because it would "greatly affect the manner in which the trial progresses by broadening the evidence available" to him. However, Father makes no argument in support of this assertion, and this Court will not "construct arguments for or find support for appellant's right to appeal from an interlocutory order" on our own initiative. *Jeffreys v. Raleigh Oaks Joint Venture*, 115 N.C. App. 377, 380, 444 S.E.2d 252, 254 (1994). Thus, Father has failed to confer appellate jurisdiction to review the trial court's order. *See Denney*, 264 N.C. App. at 17, 824 S.E.2d at 438. Accordingly, Father's cross-appeal is dismissed.

B. Petition for Writ of Certiorari

Father petitioned this Court to issue the writ of certiorari to review whether his civil conspiracy claim was properly dismissed. Father argues that the writ should issue in the interest of judicial economy. As none of the parties' appeals are properly before this Court, reviewing Father's appeal is not in the interest of judicial economy. Accordingly, Father's petition for writ of certiorari is denied.

III. Conclusion

For the foregoing reasons, no party has shown that the trial court's interlocutory order affects a substantial right. Accordingly, their appeals are dismissed.

DISMISSED.

Judges ZACHARY and MURPHY concur.

[293 N.C. App. 632 (2024)]

REAL TIME RESOLUTIONS, INC. (RTR), ROGER TOWNSEND & THOMAS, PC,
PLAINTIFFS/PETITIONERS
v.
STEPHEN COLE AND WIFE, DONNA COLE, DEFENDANTS/RESPONDENTS

No. COA23-464

Filed 7 May 2024

Statutes of Limitation and Repose—foreclosure—ten years—from date of acceleration—action barred

The trial court properly concluded that petitioner's non-judicial foreclosure action was barred by the statute of limitations in N.C.G.S. § 1-47(3) where the action was filed more than ten years after the note holder exercised its right of acceleration, as evidenced by the affirmative invocation of the right in a notice to the borrower that stated the full amount of the note was due and payable in full unless the default was cured on or before a date certain. Where the trial court misidentified the year of the payable date in two of its findings (but related the correct year elsewhere in the order), the matter was remanded for correction of the clerical errors.

Appeal by petitioners from order entered 1 December 2022 by Judge George Bell in Mecklenburg County Superior Court. Heard in the Court of Appeals 2 April 2024.

The Law Office of John T. Benjamin, Jr. P.A., by John T. Benjamin, Jr. and Jordan M. Latta, and McMichael Taylor Gray, LLC, by Brian Campbell, for petitioner-appellant Yakte Properties, LLC.

James, McElroy & Diehl, P.A., by Preston O. Odom, III, and Surane Law Group PLLC, by James W. Surane, for respondents-appellees.

GORE, Judge.

The dispositive question in this appeal is whether the applicable statute of limitations set forth in N.C.G.S. § 1-47(3) bars petitioner's foreclosure action. We conclude that it does. Accordingly, we affirm the trial court's Order denying non-judicial foreclosure of the subject property but remand for correction of clerical errors noted herein.

I.

On or about 23 June 2006, respondent Stephen E. Cole executed a Home Equity Credit Line Agreement and Disclosure Statement ("HELOC

Agreement") governing his Home Equity Credit Line Account ("Account") with Countrywide Home Loans, Inc. d/b/a America's Wholesale Lender ("Countrywide"). Mr. Cole executed a promissory note with a principal credit limit of $360,000 (herein "Note"). Under the terms of the Note, Mr. Cole promised to repay all amounts loaned together with a variable interest rate starting at 8.75% per annum on the unpaid balance. To secure the Note, Mr. Cole and wife Donna L. Cole (collectively, "respondents"), executed a deed of trust pledging their home as security for the repayment funds lent from their HELOC Account.

In 2008, respondents fell behind on payments under the Note. By written notice dated 7 April 2008 ("7 April 2008 Notice"), Countrywide alerted Mr. Cole that the Account was "in serious default because the required payments have not been made." The 7 April 2008 Notice stated, in relevant part:

> You have the right to cure the default. To cure the default, on or before May 12, 2008, Countrywide must receive the amount of $4,362.28 plus any additional regular monthly payment or payments, late charges, fees and charges, which become due on or before May 12, 2008.
>
> The default will not be cured unless Countrywide receives "good funds" in the amount of $4,362.28 on or before 12 May 2008. . . . Countrywide reserves the right to accept or reject a partial payment of the total amount due without waiving any of its rights herein or otherwise. For example, if less than the full amount that is due is sent to us, we can keep the payment and apply it to the debt but still proceed to foreclosure since the default would not have been cured.
>
> If the default is not cured on or before May 12, 2008, the mortgage payments **will be accelerated** with *the full amount remaining accelerated and becoming due and payable in full*, and foreclosure proceedings will be initiated at that time. As such, the failure to cure the default may result in the foreclosure and sale of your property.

Respondents made no payments to the Account between the 7 April 2008 Notice and the 12 May 2008 deadline dictated therein. Rather, an $11,636.84 payment was made to the Account on 18 July 2008, followed by a $1,752.28 payment on 15 August 2008. The 15 August 2008 payment was the last ever made to the Account, and none were made in response to a second Notice of Intent to Accelerate from Countrywide dated 5 November 2008.

Petitioner Yakte Properties, LLC, commenced this non-judicial foreclosure action to foreclose on respondents' property by filing a Notice of Hearing on Foreclosure of Deed of Trust on 15 November 2018 through petitioner's assigned trustee, Satterfield Legal, PLLC. Petitioner served an Amended Notice of Hearing on Foreclosure of Deed of Trust on respondents on 31 May 2019, filed on 3 June 2019. Petitioner filed an Affidavit of Indebtedness on 5 August 2019.

This matter came to be heard before the Assistant Clerk of Superior Court, Mecklenburg County, as a Contested Hearing. The Assistant Clerk entered an Order Authorizing Foreclosure on 12 September 2019 granting petitioner the right to proceed to foreclosure ("Clerk's Order"). The Clerk's Order explicitly states that respondents "contested the foreclosure, noting that the foreclosure sale is barred by the statute of limitations and challenging the standing of the Lender to foreclose[.]"

Respondents filed a Notice of Appeal on 17 September 2019 appealing the Clerk's Order. The matter came on to be heard in Superior Court, Mecklenburg County, pursuant to respondent's appeal of the Clerk's Order on 14 October 2021. After a hearing on the matter, and in an Order filed 1 December 2022, the trial court found that "there is ongoing confusion about the holder of the Note[,]" that petitioner "never adequately explained the discrepancy in the documents as to who was the holder of the note," and "[t]he conflicting or otherwise concealed or missing documentation makes the identity of the holder of the note uncertain." Further, the trial court concluded as a matter of law:

> 20. The language of the Notice from Countrywide sent to the Borrowers in April 2008 constitutes a valid acceleration of the Note.
>
> 21. Under N.C.G.S. § 1-47 there is a ten-year statute of limitation for when the power of sale by foreclosure may commence.
>
> 22. The provisions of *In re Brown*, 771 S.E.2d 829 (NC Ct. App. 2015) control, which holds that if a promissory note is accelerated, the statute of limitation runs from the date of acceleration forward for ten years from the acceleration date.
>
> 23. In the present case, the date of acceleration was May 12, 2008, and therefore under the *In re Brown* decision the statute of limitations had run prior to the Notice of Hearing filed on or after November 13, 2018 by the Petitioners and

> as such the petition to foreclose is barred under the relevant statute of limitations.
>
> 24. [Petitioner's] actions were improperly filed after the statute of limitations had expired.

Petitioners filed written notice of appeal to this Court from the trial court's Order on 28 December 2022.

The trial court's 1 December 2022 Order denying petitioner's request for foreclosure, and dismissing the foreclosure petition, is a final judgment on all remaining claims asserted by petitioner in this non-judicial foreclosure brought under N.C.G.S. § 45-21.16. Appeal therefore lies to this Court pursuant to N.C.G.S. § 7A-27(b).

II.

"The applicable standard of review on appeal where, as here, the trial court sits without a jury, is whether competent evidence exists to support the trial court's findings of fact and whether the conclusions reached were proper in light of the findings." *In re Azalea Garden Bd. & Care, Inc.*, 140 N.C. App. 45, 50 (2000) (citation omitted). "Competent evidence is evidence that a reasonable mind might accept as adequate to support the finding." *In re Adams*, 204 N.C. App. 318, 321 (2010) (quotation marks and citation omitted). "Unchallenged findings of fact are presumed correct and binding on appeal." *In re Frucella*, 261 N.C. App. 632, 635 (2018) (citation omitted). "[T]he trial court's conclusions of law are reviewable *de novo*." *Id.* (citation omitted).

III.

We elect to first review the trial court's conclusion of law that petitioner's "actions were improperly filed after the statute of limitations had expired." On appeal, petitioner asserts the trial court erred in ruling that the 10-year statute of limitations set forth in N.C.G.S. § 1-47(3) bars its petition for a non-judicial foreclosure of respondents' property. We disagree.

North Carolina General Statutes § 1-47 sets a ten-year statute of limitations to commence a foreclosure action. The statute provides:

> For the foreclosure of a mortgage, or deed in trust for creditors with a power of sale, of real property, where the mortgagor or grantor has been in possession of the property, *within ten years* after the forfeiture of the mortgage, or after the power of sale became absolute, or within ten years after the last payment on the same.

N.C.G.S. § 1-47(3) (2023) (emphasis added).

> In order for a foreclosure to be barred under this section, two events must occur: (1) the lapse of ten years after the forfeiture or after the power of sale became absolute or after the last payment, and (2) the possession of the mortgagor during the entire ten-year period. These two requirements must be coexistent.

In re Lake Townsend Aviation, Inc., 87 N.C. App. 481, 484 (1987) (citation omitted). "[T]he statute of limitations . . . begins on the date of maturity of the loan[ ] *unless* the note holder or mortgagee *has exercised* his or her *right of acceleration*." *In re Brown*, 240 N.C. App. 518, 522 (2015) (emphasis added). An "acceleration" is "[t]he advancing of a loan agreement's maturity date so that payment of the entire debt is due immediately." *Acceleration*, Black's Law Dictionary (8th ed. 2004). "[I]f payment on a promissory note is accelerated, the power of sale . . . begin[s] to run on the date of acceleration." *Brown*, 240 N.C. App. at 522.

As a preliminary matter, we presume without deciding that petitioner satisfied all essential elements to bring an action for non-judicial foreclosure of the subject property under N.C.G.S. § 45-21.16(d). Further, the second element of § 1-47(3), "possession of the mortgagor during the entire ten-year period[,]" *Lake Townsend*, 87 N.C. App. at 484; *see* § 1-47(3), is not in dispute. The parties dispute the date of acceleration, and thus, the date from which the clock started on the 10-year statute of limitations under § 1-47(3). To this effect, petitioner challenges the trial court's findings of fact 6–9 as unsupported by competent evidence in the record:

> 6. On April 7, 2008 Lender provided Borrowers with a notice of acceleration.
>
> 7. The Notice was clear and without reservation and provided that if Borrowers did not cure their default by May 12, 2012 it would in fact be accelerated.
>
> 8. Borrowers did not cure the default by the May 12, 2012 deadline and the debt was therefore accelerated on that date under the conditions set forth by Countrywide under the terms of the Acceleration Notice.
>
> 9. [Respondents] offered no argument that the Note was subsequently reinstated following the acceleration by Countrywide.

Petitioner argues, and respondents concede, that findings of fact 7 and 8 misidentify the cure date as 12 May *2012*, rather than the correct

date of 12 May *2008*. We agree but determine that the correct year—2008—is listed elsewhere under finding fact 4 and is supported by the plain language of the 7 April 2008 Notice as it appears in the record. These typographical mistakes are appropriately classified as clerical errors, which when viewed in isolation, do not disturb the validity of the entire Order. *See State v. Taylor*, 156 N.C. App. 172, 177 (2003) (cleaned up) ("Clerical error has been defined as an error resulting from a minor mistake or inadvertence, esp. in writing or copying something on the record, and not from judicial reasoning or determination.").

Additionally, finding of fact 8 states, "Borrowers did not cure before the May 12, 2012[,] deadline and the debt was therefore accelerated on that date[,]" but the 7 April 2008 Notice states respondents may cure "on or before" that date. Therefore, if acceleration occurred, it would have happened the next day (13 May 2008). "When, on appeal, a clerical error is discovered in the trial court's judgment or order, it is appropriate to remand the case to the trial court for correction because of the importance that the record 'speak the truth.' " *State v. Smith*, 188 N.C. App. 842, 845 (2008) (citation omitted). Accordingly, we remand for correction of clerical errors appearing in findings of fact 7 and 8.

Next, we address the trial court's conclusions of law 23 and 24, which indicate respondents' failure to cure the default on their HELOC Account—on or before 12 May 2008—resulted in the note holder's acceleration of the entire loan amount, and thus, started the clock on the relevant 10-year statute of limitations under § 1-47(3).

> It appears to be well settled that a provision in a bill or note accelerating the maturity thereof on nonpayment of interest or installments, or other default, at the option of the holder, requires some affirmative action on the part of the holder, evidencing his election to take advantage of the accelerating provision, and that until such action has been taken the provision has no operation. In other words, some positive action on the part of the holder is an essential condition for the exercise of his option and a mere mental intention to declare the full amount due is not sufficient. This rule requires objective evidence of an election to exercise the option.

Shoenterprise Corp. v. Willingham, 258 N.C. 36, 39–40 (1962) (internal quotation marks and citation omitted). That is, "[t]he exercise of the option to accelerate maturity of a note should be in a manner so clear and unequivocal as to leave no doubt as to the holder's intention." *Vreede v. Koch*, 94 N.C. App. 524, 527 (1989) (quotation marks and

citation omitted). "The rationale is that the acceleration clause is for the sole benefit and security of the creditor[,] and he must elect to take advantage of it." *Id.* (citation omitted).

Here, the 7 April 2008 Notice contains this clear statement: "[i]f the default is not cured on or before May 12, 2008, [then] the mortgage payments **will be accelerated** with *the full amount remaining accelerated* and becoming due and payable in full[.]"

The Notice does not employ verbs such as "might" or "may" in reference to acceleration. The Notice uses the term "will," which indicates inevitability. The only reference to a *possibility* is foreclosure and sale of the subject property at a later proceeding should respondents fail to cure the default. Thus, acceleration is not a *possible* future event—it is *guaranteed* to occur if respondents do not tender "'good funds' in the amount of $4,362.28 on or before May 12, 2008."

Respondents failed to cure the default on their Account by the specified date—12 May 2008. Thus, we determine that acceleration of the loan occurred the next day (13 May 2008). *Cf. Vreede*, 94 N.C. App. at 527 (quotation marks and citation omitted) (holding that a note holder must, in no uncertain terms, affirmatively invoke its option to accelerate maturity of a note, and "a mere threat to commence suit" following notice of default "is not sufficient either to set in motion the limitations statute or to establish an earlier maturity date for any purpose."); *Lake Townsend*, 87 N.C. App. 481, 486 (1987) (emphasis added) (determining that language in a note and deed of trust that states, "the holder of this Note *may* declare the entire sum due and payable[,]" is a statement of the note holder's "*right to* accelerate payment on the entire amount of the note[,]" but is not sufficient by itself to show that the note holder had in fact "exercised this right[ ]" to accelerate.). Because petitioner did not file its first Notice of Hearing on Foreclosure of Deed of Trust until 15 November 2018—approximately 10 years and 6 months after acceleration of the full loan amount—petitioner's action for non-judicial foreclosure of respondents' property is time barred under § 1-47(3).

IV.

We hold that the 7 April 2008 Notice contained "clear and unequivocal" language "as to leave no doubt as to the holder's intention[,]" *Vreede*, 94 N.C. App. at 527; "If the default is not cured on or before May 12, 2008, the mortgage payments **will be accelerated** with *the full amount remaining accelerated* and becoming due and payable in full[.]" Thus, we determine that petitioner filed this non-judicial foreclosure action outside the applicable 10-year statute of limitations under § 1-47(3).

Having concluded that petitioner's action is time-barred, it is unnecessary to reach the parties' remaining arguments. We, therefore, affirm the trial court's Order and remand for correction of clerical errors appearing therein.

AFFIRMED IN PART AND REMANDED FOR CORRECTION OF CLERICAL ERROR.

Judges STROUD and TYSON concur.

TIMOTHY WILLIE SCOTT, Plaintiff
v.
ALECIA MANN SCOTT, Defendant

No. COA23-263

Filed 7 May 2024

1. **Child Custody and Support—modification of custody—consent order—statutory authority—child's best interests**

   A district court had subject matter jurisdiction to modify a consent order as to child custody despite the provision in that order requiring the parties to mediate or arbitrate any disagreement regarding "major decisions" before submitting it to the court because no agreement or contract can deprive the district court of its statutory authority to protect a child's best interests. Moreover, the appellant—here, the mother—did not seek mediation or arbitration in the district court, and thus she waived any appellate review of that issue.

2. **Appeal and Error—record—lack of transcript—duty of appellant to complete**

   It is the duty of the appellant to ensure that the record on appeal is complete, and because the appellant—here, the mother—failed to include a transcript of the proceedings in the record, the appellate court could not consider her argument that the district court's findings of fact were not supported by the evidence.

3. **Child Custody and Support—change of circumstances—conclusions of law supported by findings of fact**

   In a proceeding to modify custody, where the district court's findings of fact were that the child was not able to stay with the

mother on the joint custody schedule set by consent and experienced adverse personality and demeanor changes as a result of those living arrangements, the court's conclusions of law that there had been a substantial and material change in circumstances affecting the child's welfare warranting a custody modification were supported.

Appeal by defendant from order entered 21 November 2022 by Judge Christy T. Mann in District Court, Mecklenburg County. Heard in the Court of Appeals 19 September 2023.

Plumides, Romano & Johnson, P.C., by Richard B. Johnson, for plaintiff-appellee.

The Blain Law Firm, P.C., by Sabrina Blain, for defendant-appellant.

STROUD, Judge.

Defendant Mother appeals from the trial court's order modifying child custody and argues the trial court lacked jurisdiction to modify custody because the parties had not attended mediation. She also contends the trial court did not make sufficient findings of fact to support its conclusions of law that a substantial change in circumstances affecting the welfare of the child had occurred. The consent order's provision regarding attending "mediation or arbitration" to resolve disagreement on decisions about "the general health, welfare, religious training, education and development of the child" before "submitting the issue to the court" did not create a "condition precedent" to the trial court's jurisdiction to modify child custody. Mother did not challenge any of the trial court's findings of fact as unsupported by the evidence, and those findings support the trial court's conclusions of law. We therefore affirm the trial court's order.

I. Background

Mother and Father were married in 2015 and separated in 2019. One child, Tom,[1] was born to the marriage in 2015. Father filed an action seeking child custody[2] and on 12 July 2021, the trial court entered a

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1. We have used a pseudonym to protect the identity of the minor child.

2. Our record does not include any pleadings or other documents in the case prior to the Consent Order. We note that the pleadings should be included in the Record on appeal. *See* N.C. R. App. P. 9(a)(1)(d) ("The printed record in civil actions . . . shall contain . . . copies of the pleadings[.]").

"Consent Order: Permanent Child Custody" (capitalization altered) (the "Consent Order"). The Consent Order granted joint legal and physical custody of Tom to the parties and set out a detailed schedule for "regular parenting time" and "summer/holiday parenting time" (capitalization altered) for each parent and many provisions regarding decision-making, access to records and information, communications, and other issues. The Consent Order did not include findings of fact and both parties consented that they "waive any challenge or appeal of this Order based upon lack of Findings of Fact or Conclusions of Law."

As relevant to this appeal, the Consent Order's decree regarding "Legal Custody" provided as follows:

> The parties shall share joint legal custody of the minor child. Mother and Father shall work together to decide issues of lasting significance for the minor child. The parties shall cooperate with each other, consult in good faith with each other and endeavor to agree on all major decisions regarding the minor child, including, medical treatment, dental treatment, religion, counseling, extra-curricular activities, and all other major decisions. If the parties are unable to agree on major decisions regarding the general health, welfare, religious training, education and development of the child, the parties shall timely attend mediation or arbitration before submitting the issue to the court.

On 25 March 2022, Father filed a motion to modify child custody and child support. He alleged "substantial and material changes in circumstances affecting the welfare of the minor child" which required modification of the custody provisions of the Consent Order. Generally, Father alleged Mother's employment schedule had changed, requiring her to spend substantial time away from home, and she had failed to advise Father of her travel schedule or "offer him the right of first refusal to care for the minor child." He alleged that in mid-January of 2022, Mother relied on the paternal grandparents to care for the child, and Mother then left North Carolina from 25 January 2022 until 21 March 2022. The child lived primarily with Father while Mother was out of North Carolina. He also alleged the "parties' ability to communicate has deteriorated," as shown by Mother's failure to notify Father regarding her travels and her "offensive and/or vulgar messages" to him.

On 25 August 2022, Mother filed a reply to Father's motion, in which she denied some allegations of Father's motion and admitted others. As relevant to this appeal, in response to Father's allegations regarding

changes of circumstances justifying a modification of custody, Mother admitted that "a change of circumstances exists," although she did not admit all the facts as alleged by Father. Mother also asked the court to recalculate child support. Mother did not object to Father's filing of his motion to modify custody based on his failure to first request mediation or arbitration, nor did she make any request to attend mediation or arbitration.[3]

On 29 August 2022, the trial court held a hearing regarding Father's motion for modification of custody and child support, and the trial court entered its "Modification of Child Custody Order" (capitalization altered) (the "Modification Order") on 21 November 2022.[4] Mother timely filed notice of appeal from the Modification Order.

II. Appellate Jurisdiction

Mother's brief states the trial court's order is a "final judgment on the merits" and appeal lies to this Court under North Carolina General Statute Section 7A-27(b). However, the Modification Order addressed only child custody, leaving issues of child support and attorney's fees raised by both Father's motion and Mother's reply unresolved. That means the Modification Order is an interlocutory order, as it fails to resolve the entire controversy. *See Veazey v. City of Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950) ("An interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy." (citation omitted)). "Generally, there is no right to appeal from an interlocutory order." *Flitt v. Flitt*, 149 N.C. App. 475, 477, 561 S.E.2d 511, 513 (2002) (citations omitted). But under North Carolina General Statute Section 50-19.1, this Court has jurisdiction to consider Mother's appeal, because the Modification Order is

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3. We note the Local Rules of Family Court in Mecklenburg County require mediation of motions to modify custody. Rule 7A.3 provides "[t]he Parties to all custody and visitation cases, including modifications motions shall receive from the Court an order for custody mediation and parent education with specific dates for attendance and deadlines for completion." *See* Mecklenburg Cnty. Family Ct. R. 7A.3. The trial court can waive mediation under Rule 7A.6. *See* Mecklenburg Cnty. Family Ct. R. 7A.6. Considering the deficiencies in the record before this Court and the lack of a transcript, we realize it is entirely possible the parties attended mediation as required by the Local Rules, although this mediation would have occurred *after* the filing of Father's motion to modify custody, not before.

4. The Modification Order states it was "[a]nnounced in open court on February 17, 2022 and signed this the 18 day of November, 2022." It was filed on 21 November 2022. Since the hearing was held on 29 August 2022, we assume the reference to February 17, 2022 is a clerical error, but this date does not affect our analysis.

a final order as to child custody. *See* N.C. Gen. Stat. § 50-19.1 (2023) ("Notwithstanding any other pending claims filed in the same action, a party may appeal from an order or judgment adjudicating a claim for absolute divorce, divorce from bed and board, the validity of a premarital agreement as defined by G.S. 52B-2(1), child custody, child support, alimony, or equitable distribution if the order or judgment would otherwise be a final order or judgment within the meaning of G.S. 1A-1, Rule 54(b), but for the other pending claims in the same action.").

III. Jurisdiction of Trial Court to Modify Custody

[1] Mother first contends the "trial court was without jurisdiction to modify the Consent Order . . . because of a condition precedent contained therein with which Father did not comply." (Capitalization altered.)

A. Standard of Review

"Whether a trial court has subject-matter jurisdiction is a question of law, reviewed de novo on appeal." *McKoy v. McKoy*, 202 N.C. App. 509, 511, 689 S.E.2d 590, 592 (2010) (citation omitted).

B. Analysis

Mother did not raise any objection regarding jurisdiction before the trial court. But we recognize the issue of subject matter jurisdiction can be raised at any time, even for the first time on appeal. *See Standridge v. Standridge*, 259 N.C. App. 834, 835, 817 S.E.2d 463, 464 (2018). In addition, parties cannot confer jurisdiction by consent.[5] *See id.* at 836, 817 S.E.2d at 464 (noting "if a court does not have subject matter jurisdiction over a claim, the parties cannot confer jurisdiction on the court by their agreement to have the court rule on their case").

Mother seeks to rely on cases addressing contractual rights to argue the trial court lacked subject matter jurisdiction to modify child custody. For example, Mother cites *Farmers Bank, Pilot Mountain v. Michael T. Brown Distributors, Inc.*, 307 N.C. 342, 298 S.E.2d 357 (1983), regarding contractual conditions precedent:

> Conditions precedent "are those facts and events, occurring subsequently to the making of a valid contract, that must exist or occur before there is a right to immediate performance, before there is a breach of contract

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5. Although Mother argues the trial court lacked jurisdiction to modify child custody, the Statement of Jurisdiction in the Record on Appeal states that "The parties acknowledge that the Mecklenburg County District Court had personal and subject matter jurisdiction."

> duty, before the usual judicial remedies are available." 3A A. Corbin, Corbin on Contracts § 628, at 16 (1960).

Id. at 350, 298 S.E.2d at 362. Mother also cites *Davis v. Davis*, 78 N.C. App. 464, 337 S.E.2d 190 (1985), where this Court held that although the wife had waived alimony in the parties' separation agreement, the trial court properly entered a consent order which required the husband pay her medical expenses based on the consent of both husband and wife:

> The principle is well-established that "a consent judgment is a contract between the parties entered upon the record with the approval and sanction of the court," *Coastal Production Credit v. Goodson Farms*, 71 N.C. App. 421, 422, 322 S.E.2d 398, 399 (1984), and "must be construed in the same manner as a contract to ascertain the intent of the parties." *Bland v. Bland*, 21 N.C. App. 192, 195, 203 S.E.2d 639, 641 (1974).

Id. at 469, 337 S.E.2d at 192 (brackets omitted). Mother argues the provision of the Consent Order requiring the parties to go to mediation or arbitration "before submitting the issue to the court" to resolve any disagreements regarding "major decisions regarding the minor child, including, medical treatment, dental treatment, religion, counseling, extracurricular activities, and all other major decisions" is a "condition precedent" to the trial court's exercise of subject matter jurisdiction. In her reply brief, Mother clarifies that her

> argument is that *Father* cannot file a motion to modify because he has not complied with the condition precedent. As soon as Father complies with the condition precedent he can file. In the meantime, if there is some emergency or if someone with standing, who has complied with the condition precedent or is not subject to the condition precedent files to modify, the Court's jurisdiction is unaffected.

(Emphasis in original.) Based on the reply brief, Mother's argument seems not to be that the trial court lacks jurisdiction but instead that Father did not have standing to file a motion to modify unless he has complied with the "condition precedent." Either way, Mother's argument is entirely misplaced.

First, child custody issues are uniquely within the purview of the trial court, despite contractual agreements between a mother and father. This Court has explained:

> [w]hile it is clear that a husband and wife may bind themselves by a separation agreement, it is equally clear that "no agreement or contract between husband and wife will serve to deprive the courts of their inherent as well as their statutory authority to protect the interests and provide for the welfare of infants." *Baker v. Showalter*, 151 N.C. App. 546, 551, 566 S.E.2d 172, 175 (2002) (quoting *Fuchs v. Fuchs*, 260 N.C. 635, 639, 133 S.E.2d 487, 491 (1963)). Such separation agreements "are not final and binding as to the custody of minor children or as to the amount to be provided for the support and education of such minor children." *Hinkle v. Hinkle*, 266 N.C. 189, 195, 146 S.E.2d 73, 77 (1966). This is so because "the welfare of the child is the 'polar star' which guides the court's discretion in custody determinations." *Evans v. Evans*, 138 N.C. App. 135, 141, 530 S.E.2d 576, 580 (2000).

Mohr v. Mohr, 155 N.C. App. 421, 425-26, 573 S.E.2d 729, 732 (2002) (brackets omitted). Although the provision regarding mediation or arbitration was included in a consent order, not a separation agreement or other contract between the parties, it still does not create a jurisdictional bar of any sort to the trial court's ruling on a motion to modify custody, nor does it prevent either Mother or Father from filing a motion to modify custody. Had either parent requested mediation or arbitration before the hearing on the motion for modification, the trial court could have ruled on that request, but neither party raised this issue before the trial court.

Mother did not ask for mediation or arbitration before the trial court. Instead, she admitted many allegations of Father's motion for modification. Mother has therefore waived review of any issue as to the lack of arbitration or mediation before the trial court's modification of custody. *See* N.C. R. App. P. 10 ("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.").

The Consent Order's provisions created no jurisdictional prerequisite of mediation or arbitration before Father could file a motion to modify custody or for the trial court to address modification of custody. Mother did not present any request for mediation or arbitration before the trial court, so she has waived any argument on appeal regarding the lack of mediation or arbitration as to child custody.

IV. Findings of Fact

[2] Mother next contends "the trial court made insufficient findings of fact to support its conclusions of law that a substantial change in circumstances affecting the welfare of the child had occurred." (Capitalization altered.)

Our understanding of Mother's argument in her primary brief is that she has not challenged any of the trial court's findings of fact as unsupported by the evidence, although in her brief she "assigns error and challenges" fifteen of the trial court's findings. Instead, Mother argues as to each finding the trial court should have made more or different findings. Father also understood Mother's brief as failing to challenge the findings as unsupported by the evidence. Father notes that under North Carolina Rule of Appellate Procedure 9(c), Mother cannot challenge the findings on the record before us because she did not provide a transcript of the hearing and included only one of the fourteen exhibits admitted at trial. In her reply brief, Mother responds that "Father misconstrues Mother's arguments" as being that the findings by the trial court were "too meager to support its Conclusions of Law, which are together insufficient to support its Orders." Mother clarifies that she *did* contend "that the challenged [findings of fact] are unsupported by the record." She also states Father "did not participate in the construction of the record" but he only "kicks back' and simply states: 'no transcript. But that is not enough."

But it is enough. Father is correct: without a transcript, we must accept the trial court's findings of fact as supported by the evidence. It is well-established that the *appellant* – not the appellee – has the duty to ensure that the record is complete. *See Fox v. Fox*, 283 N.C. App. 336, 354-55, 873 S.E.2d 653, 667 (2022) ("Relatedly, under North Carolina Rules of Appellate Procedure 7, 9, and 11, the burden is placed upon the appellant to commence settlement of the record on appeal, including providing a verbatim transcript if available." (citation, quotation marks, and brackets omitted)). Even if we interpreted Mother's arguments as addressing the sufficiency of the evidence to support the findings, Mother did not include the transcript from the hearing in the record on appeal. Without the transcript, we must assume the trial court's findings are supported by the evidence. This Court addressed the same issue in *Hicks v. Alford*, 156 N.C. App. 384, 389-90, 576 S.E.2d 410, 414 (2003):

> Plaintiff further argues that there was insufficient evidence to support the trial court's findings concerning the effect of the substantial change in circumstances on the minor child. Plaintiff failed to include in her appeal

> a transcript of the evidence presented to the trial court. Nor was a transcript of the evidence included in plaintiff's previous appeal of this matter to the Court. "If the appellant intends to urge on appeal that a finding or conclusion of the trial court is unsupported by the evidence or is contrary to the evidence, the appellant shall file with the record on appeal a transcript of all evidence relevant to such finding or conclusion." N.C.R. App. P. 7(a)(1) (2003). Similarly, Rule 9 of the North Carolina Rules of Appellate Procedure requires the appellant to include in the record on appeal "so much of the evidence . . . as is necessary for an understanding of all errors assigned." N.C.R. App. P. 9(a)(1)(e) (2003). It is the duty of the appellant to ensure that the record is complete. *See State v. Alston*, 307 N.C. 321, 341, 298 S.E.2d 631, 644 (1983). "An appellate court is not required to, and should not, assume error by the trial judge when none appears on the record before the appellate court." *State v. Williams*, 274 N.C. 328, 333, 163 S.E.2d 353, 357 (1968). Without the transcript, we are unable to review plaintiff's argument that the trial court erred in making findings of fact that are unsupported by the evidence. *See Pharr v. Worley*, 125 N.C. App. 136, 139, 479 S.E.2d 32, 34 (1997) (concluding that, where the appellant failed to include relevant portions of the transcript on appeal, the Court would not engage in speculation as to potential error by the trial court). We therefore overrule this assignment of error.

Id. at 389-90, 576 S.E.2d at 414. We also note Mother did include one trial exhibit in the record on appeal: 525 pages of the minor child's unredacted medical records. These records are replete with personal information regarding the parties, including addresses, phone numbers, and email addresses, as well as the personal medical information of the minor child. We have *sua sponte* sealed the record on appeal to protect the minor child. *Cf. Frazier v. Frazier*, 286 N.C. App. 565, 566, 881 S.E.2d 839, 840 (2022) ("Plaintiff, as the appellant, bore the burden of ensuring that the record on appeal was complete, properly settled, in correct form, and filed." (citation and quotation marks omitted)). Unfortunately, Mother did include in the record confidential medical records of the child, confidential records of a child abuse investigation by Wake County Child Protective Services ("CPS") and the Nash County Department of Social Services ("DSS"), and records including voluminous personal identifying information of the child and the parties. "This

Court has *sua sponte* sealed the record to protect the personal identifying information and confidential medical information of the child to the extent we can." *Id.* We remind the parties and counsel that filings in this Court are freely available online and they should take care to protect the minor child's privacy in any future proceedings before the trial court or any appellate court.

We cannot review the findings of fact based on the record before this Court, and Mother's argument is without merit.

V. Conclusions of Law

[3] Mother also contends the trial court's "Conclusions of Law are unsupported by the Findings of Fact and thus do not support the Court's Orders." In support of this argument, purportedly challenging all ten of the trial court's conclusions of law,[6] Mother cites a few snippets from cases but she makes no argument connecting these snippets to the trial court's conclusions of law. In her reply brief, Mother clarifies that "there is no [finding of fact] shedding light on the way in which the parties were unable to follow the custodial arrangements, or indeed that the custodial arrangements were not followed."

Mother's argument overlooks the trial court's actual findings of fact. The trial court's findings of fact shed more than enough light on the changes in circumstances, including the ability of the parties to follow the custodial arrangements in the Consent Order after "the first few months" following entry of the Consent Order. Specifically, in January of 2022, Mother requested help from the paternal grandparents to keep the child when she had to "go out of state for work." The grandparents agreed to keep Tom during Mother's custodial time. Shortly after Mother left the state, Father and the grandparents agreed Tom would live exclusively with Father. The trial court also made findings regarding the changes in the child's "personality and demeanor" since the Consent Order's entry. Specifically, the trial court found the child had become "less trusting, disrespectful, fearful, angry, and throws temper tantrums." The trial court found the child's living arrangements in the joint custodial situation had "become disruptive" and "had an adverse effect on the minor child." The trial court further noted the parties had been "unable to co-parent" and "their communication is ineffective and

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6. We assume Mother does not actually object to the trial court's conclusion that *she* is a "fit and proper person[ ] to share the permanent legal care, custody, and control of the parties' aforesaid minor child" or the conclusion that she is a "fit and proper person to have secondary custody with reasonable and liberal visitation with the minor child."

can become hostile and disruptive," with a "negative impact on the minor child."

The trial court's findings support its conclusions of law, and particularly its conclusions that "there has been a substantial and material change in circumstances affecting the welfare of the minor child which warrants the Court to modify the existing child custody provisions of the Consent Order" and that it is in the child's best interest to grant joint legal custody to both parties and primary physical custody to Father.

VI. Conclusion

The trial court had subject matter jurisdiction to enter the Modification Order as the Consent Order did not create any jurisdictional prerequisite for filing a motion to modify custody. Even assuming the Consent Order contemplated mediation or arbitration before filing a motion to modify custody, neither party requested mediation or arbitration. The trial court's unchallenged findings of fact support its conclusions of law, so we affirm the Modification Order.

AFFIRMED.

Judges MURPHY and FLOOD concur.

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