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ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

JANUARY 6, 2025

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COURT OF APPEALS

CASES REPORTED

FILED 21 MAY 2024

CASES REPORTED WITHOUT PUBLISHED OPINIONS

HEADNOTE INDEX

the court, in making its reasoned decision, did not err by considering more than plaintiff's total award when denying fees, including that, per the contingency agreement between plaintiff and her counsel, her counsel was entitled to one-third of the judgment—$81,713.80. **Brown v. Caruso Homes, Inc., 9.**

CHILD ABUSE, DEPENDENCY, AND NEGLECT

Disposition order—visitation rights for parent not addressed—remand for required findings and conclusions—In an initial disposition order entered following the adjudication of a juvenile as abused and neglected, the district court made no finding that respondent-father had forfeited his right to visitation or that a denial of visitation was in the juvenile's best interest—or any other finding or conclusion regarding visitation with respondent-father. Accordingly, remand was necessary for the entry of an order of visitation establishing the time, place, and conditions under which respondent-father may exercise his visitation rights. **In re B.L.M.-S., 44.**

Initial disposition—reunification efforts not required—chronic physical abuse determination—findings sufficient—In an initial disposition order entered following the adjudication of a juvenile as abused and neglected, the district court did not err in concluding that reasonable efforts for reunification of the juvenile with respondent-father were not required upon determining that respondent-father had committed, encouraged, or allowed chronic physical abuse of the juvenile. That statutory determination under N.C.G.S. § 7B-901(c)(1)(b), in turn, was explained and supported by the court's written findings of fact that: (1) the juvenile—an infant—had two rib fractures, inflicted at different times; (2) respondent-father admitted to tightly holding, squeezing (with the force used on vice grips), and shaking the juvenile on more than one occasion, and additionally, to throwing the juvenile into the air and dropping him; (3) the juvenile's mother admitted respondent-father was too rough with the infant; and (4) felony child abuse charges were expected to be filed against respondent-father. **In re B.L.M.-S., 44.**

Prohibition on contact between respondent-parents—statutory authority to remedy conditions which led to juveniles removal—In an initial disposition order after a juvenile was adjudicated abused and neglected, the trial court did not abuse its discretion by prohibiting respondent-father from having contact with respondent-mother, where the Juvenile Code authorizes a district court to order respondent-parents to "take appropriate steps to remedy conditions in the home that led to or contributed to the juvenile's adjudication" (N.C.G.S. § 7B-904(d1)(3)). The court's directive was not an abuse of the court's discretion given its findings that respondent-father: (1) engaged in domestic violence with respondent-mother, with whom reunification efforts were not ceased and to whom visitation was granted; (2) had a pattern of being too rough with the juvenile, including becoming so frustrated with the infant's crying that he tightly squeezed and shook him, refusing to allow respondent-mother to intervene; and (3) was subject to a Military Protective Order barring him from contact with respondent-mother and the juvenile. **In re B.L.M.-S., 44.**

Statutory authority regarding reunification efforts—decree that efforts "are hereby ceased"—imprecise language rather than incorrect understanding of law—In the decretal portion of an initial disposition order entered following the adjudication of a juvenile as abused and neglected, the district court's use of the phrase "are hereby ceased" in reference to reasonable reunification efforts with respondent-father was not an abuse of discretion. The phrasing did not reflect

an incorrect understanding of the applicable law but rather was merely imprecise language given that the court employed wording which accurately reflected the statutory authorization provided in N.C.G.S. § 7B-901(c)—that such efforts "are not required" in certain circumstances—in a finding of fact and a conclusion of law in the same order. Accordingly, the order was remanded for clarification of the language in the decretal portion in conformance with the pertinent statute and the order's existing proper finding and conclusion. **In re B.L.M.-S., 44.**

CHILD CUSTODY AND SUPPORT

Standing—grandparents—motion to intervene—hearing held—improper procedure—no objection by parties—After a child's grandparents filed a motion to intervene in a custody matter and the child's parents filed an objection to hearing, the trial court did not follow the proper legal standard where it held an evidentiary hearing on the merits of the motion without first determining whether the grandparents had standing to intervene—a threshold question that must be based on the pleadings alone before a proposed intervenor can become a party to and participate in the case, including by giving evidence. However, none of the parties objected to the procedure or asked the trial court to rule on the motion based only upon the pleadings, and, further, while the grandparents argued error in the subsequent ruling the court made based upon its findings of fact, they did not raise this procedural issue on appeal. **Deanes v. Deanes, 29.**

Standing—grandparents—motion to intervene—no showing of parents' lack of fitness to parent—In a child custody matter, the trial court properly denied the grandparents' motion to intervene and motion in the cause for custody where the court's findings were supported by the evidence and, in turn, supported the court's conclusion that the grandparents failed to overcome the constitutional presumption that the parents are the best people to have primary custody over their child. Although the grandparents provided assistance and support to the child's parents and had a close relationship with the child, no evidence was presented that the parents voluntarily abdicated their parental status to the grandparents, were unfit, had neglected the child, or had acted inconsistent with their constitutional rights as parents; therefore, the grandparents had no standing to intervene in the custody matter. **Deanes v. Deanes, 29.**

CONSTITUTIONAL LAW

North Carolina—as-applied challenge—firearm possession on educational property—Defendant's conviction for possession of a firearm on educational property was vacated because the application of the gun possession statute, N.C.G.S. § 14-269.2(b), was unconstitutional as applied to defendant's circumstances: (1) defendant was homeless; (2) he kept all of his possessions, including multiple firearms, in his car; (3) he parked his car in a parking lot adjacent to a university hospital when seeking emergency medical care; and (4) the parking lot adjacent to the hospital was not tied closely enough to an educational purpose to be subject to the statute's sensitive-place restriction. **State v. Radomski, 108.**

Right to choice of counsel—proper standard employed—In denying a pretrial motion by court-appointed counsel to withdraw from representing defendant in a drug possession and habitual felon prosecution, the superior court committed no structural error because it employed the correct standard by considering whether granting the motion would significantly prejudice defendant or result "in a disruption

of the orderly processes of justice unreasonable under the circumstances." Here, there was no constitutional violation given the potential disruption and delay which would have occurred had the motion to withdraw been granted, where the motion was made on the day of trial and defendant reported to the court that, although he desired a private attorney and had contacted several, he had not yet employed another attorney. **State v. Melton, 91.**

Right to unanimous jury verdict—assault on emergency personnel—jury instruction not ambiguous—Defendant's constitutional right to a unanimous verdict was not violated where the jury was instructed that it could return a guilty verdict on a charge under N.C.G.S. § 14-34.6 if it found that the victim assaulted by defendant "was an emergency medical technician, an emergency health care provider, a medical responder, or a licensed health care provider." Because this statute criminalizes a single wrong—assault against emergency personnel attempting to discharge official duties—the actual classification of emergency personnel based on a victim's specific credentials was immaterial. **State v. Juran, 81.**

COURTS

Overruling a prior superior court judge—change in circumstances—not shown—In defendant's drug possession and habitual felon prosecution, the trial judge did not abuse his discretion in declining to overrule the denial by another superior court judge of a motion to withdraw—made by defendant's court-appointed counsel earlier on the same day—where, upon the trial coming on, appointed defense counsel informed the trial judge of the prior denial and asked to be heard again on the matter but did not argue any substantial change in circumstances since the initial ruling. **State v. Melton, 91.**

FIREARMS AND OTHER WEAPONS

Possession of firearm on educational property—knowledge of type of property—insufficient evidence—In a prosecution for possession of a firearm on educational property, after determining that the application of the charging statute (N.C.G.S. § 14-269.2(b)) to defendant's case was unconstitutional as applied to his circumstances, the appellate court found as an alternative ground for reversal that the State failed to present substantial evidence that defendant knew he was on educational property when he parked his van—in which, because he was homeless, he lived with all of his possessions, including multiple long guns—in a parking lot adjacent to a university hospital while he sought emergency medical care. Since there were multiple ways of arriving at the parking lot, and no evidence was presented about which route defendant took or what signs he may have seen that would inform him that he was on a university campus, the trial court erred in denying defendant's motion to dismiss the charge. **State v. Radomski, 108.**

INDICTMENT AND INFORMATION

Variance—motion to dismiss—jury instruction and verdict sheet—professional designation of victim not prejudicial—In a prosecution for assault on emergency personnel under N.C.G.S. § 14-34.6, the trial court did not err in denying defendant's motion to dismiss that charge for insufficiency of the evidence based upon an alleged fatal variance between the indictment and the evidence produced at trial, namely, that the alleged victim was a paramedic rather than an emergency medical technician (EMT)—a distinct credentialed position specifically covered by the

plaintiffs' claims against the clinic and nonprofit cannot be construed as sounding in medical malpractice, and thus were not subject to the time bar set forth in N.C.G.S. § 1-15(c). **Cottle v. Mankin, 20**.

TERMINATION OF PARENTAL RIGHTS

Grounds for termination—neglect—failure to make reasonable progress—insufficient evidence—The trial court's order terminating a father's parental rights to his three children on the grounds of neglect and willful failure to make reasonable progress was reversed where numerous of the court's findings of fact lacked evidentiary support or were merely recitations of allegations in the termination petition without support in the record. Where the children's permanent plan—guardianship—had been achieved, and the father was compliant with his case plan (before it was ceased by the trial court), paid child support, called the children weekly, and sent gifts to the children on a regular basis, the remaining findings and record evidence did not support a conclusion that a repetition of neglect was likely if the children were to be returned to the father's care. Further, the father's actions did not demonstrate a willful failure to make reasonable progress in correcting the conditions which led to the children's removal—conditions that no longer existed as of the date of the termination hearing—and the record evidence showed that the father had made reasonable progress under the circumstances of the guardianship placement. **In re T.R.W., 57.**

TORTS, OTHER

Summary judgment—doctor suspected of malpractice—concealment or failure to inform—insufficient forecast of evidence—In a case arising from orthopedic care provided to a minor, the trial court did not err in granting summary judgment in favor of defendants (an orthopedic clinic and several of its employees) on plaintiff's claims brought under various theories of fraud, breach of fiduciary duty, and negligent and intentional infliction of emotional distress where, even in the light most favorable to plaintiffs, the forecast of evidence tended to show that, while defendants were aware that an orthopedist had performed unnecessary surgeries on some juvenile patients, at the time they treated the minor, they were unaware of any negligent care provided by that orthopedist to the minor specifically, and accordingly, they could not have concealed or failed to disclose any related facts regarding the minor's care. **Cottle v. Mankin, 20.**

N.C. COURT OF APPEALS
2025 SCHEDULE FOR HEARING APPEALS

Cases for argument will be calendared during the following weeks:

January	13 and 27
February	10 and 24
March	17
April	7 and 21
May	5 and 19
June	9
August	11 and 25
September	8 and 22
October	13 and 27
November	17
December	1

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

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

ANDREW ALDERETE, PLAINTIFF
v.
SUNBELT FURNITURE XPRESS, INC., DEFENDANT

No. COA23-896

Filed 21 May 2024

Jurisdiction—Industrial Commission—Workers' Compensation Act—exclusivity provision—inapplicable—injury not arising from employment

On a claim for negligent supervision against an employer (defendant) arising from a sexual assault committed against an employee (plaintiff) by a co-worker while both were on the job at defendant's facility, the trial court's denial of a motion to dismiss for lack of subject matter jurisdiction (Civil Procedure Rule 12(b)(1)), based upon the exclusivity provision of the North Carolina Workers' Compensation Act (the Act), was not erroneous where, although defendant was indisputably subject to the Act, the cause of action brought was not. Specifically, plaintiff's claim for negligent supervision did not satisfy the three-part applicability test because, although the injury suffered by plaintiff, (1) was unexpected by plaintiff and without his design, and thus was caused by an "accident" for purposes of the Act and (2) arose "in the course of" plaintiff's employment, it (3) did not arise "out of" plaintiff's employment because there was no causal link between the injury and plaintiff's work loading and unloading trucks and the assault was not in furtherance of defendant's business.

Appeal by defendant from order entered 6 June 2023 by Judge Gregory Hayes in Catawba County Superior Court. Heard in the Court of Appeals 19 March 2024.

Cromer Babb & Porter, LLC, by Jacob Modla, for plaintiff-appellee.

Hedrick Gardner Kincheloe & Garofalo LLP, by M. Duane Jones, G. Anderson Stein, and Mary K. Harris, for defendant-appellant.

THOMPSON, Judge.

Sunbelt Furniture Xpress, Inc. (defendant) appeals from the trial court's order denying, *inter alia*, its Rule 12(b)(1) motion to dismiss Andrew Alderete's (plaintiff) complaint for lack of subject matter jurisdiction. After careful review, we affirm the trial court's order denying defendant's Rule 12(b)(1) motion to dismiss.

I. Factual Background and Procedural History

Plaintiff was hired by defendant on 8 December 2019. Plaintiff was employed as a warehouse worker in the Hickory, North Carolina, facility (Hickory facility), wherein his job was to load and unload trucks. Defendant also employed prison inmates, who were part of the North Carolina Department of Adult Correction prison work-release program, to work in the Hickory facility.[1]

After plaintiff began his employment, defendant's management assigned Danni Billips, an inmate who was part of the work-release program, to train plaintiff on his duties and responsibilities. Between 8 December 2019 and 22 December 2019, plaintiff alleges that he observed Billips intoxicated at work. Plaintiff alleges that on 22 December 2019, he smelled alcohol on Billips and that Billips was staggering as he walked.[2] On that same day, plaintiff alleges that Billips lured him to an unoccupied loading bay and demanded that plaintiff perform a sex act on Billips. Plaintiff further alleges that when he initially rejected Billips' demand, Billips repeated several times, "do it or I will f**king kill you," which made plaintiff fearful for his life.

Plaintiff alleges he was isolated and alone with Billips in the loading bay, and that Billips physically restrained plaintiff and forced plaintiff to

1. Defendant contends that the inmates it employed through the work-release program were deemed "suitable for work release among civilians without security or guards" by the North Carolina Department of Adult Correction, and "that it explicitly declined to accept" any inmates that had pled guilty to or had been convicted of any sex offense.

2. Defendant admitted in its Answer that, "employees of [d]efendant stated that they had smelled the odor of alcohol about Billips' person on the night of [22 December] 2019."

perform a sex act on Billips. When the alleged sex act ended, plaintiff avers that Billips instructed plaintiff to meet him "later that night" in a different loading bay so that Billips "could continue and complete the sex act." Plaintiff purports that he never consented to having any physical contact with Billips, and that Billips' conduct was unwelcome.

Following the alleged sexual assault, plaintiff left work and reported the same to the Hickory Police Department (HPD) and filed charges against Billips. HPD subsequently conducted an investigation.

On 15 December 2022, plaintiff filed a complaint against defendant alleging negligent supervision. In response to plaintiff's complaint, defendant filed several motions and an answer. On 30 May 2023, a hearing was held in Catawba County Superior Court on defendant's motions to dismiss, partial motion to dismiss, and motion to strike. By order entered 6 June 2023, the trial court denied defendant's motions. On 28 June 2023, defendant filed timely written notice of appeal from the trial court's order denying its motions.

II. Discussion

On appeal, defendant contends that the trial court erred in denying its motion to dismiss for lack of subject matter jurisdiction because "the [North Carolina] Industrial Commission has exclusive jurisdiction over this matter." We do not agree.

A. Appellate jurisdiction

A trial court's order denying a defendant's Rule 12(b)(1) motion to dismiss is not a final order; instead, it is interlocutory. *Marlow v. TCS Designs, Inc.*, 288 N.C. App. 567, 570, 887 S.E.2d 448, 452 (2023). "Generally, there is no right of immediate appeal from interlocutory orders and judgments." *Id.* at 571, 887 S.E.2d at 452 (citation omitted). "However, an interlocutory order may be immediately appealable if it affects a substantial right." *Id.* The denial of a Rule 12(b)(1) motion based on the exclusivity provision of the North Carolina Workers' Compensation Act (the Act) affects a substantial right, and thus, an order denying a Rule 12(b)(1) motion based on the exclusivity provision of the Act is immediately appealable. *Id.*

In the present matter, defendant filed, *inter alia*, a Rule 12(b)(1) motion to dismiss contending that the trial court lacked subject matter jurisdiction over this matter due to the exclusivity provision of the Act. The trial court denied defendant's motions. Therefore, defendant's Rule 12(b)(1) motion to dismiss based on the exclusivity provision of the Act is properly before us on appeal.

B. Standard of review

"A Rule 12(b)(1) motion to dismiss represents a challenge to the trial court's subject matter jurisdiction over a plaintiff's claims." *Id.* at 572, 887 S.E.2d at 452. "Subject matter jurisdiction refers to the power of the court to deal with the kind of action in question." *Id.* (citation omitted). "The trial court need not confine its evaluation of a Rule 12(b)(1) motion to the face of the pleadings, but may review or accept any evidence, such as affidavits, or it may hold an evidentiary hearing." *Id.* at 572, 887 S.E.2d at 452–53 (internal quotation marks and citation omitted). This Court reviews a trial court's order on a Rule 12(b)(1) motion to dismiss de novo. *Id.* at 572, 887 S.E.2d at 453.

C. Workers' Compensation Act

As an initial matter, we must determine if defendant is subject to the provisions of the Act, and if so, whether defendant has complied with the provisions of the Act.

"The superior court is a court of general jurisdiction and has jurisdiction in all actions for personal injuries caused by negligence, except where its jurisdiction is divested by statute." *Id.* (internal brackets and citation omitted). "By statute the superior court is divested of original jurisdiction of all actions which come within the provisions of the Workers' Compensation Act." *Id.* (internal brackets and citation omitted). "Where an employee and their employer are subject to and have complied with the provisions of the Act, the rights and remedies granted to the employee under the Act exclude all other rights and remedies of the employee." *Id.*

Here, there is no dispute that defendant was subject to the Act at the time of the incident. Defendant held a workers' compensation and employers' liability insurance policy at the time of the incident, and there is no indication that defendant was not in compliance with the provisions of the Act. Thus, defendant is subject to the Act.

D. Jurisdiction pursuant to the Act

Next, we must look to the cause of action to determine if it comes within the provisions of the Act such that the Industrial Commission has exclusive jurisdiction over this matter. In its brief, defendant contends that, "it is the intent, and has always been the intent, of the legislature that *all* workplace injuries be adjudicated through the North Carolina Industrial Commission and not in our civil courts." (Emphasis added). We do not agree.

Defendant's assertion that the Industrial Commission hears "*all* workplace injur[y]" cases, casts an overly broad net regarding the jurisdiction of the Industrial Commission. This Court has held that, "[t]he Industrial Commission is not a court of general jurisdiction. Rather, it is a quasi-judicial administrative board created to administer the Workers' Compensation Act and has no authority beyond that conferred upon it by statute." *Salvie v. Med. Ctr. Pharm. of Concord, Inc.*, 235 N.C. App. 489, 491, 762 S.E.2d 273, 275 (2014). "The Workers' Compensation Act specifically relates to the rights and liabilities of employee and employer by reason of injuries and disabilities *arising out of and in the course of the employment relation*." *Id.* (emphasis added). And this Court has made it clear that, "[w]here that relation does not exist[,] the Act has no application." *Id.* at 491, 762 S.E.2d at 275–76. Therefore, when an employer is subject to the Act, the Industrial Commission only has exclusive jurisdiction over injuries that "arise out of and in the course of the employment," not *all* workplace injuries.

To determine whether the cause of action in the present case comes within the provisions of the Act—that is, whether it arises out of and in the course of employment—we must apply the "applicability test." *See Marlow*, 288 N.C. App. at 572, 887 S.E.2d at 453 (establishing the test). Under the applicability test, "[a]n action comes within the provisions of the Act if: (1) the injury was caused by an accident; (2) the injury was sustained in the course of employment; and (3) the injury arose out of the employment." *Id.* In the present matter, the cause of action is "negligent supervision," but the injury giving rise to this cause of action is sexual assault committed against plaintiff by another employee of defendant. Therefore, we must first determine whether plaintiff's injury was caused by accident.

Finally, it is important to note that "[b]ecause these claims arise upon defendant['s] motions to dismiss, we treat plaintiff['s] factual allegations . . . as true." *Stone v. N.C. Dep't. of Labor*, 347 N.C. 473, 477, 495 S.E.2d 711, 713 (1998). Thus, for the purposes of this appeal, we will treat the factual allegations found in plaintiff's complaint as true.

a. Was the injury caused by an accident?

The Act is found in Chapter 97 of the North Carolina General Statutes. N.C. Gen. Stat. § 97 (2023). Under N.C. Gen. Stat. § 97-2, our legislature has provided definitions to aid in the interpretation of the provisions of the Act. "Injury," for the purposes of the Act "shall mean only injury by accident arising out of and in the course of the employment . . . ." N.C. Gen. Stat. § 97-2(6). However, the statute does not define 'accident.' And

although our Supreme Court has made it clear that sexual assault is an intentional tortious act, *Medlin v. Bass*, 327 N.C. 587, 594, 398 S.E.2d 460, 464 (1990), "[i]njuries resulting from an assault are caused by 'accident' within the meaning of the Act when, from the employee's perspective, the assault was unexpected and was without design on [his] part." *Culpepper v. Fairfield Sapphire Valley*, 93 N.C. App. 242, 247, 377 S.E.2d 777, 780 (1989) (emphasis omitted).

Here, "treat[ing] plaintiff's factual allegations . . . as true," *Stone*, 347 N.C. at 477, 495 S.E.2d 713, we conclude that the sexual assault constituted an accident for purposes of the Act, because, from plaintiff's "perspective, the assault was unexpected and without design on [plaintiff's] part." *Culpepper*, 93 N.C. App. at 247, 377 S.E.2d at 780 (emphasis omitted); *see also Stack v. Mecklenburg County*, 86 N.C. App. 550, 554, 359 S.E.2d 16, 18 (1987) (holding that the plaintiff's alleged injury, another intentional tort, "rape[,]" constituted an accident for the purposes of the Act). Thus, we conclude that, in this context, plaintiff's injury was an accident.

Next, we must determine whether plaintiff's injury "was sustained in the course of employment" and "arose out of the employment." *Marlow*, 288 N.C. App. at 572, 887 S.E.2d at 453.

b. Did the injury arise out of and in the course of employment?

This Court has indicated that, "while the 'arising out of' and 'in the course of' elements are distinct tests, they are interrelated and cannot be applied entirely independently." *Culpepper*, 93 N.C. App. at 247–48, 377 S.E.2d at 781. "The words 'arising out of the employment' refer to the origin or cause of the accidental injury." *Id.* at 248, 377 S.E.2d 781 (internal ellipses omitted). Our Supreme Court has held that

> [a]n accident occurring during the course of an employment, however, does not *ipso facto* arise out of it. The term "arising out of the employment" is not susceptible of any all-inclusive definition, but it is generally said that an injury arises out of the employment when it is a natural and probable consequence or incident of the employment and a natural result of one of its risks, so there is some causal relation between the injury and the performance of some service of the employment.

Robbins v. Nicholson, 281 N.C. 234, 238–39, 188 S.E.2d 350, 354 (1972) (internal quotation marks and citation omitted).

Culpepper illustrates the "causal relation between the injury and the performance of some service of the employment." *Robbins*, 281 N.C. at

238–39, 188 S.E.2d at 354 (citation omitted). In *Culpepper*, the plaintiff was a cocktail waitress at the defendant's mountain resort, and she filed a workers' compensation claim against the defendant. *Culpepper*, 93 N.C. App. at 243, 377 S.E.2d at 778. The record indicated that, as part of her job, the plaintiff was "to be very cordial and friendly and nice and to *offer any assistance that she could* to members and guests since most of the people coming up there were looking at buying property at the resort." *Id.* at 244, 377 S.E.2d at 779 (emphasis in original) (internal quotation marks and brackets omitted). One night after work, as the plaintiff was traveling on a resort road, she noticed a car stopped on the side of the road. *Id.* at 245, 377 S.E.2d at 779. As the plaintiff got closer, she noticed a guest—who had made the plaintiff uncomfortable on several occasions by making unwelcomed advances towards her—standing in the road, waving his arms with the hazard lights flashing on his vehicle. *Id.* The plaintiff stopped and asked the guest if he needed assistance. *Id.* However, the guest's car trouble was merely a ruse to get the plaintiff to stop for him; the guest subsequently kidnapped and sexually assaulted the plaintiff, who suffered several injuries as a result of the incident. *Id.*

In relevant part, this Court held that the plaintiff's injuries "arose out of her employment because the injuries were causally connected to her employment, [because] the nature of her job increased the risk of sexual assault, and her act of stopping to assist a guest was of appreciable benefit to her employer." *Id.* at 254, 377 S.E.2d at 784. In so holding, this Court indicated that, "the only reason [plaintiff] stopped on the resort road—particularly since she felt uncomfortable around [the guest]—was to offer a guest assistance, as her employer instructed her to do." *Id.* at 248, 377 S.E.2d at 781.

Returning to the present case, it is uncontested that plaintiff's injury was sustained in the course of employment. Plaintiff's complaint alleged that on 22 December 2019, immediately following the sexual assault, he left the workplace and reported the assault to HPD and filed charges against Billips. Defendant concedes that on 22 December 2019, "sometime after plaintiff left the facility prior to the end of his regularly scheduled shift," HPD arrived at defendant's facility. Therefore, the second prong, whether the injury was sustained in the course of employment, is satisfied. *Marlow*, 288 N.C. App. at 572, 887 S.E.2d at 453.

Nevertheless, as noted above, "an accident occurring during the course of an employment, however, does not *ipso facto* arise out of it." *Robbins*, 281 N.C. at 238, 188 S.E.2d at 354. Moreover, "intentional tortious acts are rarely considered to be within the scope of an employee's employment." *Medlin*, 327 N.C. at 594, 398 S.E.2d at 464 (internal

brackets and citation omitted). Rather, when an intentional tortious act such as an assault occurs at the workplace but "the assault was not for the purpose of doing anything related to the duties of the employee, but was for some undisclosed, personal motive[,] [i]t cannot, therefore, be deemed an act of his employer." *Id.* (internal brackets, ellipses, and citation omitted).

Here, unlike in *Culpepper*, the "origin or cause" of plaintiff's injury is not related to the performance of the services required of him as an employee, *Culpepper*, 93 N.C. App. at 248, 377 S.E.2d at 781, as plaintiff was hired exclusively to load and unload trucks. Moreover, Billips' sexual assault of plaintiff was not "in furtherance of [defendant's] business and for the purpose of accomplishing the duties of employment[,]" *Phelps v. Vassey*, 113 N.C. App. 132, 135, 437 S.E.2d 692, 695 (1993) (citation omitted), but was the result of Billips departing from his employment duties to accomplish an "undisclosed, personal motive" that was not incidental to Billips' job. *Medlin*, 327 N.C. at 594, 398 S.E.2d at 464.

Consequently, we conclude that the Industrial Commission does not have jurisdiction over plaintiff's complaint because although plaintiff's injury was sustained in the course of his employment under the second prong of the applicability test, it did not *arise* out of plaintiff's employment under the third prong of the applicability test. For the Industrial Commission to have exclusive jurisdiction over plaintiff's complaint, plaintiff's injury must have "arise[n] out of ***and*** in the course of the employment relation[,]" and "[w]here that relation does not exist[,] the Act has no application." *Salvie*, 235 N.C. App. at 491, 762 S.E.2d at 275–76. For this reason, the trial court did not err in denying defendant's Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction.

III. Conclusion

We conclude that plaintiff's cause of action does not come within the provisions of the Act because, although plaintiff's injury was an "accident"—for the purposes of the Act—and it occurred in the course of employment, plaintiff's injury did not arise out of his employment with defendant. Therefore, the exclusivity provision of the Act does not apply to this case. For these reasons, we hold that the trial court did not err in denying defendant's Rule 12(b)(1) motion to dismiss.

AFFIRMED.

Judges HAMPSON and GRIFFIN concur.

CHEREE BROWN, PLAINTIFF
v.
CARUSO HOMES, INC., DEFENDANT

No. COA23-1014

Filed 21 May 2024

Attorney Fees—Wage and Hour Act claim—prevailing party—denial of request for fees—discretionary decision—sufficiency of findings

The trial court did not abuse its discretion by denying plaintiff's request for attorney fees in her action filed pursuant to the North Carolina Wage and Hour Act to recover unpaid commissions from her former employer after she was terminated. Given the permissive language of N.C.G.S. § 95-25.22(d) (using "may" rather than "shall"), the decision to award attorney fees was within the court's sole discretion, and that discretion was not limited by the fact that plaintiff was the prevailing party in her action (in which she was awarded unpaid commissions of $122,568.24 along with punitive damages in the same amount). Further, the court was not required to make findings of fact regarding the reasonableness of attorney fees where it denied the request for fees, and the court, in making its reasoned decision, did not err by considering more than plaintiff's total award when denying fees, including that, per the contingency agreement between plaintiff and her counsel, her counsel was entitled to one-third of the judgment—$81,713.80.

Appeal by plaintiff from order entered 10 July 2023 by Judge Bryan Collins in Wake County Superior Court. Heard in the Court of Appeals 9 April 2024.

The Law Offices of Gilda A. Hernandez, PLLC, by Gilda A. Hernandez, Hannah B. Simmons, and Matthew Marlow, for plaintiff-appellant.

Hilton Silvers & McClanahan PLLC, by Nelson G. Harris, for defendant-appellee.

FLOOD, Judge.

Plaintiff Cheree Brown appeals from an order entered 10 July 2023, arguing the trial court abused its discretion in denying her request for

attorney's fees because: (1) the trial court had "no basis" to deny attorney's fees under the North Carolina Wage and Hour Act ("NCWHA") where Plaintiff is the prevailing party; (2) the trial court abused its discretion in Finding of Fact 3; (3) the trial court failed to make findings of fact demonstrating it considered the reasonableness of Plaintiff's request; and (4) Plaintiff's request for attorney's fees was "reasonable." After careful review, we conclude the trial court has the sole discretion to deny attorney's fees, and the case law of this State does not limit that discretion when the plaintiff is the prevailing party or require findings of fact demonstrating the reasonableness of the trial court's decision when fees are denied. We further conclude the trial court's denial of attorney's fees was the result of a reasoned decision, and the trial court therefore did not abuse its discretion.

I. Factual and Procedural Background

On 26 November 2019, Plaintiff filed a complaint against her former employer, Defendant Caruso Homes, Inc., to recover unpaid commissions she had earned prior to her termination in July 2019. In her complaint, she alleged Defendant violated NCWHA by withholding commissions Plaintiff had earned during her employment. Plaintiff sought "all owed, earned, accrued, agreed upon, and/or promised wages due, an amount in excess of $25,000" and "liquidated damages."

On 9 March 2023, after a discovery period and years of delays, in large part due to the COVID-19 pandemic, a jury returned a verdict awarding Plaintiff $122,568.24 in unpaid commissions. The trial court further concluded Defendant's failure to pay Plaintiff her owed commissions was not in good faith and awarded Plaintiff an additional $122,568.24 in liquidated damages.

On 17 March 2023, Plaintiff, through her counsel, Gilda Hernandez, filed a motion requesting attorney's fees in the amount of $463,320.00, litigation costs in the amount of $22,767.83, and "post-judgment interest in an amount to be calculated by the [c]ourt."

In support of Plaintiff's motion for attorney's fees, Ms. Hernandez submitted a declaration detailing the time and costs her firm had expended on this litigation. Ms. Hernandez represented that, as of 17 March 2023, she and her firm had "spent more than 1,354.20 hours" working on Plaintiff's case. The declaration further explained that Ms. Hernandez had agreed to litigate Plaintiff's claim on a "wholly contingent basis" and would recover payment only if Plaintiff was successful at trial. The contingency agreement between Plaintiff and Ms. Hernandez provided:

> Should Client recover any money, regardless of the means of recovery, Client agrees to pay Attorneys the **greater** of Attorneys' "**lodestar**" (defined as the total of Attorneys' hourly rates times the number of hours each lawyer and staff member worked on this matter), **or** a sum equal to **one-third (33.33%)** of the total amount of the **Gross Value** of the settlement or award. "Gross Value" means the total of all monetary awards obtained whether by settlement, arbitration award or court judgment, including back and front pay, all damages, interest, and Attorneys' fees.

Under this agreement, Ms. Hernandez would receive the "lodestar" if the trial court were to elect to award attorney's fees, and the amount awarded was greater than one-third of Plaintiff's award. This would allow Plaintiff to keep the entirety of her award, and Defendant would owe an additional amount of attorney's fees as determined by the trial court. If, however, the trial court were to deny attorney's fees, Ms. Hernandez would claim one-third of Plaintiff's award.

On 27 April 2023, Ms. Hernandez filed an amended motion for attorney's fees, which reduced the requested litigation costs to $5,462.55 and included a calculation for pre-judgment interest in the amount of $20,106.89. In her amended declaration submitted along with the amended motion, Ms. Hernandez noted her firm had spent "more than 1,374 hours litigating" this case—a twenty hour increase from her representation in the original motion—but had "voluntarily" reduced that number to 1,161.6 hours. As of 26 May 2023, the day of the hearing on the motion for attorney's fees, Ms. Hernandez represented that the hours had gone up from 1,374 to "almost 1,500 hours."

On 10 July 2023, the trial court entered an order denying Plaintiff's request for attorney's fees. On 17 July 2023, Plaintiff filed a timely notice of appeal to this Court.

II. Jurisdiction

This Court has jurisdiction to review this appeal from a final judgment of a superior court pursuant to N.C. Gen. Stat. § 7A-27(b) (2023).

III. Analysis

A single issue is before us in this appeal: whether the trial court abused its discretion in denying Plaintiff's request for attorney's fees. For the reasons that follow, we conclude that it did not.

A. Standard of Review

NCWHA provides that the trial court, "*may*, in addition to any judgment awarded [a] plaintiff, order costs and fees of the action and reasonable attorney['s] fees to be paid by [a] defendant." N.C. Gen. Stat. § 95-25.22(d) (2023) (emphasis added). It is well established by our appellate courts that this permissive statute places the decision to award attorney's fees under NCWHA solely in the discretion of the trial court; our review, therefore, is abuse of discretion. *See Kornegay v. Aspen Asset Grp., LLC*, 204 N.C. App. 213, 247, 693 S.E.2d 723, 746 (2010) ("A trial court's decision whether or not to award attorney's fees under N.C. Gen. Stat. § 95-25.22(d) is reviewed for abuse of discretion."); *see also Morris v. Scenera Rsch., LLC*, 229 N.C. App. 31, 56, 747 S.E.2d 362, 377 (2013) ("Interpreting subsection 25.22(d) of the [NC]WHA, we have held that 'a trial court's decision regarding whether or not to award attorney['s] fees . . . is reviewed for abuse of discretion.' " (citation and brackets omitted), *rev'd on other grounds*, 368 N.C. 857, 788 S.E.2d 154 (2016)); *Fulk v. Piedmont Music Ctr.*, 138 N.C. App. 425, 435, 531 S.E.2d 476, 482 (2000) ("Thus where, as here the [NCWHA] applies, the court in its discretion may award plaintiff attorney's fees."). It is not this Court's role to "second-guess a trial court's exercise of discretion absent evidence of abuse. An abuse of discretion occurs when a court makes a patently arbitrary decision, manifestly unsupported by reason." *Buford v. Gen. Motors Corp.*, 339 N.C. 396, 406, 451 S.E.2d 293, 298 (1994). The trial court is not required to state its reasoning, but instead, "[i]n reviewing the trial court's denial of [a] plaintiff['s] motion for attorney's fees, we must determine whether it could 'have been the result of a reasoned decision.' " *Id.* at 406, 451 S.E.2d at 298 (citation omitted).

Despite the discretionary nature of NCWHA's fee provision, Plaintiff argues the trial court "ignored the remedial nature of the NCWHA" because the Legislature did not intend for attorney's fees to be taken "away from an employee's justly owed damages." Specifically, Plaintiff argues NCWHA should be construed "liberally" to allow her to "retain the full amount of commissions she is rightfully entitled, with a separate award of attorney['s] fees."

We begin by noting that, while NCWHA is modeled after the Federal Fair Labor Standards Act ("FLSA"), the two articles are not identical. *See Whitehead v. Sparrow Enter., Inc.*, 167 N.C. App. 178, 181, 605 S.E.2d 234, 237 (2004). The FLSA *requires* a court to award reasonable attorney's fees to be paid by the defendant when the plaintiff is the prevailing party. *See* 29 U.S.C. § 216(b) (2023) ("The court in such action *shall*, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a

reasonable attorney's fee to be paid by the defendant, and costs of the action." (emphasis added)).

Here, we interpret Plaintiff's assertion to mean that a "liberal" interpretation of NCWHA would *require* the trial court to award attorney's fees to a prevailing party. Such a conclusion, however, would obviate our Legislature's clear intent to leave the decision to award or deny attorney's fees under NCWHA to the discretion of the trial court. Considering that NCWHA is modeled after—but is not identical to the FLSA, if our Legislature intended to require a trial court to award attorney's fees to plaintiffs who were successful in their NCWHA claims, it would have used the exact language used by Congress in the FLSA. Instead, our Legislature's use of the word "may" in place of "shall" indicates its clear intention to reserve the decision to award attorney's fees to the sound discretion of the trial court. *See* N.C. Gen. Stat. § 95-25.22(d) (2023) (providing the trial court, "*may*, in addition to any judgment awarded plaintiff, order costs and fees of the action and reasonable attorney['s] fees to be paid by the defendant." (emphasis added)).

Thus, the denial of Plaintiff's request for attorney's fees, alone, is insufficient to show the trial court "ignored the remedial nature of the NCWHA" when NCWHA places the decision to award or deny attorney's fees in the sound discretion of the trial court. *See Kornegay*, 204 N.C. App. at 247, 693 S.E.2d at 746.

B. Reasonableness of the Trial Court's Denial of Attorney's Fees

In her sole allegation of error, Plaintiff argues both directly and impliedly that, because Plaintiff was the prevailing party, the trial court's decision to deny attorney's fees was unreasonable. In turn, we address Plaintiff's assertions that: (1) the trial court had "no basis" to deny attorney's fees under NCWHA where Plaintiff is the prevailing party; (2) the trial court abused its discretion in Finding of Fact 3; (3) the trial court failed to make findings of fact demonstrating it considered the reasonableness of Plaintiff's request; and (4) Plaintiff's request for attorney's fees was "reasonable."

1. Denial of Attorney's Fees Where Plaintiff is Prevailing Party

Plaintiff argues "the Supreme Court in *Hensley* established that where plaintiff prevails at trial on claims asserted, there is no basis to deny attorney['s] fees." *See Hensley v. Eckerhart*, 461 U.S. 424, 440, 103 S. Ct. 1933, 1943, 76 L. Ed. 2d 40, 54 (1983). *Hensley*, however, established no such bright line rule that would be applicable to the facts of this case.

In *Hensley*, the issue was whether a plaintiff who partially prevailed on a claim brought under the Civil Rights Act could recover attorney's fees for legal services expended on their unsuccessful claims. *Id.* at 426, 103 S. Ct. at 1936, 76 L. Ed. 2d at 46. Citing to Senate Report 94–1011, the Supreme Court determined that a plaintiff who prevails on a civil rights claim "should ordinarily recover an attorney's fee." *Id.* at 429, 103 S. Ct. at 1937, 76 L. Ed. 2d at 48; *see also* S. Rep. No. 94–1011, p. 4 (1976). Based on our reading of *Hensley*, and the Supreme Court's numerous citations to Senate reports and references to Congress's intent, we interpret this determination to be specific to attorney's fees awarded pursuant to the Civil Rights Act. *See Hensley*, 461 U.S. at 429, 103 S. Ct. at 1937, 76 L. Ed. 2d at 48 ("*Congress* enacted the Civil Rights Attorney's Fees Awards Act [], authorizing the district courts to award a reasonable attorney's fee to prevailing parties in civil rights litigation. . . . The *legislative history* [] does not provide a definitive answer as to the proper standard for setting a fee award[.] . . . The *congressional intent* to limit awards to prevailing parties requires that these unrelated claims be treated as if they had been raised in separate lawsuits[.]" (emphasis added)).

In that *Hensley* dealt specifically with awards of attorney's fees for parties in *civil rights* litigation, the Supreme Court's holding does not stand for Plaintiff's proposition that the trial court had "no basis" to deny attorney's fees to a prevailing party. While this Court has adopted, in pertinent part, the reasoning put forth in *Hensley* in considering whether a trial court erred in *awarding* attorney's fees pursuant to NCWHA, it did so when determining *how* attorney's fees should be apportioned among successful and unsuccessful claims, not *whether* attorney's fees were properly awarded. *See Morris*, 229 N.C. App. at 56, 747 S.E.2d at 377 (employing the rationale from *Hensley* to support its holding that the business court erred in its award of attorney's fees because it failed to make findings of fact supporting its apportionment of attorney's fees between the successful NCWHA claim and the unsuccessful tort claims).

This Court has not, however, adopted a blanket rule that a prevailing party *must* be awarded attorney's fees, as Plaintiff argues. Accordingly, the trial court was not required to award attorney's fees to the prevailing party, but rather could exercise its discretion pursuant to N.C. Gen. Stat. § 95-25.22(d).

2. Finding of Fact 3

Next, we address Plaintiff's argument that the trial court abused its discretion in Finding of Fact 3 because this finding "cannot be supported by reason." Plaintiff cites to *Lacey v. Kirk*, 238 N.C. App. 376, 767 S.E.2d

632 (2014) for the proposition that the purpose of attorney's fees is to make the party whole, and because Plaintiff received an award of damages, the trial court cannot deny attorney's fees based on that award.

In *Lacey*, a trial court reduced the amount of attorney's fees requested by the plaintiffs based on the jury's large award of punitive damages. *Id.* at 399, 767 S.E.2d at 649. On appeal, the plaintiffs argued the trial court lacked the authority to reduce the amount of attorney's fees based on the fact that the plaintiffs were the beneficiaries of a large punitive damages award. *Id.* at 398, 767 S.E.2d at 648. This Court agreed, holding it was an abuse of discretion to reduce an otherwise reasonable award of attorney's fees, based on a large punitive damages award. *Id.* at 403, 767 S.E.2d at 651. This was particularly true where the trial court made applicable findings of fact and determined it would be proper to award attorney's fees, but chose not to award attorney's fees *only* because of the large punitive damages award. *Id.* at 403, 767 S.E.2d at 651. In reaching this conclusion, this Court explored the separate purposes behind attorney's fees and punitive damages, stating, "punitive damages 'are awarded as punishment due to the outrageous nature of the wrongdoer's conduct' while an award of attorney['s] fees serves an entirely different set of purposes, including 'restor[ing] [the p]laintiffs to the same position they would have been in had no breach of fiduciary duty occurred.' " *Id.* at 402–03, 767 S.E.2d at 650–51 (citations omitted).

Thus, while this Court in *Lacey* stated the purpose of attorney's fees was to make a party whole, it did not state this purpose therefore *requires* a trial court to award attorney's fees—or severely limits the trial court's discretion—nor would such a statement comport with NCWHA's discretionary authorization of attorney's fees.

Here, the trial court's Finding of Fact 3 provides:

> 3. The Judgment entered herein provides that Plaintiff will recover actual and liquidated damages in the aggregate amount of $245,136.48, plus interest and costs; of which Plaintiff will receive approximately $163,422,68, plus interest; and Plaintiff's counsel will receive approximately $81,713.80, plus interest, and recover the costs provided for in the General Statutes and awarded in the Judgment.

It is unclear whether Finding of Fact 3 suggests attorney's fees were denied *because of* the award Plaintiff received. It is even less clear when read together with Finding of Fact 4, in which the trial court explicitly states it considered the verdict *as well as* the evidence at trial, Plaintiff's motions, Defendant's responses, and all other matters before the trial

court. Moreover, unlike the trial court in *Lacey*, which found an award of attorney's fees would have been reasonable, the trial court here concluded that denying attorney's fees was reasonable.

Plaintiff failed to persuasively argue that the trial court denied attorney's fees based solely on the liquidated damages awarded to Plaintiff, and we do not conclude it did so on this basis. Reading Findings of Fact 3 and 4 together, we conclude the trial court affirmed that, per her own agreement, Ms. Hernandez was entitled to one-third of the judgment—$81,713.80.

Accordingly, Plaintiff has not shown that the trial court abused its discretion by finding that Ms. Hernandez could collect her fee from Plaintiff's award. *See Kornegay*, 204 N.C. App. at 247, 693 S.E.2d at 746.

3. Trial Court's Obligation to Consider Reasonableness of Fee Request

We now address Plaintiff's challenge to the reasonableness of the trial court's denial of attorney's fees. Citing to *Ehrenhaus v. Baker*, 216 N.C. App. 59, 97–98, 717 S.E.2d 9, 33–34 (2011), Plaintiff argues that when "determining whether it is reasonable to award [attorney's] fees . . . the trial court must consider the factors listed in Rule 1.5 of the Revised North Carolina Rules of Professional Conduct[.]" This is an incorrect statement of law.

Ehrenhaus concerned the "common benefit doctrine[,]" which is an exception to the "American Rule" for the award of attorney's fees—the prevailing rule followed by North Carolina courts, which states that "a successful litigant may not recover attorneys' fees . . . unless such a recovery is expressly authorized by statute." *Id.* at 94, 717 S.E.2d at 32. The common benefit doctrine requires, under particular circumstances, an award of attorney's fees to a "litigant who confers a common monetary benefit upon an ascertainable stockholder class[.]" *Id.* at 95, 717 S.E.2d at 32. In *Ehrenhaus*, based on the common benefit doctrine, this Court instructed the trial court to consider on remand the reasonableness factors included in Rule 1.5 of the Revised Rules of Professional Conduct and to "includ[e] a reasoned decision on the issue of how it arrived at the figure to be awarded." *Id.* at 96, 99, 717 S.E.2d at 33, 35.

Contrary to Plaintiff's argument, the *Ehrenhaus* Court did not hold that the trial court "must" consider the "factors listed in Rule 1.5 of the Revised North Carolina Rules of Professional Conduct" when *denying* attorney's fees. The denial of attorney's fees was not an issue that was before the *Ehrenhaus* Court, nor did that case involve a statute that gave the trial court discretionary authority to award or deny attorney's

fees. *Ehrenhaus* is inapplicable where, like the case at hand, the trial court denied attorney's fees. *See*, *e.g.*, *E. Brooks Wilkins Fam. Med., P.A. v. WakeMed*, 244 N.C. App. 567, 580, 784 S.E.2d 178, 186 (2016) ("We hold that when the trial court in its discretion *denies* a motion for attorney's fees, *it need not* make statutory findings required to support a fee award."); *cf. Lacey*, 238 N.C. App. at 399, 767 S.E.2d at 648 ("*If* the trial court decides to *award* a reasonable attorneys' fee, it must make findings of fact . . . determining the reasonableness of an attorneys' fee award[.]") (emphasis added); *Williams v. New Hope Foundation, Inc.*, 192 N.C. App. 528, 530, 665 S.E.2d 586, 588 (2008) ("*Before awarding attorney's fees*, the trial court must make specific findings of fact concerning: (1) the lawyer's skill; (2) the lawyer's hourly rate; and (3) the nature and scope of the legal services rendered.") (emphasis added)).

Accordingly, the trial court is not required to make findings of fact demonstrating the reasonableness of its decision to deny attorney's fees. *See E. Brooks Wilkins Fam. Med., P.A.*, 244 N.C. App. at 580, 784 S.E.2d at 186.

4. Reasonableness of Plaintiff's Request

Plaintiff makes several additional arguments as to why her request for attorney's fees was reasonable. Those arguments, however, are immaterial to our inquiry—whether the trial court abused its discretion in denying her request for attorney's fees. *See Kornegay*, 204 N.C. App. at 247, 693 S.E.2d at 746. As stated, our review for an abuse of discretion requires us to consider whether the trial court's ruling "could" have been the result of a reasoned decision, which we conclude it could have been. *See Buford*, 339 N.C. at 406, 451 S.E.2d at 298.

First, Ms. Hernandez entered into a contingency agreement where she offered to represent Plaintiff and would collect payment only if Plaintiff succeeded on her claims. If Plaintiff were to succeed, Ms. Hernandez would be entitled to either the lodestar amount as determined by the trial court or one-third of Plaintiff's award, whichever was greater. If Plaintiff were to be awarded a monetary judgment, and the trial court elected to deny attorney's fees, as was the case here, Ms. Hernandez could collect payment for her services from one-third of Plaintiff's total award. It appears Ms. Hernandez seeks to gain from Defendant's deep pockets in requesting nearly half a million dollars in attorney's fees, an amount the trial court described as "grossly excessive."

Ms. Hernandez consciously entered into an agreement with Plaintiff where: if Plaintiff lost, Ms. Hernandez would not receive payment for her work on Plaintiff's case; if Plaintiff received a judgment, the trial

court could award separate attorney's fees; or, Plaintiff could be awarded a judgment from which Ms. Hernandez would receive one-third as compensation for her services. Ms. Hernandez knowingly assumed the risk that she could recover nothing or be limited to a one-third recovery, as is clearly stated in the motion for attorney's fees: "Plaintiff's Counsel . . . assumed the risk that they may not recover for these hours worked, expenses, and costs." In its order, the trial court identified one-third of Plaintiff's award as the amount to be paid to the attorneys for this case—fully aligning with Ms. Hernandez's own contingency agreement.

Moreover, as to whether the trial court's decision was a reasoned one, this was not complex litigation involving multiple parties and multiple claims. Plaintiff asserted a single claim under NCWHA, an area of law in which Ms. Hernandez proffered to have "substantial experience." The trial court questioned the inconsistent statements Ms. Hernandez made regarding both the complexity of the case and her experience:

> **The Court**: I just don't understand, and maybe I'm just taking something out of context, but on page 2 of your brief, at the very top, it says, "the claims in this case are simple." And then on page 12 at the top it says, "the present case involved a complex legal issue, which was not only novel, but also highly intricate in nature." And I don't understand how you can say that. . . . Which is it?

In attempting to answer the trial court's question, Ms. Hernandez seemed to argue that Defendant's refusal to settle was what complicated the issue. The claim, however, remained the same. It is difficult to understand, and Ms. Hernandez did not explain, how a simple claim for unpaid commissions was a "novel" legal issue.

As to discrepancies surrounding Ms. Hernandez's experience in NCWHA litigation, the trial court asked:

> **The Court**: You urged this court to find that you are highly skilled and experienced in these matters and have a great reputation, and I don't doubt any of that. . . . But if that's true, why did you have to spend so much time researching wage and hour law and expect the other side to pay for that?
>
> **Ms. Hernandez**: I thought this was going to be a simple case, until my – my associate attorney, Charlotte Smith, was – two years out of law school. And so this was an opportunity for her to learn, but under my guidance and

> mentorship. And that's why she was probably spending a lot of time researching this case.
>
> . . . .
>
> **The Court**: And I'm not going [to] make the other side pay for your young associate's educating themselves on the law. But anyway.

Based on these specific concerns the trial court had with Plaintiff's request, and our independent review of the Record, we conclude the trial court properly determined, in its discretion, that Plaintiff's request was unreasonable, and the trial court therefore did not abuse its discretion in denying attorney's fees. *See Kornegay*, 204 N.C. App. at 247, 693 S.E.2d at 746.

IV. Conclusion

We conclude the trial court retains the discretion to award attorney's fees, and case law does not diminish that discretion based on whether Plaintiff is the prevailing party. We further conclude the trial court did not abuse its discretion in Finding of Fact 3 because the order indicates the trial court considered more than just Plaintiff's total award when denying attorney's fees. Finally, the trial court did not abuse its discretion in denying attorney's fees because it was not required to make findings of fact addressing the reasonableness of attorney's fees when denying attorney's fees, and the trial court's denial was the result of a reasoned decision.

AFFIRMED.

Judges WOOD and THOMPSON concur.

COTTLE v. MANKIN

[294 N.C. App. 20 (2024)]

BRITTANY JEANNE COTTLE, TERRY ALAN COTTLE AND CYNTHIA BALKCUM COTTLE, PLAINTIFFS
v.
KEITH PINKEY MANKIN, MD; JEANNE HALL, RN, MSN, FNP-C; BRADLEY K. VAUGHN, MD; WALLACE F. ANDREW, JR., MD; KARL STEIN; JOSEPH U. BARKER, MD; MARK R. MIKLES, MD; RALEIGH ORTHOPAEDIC CLINIC, P.A.; AND RALEIGH ORTHOPAEDIC RESEARCH FOUNDATION, DEFENDANTS

No. COA22-633

Filed 21 May 2024

1. Statutes of Limitation and Repose—negligent retention of a physician by a medical clinic—medical malpractice statute of limitation not applicable

In a case arising from orthopedic care provided to a minor, the trial court erred in granting summary judgment in favor of defendants (an orthopedic clinic and its associated nonprofit foundation) on plaintiffs' claims for negligent retention of a doctor who had been accused of performing unnecessary surgeries after the court applied the four-year statute of repose applicable to medical malpractice claims (N.C.G.S. § 1-15(c)) because N.C.G.S. § 90-21.11(2) provides that a medical malpractice claim may only be brought against a hospital, licensed nursing home, licensed adult care home, or "health care provider." Given that the only non-human entities included in the statutory definition of the latter term are a "hospital, nursing home[, or] adult care home" (N.C.G.S. § 90-21.11(1)), plaintiffs' claims against the clinic and nonprofit cannot be construed as sounding in medical malpractice, and thus were not subject to the time bar set forth in N.C.G.S. § 1-15(c).

2. Medical Malpractice—summary judgment—breach of duty or causation—insufficient forecast of evidence

In a case arising from orthopedic care provided to a minor, in which plaintiffs asserted various tort claims against two physicians (defendants) who treated the minor approximately four years after her last surgery by another physician at the same practice, who had been accused of committing medical malpractice against other minor patients—the trial court did not err in granting summary judgment on tort claims in favor of defendants where plaintiffs failed to forecast evidence demonstrating that the failure of these defendants to inform the minor of what they had come to learn, namely, that the prior surgery was botched, directly damaged the minor or worsened her injuries.

3. Torts, Other—summary judgment—doctor suspected of malpractice—concealment or failure to inform—insufficient forecast of evidence

In a case arising from orthopedic care provided to a minor, the trial court did not err in granting summary judgment in favor of defendants (an orthopedic clinic and several of its employees) on plaintiff's claims brought under various theories of fraud, breach of fiduciary duty, and negligent and intentional infliction of emotional distress where, even in the light most favorable to plaintiffs, the forecast of evidence tended to show that, while defendants were aware that an orthopedist had performed unnecessary surgeries on some juvenile patients, at the time they treated the minor, they were unaware of any negligent care provided by that orthopedist to the minor specifically, and accordingly, they could not have concealed or failed to disclose any related facts regarding the minor's care.

Appeal by plaintiffs from summary judgment entered 16 March 2022 by Judge William R. Pittman in Wake County Superior Court. Heard in the Court of Appeals 25 January 2023.[1]

Mast, Johnson, Trimyer, Wright, Booker & Van Patten, P.A., by Charles D. Mast and Nichole G. Booker, for plaintiff-appellants.

Huff, Powell, & Bailey, PLLC, by Pankaj Shere, for defendant-appellants.

DILLON, Chief Judge.

Plaintiffs commenced this action against Defendants arising out of medical care Plaintiff Brittany Jeanne Cottle received for back pain, while a minor, from Dr. Keith Pinkney Mankin, MD, specifically from injuries she claimed she suffered as a result of two surgeries he performed on her, the last being performed on 23 November 2012. Plaintiffs Terry Alan Cottle and Cynthia Balkum Cottle are Brittany's parents.

Plaintiffs commenced this action in March 2017, more than four years after Brittany's last surgery, against Dr. Mankin and others, alleging

1. This matter was orally argued before Judges Dillon, Murphy, and Flood. Judge Murphy subsequently recused. By Order entered on 6 May 2024, Judge Stading substituted for Judge Murphy to consider the matter based on the briefs and record and on the recording of the 25 January 2023 oral argument.

medical malpractice claims and other claims, including negligent retention. In all claims, Plaintiffs seek damages for the injuries they alleged Brittany suffered from Dr. Mankin's surgeries.

Through a series of orders, the trial court granted summary judgment for Defendants on *all* claims. On appeal, Plaintiffs challenge the grant of summary judgment only as to some claims. They do not appeal the grant of summary judgment on their medical malpractice claims, apparently conceding that those claims are barred by the four-year statute of repose. *See* N.C. Gen. Stat. § 1-15 (2023). Further, Plaintiffs do not appeal the grant of summary judgment on any claim they alleged against Dr. Mankin (medical malpractice or otherwise); and, therefore, Dr. Mankin is not involved in this appeal.

Rather, in this appeal, Plaintiffs challenge only the grant of summary judgment on claims they characterize as not being medical malpractice claims, essentially contending that those claims survived the operation of the statute of repose. Those claims are as follows:

Some claims involve allegations of conduct by certain Defendants occurring up to 2012, before and during Dr. Mankin's care of Brittany, specifically, the failure of these Defendants to act upon their knowledge of complaints and concerns regarding Dr. Mankin's general care of patients, unrelated to his care of Brittany.

For instance, Plaintiffs allege claims of negligent retention and/or supervision against Defendant Raleigh Orthopaedic Clinic, P.A., and Defendant Raleigh Orthopaedic Research Foundation (collectively, "ROC"). The Clinic is a physician practice with whom Dr. Mankin was associated while he treated Brittany. The Foundation, now dissolved, was a non-profit organization associated with the Clinic. Dr. Mankin was associated with ROC until early 2013.

Also, Plaintiffs assert claims of fraud and constructive fraud, breach of fiduciary duty and negligent/intentional infliction of emotional distress against ROC and several individuals associated with ROC prior to 2013 who allegedly knew of issues that Dr. Mankin had with other patients. These other Defendants include: (1) Defendant Jeanne Hall, a nurse who worked under and assisted Dr. Mankin in his care for Brittany; (2) Defendant Bradley K. Vaughn, MD, who served as ROC's president until 2008, where evidence shows that another doctor expressed a concern to him that Dr. Mankin was performing unnecessary back surgeries on young girls and that he told Dr. Mankin that "half of Raleigh" thinks Dr. Mankin is wrong in providing such treatment and to be careful; (3) Defendant Wallace F. Andrew, Jr., MD, a doctor associated with ROC

who expressed concerns about Dr. Mankin, recommending in 2012 that Dr. Mankin be disassociated with ROC, a recommendation which went unheeded for a time; and (4) Defendant Karl Stein, who served as the executive director of ROC and who received numerous complaints regarding Dr. Mankin, including three cases in 2012, yet ROC retained its association with Dr. Mankin through 2012, the time during which Dr. Mankin performed his last surgery on Brittany.

Other claims involve conduct by certain Defendants occurring after 2012, after Dr. Mankin last performed surgery on Brittany. These claims are asserted against Defendants Joseph U. Barker, MD, and Mark R. Mikels, MD, who were associated with ROC and who saw Brittany in 2016 when she returned after over three years, complaining of pain from Dr. Mankin's earlier surgeries. Plaintiffs assert claims of breach of fiduciary duty, constructive fraud, fraud, and negligent and/or intentional infliction of emotional distress. Essentially, Plaintiffs allege Drs. Barker and Mikels did not disclose that Dr. Mankin had provided bad care, which became (or should have become) evident to them during their 2016 interaction with Brittany; that Dr. Mankin had issues with other patients; or the reasons Dr. Mankin was no longer associated with ROC. Evidence shows that neither doctor informed Brittany that screws in her hip inserted by Dr. Mankin in 2012 were ineffective and that a spinal fusion performed by Dr. Mankin in 2012 was flawed.

I. Factual Background

The following is a more detailed discussion of the evidence. In June 2010, Brittany, then 14 years old, sought treatment for back pain at ROC. During an appointment, Dr. Mankin diagnosed Brittany with spinal stenosis and lumbar stress syndrome. Three months later, in September 2010, Brittany underwent an MRI, which did not indicate stenosis. However, the next month, in October 2010, Dr. Mankin recommended that Brittany undergo fusion surgery. During his pre-operative diagnosis, Dr. Mankin diagnosed Brittany with "spondylolysis with stenosis L5-S1." This was Dr. Mankin's first mention of a spondylolysis diagnosis.

Around or about late 2011 or early 2012, the father of another of Dr. Mankin's surgical patients complained to Dr. Andrew and Defendant Stein that Dr. Mankin never actually performed the fusion he claimed to have performed on his daughter and that the surgery he performed was unnecessary. On 12 March 2012, Dr. Neil Vining, a pediatric orthopedist newly admitted to ROC, presented three pediatric cases to Defendant Stein, Dr. Andrew, and an officer of Medical Mutual Insurance Company demonstrating that Dr. Mankin was a significant danger to his patients.

The Company officer recommended offering settlements for the mistreatment, and Dr. Andrew suggested that Dr. Mankin be fired. However, Dr. Mankin continued to practice at ROC throughout 2012.

On 29 March 2012, an ROC doctor received an email from an outside practitioner, describing the "community's concern" with Dr. Mankin's "bad results." He gave a printed copy of the email to ROC's then executive director, Mr. Stein.

During July 2012, Brittany returned to Dr. Mankin with continued back pain. On 23 November 2012, with the assistance of Nurse Hall, Dr. Mankin performed a second surgery on Brittany, a left sacroiliac fusion and a stabilization fixation with three screws. Although Dr. Mankin's operative report stated the screws were properly fixed, operating room imaging studies demonstrated that two of the three screws were not fixed. Dr. Mankin did not perform any more surgeries on Brittany.

In early 2013, Dr. Mankin underwent a peer review after another ROC doctor had shared his intention to send a letter to WakeMed expressing his view that Dr. Mankin was a danger in the way he treated some of his patients. On 13 March 2013, following the review, Dr. Mankin resigned from ROC. As part of a separation agreement between ROC and Dr. Mankin, the parties agreed they would not disparage one another professionally.

ROC never reported any concerns about Dr. Mankin to the North Carolina Medical Board ("NCMB"), and Dr. Mankin subsequently opened his own private practice. Upon learning of this, Dr. Vining wrote a letter to the NCMB, detailing surgeries, which Dr. Mankin performed without any legitimate indications that the surgeries were necessary, and Dr. Mankin's misrepresentation of findings to justify performing such surgeries. After receiving Dr. Vining's letter, the NCMB issued a Non-Disciplinary Consent Order, under which Dr. Mankin agreed to no longer perform surgery, to move from North Carolina to pursue non-medical interests, and to not return to North Carolina to practice medicine.

In 2016, Brittany's back pain recurred, and Plaintiffs called ROC to schedule an appointment. Brittany found that Dr. Mankin no longer practiced at ROC and scheduled an appointment with Dr. Mikles, who had participated in Dr. Mankin's 2013 peer review. During two visits to ROC, neither Dr. Mikles nor Dr. Barker informed Brittany that the screws in her hips were ineffective, that her spinal fusion was flawed, that Dr. Mankin had been asked to resign, that Dr. Mikles was involved with the review board that triggered Dr. Mankin's resignation, or that Dr.

Mankin could no longer practice medicine in North Carolina. Shortly after her visits with Dr. Mikles, Brittany saw another doctor associated with another practice, who told her family that Brittany never had spinal stenosis nor spondylolysis, that there was little evidence of a fusion ever having occurred, that she did not need the SI joint fusion, and the screws used during this fusion were never properly placed.

On 21 March 2017, pursuant to a 21 November 2016 order extending the statute of limitations under North Carolina Rule of Civil Procedure 9(j), Plaintiffs filed a Complaint against Defendants alleging medical malpractice, breach of fiduciary duty, constructive fraud, fraud, and other related claims. Four months later, in July 2017, the trial court granted WakeMed's motion to dismiss all claims against it, finding they were barred by the four-year statute of repose under N.C.Gen. Stat. § 1-15(c). Later that month, the trial court also entered an order dismissing the medical malpractice claims against Dr. Mankin and Nurse Hall, and the negligence and/or gross negligence claims against Dr. Vaughn and Dr. Andrew—the ROC doctors who had expressed concerns prior to 2013 about Dr. Mankin's work.

Defendants filed for summary judgment on the remaining claims. On 16 March 2022, after a hearing on the matter, the trial court entered its order granting Defendants' motion for summary judgment. Plaintiffs appealed.

II. Analysis

Our standard of review from a summary judgment order is *de novo*. *Builders Mut. Ins. Co. v. N. Main Constr., Ltd.*, 361 N.C. 85, 88, 637 S.E.2d 528, 530 (2006). Summary judgment should be upheld "when the record shows that there is no genuine issue as to any material fact and that the party is entitled to judgment as a matter of law." *Raymond v. Raymond*, 257 N.C. App. 700, 708, 811 S.E.2d 168, 173–74 (2018). When considering a motion for summary judgment, the evidence must be viewed in the light most favorable to the nonmoving party. *Johnson v. Trs. of Durham Tech. Cmty. Coll.*, 139 N.C. App. 676, 683, 535 S.E.2d 357, 362 (2000).

Our General Statutes provide a four-year statute of repose for medical malpractice claims. N.C. Gen. Stat. § 1-15(c). Our Supreme Court has expressed that our General Assembly "did not intend for actions premised on medical malpractice to be instituted more than four years after the last allegedly negligent act[.]" *Udzinski v. Lovin*, 358 N.C. 534, 537, 597 S.E.2d 703, 706 (2004).

Our General Statutes define a medical malpractice action as a "civil action for damages for personal injury or death arising out of the furnishing or failure to furnish professional services in the performance of medical, dental, or other health care by a health care provider." N.C. Gen. Stat. § 90-21.11(2)(a) (2023).

We have carefully reviewed the briefs of the parties and the evidence in the record and conclude that the trial court erred in granting summary judgment on Plaintiff's claim against ROC for negligently retaining Dr. Mankin as an employee of the Clinic to perform pediatric surgeries. We further conclude, however, that the trial court did not err in granting summary judgment on all other claims challenged by Plaintiffs in this appeal.

[1] We first address the claims against ROC for negligent retention of Dr. Mankin. Our Supreme Court has recently reiterated that our State recognizes "that an employer's duty to exercise reasonable care of its employment and retention of employees could extend to [customers and clients]." *Keith v. Health-Pro Home Care Servs. Inc.*, 381 N.C. 442, 451, 873 S.E.2d 567, 575 (2022). Our Court has held that negligent retention claims can extend to a hospital or group for negligent acts of their employees and doctors. *See Willoughby v. Wilkins*, 65 N.C. App. 626, 637, 310 S.E.2d 90, 97 (1983) (recognizing claim of negligent hiring against hospital for the hiring of a physician); *Dunkley v. Shoemate*, 121 N.C. App. 360, 465 S.E.2d 319 (1996) (negligent hiring claim against hospital for acts of a resident in psychiatry).

It could be argued that ROC's actions in retaining Dr. Mankin are, in fact, claims for medical malpractice, and thus barred by the statute of repose. However, the plain language of Article 1B, Chapter 90 of our General Statutes, which concerns medical malpractice actions, does not suggest that the alleged actions of ROC for negligently retaining Dr. Mankin fall within the definition of medical malpractice. Specifically, under the Article, only a "health care provider" can be liable for "medical malpractice." N.C. Gen. Stat. § 90-21.11 (2023). Section 90-21.11(a) defines who is considered a "health care provider." The only non-human entities incorporated within the definition of "health care provider" are "[a] hospital, a [duly licensed] nursing home and [a duly licensed] adult care home."

Section 90-21.11(2) defines a "medical malpractice action" as either a claim for damages (1) "for personal injury or death arising out of the furnishing or failure to furnish professional services in the performance of medical . . . care by a health care provider" or (2) "against a hospital, a [duly licensed] nursing home, or [a duly licensed] adult care home

[alleging] a breach of administrative or corporate duties, including [ ] allegations of . . . negligent monitoring and supervision . . . ."

It may be that the actions alleged against ROC for negligent retention are a breach of its administrative duties and, therefore, fall within a claim for medical malpractice. However, the plain language of Section 90-21.11(2) does not include a medical practice, such as ROC, within its gamut. There is no evidence that ROC is a hospital, a nursing home, or adult care home. Accordingly, we must conclude that Plaintiffs' claim against ROC for negligent retention is not barred by the statute of repose, as the claim is not one of malpractice under the relevant statute.

[2] We, however, conclude that the trial court did not otherwise err in granting summary judgment on the other claims challenged by Plaintiffs in this appeal. For instance, regarding the claims against Drs. Barker and Mikels for alleged torts they committed in their treatment of Brittany in 2016, approximately four years after Dr. Mankin last operated on Brittany, Plaintiffs do not point to any evidence that Brittany was further damaged by their care. Plaintiffs do not allege that either Dr. Barker or Dr. Mikels injured Brittany in any way during their treatment of her, but instead allege that all her injuries sprung from the surgeries performed by Dr. Mankin. Plaintiffs essentially allege that Drs. Barker and Mikels likely came to learn in 2016 that Dr. Mankin botched his 2012 surgery but failed to disclose this information to Brittany. Brittany only learned of Dr. Mankin's allegedly poor treatment of her when she saw a doctor at another practice shortly after Dr. Barker and Dr. Mikels saw her.

To the extent that the claims alleged against Drs. Barker and Mikels are medical malpractice claims, they are not barred by the statute of repose, as these doctors saw Brittany in 2016, well within four years of the commencement of this action. However, assuming Plaintiffs met their burden of producing evidence at the summary judgment hearing that Drs. Barker and Mikels' actions were tortious, Plaintiffs point to no evidence showing how Brittany was damaged by Drs. Barker and Mikels' conduct. She was already allegedly injured by Dr. Mankin's surgeries when she presented herself to Drs. Barker and Mikels in 2016. And Plaintiffs do not point to any evidence showing how her injuries worsened or how she was otherwise damaged by Drs. Barker and Mikels. Accordingly, we conclude that the trial court did not err by granting summary judgment for all claims against all Defendants for any actions of Drs. Barker and Mikels in their treatment of Brittany in 2016.

[3] We next address the claims against ROC, Drs. Vaughn and Andrew, and Mr. Klein under various theories of fraud, breach of fiduciary duty, and for negligent/intentional infliction of emotional distress. Plaintiffs

cite evidence in the record that, when viewed in the light most favorable to Plaintiffs, tend to show that these individuals became aware that Dr. Mankin was performing unnecessary surgeries on juvenile patients before he performed the surgeries on Brittany.

Our Supreme Court recognizes that a plaintiff may have a claim for failing to disclose information to a patient (*e.g.*, a fraud concealment) apart from a malpractice claim. *See*, *e.g.*, *Watts v. Cumberland Cnty. Hosp. Sys.*, *Inc.*, 317 N.C. 110, 116–17, 343 S.E.2d 879, 884 (1986). We have reviewed the evidence cited by Plaintiffs and conclude that such evidence, even viewed in the light most favorable to Plaintiffs, fails to allege a cause of action. For instance, *Watts* and similar cases concern concealment of facts concerning the treatment of the plaintiff. However, here, Plaintiffs point to no evidence that these Defendants were aware of Dr. Mankin's treatment of Brittany, specifically. There is no allegation these Defendants knew of Brittany's condition when she presented herself to Dr. Mankin, or of the course of treatment that Dr. Mankin recommended including the two surgical procedures, or of facts that would show the surgeries were inappropriate or poorly performed. We conclude that the trial court properly granted summary judgment to these Defendants on these claims.

In conclusion, we have carefully considered the evidence in the record and the arguments of the parties in this appeal and conclude that the trial court properly granted summary judgment on all claims challenged by Plaintiffs in this appeal, except for the claim against ROC for negligent retention of Dr. Mankin.

AFFIRMED IN PART, REVERSED IN PART.

Judges FLOOD and STADING concur.

DEANES v. DEANES

[294 N.C. App. 29 (2024)]

BRANDI LUKE DEANES, Plaintiff
v.
WILLIAM RYAN DEANES, Defendant
v.
LISA BEAMON and GORDON BEAMON, Proposed Third Party Intervenors

No. COA23-56

Filed 21 May 2024

1. Child Custody and Support—standing—grandparents—motion to intervene—hearing held—improper procedure—no objection by parties

After a child's grandparents filed a motion to intervene in a custody matter and the child's parents filed an objection to hearing, the trial court did not follow the proper legal standard where it held an evidentiary hearing on the merits of the motion without first determining whether the grandparents had standing to intervene—a threshold question that must be based on the pleadings alone before a proposed intervenor can become a party to and participate in the case, including by giving evidence. However, none of the parties objected to the procedure or asked the trial court to rule on the motion based only upon the pleadings, and, further, while the grandparents argued error in the subsequent ruling the court made based upon its findings of fact, they did not raise this procedural issue on appeal.

2. Child Custody and Support—standing—grandparents—motion to intervene—no showing of parents' lack of fitness to parent

In a child custody matter, the trial court properly denied the grandparents' motion to intervene and motion in the cause for custody where the court's findings were supported by the evidence and, in turn, supported the court's conclusion that the grandparents failed to overcome the constitutional presumption that the parents are the best people to have primary custody over their child. Although the grandparents provided assistance and support to the child's parents and had a close relationship with the child, no evidence was presented that the parents voluntarily abdicated their parental status to the grandparents, were unfit, had neglected the child, or had acted inconsistent with their constitutional rights as parents; therefore, the grandparents had no standing to intervene in the custody matter.

Appeal by proposed third party intervenors from order entered 12 September 2022 by Judge J. Henry Banks in District Court, Hertford County. Heard in the Court of Appeals 8 August 2023.

Mitchell S. McLean for plaintiff and defendant-appellees.

Pritchett & Burch, PLLC, by Lloyd C. Smith, III, for proposed third party intervenors-appellant.

STROUD, Judge.

Proposed third party intervenors appeal a trial court order denying their Motion to Intervene in a child custody proceeding regarding their grandchild. Because proposed third party intervenors failed to show Mother and Father are unfit or have acted inconsistently with their constitutionally protected rights as parents, the trial court did not err by denying their Motion to Intervene and we affirm the trial court's order.

I. Background

Plaintiff-mother and defendant-father were married and in January of 2016, they had a child, Raymond.[1] In May of 2016, Mother and Father separated and Mother filed a complaint against Father with claims including child custody, child support, equitable distribution, and attorney's fees. On 11 May 2016, the trial court entered a temporary custody order granting custody of Raymond to Mother and allowing Father supervised visitation. Thereafter, in June of 2016, the trial court entered an order ("2016 Order") incorporating a memorandum of order granting Mother physical and legal custody of Raymond; Father was granted unsupervised visitation; the claims for child support and attorney's fees were dismissed; and their marital property was distributed by consent. After entry of the 2016 Order, Mother and Father "reconciled with one another and are now an intact family[.]" After Mother and Father's reconciliation, Mother and Father had another child, Ed, who was not a subject of the original custody claim or Grandparents' Motion to Intervene.

In 2022, Raymond's maternal grandmother and maternal step-grandfather ("Grandparents") filed a Motion to Intervene and Motion in the Cause for Child Custody in the child custody case seeking custody of Raymond. Grandparents alleged:

> 11. A prior custody determination was entered by this Court between the Plaintiff and Defendant which

1. Pseudonyms are used to protect the identities of the children.

> terms are no longer effectuated as the Plaintiff and Defendant have reconciled. Both Plaintiff and Defendant have voluntarily deferred parental responsibility and authority for the minor child upon the movements (sic) and have acted in a manor (sic) inconsistent with their constitutionally protected rights, as more specifically alleged herein.
>
> 12. It is in the best interest of the minor child that the Court allow the Movant Intervenors to intervene and that the Court enter an Order granting custody to the Intervenors, as it serves the best interest of the minor child and the Plaintiff and Defendant have acted inconsistent with their constitutionally protected rights.

Grandparents further alleged Mother moved into their home in May of 2016, upon her separation from Father. They alleged they then became Raymond's primary caregivers; Mother and Father had "ceded parental responsibilities" and "day-to-day decision-making authority" to them; they have "a permanent parent-like relationship with the minor child and have in fact become the de[ ]facto parent[s]" of Raymond; Father had "little to no contact" with Raymond for three years and five months; and Mother moved out to live with her girlfriend leaving Raymond with Grandparents. Most of Grandparents' allegations focused on their claim Parents had ceded their parental responsibilities to Grandparents based upon their assisting in caring for Raymond. They also alleged Parents were unfit as parents but only one factual allegation addressed unfitness; this allegation addressed an incident during the 2021 Christmas holiday that Father had assaulted Raymond, Mother had threatened suicide, and then Mother and Father cut off all contact with Grandparents.

On 31 May 2022, Parents filed an "Objection to Hearing and Motion to Continue." In this pleading, Parents alleged the Motion to Intervene and Motion for Custody had been scheduled by Grandparents for hearing "upon the merits of their Motion in the Cause for child custody, for the June 29 & 30, 2022" session of court. Parents alleged they "have no objection to" a hearing on the Motion to Intervene at that session, although they "strongly object[ed]" to the intervention. They alleged that Grandparents "are not parties to this action and, therefore, [Parents] have not served any discovery requests upon them," but if the Motion to Intervene was allowed, they intended to "propound discovery requests" upon Grandparents. Parents also noted that if intervention was allowed, they and Grandparents would be required to participate in the "mandatory child custody mediation requirements of the 6th Judicial District."

Parents requested that the trial court continue the hearing on the merits of child custody until after discovery and mediation were completed, should the trial court allow the Motion to Intervene. Parents also filed a "Written Objection and Motion to Quash Subpoena" for subpoenas Grandparents had issued to the child's daycare center and elementary school seeking records of the child. Parents alleged Grandparents were not yet parties to the case and thus had no authority to have subpoenas issued under North Carolina Rule of Civil Procedure 45(a), in addition to various objections to production of the privileged and confidential information regarding the child. *See* N.C. Gen. Stat. § 1A-1, Rule 45(a) (2023) ("Form; Issuance. – (1) Every subpoena shall state all of the following: a. The title of the action, the name of the court in which the action is pending, the number of the civil action, and the *name of the party at whose instance the witness is summoned*. . . . (4) The clerk of court in which the action is pending shall issue a subpoena, signed but otherwise blank, *to a party requesting it*, who shall complete it before service.").

The hearing was held on 23 August 2022. At the start of the hearing, counsel informed the trial court they had resolved the dispute regarding the subpoenas by consent. Grandparents' counsel noted that "obviously what we intend to be heard today specifically is the motion to intervene, but not the best interest part of it." The hearing then proceeded with presentation of testimony and evidence from Grandparents.

On 12 September 2022, the trial court entered an order denying Grandparents' Motion to Intervene. The trial court made findings of fact regarding the history of the custody case, including a finding that Mother and Father had reconciled after entry of the June 2016 Order and "are now an intact family, whereby each parent/party exercises custody and supervision over the minor child." The trial court also found:

> 9. That, despite the showing that the proposed third party intervenors have maintained a close and substantial relationship with the subject minor child for a number of years, they have not presented evidence to the court sufficient to show that either parent is either unfit as a custodian for the minor child, has neglected the child, or has exhibited conduct, either through acts or omissions, that would be inconsistent with the presumption that the parents are the best persons to have custody over the child.
>
> 10. That, absent a showing by the proposed third-party intervenors that the plaintiff and defendant,

> the natural parents of the minor child, are either unfit, have neglected the welfare of the child, or have acted in a manner inconsistent with the paramount status provided to a natural parent by the constitution, the proposed intervenors do not have standing to intervene in this child custody action.

Grandparents appeal.

II. Procedure to Determine Standing as a Third-Party in a Child Custody Proceeding

[1] Grandparents first argue that "the trial court failed to make sufficient findings of fact to support its conclusion of law that the proposed third-party intervenors lack standing to intervene." (Capitalization altered.)

Before addressing Grandparents' arguments directly, we first note a procedural issue complicating our review. Standing to bring a custody claim should be based upon the allegations of the pleadings. *See Perdue v. Fuqua*, 195 N.C. App. 583, 588, 673 S.E.2d 145, 149 (2009) ("Intervenor failed to allege conduct sufficient to support a finding that the parents engaged in conduct inconsistent with their parental rights and responsibilities. Therefore intervenor could not overcome the presumption that the parents have the superior right to the care, custody, and control of the child, and lacked standing to intervene." (emphasis added)); *see also Sharp v. Sharp*, 124 N.C. App. 357, 363, 477 S.E.2d 258, 262 (1996) ("We hold accordingly that G.S. § 50-13.1(a) grants grandparents the right to bring an initial suit for custody when there are *allegations* that the child's parents are unfit." (emphasis added)).

Standing is a threshold question which must be answered for the trial court to rule upon a motion to intervene and is separate from the question of whether a third party who has already been allowed to intervene has made a sufficient showing in an evidentiary hearing to convince the trial court and to support findings of fact of the third parties' entitlement to custody. In *Thomas v. Oxendine*, this court explained this initial determination of standing based upon the pleadings:

> Standing is required to confer subject matter jurisdiction. A trial court's subject matter jurisdiction over a particular matter is invoked by the pleading. At the motion to dismiss stage, all factual allegations in the pleadings are viewed in the light most favorable to the plaintiff, granting the plaintiff every reasonable inference. We review de novo whether a plaintiff has standing to bring a claim.

Thomas v. Oxendine, 280 N.C. App. 526, 530-31, 867 S.E.2d 728, 733 (2021) (citations, quotation marks, and brackets omitted).

As Parents' Objection to Hearing and Motion to Continue correctly noted, Grandparents did not automatically become *parties* to the custody case by filing the Motion to Intervene; the trial court would have to rule upon the Motion to Intervene first, and then, *if* Grandparents were allowed to intervene, they would become parties to the case and would then have the authority and duty as parties to participate fully in the case. Our Supreme Court has explained this difference between a movant who is seeking to intervene and a party who has been allowed to intervene:

> Only parties of record to a suit have a standing therein which will enable them to take part in or control the proceedings. If they desire to seek relief with respect to the matters involved they must either obtain the status of parties in the suit or, in proper instances, institute an independent action. Thus a person not originally a party may be permitted to become a party by his own intervention. In legal terminology, intervention is the proceeding by which one not originally a party to an action is permitted, on his own application, to appear therein and join one of the original parties in maintaining the action or defense, or to assert a claim or defense against some or all of the parties to the proceeding as originally instituted. Stated in another way, intervention is the admission by leave of court of a person not an original party to the pending legal proceeding, by which such person becomes a party thereto for the protection of some right or interest alleged by him to be affected by such proceeding.

Strickland v. Hughes, 273 N.C. 481, 484-85, 160 S.E.2d 313, 316 (1968) (citations and quotation marks omitted).

Parents filed their Objection to Hearing and Motion to Continue alleging this difference between a motion to intervene and the motion for custody and requesting a ruling on the motion to intervene before a hearing on the merits was held. The trial court did not rule upon the Objection to Hearing and Motion to Quash because counsel resolved that dispute and the trial court correctly heard only the Motion to Intervene. But instead of ruling on the Motion to Intervene based upon the pleadings alone, as would be appropriate, the trial court instead held an evidentiary hearing regarding the Motion to Intervene. Based upon the appropriate legal standard for standing of Grandparents to

intervene – the allegations of the pleadings as noted above, viewed in the light most favorable to Grandparents – they made sufficient allegations to have standing to intervene. *See Sharp*, 124 N.C. App. at 363, 477 S.E.2d at 262. They alleged Parents "ceded parental responsibilities" and "day-to-day decision-making authority" to them; they have "a permanent parent-like relationship with the minor child and have in fact become the de[ ]facto parent[s]" of Raymond. They also alleged Parents were unfit. But the trial court did not rule based upon the pleadings alone; instead, it held an evidentiary hearing and made findings of fact and ultimately denied the Motion to Intervene based upon its findings of fact.

Neither Parents nor Grandparents objected to the evidentiary hearing on the Motion to Intervene and did not request the trial court to rule based only upon the pleadings. Instead, at the hearing Grandparents' counsel noted that "what we intend to be heard today specifically is the motion to intervene," and they did not ask the trial court to rule based on the pleadings but proceeded to present testimonial evidence. Nor have Grandparents raised any argument on appeal asserting their Motion to Intervene should have been addressed only based upon the pleadings viewed in the light most favorable to Grandparents. Although an evidentiary hearing was not necessary for the trial court to rule upon the Motion to Intervene, no one objected to this procedure. Since there was no objection to the trial court's holding an evidentiary hearing instead of ruling based only on the pleadings, we will consider the Grandparents' arguments on appeal based upon the trial court's order.

A. Findings of Fact

[2] Grandparents contend that "assuming the trial court made sufficient finds (sic) of fact said finds (sic) of fact are not supported by competent evidence." (Capitalization altered.) Since the trial court did make findings of fact, we will address Grandparents' second argument first, since if the findings are not supported by competent evidence, we would be required to disregard them.

> The standard of review when the trial court sits without a jury is whether there was competent evidence to support the trial court's findings of fact and whether its conclusions of law were proper in light of such facts. In a child custody case, 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. Unchallenged findings of fact are binding on appeal. Whether the trial court's findings of fact support its conclusions of law is reviewable de novo. If the trial court's

> uncontested findings of fact support its conclusions of law, we must affirm the trial court's order.

Sherrill v. Sherrill, 275 N.C. App. 151, 157, 853 S.E.2d 246, 251 (2020) (citation, quotation marks, ellipsis, and brackets omitted).

The substance of Grandparents' argument challenging the trial court's findings of fact does not truly challenge the findings as unsupported by competent evidence. Instead, Grandparents argue that the "trial court's order is devoid of any reference to specific testimony or evidence upon which it relied to support said findings" and that "[a]ll evidence received by the trial court came from the third-party intervenors" and Mother and Father did not offer any evidence. Grandparents also summarize some of the "uncontradicted testimony and evidence" presented at the hearing. We note that most of the evidence as summarized addresses events from 2016 until Mother and Father reconciled. But to the extent these facts are relevant to Grandparents' standing at the time they filed the Motion to Intervene in 2022 – about two years after Parents reconciled – the trial court is not required to make detailed findings regarding all the evidence presented; the trial court must only make the findings of ultimate fact needed to resolve the issues presented. *See In re G.C.*, 384 N.C. 62, 66 n.3, 884 S.E.2d 658, 661 n.3 (2023) ("There are two kinds of facts: Ultimate facts, and evidentiary facts. Ultimate facts are the final facts required to establish the plaintiff's cause of action or the defendant's defense; and evidentiary facts are those subsidiary facts required to prove the ultimate facts. Ultimate facts are those found in that vaguely defined area lying between evidential facts on the one side and conclusions of law on the other. In consequence, the line of demarcation between ultimate facts and legal conclusions is not easily drawn. An ultimate fact is the final resulting effect which is reached by processes of logical reasoning from the evidentiary facts. Whether a statement is an ultimate fact or a conclusion of law depends upon whether it is reached by natural reasoning or by an application of fixed rules of law. When the statements of the judge are measured by this test, it is manifest that they constitute findings of ultimate facts, *i.e.*, the final facts on which the rights of the parties are to be legally determined." (citation and ellipsis omitted)).

The trial court did not need to cite to specific evidence in its findings or to make a finding of fact on each and every piece of evidence presented by Grandparents. *See In re J.A.A.*, 175 N.C. App. 66, 75, 623 S.E.2d 45, 51 (2005) ("[T]he trial court is not required to make findings of fact on all the evidence presented, nor state every option it considered."). As Grandparents have not demonstrated that any of the trial court's findings of fact are not supported by competent evidence, we

will consider whether the trial court's findings of fact support its conclusion of law.

B. Conclusion of Law

The trial court denied the Motion to Intervene and Motion in the Cause for Child Custody and concluded that Grandparents "have failed to carry their burden of proof to show that they have standing in this action to intervene as a party opponent against the natural parents of the subject minor child" and therefore denied the Motion to Intervene. "We review questions of standing in child custody actions *de novo*." *Wellons v. White*, 229 N.C. App. 164, 173, 748 S.E.2d 709, 717 (2013) (citation omitted). "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *Id.* (citations and quotation marks omitted). And we note that although standing would normally be based upon the allegations of the pleadings alone, we are basing our review on the trial court's order because of the procedure used in this case, without objection from Parents or Grandparents.

Here, Grandparents were seeking custody of Raymond, not visitation. "[O]ur Courts have distinguished grandparents' standing to seek visitation from grandparents' standing to seek custody."[2] *Perdue*, 195 N.C. App. at 586, 673 S.E.2d at 148.

> Under the "intact family" rule, "a grandparent cannot initiate a lawsuit for visitation rights unless the child's family is already undergoing some strain on the family relationship, such as an adoption or an ongoing custody battle." The "intact family" rule is intended to protect parents' constitutional right "to determine with whom their child shall associate." In North Carolina, an "intact family" is not limited to situations where "both natural parents live together with their children;" instead, it may "include a single parent living with his or her child."

Wellons, 229 N.C. App. at 175, 748 S.E.2d at 718 (brackets omitted).

In *Perdue v. Fuqua*, the maternal grandmother sought to intervene in a custody proceeding between the grandchild's parents, but she failed to make sufficient allegations that the "natural parents are unfit, have neglected the welfare of the child, or have acted in a manner inconsistent with the paramount status provided by the Constitution[.]" *Perdue*,

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2. Grandparents' counsel noted at the hearing "just to be clear, we are not moving under grandparent visitation. . . . this is not a visitation action."

195 N.C. App. at 586-87, 673 S.E.2d at 148. This Court thus affirmed the trial court's denial of her motion to intervene. *Id.* at 588, 673 S.E.2d at 149. This Court explained,

> While this Court recognizes that intervenor satisfies the definition of "other person" because she was the primary caregiver since birth and she had a close familial relationship with the minor child, the grandmother is still required to allege parental unfitness. Despite the broad language of N.C. Gen.Stat. § 50-13.1, non-parents do not have standing to seek custody against a parent unless they overcome the presumption that the parent has the superior right to the care, custody, and control of the minor child. A parent can lose this superior right status through conduct inconsistent with the presumption that the parent is the best person to have primary custody over the child.
>
> While the court applies the best interest of the child analysis in a custody action between parents, to do so when the custody dispute is between a parent and a non-parent offends the Due Process Clause if the parent's conduct has not been inconsistent with his or her constitutionally protected status. If the non-parent can show the parent engaged in conduct inconsistent with his or her right to custody, such as abandonment, then the court can apply the best interest test to determine whether the non-parent should receive custody.
>
> Therefore, absent a showing by intervenor that the natural parents are unfit, have neglected the welfare of the child, or have acted in a manner inconsistent with the paramount status provided by the Constitution, the intervenor does not have standing. If a party does not have standing to bring a claim, a court has no subject matter jurisdiction to hear the claim. Without jurisdiction the trial court must dismiss all claims brought by the intervenor.

Id. at 586-87, 673 S.E.2d at 148.

Just as the intervenor in *Perdue*, here, Grandparents satisfy the definition of "other person" under North Carolina General Statute Section 50-13.1(a). *See id.* The trial court found "the proposed third-party intervenors have shown that they have maintained a substantial and close relationship with the subject minor child for many years." But the trial court also stated that a third party does not have standing to seek

custody against a parent unless they overcome the presumption that the parent has a constitutional superior right to the care, custody, and control of the minor child. A parent can lose this superior status if the parent is unfit, has neglected the child, or has acted in a manner inconsistent with the parent's constitutionally protected status. *See id.*

Thus here, as non-parents seeking custody from parents, Grandparents must demonstrate "that the natural parents are unfit, have neglected the welfare of the child, or have acted in a manner inconsistent with the paramount status provided by the Constitution[.]" *Id.* The trial court found Grandparents did not carry their burden of proof to show Mother and Father are unfit or have acted in a manner inconsistent with their constitutionally protected rights as parents.

The trial court's findings of fact 8-11 state:

> 8. That the proposed third-party intervenors have shown that they have maintained a substantial and close relationship with the subject minor child for many years.
>
> 9. That, despite the showing that the proposed third party intervenors have maintained a close and substantial relationship with the subject minor child for a number of years, they have not presented evidence to the court sufficient to show that either parent is either unfit as a custodian for the minor child, has neglected the child, or has exhibited conduct, either through acts or omissions, that would be inconsistent with the presumption that the parents are the best persons to have custody over the child.
>
> 10. That, absent a showing by the proposed third-party intervenors that the plaintiff and defendant, the natural parents of the minor child, are either unfit, have neglected the welfare of the child, or have acted in a manner inconsistent with the paramount status provided to a natural parent by the constitution, the proposed intervenors do not have standing to intervene in this child custody action.
>
> 11. That the proposed third-party intervenors have not carried their burden of proof to show that they, based upon the greater weight of the evidence presented, have standing, or otherwise should be allowed to participate as a party, in this child custody action against the natural parents of the subject minor child.

While the trial court's order is brief, the trial court's findings addressed the ultimate facts necessary for its conclusion of law. Even if we assume all the evidence presented by Grandparents is true, the evidence failed to show Parents are unfit or have acted in a manner inconsistent with their constitutionally protected rights by abdicating their role as parents.

Most of Grandparents' evidence addressed the time period from the child's birth in January 2016 until May 2020, when the Parents reconciled. During most of the four years prior to May 2020, Mother and Raymond resided with Grandparents. During this time, Mother was employed, and Grandparents assisted Mother in caring for the child, especially when she was working. Mother's job often required 24-hour shifts, so Grandparents cared for Raymond when she was working or sleeping after work. There is no dispute that Grandparents had a close relationship with Raymond. For a period of a few months in 2019, Mother moved to stay with a friend in Elizabeth City, and she took Raymond with her, but he continued to stay with Grandparents about "75 percent" of the time. In May 2020, when Parents reconciled, Mother and the child began residing with Father.

Grandparents did allege in their motion that Parents were unfit and made allegations regarding Father assaulting Raymond and Mother threatening suicide, but at the hearing they did not present any evidence regarding these allegations. Thus, at the hearing Grandparents relied entirely upon their contention that Parents had voluntarily ceded their parental responsibilities to Grandparents. In fact, Parents also had a younger child, Ed, born in 2021, but Grandparents did not seek custody of the younger child. At the hearing, Grandparents acknowledged that Parents were fit parents for both grandchildren but sought custody of only Raymond because they had a "stronger relationship" with him based on the time he resided in their home prior to May 2020. After Parents reconciled, Raymond continued to visit with Grandparents several days a week, but Ed, who was a baby at the time, did not visit as often.

Before the trial court, Grandparents argued that Mother voluntarily relinquished Raymond to Grandparents based upon the period of a few months in 2019 when she lived with a friend in Elizabeth City. But the evidence did not demonstrate that Mother voluntarily abdicated her role as a parent in any way, even during the few months in 2019, about four years before Grandparents filed their Motion to Intervene. This case is similar to *Rose v. Powell*, where a grandparent has provided assistance and support for a parent and grandchild in a time of need but the parent has not ceded her role as a parent. *See Rose v. Powell*, 290 N.C.

App. 339, 342, 892 S.E.2d 102, 103-04 (2023). In *Rose*, the paternal grandparents brought a claim for custody of their grandchild after the death of their son, the grandchild's father. *Id.* at 340-41, 892 S.E.2d at 103-04. They alleged that after the father's death, the paternal grandparents and grandchild "spent time together, had weekly dinners, went shopping, and took occasional trips to Myrtle Beach[;]" they also provided some financial assistance for the grandchild. *Id.* at 341, 892 S.E.2d at 103. Later, the mother cut off the grandparents' relationship with the grandchild and the grandparents sued for custody or visitation. *Id.* at 341, 892 S.E.2d at 103-04. This Court affirmed the trial court's order dismissing the grandparents' claims,[3] stating:

> First, [the p]laintiffs claim that [the d]efendant acted in a manner inconsistent with her protected parental status when she essentially adopted [the p]laintiffs and their family as an integral part of Aubrey's life.
>
> A natural parent's constitutionally protected paramount interest in the companionship, custody, care, and control of his or her child is based on a presumption that he or she will act in the best interest of the child. A parent acts inconsistently with their constitutionally-protected status when they are unfit or if they neglect or abandon the child. Another way in which a parent's actions may be deemed inconsistent with their constitutionally-protected interest is if he or she brings a nonparent into the family unit, represents that the nonparent is a parent, and voluntarily gives custody of the child to the nonparent without creating an expectation that the relationship would be terminated.
>
> Here, [the p]laintiffs allege the constitutional presumption that [the d]efendant should have custody was overcome by demonstrating in their complaint that [the d]efendant acted inconsistently with her parental status when she brought them into the family unit and represented them as an integral part of the family unit without creating an expectation that the relationship would be terminated. [The p]laintiffs liken themselves to the plaintiff in *Boseman v. Jarrell*, a case in which domestic partners intentionally and voluntarily created a family unit in which plaintiff was intended to act—and acted—as a parent. This argument misses the mark. Unlike the plaintiff in *Boseman*, here,

3. This dismissal was based upon the pleadings and not an evidentiary hearing.

> [the d]efendant never had a romantic relationship with either [p]laintiff nor did [the d]efendant conceive a child with either [p]laintiff. The facts in the Record show that [the p]laintiffs provided some financial support to [the d]efendant, introduced [the d]efendant to their family in Ohio, had weekly phone calls with [the d]efendant, and for a time would come over to [the d]efendant's house to let her dog out. At no point did [the d]efendant represent that either [p]laintiff would be considered a parent to Aubrey or that they would have guaranteed visitation with Aubrey. Further, no allegations assert [the d]efendant was unfit or otherwise incapable of caring for Aubrey. For those reasons, we hold the trial court did not err when it dismissed [the p]laintiffs' claim that [the d]efendant was acting in a manner inconsistent with her protected parental status.

Id. at 341-42, 892 S.E.2d at 104 (citation, quotation marks, ellipsis, and brackets omitted).

Although here we relied upon the trial court's findings of fact instead of the pleadings, as previously explained, just as in *Rose*, Grandparents here failed to demonstrate they assumed a parental role with Raymond or that either Mother or Father had represented that Grandparents would be considered as parents or guaranteed visitation with Raymond. *See id.*

In *Mason v. Dwinnell*, this Court noted

> [w]hen examining a legal parent's conduct to determine whether it is inconsistent with his or her constitutionally-protected status, the focus is not on whether the conduct consists of good acts or bad acts. Rather, the gravamen of inconsistent acts is the volitional acts of the legal parent that relinquish otherwise exclusive parental authority to a third party.

*Mason v. Dwinnel*l, 190 N.C. App. 209, 228, 660 S.E.2d 58, 70 (2008) (quotation marks omitted). In *Rodriguez v. Rodriguez*, this Court noted

> the specific question to be answered in cases such as this one is: Did the legal parent act inconsistently with her fundamental right to custody, care, and control of her child and her right to make decisions concerning the care, custody, and control of that child? In answering this question, it is appropriate to consider the legal parent's intentions

> regarding the relationship between his or her child and the third party during the time that relationship was being formed and perpetuated.
>
> Thus the court's focus must be on whether the legal parent has voluntarily chosen to create a family unit and to cede to the third party a sufficiently significant amount of parental responsibility and decision-making authority to create a permanent parent-like relationship with his or her child. The parent's intentions regarding that relationship are necessarily relevant to that inquiry. By looking at both the legal parent's conduct and his or her intentions, we ensure that the situation is not one in which the third party has assumed a parent-like status on his or her own without that being the goal of the legal parent.

Rodriguez v. Rodriguez, 211 N.C. App. 267, 277, 710 S.E.2d 235, 242 (2011) (citations, quotation marks, ellipsis, and brackets omitted).

Here, Grandparents did not present any evidence tending to show either Parent ceded any "parental responsibility [or] decision-making authority" to them. *Id.* Instead, Grandparents assisted Mother and Raymond in many ways during Mother and Father's separation. But there is no evidence Mother and Father ever had any intention of allowing Grandparents to assume a "parent-like status" to Raymond. *Id.* Grandparents alleged sufficient facts in their Motion to Intervene to survive a motion to dismiss for standing based on the pleadings, but without objection, the trial court held an evidentiary hearing instead of ruling based upon the pleadings. The trial court's findings of fact are supported by the evidence and these findings support the trial court's conclusion that Grandparents have failed to prove either Parent acted inconsistently with their constitutionally protected status or are unfit. *Id.* We therefore affirm the trial court's order denying the Motion to Intervene.

III. Conclusion

As the trial court's findings of fact are supported by the evidence, and the findings support its conclusion of law and denial of Grandparents' Motion to Intervene, we affirm the trial court's order.

AFFIRMED.

Judges ARROWOOD and GRIFFIN concur.

IN RE B.L.M.-S.

[294 N.C. App. 44 (2024)]

IN THE MATTER OF B.L.M.-S.

No. COA23-960

Filed 21 May 2024

1. Child Abuse, Dependency, and Neglect—initial disposition—reunification efforts not required—chronic physical abuse determination—findings sufficient

In an initial disposition order entered following the adjudication of a juvenile as abused and neglected, the district court did not err in concluding that reasonable efforts for reunification of the juvenile with respondent-father were not required upon determining that respondent-father had committed, encouraged, or allowed chronic physical abuse of the juvenile. That statutory determination under N.C.G.S. § 7B-901(c)(1)(b), in turn, was explained and supported by the court's written findings of fact that: (1) the juvenile—an infant—had two rib fractures, inflicted at different times; (2) respondent-father admitted to tightly holding, squeezing (with the force used on vice grips), and shaking the juvenile on more than one occasion, and additionally, to throwing the juvenile into the air and dropping him; (3) the juvenile's mother admitted respondent-father was too rough with the infant; and (4) felony child abuse charges were expected to be filed against respondent-father.

2. Child Abuse, Dependency, and Neglect—disposition order—visitation rights for parent not addressed—remand for required findings and conclusions

In an initial disposition order entered following the adjudication of a juvenile as abused and neglected, the district court made no finding that respondent-father had forfeited his right to visitation or that a denial of visitation was in the juvenile's best interest—or any other finding or conclusion regarding visitation with respondent-father. Accordingly, remand was necessary for the entry of an order of visitation establishing the time, place, and conditions under which respondent-father may exercise his visitation rights.

3. Child Abuse, Dependency, and Neglect—prohibition on contact between respondent-parents—statutory authority to remedy conditions which led to juveniles removal

In an initial disposition order after a juvenile was adjudicated abused and neglected, the trial court did not abuse its discretion by prohibiting respondent-father from having contact with

respondent-mother, where the Juvenile Code authorizes a district court to order respondent-parents to "take appropriate steps to remedy conditions in the home that led to or contributed to the juvenile's adjudication" (N.C.G.S. § 7B-904(d1)(3)). The court's directive was not an abuse of the court's discretion given its findings that respondent-father: (1) engaged in domestic violence with respondent-mother, with whom reunification efforts were not ceased and to whom visitation was granted; (2) had a pattern of being too rough with the juvenile, including becoming so frustrated with the infant's crying that he tightly squeezed and shook him, refusing to allow respondent-mother to intervene; and (3) was subject to a Military Protective Order barring him from contact with respondent-mother and the juvenile.

4. Child Abuse, Dependency, and Neglect—statutory authority regarding reunification efforts—decree that efforts "are hereby ceased"—imprecise language rather than incorrect understanding of law

In the decretal portion of an initial disposition order entered following the adjudication of a juvenile as abused and neglected, the district court's use of the phrase "are hereby ceased" in reference to reasonable reunification efforts with respondent-father was not an abuse of discretion. The phrasing did not reflect an incorrect understanding of the applicable law but rather was merely imprecise language given that the court employed wording which accurately reflected the statutory authorization provided in N.C.G.S. § 7B-901(c)—that such efforts "are not required" in certain circumstances—in a finding of fact and a conclusion of law in the same order. Accordingly, the order was remanded for clarification of the language in the decretal portion in conformance with the pertinent statute and the order's existing proper finding and conclusion.

Judge TYSON concurring in part and dissenting in part.

Appeal by respondent-father from order entered 10 July 2023 by Judge James W. Bateman, III in District Court, Onslow County. Heard in the Court of Appeals 1 May 2024.

No brief filed on behalf of petitioner-appellee Onslow County Department of Social Services.

Womble Bond Dickinson (US) LLP, by Jacob S. Wharton and Allison T. Pearl, for the guardian ad litem.

Edward Eldred for respondent-appellant father.

ARROWOOD, Judge.

Respondent-father appeals from the trial court's order adjudicating his infant son to be an abused and neglected juvenile, contending the trial court erred in its disposition concerning visitation and reunification efforts. For the following reasons, we affirm in part and remand.

I. Background

"Ben"[1] was born on 21 November 2022 to respondent-father and the mother,[2] a young married couple living in Jacksonville. The Onslow County Department of Social Services ("DSS") became involved with the family on 27 January 2023 when it received a report raising concerns about the child's failure to thrive, broken ribs, and exposure to domestic violence. Specifically, DSS learned that a primary care provider became concerned by Ben's failure to thrive at a routine appointment on 25 January 2023, and after the child was found to have lost more weight at a follow-up visit the next day, Ben was admitted to a local hospital, where concerns about possible fractures arose. Ben was transferred to ECU Health for medical treatment, where he was discovered to have two broken ribs at different stages of healing.

The parents, who were Ben's only caregivers, could not provide a satisfactory explanation for the injuries, and respondent-father admitted to a social worker that on more than one occasion when Ben cried, he squeezed and shook his son out of frustration. Respondent-father also admitted to a Jacksonville Police Department detective that he had once thrown Ben into the air and failed to catch the child and further described squeezing Ben "with a force equivalent to that used to squeeze vice grips." As a result, respondent-father was charged with a single count of misdemeanor child abuse. DSS also expressed concerns regarding domestic violence between respondent-father and the mother. Due to these circumstances, DSS believed that respondent-father should not have any contact with Ben and that the mother required supervision to care for Ben. Ben's paternal grandmother began residing with the mother and Ben in late January to assist with the child's safety and care.

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1. The stipulated pseudonym for the juvenile.

2. The mother is not a party to this appeal.

Respondent-father was a United States Marine at the time Ben's injuries were identified. The Marine Corps entered a Military Protective Order ("MPO") which barred respondent-father from having any contact with the mother or Ben. On 13 February 2023, however, the mother met with respondent-father's command personnel to ask them to rescind the MPO so she could see respondent-father. When command personnel refused to do so, the mother "became belligerent, flipped off said command personnel, and sped out of the parking lot."

After the mother informed DSS that she planned to take Ben out of North Carolina at the end of February, DSS obtained nonsecure custody of the juvenile on 21 February 2023 and placed him in foster care. On the same date, DSS filed a petition alleging that Ben was an abused and neglected juvenile. In each of three subsequent orders on the need for continued nonsecure custody entered between 28 February and 5 April 2023, the district court concluded it was not in Ben's best interest to visit with respondent-father and barred respondent-father and the mother from having contact with each other. On 4 May 2023, in a fourth order on the need for continued nonsecure custody, the court allowed respondent-father one hour of supervised visitation per week.

The abuse and neglect petition was heard on 6 June 2023, and an adjudication and initial disposition order was entered on 10 July 2023 in which Ben was determined to be an abused juvenile as defined in N.C.G.S. § 7B-101(1) and a neglected juvenile as defined in N.C.G.S. § 7B-101(15). In the adjudication portion of the order, the district court made several findings of fact covering the circumstances recounted above. The trial court concluded that reasonable efforts to reunify respondent-father with Ben were not required and ordered respondent-father not to have contact with the mother. The district court did not cease reunification efforts with the mother and afforded her ten hours of supervised visitation with Ben, who was placed with the maternal grandparents.

Respondent-father timely filed notice of appeal from the adjudication and disposition order on 24 July 2023.

II. Discussion

In his appeal, respondent-father argues that (1) there were insufficient findings to support the district court's conclusion that reasonable reunification efforts were not required; (2) the court erred in failing to address his visitation rights; (3) the court exceeded its authority in ordering him to have no contact with the mother; and (4) the court exceeded its authority in ordering that efforts to reunify him with Ben to be ceased.

A. Standards of Review

In reviewing orders entered under Chapter 7B, uncontested findings of fact are binding on this Court. *In re J.M.*, 384 N.C. 584, 591 (2023). Further, we do not second-guess the district court's "decisions as to the weight and credibility of the evidence, and the inferences drawn from the evidence." *Id.* (quoting *In re D.W.P.*, 373 N.C. 327, 330 (2020)). Moreover,

> dispositional choices—including the decision to eliminate reunification from the permanent plan—are reviewed for abuse of discretion. Abuse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision. In the rare instances when a reviewing court finds an abuse of discretion, the proper remedy is to vacate and remand for the trial court to exercise its discretion. The reviewing court should not substitute its own discretion for that of the trial court.

Id. (cleaned up).

B. Conclusion of Law that Reunification Efforts were not required

[1] In an initial disposition—which must follow the adjudication of a child as an abused, neglected, and/or dependent juvenile—a district court "shall direct that reasonable efforts for reunification . . . shall not be required" in certain circumstances and upon the entry of written findings supporting the court's decision. N.C.G.S. § 7B-901(c) (2023); *see also In re J.M.*, 384 N.C. at 592. One basis for not requiring reunification efforts is a court's "determination that aggravated circumstances exist because the parent has committed or encouraged the commission of, or allowed the continuation of," *inter alia*, "chronic physical abuse." N.C.G.S. § 7B-901(c)(1)(b) (cleaned up). A court's "mere declaration" that such aggravating circumstances exist, however, "without explaining what those circumstances are, is not sufficient to constitute a valid finding for purposes of N.C.G.S. § 7B-901(c)." *In re L.N.H.*, 382 N.C. 536, 547 (2022) (citations omitted). Rather, written findings that explain the aggravating circumstances are necessary. *Id.*

Here, the disposition portion of the order appealed from includes a determination that respondent-father "has committed or encouraged the commission of, and/or allowed the continuation of chronic physical abuse of the juvenile." Respondent-father acknowledges that the district court found as fact the following:

> 11. That the juvenile was diagnosed with two rib fractures in different stages of healing; that Respondents were the

> sole caregivers for the juvenile; and that the Respondents have not offered a plausible explanation for the injuries sustained by the juvenile except for non-accidental means.
>
> 12. That the juvenile's injuries were inflicted on more than one (1) occasion.
>
> 13. That Respondent father admitted that when the juvenile cried, he became frustrated, he held the juvenile tightly, squeezed the juvenile, and shook the juvenile on more than one occasion.
>
> 14. That Respondent father admitted to Detective Peck, Sr. of the Jacksonville Police Department that the Respondent father threw the juvenile in the air and then fumbled or dropped the juvenile, and that Respondent father squeezed the juvenile with a force equivalent to that used to squeeze vice grips.
>
> 15. That Respondent mother admitted that Respondent father was too rough with the juvenile.
>
> 16. That Respondent father was criminally charged . . . with one count of misdemeanor child abuse; that said charges were dismissed; and that Detective Peck indicated that felony charge(s) were likely to be filed.

But respondent-father characterizes these findings as merely "suggest[ing]" that he broke two of Ben's ribs and failing to "affirmatively state [respondent-father] caused, or encouraged, or allowed Ben to be abused." He notes that the court did not specifically find him at fault for causing Ben's broken ribs and instead found that both he and the mother were Ben's caregivers when the infant's ribs were broken.

This argument is unpersuasive, as respondent-father focuses solely on his son's broken ribs and fails to perceive the import of his admissions that he "held the juvenile tightly, squeezed the juvenile, and shook the juvenile *on more than one occasion*" and "squeezed the juvenile with a force equivalent to that used to squeeze vice grips." (emphasis added). These admissions support the court's conclusion that respondent-father physically abused Ben by shaking him and by squeezing him with the force used to operate a tool[3] on multiple occasions, which is separate and apart from any role that respondent-father played in causing or

3. The transcript reveals that a DSS social worker testified that when respondent-father admitted this conduct to her, he described squeezing Ben out of frustration with his

allowing to be caused the child's broken ribs. *See*, *e.g.*, *In re J.M.*, 384 N.C. at 586–87 (noting that a six-week-old juvenile was abused when the child had been squeezed and shaken); *see also In re V.S.O.*, 268 N.C. App. 324, 2019 WL 5718175, at *4 (2019) (unpublished) (noting that the slapping and shaking of an infant could support a determination of physical abuse under N.C.G.S. § 7B-901(c)(1)(b)).

We likewise find no merit in respondent-father's contention that the factual findings here do not support the conclusion that Ben suffered "chronic" physical abuse because the child's injuries were inflicted over the course of *only* two months and consisted of *only* two injuries—noting the broken ribs. Although respondent-father cites *In re V.S.O.* for the proposition that "[t]he term chronic, although not defined in section 7B, is commonly defined as 'lasting a long time or recurring often,' " we find that case unhelpful here because that Court *upheld* the district court's determination that a four-month-old juvenile had suffered *chronic* physical abuse where evidence indicated that the abuse "persisted over [the juvenile's] entire life." *In re V.S.O.*, 268 N.C. App. 324, 2019 WL 5718175, at *4 (citation omitted).

We hold that the findings here—that respondent-father admitted shaking Ben and squeezing his son with the force used on vice grips on more than one occasion over the juvenile's two months of life and that the child also suffered a rib fracture on two distinct occasions—support the court's conclusion that respondent-father "committed or encouraged . . . and/or allowed the . . . chronic physical abuse of the juvenile."

As for respondent-father's emphasis that DSS did not ask the district court to find that reunification efforts with him were not required, we observe that the court was under no obligation to adopt DSS's position in this regard. *See*, *e.g.*, *In re Rholetter*, 162 N.C. App. 653, 664 (2004) ("North Carolina caselaw is replete with situations where the trial court declines to follow a DSS recommendation." (citation omitted)). "[D]ispositional choices—including the decision to eliminate reunification from the permanent plan—are" instead left to the discretion of the district court. *In re J.M.*, 384 N.C. at 591.

In sum, the district court's conclusion of law that reunification efforts with respondent-father were not required was supported by

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son's crying and described the force used as hard enough to make the infant "cry harder." She further distinguished between respondent-father giving Ben "a tight squeeze" as opposed to "a gentle hug." The social worker also noted that the mother had disclosed that respondent-father had "a pattern" of being "rough" with the baby, and that this behavior was "frequent."

sufficient written findings, and respondent-father's contention to the contrary is overruled.

C. Failure to address visitation rights for respondent-father

[2] Respondent-father next argues that the district court erred in failing to address his visitation rights in its order.[4] We agree.

Our Juvenile Code mandates that an order which "continues the juvenile's placement outside the home shall provide for visitation that is in the best interests of the juvenile consistent with the juvenile's health and safety, including no visitation." N.C.G.S. § 7B-905.1(a) (2023). Accordingly, such an "order *must establish a visitation plan for parents unless the* [*district*] *court finds that the parent has forfeited their right to visitation or that it is in the child's best interest to deny visitation*." *In re N.L.M.*, 283 N.C. App. 356, 374 (2022) (emphasis added) (citation and internal quotation marks omitted).

Here, the district "court made no finding that [respondent-father] had forfeited [his] right to visitation or that it was in the best interests of [Ben] to deny visitation" and thus the court "was required to provide a plan containing a minimum outline of visitation, such as the time, place, and conditions under which visitation may be exercised." *See In re T.H.*, 232 N.C. App. 16, 34 (2014).[5] Indeed, the order includes no findings of fact or conclusions of law regarding visitation with respondent-father. Therefore "we remand for entry of an order of visitation which clearly defines and establishes the time, place, and conditions under which respondent-father may exercise his visitation rights." *Id.* at 35 (cleaned up).

D. Prohibition on respondent-father having contact with the mother

[3] Respondent-father next argues that the district court exceeded its authority under N.C.G.S. § 7B-904 when it ordered that he "have no contact whatsoever with" the mother, characterizing this language as a civil "no contact order" under Chapter 50 of the North Carolina General

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4. In light of our resolution of this argument, we need not reach respondent-father's alternative position: that a complete denial of visitation was not supported by the court's pertinent findings of fact.

5. On appeal, the GAL does not identify any portion of the order that would satisfy the statutory mandate as discussed in *In re T.H.*, and instead, focuses on whether the existing findings of fact and evidence could support a hypothetical finding that respondent-father had either forfeited his right to visitation with Ben or that visitation would not be in Ben's best interests.

Statutes.[6] Yet respondent-father concedes that "[*p*]*erhaps* that power [to bar him from contact with the mother] falls under the umbrella of N.C.G.S. § 7B-904(d1)(3), which allows the [district] court to order parents to 'take appropriate steps to remedy conditions in the home that led to or contributed to the juvenile's adjudication.' " We agree with respondent-father's latter interpretation.

The provision identified by respondent-father permits a district court to order the parent of a juvenile who has been adjudicated to be abused, neglected, or dependent to "[t]ake appropriate steps to remedy conditions in the home that led to or contributed to the juvenile's adjudication or to the court's decision to remove custody of the juvenile from the parent, guardian, custodian, or caretaker." N.C.G.S. § 7B-904(d1)(3) (2023). Thus, a "judge in an abuse, neglect, or dependency proceeding has the authority to order a parent to take any step reasonably required to alleviate any condition that *directly or indirectly* contributed to causing the juvenile's removal from the parental home," *In re B.O.A.*, 372 N.C. 372, 381 (2019) (emphasis added), as long as there is "a nexus between the step ordered by the court and a condition that is found or alleged to have led to or contributed to the adjudication." *In re T.N.G.*, 244 N.C. App. 398, 408 (2015) (citation omitted).

The court here made several findings of fact regarding domestic violence between respondent-father and the mother, including that it was a basis of the initial report DSS received about the family, that the parents "have engaged in acts of domestic violence" and "[t]hat a Military Protective Order was entered, which, in part, barred the [respondent-father] from having contact with the . . . mother and juvenile." In addition, the social worker testified about the mother's disclosures that when respondent-father was being "rough with the baby" and the mother tried to intervene, respondent-father "would not let her" retrieve the baby. In light of the evidence that respondent-father engaged in domestic violence with the mother and had a pattern of being too rough with Ben, including becoming so frustrated by his infant son's crying that he tightly squeezed and shook the juvenile and refused to allow the mother to take the child from him at those times, we hold that the district court's directive that respondent-father have no contact with the mother was well within its authority under N.C.G.S. § 7B-904(d1)(3) and was not an abuse of discretion.

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6. Respondent-father cites N.C.G.S. § 50C-5(a) (2023).

E. Order that reunification efforts with respondent-father are "ceased"

[4] In his final argument, respondent-father contends that the district court abused its discretion by acting under a misapprehension of the law when it ordered in the decretal portion of the order that reunification efforts with him "are hereby ceased." "[T]he extent to which [a] trial court exercised its discretion on the basis of an incorrect understanding of the applicable law raises an issue of law subject to de novo review on appeal." *In re A.F.*, 231 N.C. App. 348, 352 (2013) (citation and italics omitted).

As respondent-father contends, and the GAL concedes, while the Juvenile Code permits a district court to determine that reasonable efforts at reunification "shall not be required," N.C.G.S. § 7B-901(c), it does *not* authorize a court to order DSS to cease reunification efforts with a respondent. *See In re C.B.*, 254 N.C. App. 344, (2017) (unpublished) (noting that the phrase "or shall cease" was removed from the statute in 2015 and citing An Act to Make Various Changes to the Juvenile Laws Pertaining to Abuse, Neglect, and Dependency, S.L. 2015-136, sec. 7, 9, 2015 N.C. Sess. Laws 320, 324-26 (codified as amended at N.C.G.S. § 7B-901(c) (2015)). We observe that the court here employed the correct phraseology from the amended statute in a both a finding of fact and an identically worded conclusion of law in its disposition section: "[t]hat reasonable efforts for reunification . . . *are not required* with [r]espondent[-]father because [he] . . . committed or encouraged . . . and/or allowed the . . . chronic physical abuse of the juvenile." (emphasis added).

In light of its repeated use of the proper statutory language, we do not believe the court's use of the words "are hereby ceased" in the decretal portion of the order indicates "an incorrect understanding of the applicable law," to wit: the scope of district court's authority under section 7B-901(c). *See In re A.F.*, 231 N.C. App. at 352. Rather, we perceive it to be merely an instance of imprecise language on the part of the court.[7] Accordingly, on remand the district court should clarify the wording of the third decree in the order so that it conforms to the pertinent statutory language and the court's own proper and supported conclusion of law as to efforts at reunification with respondent-father. *See Porter*

7. Moreover, even if we held that that the district court did misunderstand and attempt to exceed its statutory authority, respondent-father makes no argument regarding prejudice. *See In re C.B.*, 254 N.C. App. 344 (affirming a permanency planning order where the "court exceeded its statutory authority by ordering DSS to cease reunification efforts, [because the] respondent . . . failed to show prejudice").

v. Porter, 252 N.C. App. 321, 330 (2017) (remanding for clarification of "a poorly worded decretal provision" in an equitable distribution order).

III. Conclusion

In conclusion, this matter is remanded for (1) the entry of an order of visitation for respondent-father and (2) clarification of the decretal portion of the adjudication and disposition order.

AFFIRMED IN PART; REMANDED.

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, and we all agree the trial court erred and portions of the order must be vacated, and for this cause be remanded for: (1) the entry of an order of visitation for respondent-father; and, (2) compliance of the decretal portion of the adjudication and disposition order with the statute.

The trial court was also without authority to unilaterally cease reunification efforts, or to *sua sponte* order no contact between the married parents in the absence of a Petition for a Domestic Violence Protection Order by mother. Those portions of the orders must also be vacated and remanded. I respectfully dissent.

I. Factual Background

"Ben" was born on 21 November 2022 to mother and respondent-father, a married couple. Respondent-father was 20 years old. The young couple and parents lived in Jacksonville, while respondent father actively served our country in the Marine Corps. The parents voluntarily took Ben to the Navy hospital for consecutive days seeking treatment for him on 25 and 26 January 2023.

Ben's paternal grandmother began residing with the mother and Ben in January to assist with the child's safety and care. DSS removed three-month-old Ben from his parents, grandparent, and his home on 21 February 2023 and placed him into foster care with strangers, without first seeking other statutorily-required familial placement. *See*

N.C. Gen. Stat. § 7B-903(a1) (2023) ("In placing a juvenile in an out-of-home care under this section, the court *shall first* consider whether a *relative of the juvenile* is willing and able to provide proper care and supervision of the juvenile in a safe home."(emphasis supplied)).

In three additional orders entered between 28 February and 5 April 2023, and in the absence of a supported conclusion of unfitness or conduct inconsistent with his parental rights, and in disregard of constitutionally-protected marital and parental rights, the district court ordered it was not in Ben's best interest to visit with his father, and *sua sponte* barred any contact between respondent-father and mother, husband and wife, and while respondent-father's mother was present in the family's home to help care for Ben.

On 4 May 2023, and nearly three months after removing the child from his home and family, the court "allowed" respondent-father one hour of supervised visitation per week with his seven months old son.

Respondent-father had admitted to a DSS social worker, he had squeezed and shaken his son out of frustration when Ben cried. Respondent-father also admitted to a Jacksonville Police Department detective that he had once thrown Ben into the air and had failed to catch the child. The detective asserted respondent-father had squeezed Ben "with a force equivalent to that used to squeeze vice grips."

Respondent-father's charge of a single count of misdemeanor child abuse was dismissed. Respondent-father's military command had issued a Military Protective Order ("MPO"), which barred respondent-father from having any contact with the mother or Ben. On 13 February 2023, mother met with respondent-father's command personnel and asked them to rescind the MPO so she could see her husband.

This meeting between mother and military command occurred a week prior to Ben being forcibly removed from his parents and grandmother at three months old, and being placed outside of his family into foster care on 21 February 2023. Mother had informed DSS she planned to travel with Ben to other family outside of North Carolina at the end of February. Mother was under no travel restrictions, accusations, or charges at that time or now.

The overriding Constitutional and legislative purposes of the Juvenile Code is: (1) to preserve and serve to maintain the family unit; (2) for DSS to offer needed assistance, training, and services to the family; (3) to prevent the removal of a child from his parent's care, custody, and control; and, (4) to reunite the child at the earliest possible times

after the conditions leading to removal are ameliorated. *See* N.C. Gen. Stat. § 7B-100, *et seq*. (2023).

After the hearing on DSS' petition on 6 June 2023, an adjudication and initial disposition order was delayed and not entered until over a month later on 10 July 2023. The district court continued DSS' statutory reunification efforts with mother, eventually placed Ben with the mother's parents, and afforded mother ten hours of supervised visitation.

II. Reunification with Respondent-Father

The district court's conclusion that statutory reunification efforts with respondent-father are not required is not supported by supported written findings. We all agree the trial court erred in its conclusion that statutory reasonable efforts to reunify respondent-father with Ben were not required and again ordered, *sua sponte*, respondent-father to have no contact with mother and no visitation schedule with Ben. The order is absolutely devoid of statutorily-mandated findings of fact or conclusions of law regarding mandated visitation with respondent-father. N.C. Gen. Stat. § 7B-901(c) (2023) (Statute does *not* authorize a court to order DSS to cease reunification efforts with a respondent.).

III. No Contact with Mother

The district court ordered respondent-father to "have no contact whatsoever with" mother. The majority's opinion affirms this restriction based upon N.C. Gen. Stat. § 7B-904(d1)(3), which authorizes a district court to order a parent to: "[t]ake *appropriate steps to remedy conditions in the home* that led to or contributed to the juvenile's adjudication or to the court's decision to remove custody of the juvenile from the parent, guardian, custodian, or caretaker." N.C. Gen. Stat. § 7B-904(d1)(3) (2023) (emphasis supplied). This belt and suspenders approach grossly overstretches the elastic waist of the statute. *Id*.

The majority's opinion further cites our Supreme Court's opinion in *In re B.O.A.*, 372 N.C. 372, 385, 831 S.E.2d 305, 314 (2019) to support its notion, however, it omits the preceding sentences from the quotation it cited, which provides:

> *We do not*, of course, wish to be understood as *hold*ing that *a trial judge's authority* to adopt a case plan pursuant to N.C.G.S. § 7B-904(d1)(3) *is unlimited* or that the reference to the *conditions of removal* contained in N.C.G.S. § 7B-1111(a)(2) *has no meaning whatsoever*. Instead, a trial judge should refrain from finding that a parent has failed to make reasonable progress . . . in correcting those

> conditions which led to the removal of the juvenile simply because of his or her failure to fully satisfy all elements of the case plan goals.

Id. (citations and internal quotation marks omitted) (emphasis supplied).

Our General Statutes provide mechanisms for parties to seek a domestic violence protective order ("DVPO") under N.C. Gen. Stat. § 50B-1(b)(6) (2023) or for a no-contact order under N.C. Gen. Stat. § 50C (2023). The legislature did not intend and the plain language of N.C. Gen. Stat. § 7B-904(d1)(3) does not allow circumvention of these procedures for a *de facto* no contact order to be entered against a married couple on the unpetitioned and *sua sponte* action by the trial court under N.C. Gen. Stat. § 7B-904(d1)(3).

This reading is far too expansive of an interpretation of N.C. Gen. Stat. § 7B-904(d1)(3) to protect respondent-father's and mother's fundamental marital and parental rights, and to prevent communication and work together in a plan to reunify with their child. I respectfully dissent.

IN THE MATTER OF T.R.W., T.D.Y.J.W., T.Z.A.M.W.

No. COA23-1007

Filed 21 May 2024

Termination of Parental Rights—grounds for termination—neglect—failure to make reasonable progress—insufficient evidence

The trial court's order terminating a father's parental rights to his three children on the grounds of neglect and willful failure to make reasonable progress was reversed where numerous of the court's findings of fact lacked evidentiary support or were merely recitations of allegations in the termination petition without support in the record. Where the children's permanent plan—guardianship—had been achieved, and the father was compliant with his case plan (before it was ceased by the trial court), paid child support, called the children weekly, and sent gifts to the children on a regular basis, the remaining findings and record evidence did not support a conclusion that a repetition of neglect was likely if the children were to be returned to the father's care. Further, the father's actions did not demonstrate a willful failure to make reasonable progress in correcting the conditions which led to the children's removal—conditions

that no longer existed as of the date of the termination hearing—and the record evidence showed that the father had made reasonable progress under the circumstances of the guardianship placement.

Appeal by Respondent-Father from order entered 1 August 2023 by Judge Vartan A. Davidian in Wake County District Court. Heard in the Court of Appeals 30 April 2024.

Robin E. Strickland for Petitioners-Appellees.

Jason R. Page for Respondent-Appellant Father.

COLLINS, Judge.

Respondent-Father appeals from the trial court's order terminating his parental rights to Tiffany, Tara, and Terry on the grounds of neglect and willfully leaving the children in placement outside of the home for more than 12 months without showing reasonable progress in correcting the conditions which led to the children's removal.[1] Father argues that certain findings of fact are unsupported by clear, cogent, and convincing evidence, and that the remaining findings of fact do not support the conclusions of law that the children were neglected and that Father showed a lack of reasonable progress in correcting the conditions which led to the children's removal. For the reasons stated below, we reverse the trial court's order.

I. Background

Tiffany, Tara, and Terry, aged 14, 12, and 10 respectively, are the minor biological children of Father and Mother.[2] In December 2014, a report was made to Wake County Human Services ("WCHS") that raised concerns about the children's hygiene and the condition of the family's home, and alleged that the parents failed to meet the children's medical needs. In January 2015, WCHS filed a petition alleging that the children were neglected and obtained an order for nonsecure custody of the children. The children were adjudicated neglected in May 2015 and put into foster care placement, and the parents were ordered to comply with a case plan put into effect by WCHS. The trial court set the primary plan for the children of reunification.

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1. We use pseudonyms to protect the identities of the minor children. *See* N.C. R. App. P. 42.

2. The children's biological mother is not a party to this appeal.

The parents complied with the case plan and were granted a trial home placement from December 2015 through August 2016. In April 2016, the trial court entered an order that maintained the trial placement with the parents and maintained the primary plan of reunification, but it found an incident of domestic violence between the parents and that it was recommended that Mother complete a mental health assessment to address concerns arising from the domestic violence report.

The trial court entered an order in July 2016 finding that Tiffany was regressing in her behavior and in school since returning to the parent's home but maintaining the trial home placement. In September 2016, the trial court terminated the trial home placement due to multiple reports of neglect and concerns about the children's hygiene. The trial court maintained the primary plan of reunification and adopted a secondary plan of guardianship in order to timely achieve permanence for the children.

In March 2017, the trial court entered an order changing the primary plan to guardianship and adopting a secondary plan of reunification. The trial court found that Father had suffered a stroke in 2016 and remained in a physical rehabilitation center, and that the parents were two months behind on rent. The trial court entered an order in August 2017 changing the primary plan to adoption and adopting reunification as a secondary plan; the court found that the parents had moved to South Carolina following Father's stroke in order to live with the maternal grandmother.

Tiffany was placed in foster placement with the Dempseys ("Petitioners") in September 2017, and Tara and Terry were placed in foster placement with Petitioners in February 2018. From October 2017 through June 2019, the trial court entered a series of orders that maintained the primary plan of adoption and the secondary plan of reunification; ordered WCHS to continue to make reasonable efforts towards accomplishment of the primary and secondary plans; ordered home studies of the maternal grandmother's home in South Carolina; ordered WCHS to determine whether the children could be placed with maternal relatives in a guardianship placement; and ordered the parents to comply with WCHS recommendations. In November 2019, the trial court entered an order changing the primary plan to guardianship and adopting a secondary plan of reunification.

The trial court entered an order on 10 January 2020 finding that "[t]he primary plan of guardianship is being achieved at this time. No secondary plan is necessary." The trial court found that reunification efforts were not necessary as those efforts "clearly would be unsuccessful"

because: the children had been in foster care for almost five years; a trial placement failed because the parents were unable to provide proper care and supervision for the children; the parents had moved to South Carolina following Father's stroke in order to be closer to family who could provide assistance and support; two home studies on the maternal grandmother's home were conducted and placement was twice denied; a parental capacity evaluation on the parents raised significant questions about the parents' abilities to meet the children's basic needs on a permanent basis; and the parents' support network for care of the children was not as dependable as the parents wanted to believe. The trial court found that the parents were unfit to have custody of the children and had acted inconsistently with their "Constitutionally-protected" parental status but that "[a] proceeding to terminate the parental rights of the children's parents [was] not necessary in order to perfect the primary permanent plan for the children because the primary permanent plan for the children is guardianship . . . ."

The trial court's order concluded that it was in the children's best interests to be placed in guardianship with Petitioners and that it was in the children's best interests to waive all future hearings. The trial court relieved WCHS of supervisory responsibility for the family as it pertained to the children and released the guardian ad litem and the parents' court-appointed attorneys from their appointments. The trial court granted visitation to both parents, permitting visits with the children four times a year and telephone calls at least once per week.

Nearly two years after the entry of that order, on 13 October 2021, Petitioners filed a petition to terminate the parental rights of Father and Mother, alleging the following three grounds: neglect, willfully leaving the children in placement outside of the home for more than 12 months without making reasonable progress under the circumstances in correcting those conditions which led to the removal of the juveniles, and dependency. The matter came on for hearing on 5 April and 17 April 2023. The trial court entered an order on 1 August 2023 terminating the parents' rights to the children on the grounds of neglect and willfully leaving the children in placement outside of the home for more than 12 months without making reasonable progress. The trial court did not find grounds to terminate the parents' rights pursuant to dependency. Father properly noticed appeal on 18 August 2023.

II. Discussion

Father argues on appeal that (1) numerous findings of fact are unsupported by clear, cogent, and convincing evidence; (2) "the competent findings fail to support the conclusion that [Father] would neglect

his children in the future when a permanent plan of guardianship had been achieved, he visited the children when possible, he paid child support, and he called [the children] every week"; and (3) "the competent findings of fact fail to support the conclusion that [Father] did not make reasonable progress under the circumstances in correcting the conditions which led to the children's removal when guardianship had been in place for more than three years, he had maintained custody of his youngest child, and the reasons for the children's removal were no longer a concern[.]"

A. Standard of Review

In a termination of parental rights proceeding, the trial court must adjudicate the existence of any grounds for termination alleged in the petition. At the adjudication hearing, the trial court must "take evidence [and] find the facts" necessary to support its determination of whether the alleged grounds for termination exist. N.C. Gen. Stat. § 7B-1109(e) (2023). "At the adjudicatory stage, the petitioner bears the burden of proving by 'clear, cogent, and convincing evidence' the existence of one or more grounds for termination under N.C. Gen. Stat. § 7B-1111(a)." *In re A.L.L.*, 376 N.C. 99, 100, 852 S.E.2d 1, 4 (2020) (brackets and citation omitted). We review a trial court's adjudicatory findings of fact to determine whether they are supported by clear, cogent, and convincing evidence and whether the findings of fact support the conclusions of law. *In re K.N.*, 373 N.C. 274, 278, 837 S.E.2d 861, 865 (2020). Any unchallenged findings are "deemed supported by competent evidence and are binding on appeal." *In re T.N.H.*, 372 N.C. 403, 407, 831 S.E.2d 54, 58 (2019) (citations omitted). The trial court's conclusions of law are reviewed de novo. *In re K.N.*, 373 N.C. at 278, 837 S.E.2d at 865. "[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." *In re M.N.C.*, 176 N.C. App. 114, 122, 625 S.E.2d 627, 632 (2006) (citation omitted).

B. Legal Rules for Neglect and Lack of Progress

The first ground for termination found by the trial court was neglect under N.C. Gen. Stat. § 7B-1111(a)(1).[3] This subsection allows for parental rights to be terminated if the trial court finds that the parent has neglected their child to such an extent that the child fits the statutory definition of a "neglected juvenile." N.C. Gen. Stat. § 7B-1111(a)(1)

3. N.C. Gen. Stat. §§ 7B-1111 and 7B-101 were amended significantly in 2023. The current versions of the statutes became effective on 1 October 2023. However, as the trial court's order terminating Father's parental rights was entered on 1 August 2023, we cite to the versions of the statutes in effect on the order's date of entry.

(2023). A neglected juvenile is defined, in relevant part, as a juvenile "whose parent, guardian, custodian, or caretaker . . . [d]oes not provide proper care, supervision, or discipline" or who lives in an "environment that is injurious to the juvenile's welfare[.]" *Id.* § 7B-101(15) (2023). "[E]vidence of neglect by a parent prior to losing custody of a child—including an adjudication of such neglect—is admissible in subsequent proceedings to terminate parental rights." *In re Ballard*, 311 N.C. 708, 715, 319 S.E.2d 227, 232 (1984).

> Termination of parental rights based upon this statutory ground requires a showing of neglect at the time of the termination hearing or, if the child has been separated from the parent for a long period of time, there must be a showing of a likelihood of future neglect by the parent. When determining whether such future neglect is likely, the district court must consider evidence of changed circumstances occurring between the period of past neglect and the time of the termination hearing.

In re R.L.D., 375 N.C. 838, 841, 851 S.E.2d 17, 20 (2020) (ellipses, quotation marks, and citations omitted).

The second ground for termination found by the trial court was lack of reasonable progress under N.C. Gen. Stat. § 7B-1111(a)(2). This subsection allows for termination of parental rights if the trial court finds that, as of the time of the hearing, the child has been willfully left in placement outside of the home for more than 12 months and that the parent has not made "reasonable progress under the circumstances to correct the conditions which led to the removal of the child." *In re O.C.*, 171 N.C. App. 457, 465, 615 S.E.2d 391, 396 (2005). The trial court may consider evidence of reasonable progress made by a parent "until the date of the termination hearing." *In re J.G.B.*, 177 N.C. App. 375, 385, 628 S.E.2d 450, 457 (2006) (citation omitted).

C. Findings of Fact

The trial court made the following relevant findings of fact:

> 8. There is an existing child custody order in Wake County, North Carolina juvenile court file . . . which grants Petitioners guardianship of the minor children.
>
> 9. The minor children were removed from the parents in 2015 and were adjudicated neglected.
>
> 10. Despite complying with their case plan, the parents were not able to demonstrate skills learned in their interactions

with the minor children. The Court notes that the parenting classes the parents completed was the Families on the Grow series which is a parenting curriculum for parents with cognitive deficits. The children returned to the parents' home in December 2015 for a trial home placement, but this placement could not be sustained. The children were once again removed on August 26, 2016 because the parents were unable to provide proper care and supervision for them.

11. The father believes the children were removed from their care because he was at work and the mother did not have a car seat to put in a cab to transport the minor children. The children were removed a second time due to the parents' inability to properly supervise the minor children in addition to a report of domestic violence and not because of an alleged lack of a car seat.

12. In March of 2017 the parents moved to Orangeburg, South Carolina to be closer to family after the father suffered a stroke. Their decision to move away from the minor children made visitation and reunification difficult.

13. The parents have not been consistent with their visitation with the minor children. From September 2017 through November 2019 they were allowed phone calls on Sundays at 5:30pm and visits on the 3rd Saturday of each month. They missed over half of the calls and visits during this time period.

. . . .

15. The parents attended the February 2020 visit at the Museum of Life and Science in Durham. The maternal grandmother drove them to the visit along with the parents' three year old daughter. The visit was scheduled from 10am until 4pm, but the parents arrived late at 11:05am. They left the area where the minor children were in order to take their three year old somewhere in the museum. The father returned after 20 minutes, and the mother returned 45 minutes after that. Then they sat on a bench and watched the children from a distance with no interaction. They left at 3:30pm with little notice to the minor children.

16. The parents elected not to visit in May 2020 due to COVID. Petitioners offered a FaceTime visit instead, but the parents did not respond.

17. The parents did not visit in August 2020. Petitioners booked tickets for the museum but never received a request or confirmation for a visit from either parent.

18. The mother, her three year old and the maternal grandmother came for the November 2020 visit. Petitioners planned to meet them at the gate of the museum at 10:30am. The maternal grandmother met with Petitioners and the minor children while the mother walked around the museum with the three year old until 11:15am. At 11:40am the mother left to go to her car but returned to the museum café for lunch with everyone at 12:05pm. At 2pm the mother, the three year old and the maternal grandmother left to go home. The mother and maternal grandmother did not interact with the minor children during the visit.

19. The mother and father did not request a visit for February 2021, May 2021, or August 2021.

20. The mother, the maternal grandmother, the father and the paternal grandparents attended the visit in November 2021. There was minimal interaction with the minor children.

21. The mother and father did not request to have visits in February and May of 2022.

. . . .

23. The mother and the father did not confirm the November of 2022 visit in sufficient time for the visit to occur. Petitioner Mariah Dempsey offered to reschedule the visit for the following week. The parties agreed to have a visit at Frankie's Fun Park. The father attended the visit with his parents, his sister, his niece and his nephew. The father provided $20 for the minor children to share to play games, and he also provided each of the children with a Christmas gift. The father and his family spent little time interacting with the children. Instead, the father spent the majority of the visit walking around playing video games. At one point the father asked permission to take [Terry] with him to play a game, and Petitioners agreed. After five

minutes, the Petitioners walked over to where the father was to check on [Terry], but the father was playing a video game alone without [Terry] anywhere in sight. Petitioner Mariah Dempsey walked around to look for [Terry], and she found him standing alone on the other side of the arcade.

. . . .

25. The mother sent a text to Petitioners stating that the parents would not be exercising their February 2023 visit.

26. The father consistently calls each Sunday at 5:30pm. He is appropriate during the call, but the calls do not last long as the minor children do not want to talk, and the father asks the minor children the same questions during each call.

. . . .

28. The parents have not attended to the children's physical, emotional or financial needs. They have not provided any financial support for the minor children, and they do not regularly provide gifts, cards or letters for the minor children. The father provided a small toy animal bucket for [Terry] and a bracelet set for [Tiffany] and [Tara] to share in December 2020. In January of 2021 the mother sent an online card to the minor children that said "hi." [Father and Mother] have not otherwise provided any birthday or Christmas gifts to the minor children since Petitioners have been the minor children's guardians. The mother claims that she has sent electronic gift cards to Petitioners, but Petitioners have not received them.

29. The parents could have continued to comply with the orders of the court in order to increase their visitation with the minor child[ren], but they elected not to do so.

30. North Carolina law gives guardians standing to file actions for termination of parental rights which is what Petitioners have done in this case. The parents do not get to continue neglecting their minor children just because the permanent plan has been achieved and then use that permanent plan as a shield from having their rights terminated.

31. The father is unable to drive legally at this time. He suffers from seizures, and each time he has a seizure, he must wait a minimum of six months before attempting to reinstate his driver's license. In addition, the father has some legal matters he must settle before he is eligible to obtain his driver's license.

32. The father relies on his family for transportation. He has had his parents drive him to visits with the minor children, or he has ridden with the maternal grandmother. He missed at least one visit with the minor children because his sister had COVID and the paternal grandfather had to care for her children and was unable to drive the father to the visit.

. . . .

34. The Court notes the parties have been able to maintain custody of their child who was born after the minor children in this matter were removed from their care. Their ability to successfully parent one child does not mean they would be able to successfully parent that child plus the three minor children subject to this action. The Court notes that while the parents have maintained custody of their other child, that child spends entire summers with the maternal grandfather, several nights per week with the maternal grandmother, and every other weekend with the father. As a result, the mother does very little actual parenting of the child, and the father only has the child for four overnights per month.

35. The parents' ability to properly supervise the minor children is still a concern given the father's inability to adequately supervise [Terry] during the last visit and the mother's failure to interact with the minor children during her last several visits.

36. While the parents have been able to maintain custody of their youngest child, they still have an ongoing foster care case in Wake County with an older child who was removed in 2015 along with the other children. They still have not been able to reunify with that child. This shows that the conditions which brought the minor children into care still have not been corrected almost eight years later. The parents have willfully left the minor children in an out

of home placement, and they have not made reasonable progress at correcting the conditions which brought the children into care.

. . . .

38. Other than maintain custody of their new child, the parents are in the same position as they were when the children initially came into care. They have not consistently visited with the minor children. They do not have suitable housing. There is no evidence before the court that they have received adequate mental health counseling.

39. The parents have neglected the minor children, and there is a probability of a repetition of neglect if the minor children were returned to their care. This is evidenced by the father's decision to play video games by himself during the most recent visit and by the mother electing to tour the museum with her other child instead of spending time with the minor children during their very limited visitation. Not only do the parents continue to neglect the minor children outside of visits, they neglect them during their visits as well.

40. The parental rights of the parents are subject to termination pursuant to N.C. Gen. Stat. § 7B-1111(a)(2) in that they willfully left the minor children in a placement out of the home for more than twelve months without showing to the satisfaction of the [c]ourt that reasonable progress under the circumstances has been made in correcting those conditions which led to the removal of the juveniles, and poverty is not the sole reason they cannot care for the juveniles.

41. The minor children were originally removed from the parents' custody in 2015 due to their inability to properly care for the minor children. The parents technically "complied" with services in that they attended services, but they did not benefit from the lessons taught in their services.

. . . .

43. The parents have not sufficiently learned about the special needs of [Tiffany]. She attends school in an exceptional children's classroom and has a one-on-one aid during the school day. Since moving to Petitioners' home, she

> has surpassed the developmental and educational expectations of her doctors.
>
> 44. During visits the parents have sought the assistance of Petitioner Mariah Dempsey as well as that of their older son . . . to help with the minor children during the visit. [Their older son] is diagnosed with autism and has a moderate to severe intellectual disability, yet the father asked him to help with his younger siblings. The parents have had 8 years to remedy the conditions which brought the minor children into care, and they have not done so.
>
> 45. The parents have not provided for the day-to-day needs of the minor children. The father claims he has been paying child support, but it has not been received by Petitioners. The father asked Petitioner Mariah Dempsey if she had received any child support, and she told him [s]he had not. The father testified that he could not contact child support enforcement to determine where the money he was paying was going. He claimed that his work schedule and his doctor appointments prevent him from calling. The [c]ourt notes that the father works part-time, and that his doctor appointments are once every three months.
>
> . . . .
>
> 59. The parents have shown a deliberate indifference towards support and care of the minor children.

We note that many of these findings refer to "the parents" and their actions or inaction. However, as only Father is the appellant in this case, we review the findings as to their applicability to Father only. Father challenges findings of fact 13, 15-21, 23, 28-29, 31, 35-36, 38-39, 41, 43-44, and 59 as being unsupported by clear, cogent, and convincing evidence. We will review each challenged finding in turn:

Finding of Fact 13

Finding 13 states:

> The parents have not been consistent with their visitation with the minor children. From September 2017 through November 2019 they were allowed phone calls on Sundays at 5:30pm and visits on the 3rd Saturday of each month. They missed over half of the calls and visits during this time period.

There is not clear, cogent, and convincing evidence to support that Father missed over half of the calls and visits during the time period of September 2017 through November 2019, as the record evidence shows that Father spoke with the children on a weekly basis and visited with the children on a monthly basis except for when he missed in-person visits in March 2018, May 2018, August 2018, June 2019, August 2019, and September 2019. The record evidence shows that, of the 27 in-person visits allowed during the relevant time frame, Father missed six. This finding also conflicts with Finding 26 which states that Father called consistently each Sunday at 5:30 p.m. and was appropriate during the phone calls.

Finding of Fact 15

Finding 15 states:

> The parents attended the February 2020 visit at the Museum of Life and Science in Durham. The maternal grandmother drove them to the visit along with the parents' three year old daughter. The visit was scheduled from 10am until 4pm, but the parents arrived late at 11:05am. They left the area where the minor children were in order to take their three year old somewhere in the museum. The father returned after 20 minutes, and the mother returned 45 minutes after that. Then they sat on a bench and watched the children from a distance with no interaction. They left at 3:30pm with little notice to the minor children.

There is not clear, cogent, and convincing evidence to support this finding of fact. The only evidence about the February 2020 visit was testimony from Petitioner who testified that the parents "came, arrived late" and "the visit ended early." The details in Finding 15 appear to be a recitation of the allegations in the petition and are unsupported by any record evidence. *See In re H.P.*, 278 N.C. App. 195, 204, 862 S.E.2d 858, 866 (2021) ("The trial court's findings must be more than a recitation of allegations." (brackets, ellipsis, and citation omitted)).

Finding of Fact 16

Finding 16 states:

> The parents elected not to visit in May 2020 due to COVID. Petitioners offered a FaceTime visit instead, but the parents did not respond.

There is clear, cogent, and convincing evidence to support the first sentence of this finding but not the second sentence. The record is

devoid of evidence showing that Father did not respond to an offer for a FaceTime visit and, instead, the record shows that the parents texted Petitioners in May 2020 to ask about "video chatting" with the children. The parents explained that they did not have iPhones and could not FaceTime, and they asked Petitioners if they would download another app called Duo in order to see the children.

Finding of Fact 17

Finding 17 states:

> The parents did not visit in August 2020. Petitioners booked tickets for the museum but never received a request or confirmation for a visit from either parent.

There is not clear, cogent, and convincing evidence to support this finding of fact. The only evidence in the record shows that a visit did not occur in August 2020 due to COVID. Although Ms. Dempsey testified that they had purchased a yearly museum membership for everyone, there is no evidence to support that Petitioners never received a request or confirmation for a visit from Father and, in fact, Ms. Dempsey's testimony was that the August 2020 visit did not take place due to COVID. The details in Finding 17 appear to be a recitation of the allegations in the petition and are unsupported by any record evidence. *See id.* ("The trial court's findings must be more than a recitation of allegations." (brackets, ellipsis, and citation omitted)).

Finding of Fact 18

Finding 18 states:

> The mother, her three year old and the maternal grandmother came for the November 2020 visit. Petitioners planned to meet them at the gate of the museum at 10:30am. The maternal grandmother met with Petitioners and the minor children while the mother walked around the museum with the three year old until 11:15am. At 11:40am the mother left to go to her car but returned to the museum café for lunch with everyone at 12:05pm. At 2pm the mother, the three year old and the maternal grandmother left to go home. The mother and maternal grandmother did not interact with the minor children during the visit.

We note that this finding does not pertain to Father, but Father specifically challenges it on appeal and argues that there is not clear, cogent, and convincing evidence to support this finding of fact. We agree. The

only evidence in the record about this specific visit is testimony from Ms. Dempsey who testified that the November 2020 visit "was the same as pretty much all the others, as far as there was not much interaction with [the children]." There is no evidence to support the details in Finding 18, which appears to be a recitation of the allegations in the petition. *See id.* ("The trial court's findings must be more than a recitation of allegations." (brackets, ellipsis, and citation omitted)).

Finding of Fact 19

Finding 19 states:

> The mother and father did not request a visit for February 2021, May 2021, or August 2021.

There is not clear, cogent, and convincing evidence to support that Father did not request visits. The record evidence shows only that visits did not occur in February, May, and August 2021, and that Ms. Dempsey cancelled the August 2021 visit due to a family illness and the parents could not come to the re-scheduled visit.

Finding of Fact 20

Finding 20 states:

> The mother, the maternal grandmother, the father and the paternal grandparents attended the visit in November 2021. There was minimal interaction with the minor children.

There is not clear, cogent, and convincing evidence to support this finding of fact. The record is completely silent as to the interaction between Father and the children during the visit in November 2021. When Ms. Dempsey was asked if she remembered "anything of note with that visit[,]" she testified, "Not anything extra that stands out." There is otherwise no other record evidence about the November 2021 visit. Finding 20 appears to be a recitation of the allegations in the petition. *See id.* ("The trial court's findings must be more than a recitation of allegations." (brackets, ellipsis, and citation omitted)).

Finding of Fact 21

Finding 21 states:

> The mother and father did not request to have visits in February and May of 2022.

There is not clear, cogent, and convincing evidence to support that Father did not request visits. The only record evidence about these visits

is Ms. Dempsey's testimony that, to her recollection, there were not any visits in February and May of 2022.

Finding of Fact 23

Finding 23 states:

> The mother and the father did not confirm the November of 2022 visit in sufficient time for the visit to occur. Petitioner Mariah Dempsey offered to reschedule the visit for the following week. The parties agreed to have a visit at Frankie's Fun Park. The father attended the visit with his parents, his sister, his niece and his nephew. The father provided $20 for the minor children to share to play games, and he also provided each of the children with a Christmas gift. The father and his family spent little time interacting with the children. Instead, the father spent the majority of the visit walking around playing video games. At one point the father asked permission to take [Terry] with him to play a game, and Petitioners agreed. After five minutes, the Petitioners walked over to where the father was to check on [Terry], but the father was playing a video game alone without [Terry] anywhere in sight. Petitioner Mariah Dempsey walked around to look for [Terry], and she found him standing alone on the other side of the arcade.

Father challenges the portion of this finding that he "did not confirm the November of 2022 visit in sufficient time for the visit to occur. Petitioner Mariah Dempsey offered to reschedule the visit for the following week." We agree that there is not clear, cogent, and convincing evidence to support this challenged portion of Finding 23. Ms. Dempsey testified about the November 2022 visit but said nothing about Father failing to confirm the visit or rescheduling the visit. There is no record evidence to support the challenged portion of Finding 23.

Finding of Fact 28

Finding 28 states:

> The parents have not attended to the children's physical, emotional or financial needs. They have not provided any financial support for the minor children, and they do not regularly provide gifts, cards or letters for the minor children. The father provided a small toy animal bucket for [Terry] and a bracelet set for [Tiffany] and [Tara] to share in December 2020. In January of 2021 the mother sent an

> online card to the minor children that said "hi." [Father and Mother] have not otherwise provided any birthday or Christmas gifts to the minor children since Petitioners have been the minor children's guardians. . . .

There is not clear, cogent, and convincing evidence to support that Father has not provided any financial support for the minor children, does not regularly provide gifts, cards, or letters for the children, and has not otherwise provided any birthday or Christmas gifts for the minor children. Father testified that he has been paying child support specifically for Tiffany, Tara, and Terry and that those payments are not going towards his other children, and the record contains evidence of Father's pay stubs which show that $159.92 is garnished from each paycheck for child support. There is additional evidence in the form of payment history reports which further show that Father pays $325 monthly for "CS – Child Support." There is also abundant evidence that Father provides gifts and items to the children. Ms. Dempsey testified that Father brought gifts to the November visits and provided Terry with a Nerf gun and a book, and that Father "was pretty consistent" with sending gifts and items for the children at Christmas. She testified that Father "would order something online . . . for me to be able to go pick up and bring to the kids from him."

Finding of Fact 29

Finding 29 states:

> The parents could have continued to comply with the orders of the court in order to increase their visitation with the minor child, but they elected not to do so.

This finding does not specify which orders Father did not comply with or what Father elected not to do. The court awarded guardianship to Petitioners by order entered 10 January 2020; in that order, the trial court found that the "primary plan of guardianship is being achieved at this time" and it waived future hearings. However, the order also provided that the "visitation provisions . . . may be reviewed upon motion for review by any party." Finding 29 is supported to the extent that Father could have filed a motion with the trial court in order to increase his visitation with the children.

Finding of Fact 31

Finding 31 states:

> The father is unable to drive legally at this time. He suffers from seizures, and each time he has a seizure, he must

> wait a minimum of six months before attempting to reinstate his driver's license. In addition, the father has some legal matters he must settle before he is eligible to obtain his driver's license.

Father agrees that the first two sentences of Finding 31 are supported, but argues that the last sentence is unsupported. Upon our review of the record evidence, we agree that there is not clear, cogent, and convincing evidence to support that Father had "some legal matters" to settle before he could obtain his driver's license. The testimonial evidence shows that Father had a speeding ticket at one point, but that the speeding ticket had been paid, and that Father's lack of health insurance prevented him from obtaining an eye exam in order to obtain his driver's license. This evidence does not support that Father had "some legal matters" to settle before he could obtain his driver's license.

Finding of Fact 35

Finding 35 states:

> The parents' ability to properly supervise the minor children is still a concern given the father's inability to adequately supervise [Terry] during the last visit and the mother's failure to interact with the minor children during her last several visits.

There is clear, cogent, and convincing evidence to support that Father inadequately supervised Terry during a visit in November 2022. While Father was visiting with the children at an arcade and fun park, Terry walked away from Father while they were playing video games. Father testified that he was playing a game with Terry when Terry walked away from him, and Ms. Dempsey testified that Father was playing a game while Terry "was on a whole other row out of sight, out of vision from [Father]." There is clear, cogent, and convincing evidence to support that Father inadequately supervised Terry during the November 2022 visit.

Finding of Fact 36

Finding 36 states:

> While the parents have been able to maintain custody of their youngest child, they still have an ongoing foster care case in Wake County with an older child who was removed in 2015 along with the other children. They still have not been able to reunify with that child. This shows that the conditions which brought the minor children into care still have not been corrected almost eight years later.

> The parents have willfully left the minor children in an out of home placement, and they have not made reasonable progress at correcting the conditions which brought the children into care.

There is clear, cogent, and convincing record evidence to support the finding that the parents have custody of their youngest child. There is not clear, cogent, and convincing evidence that they have an older child in foster care and "still have not been able to reunify" with their older child as the record is devoid of evidence as to whether they have made efforts to reunify with this child. At the time of the TPR hearing, the parents appear to have had a child who was approximately seventeen-and-a-half years old. The most recent record evidence about that child is a February 2021 report showing that he was in a stable foster home, the recommended plan for him was guardianship, and that no permanent plan had been achieved. That same report stated that Father "participated in all the agency meetings," "showed interest in the children, listened to them and gave them advice. He participates in weekly phone visitations also." There is no record evidence indicating what happened in that child's case between the February 2021 report and the TPR hearing in 2023. Accordingly, contrary to the third sentence, the previous findings do not necessarily "show[] that the conditions which brought the minor children into care still have not been corrected almost eight years later." The fact that the parents maintain custody of their youngest child directly contradicts the finding that they have not corrected the conditions that led to Tiffany, Tara, and Terry's removal. The remainder of this finding is, in fact, a conclusion of law that is not supported by the findings of fact, as we address more in depth below.

Finding of Fact 38

Finding 38 states:

> Other than maintain custody of their new child, the parents are in the same position as they were when the children initially came into care. They have not consistently visited with the minor children. They do not have suitable housing. There is no evidence before the court that they have received adequate mental health counseling.

There is not clear, cogent, and convincing evidence to support that Father is in the same position as he was when the children first came into care, that he does not have suitable housing, and that he has not received adequate mental health counseling. The record evidence shows that Father complied with his case plan; that Father moved to South

Carolina to live with his parents following his stroke and that there was no requirement that he have independent housing; and that Father completed a psychological evaluation as ordered by WCHS and was in therapy on a monthly basis. There is clear, cogent, and convincing evidence that Father did not consistently visit with the minor children.

Finding of Fact 39

Finding 39 states:

> The parents have neglected the minor children, and there is a probability of a repetition of neglect if the minor children were returned to their care. This is evidenced by the father's decision to play video games by himself during the most recent visit and by the mother electing to tour the museum with her other child instead of spending time with the minor children during their very limited visitation. Not only do the parents continue to neglect the minor children outside of visits, they neglect them during their visits as well.

The first sentence of this finding is essentially a conclusion of law that is not supported by the findings of fact, as we address more in depth below. There is clear, cogent, and convincing evidence to support the portion of Finding 39 that Father decided to play video games by himself during the November 2022 visit. Father testified that he was playing a game with Terry during the November 2022 visit and that Terry walked away from him, thus leaving Father to play the video game by himself. Ms. Dempsey's testimony supported this version of events as well, explaining that Terry was out of Father's sight and not even on the same row of video games as Father, thus leaving Father to play the game alone.

Finding of Fact 41

Finding 41 states:

> The minor children were originally removed from the parents' custody in 2015 due to their inability to properly care for their minor children. The parents technically complied with services in that they attended services, but they did not benefit from the lessons taught in their services.

There is clear, cogent, and convincing evidence to support that the children were originally removed in 2015 due to the parents' inability to properly care for the children and that the parents complied with the services ordered by WCHS. However, there is not clear, cogent,

and convincing evidence that Father did not benefit from the lessons taught in those services. The record evidence shows that, when WCHS initiated services with Father and Mother in 2014, there were concerns that, inter alia, the children's medical needs were not being met; that the children were dirty and smelling of urine; and that Father and Mother's home was unsanitary due to the amount of trash, dirty dishes, and floors covered with trash and food. Father complied with services ordered by WCHS, and following Father's stroke at the end of 2016 and his subsequent move to South Carolina, the South Carolina Department of Social Services ("SCDSS") evaluated Father and Mother's home in June 2018. SCDSS noted that Father and Mother had custody of their youngest child, determined that the home was "neat, clean and free of any observable safety hazards," but still noted concerns about Father's stability of employment, lack of reliable transportation, and need for a psychological assessment. Father completed a psychological assessment in December 2018 and was able to answer questions about how he would know to take his children to the doctor; how he would make a home safe for a toddler or child; how he would properly discipline children if they misbehaved; and other parenting questions. The record evidence shows that Father benefitted from services despite the children remaining in foster care and guardianship.

Finding of Fact 43

Finding 43 states:

> The parents have not sufficiently learned about the special needs of [Tiffany]. She attends school in an exceptional children's classroom and has a one-on-one aid during the school day. Since moving to Petitioner's home, she has surpassed the developmental and educational expectations of her doctor.

There is clear, cogent, and convincing evidence to support the last two sentences of Finding 43, but not to support that Father has not sufficiently learned about Tiffany's special needs. Father testified that he knew Tiffany had emotional limitations and challenges and that Tiffany was in her own independent class setting, but the record evidence is otherwise silent as to whether Father had sufficiently learned about Tiffany's special needs.

Finding of Fact 44

Finding 44 states:

> During visits the parents have sought the assistance of Petitioner Mariah Dempsey as well as that of their older

> son . . . to help with the minor children during the visit. [Their older son] is diagnosed with autism and has a moderate to severe intellectual disability, yet the father asked him to help with his younger siblings. The parents have had 8 years to remedy the conditions which brought the minor children into care, and they have not done so.

Father argues that the last sentence is not supported by clear, cogent, and convincing evidence. The children first came into WCHS custody due to concerns about the children's hygiene and the condition of the family's home, and allegations that the parents failed to meet the children's medical needs. There is not clear, cogent, and convincing evidence that those are current concerns for the children as they have been in guardianship placement since January 2020; WCHS was relieved of supervisory responsibility for the family and was no longer monitoring the family; and the record evidence shows that Father is working part-time and living with his parents in South Carolina following his stroke, that he has retained custody of the youngest child Father shares with Mother, and that there has been no child protective services involvement in South Carolina with Mother and Father.

Finding of Fact 59

Finding 59 states:

> The parents have shown a deliberate indifference towards support and care of the minor children.

There is not clear, cogent, and convincing evidence to support that Father has shown a deliberate indifference towards support and care of the minor children. The record evidence shows that Father complied with services ordered by WCHS, consistently called the children on a weekly basis, has paid child support for the children, and has sent gifts and items to the children.

D. Conclusions of Law

Here, the trial court terminated Father's parental rights on the grounds of neglect and lack of progress.

1. Conclusion of Neglect

The trial court's Finding 39 that "the parents have neglected the minor children, and there is a probability of a repetition of neglect if the minor children were returned to their care" is essentially a conclusion of law that we review de novo on appeal. *In re M.N.C.*, 176 N.C. App. at 122, 625 S.E.2d at 632. The trial court also specifically concluded

that "[t]he parents have neglected the minor children within the meaning of N.C. Gen. Stat. § 7B-101(15), and there is a probability of a repetition of neglect if the minor children were returned to their care."

Here, the children have been separated from Father for more than six years, they have been in guardianship with Petitioners for more than four years and permanency has been achieved, and Father's personal interactions with the children have been limited to in-person visits four times per year and weekly phone calls. The supported findings of fact and record evidence indicate that Father was compliant with his case plan with WCHS before that plan was ceased, is working, is in therapy, consistently calls the children every Sunday evening and is appropriate during the phone calls, pays child support, and consistently sends gifts to the children. As the children have achieved permanency through the guardianship, the supported findings and record evidence do not support a conclusion that there is a likelihood that Father will neglect the children in the future. *See In re R.L.D.*, 375 N.C. at 841, 851 S.E.2d at 20; *see also In re A.L.L.*, 376 N.C. at 113, 852 S.E.2d at 11 (explaining the protections afforded parents whose children are in guardianship and noting that "a permanency guardianship allows parents whose children cannot be returned to them to have a meaningful opportunity to maintain a legal relationship with their children").

2. Willful Failure to Make Reasonable Progress

The trial court's Finding 36 that "the parents have willfully left the minor children in an out of home placement, and they have not made reasonable progress at correcting the conditions which brought the children into care" is essentially a conclusion of law that we review de novo on appeal. *In re M.N.C.*, 176 N.C. App. at 122, 625 S.E.2d at 632. The trial court also specifically concluded:

> The parental rights of the parents are subject to termination pursuant to N.C. Gen. Stat. § 7B-1111 (a)(2) in that they willfully left the minor children in a placement out of the home for more than twelve months without showing to the satisfaction of the Court that reasonable progress under the circumstances has been made in correcting those conditions which led to the removal of the juveniles, and poverty is not the sole reason they cannot care for the juveniles.

The children came into custody in 2015 due to concerns about the children's hygiene, the condition of the family's home, and that the parents could not meet the children's medical needs. The findings

and record evidence do not show those issues to be current concerns as the children have been in foster placement with Petitioners since September 2017 and February 2018 and then in guardianship placement with Petitioners since January 2020, and they have been making good progress while in Petitioners' care. Moreover, during this time period, Father suffered a stroke and seizure disorder, yet he complied with his case plan with WCHS until the order awarding guardianship relieved WCHS "of supervisory responsibility for this family as it pertains to these children," released the guardian ad litem and court-appointed attorneys for the parents, and waived future hearings for the children.

After the guardianship was established, Father was permitted to see the children four times a year and speak to them on a weekly basis, and Father consistently spoke with the children on a weekly basis. Father maintained employment, provided child support, and also sent gifts to the children. As "[w]illfulness is established when the respondent had the ability to show reasonable progress, but was unwilling to make the effort[,]" we cannot conclude that Father's actions evince a willful failure to make reasonable progress in correcting the conditions which led to the children's removal. *In re McMillon*, 143 N.C. App. 402, 410, 546 S.E.2d 169, 175 (2001) (citations omitted). We conclude that Father made reasonable progress under the circumstances of the guardianship placement. *In re L.C.R.*, 226 N.C. App. 249, 252, 739 S.E.2d 596, 598 (2013) ("[T]he conditions which led to removal are not required to be corrected completely to avoid termination. Only reasonable progress in correcting the conditions must be shown."); *see also In re A.L.L.*, 376 N.C. at 113, 852 S.E.2d at 11 (explaining the protections afforded parents whose children are in guardianship and noting that "a permanency guardianship allows parents whose children cannot be returned to them to have a meaningful opportunity to maintain a legal relationship with their children").

III. Conclusion

For the reasons stated herein, we reverse the order of the trial court terminating Father's parental rights to Tiffany, Tara, and Terry.

REVERSED.

Judges STROUD and WOOD concur.

STATE OF NORTH CAROLINA
v.
RACHEL SHALOM JURAN, DEFENDANT

No. COA23-881

Filed 21 May 2024

1. Indictment and Information—variance—motion to dismiss—jury instruction and verdict sheet—professional designation of victim not prejudicial

In a prosecution for assault on emergency personnel under N.C.G.S. § 14-34.6, the trial court did not err in denying defendant's motion to dismiss that charge for insufficiency of the evidence based upon an alleged fatal variance between the indictment and the evidence produced at trial, namely, that the alleged victim was a paramedic rather than an emergency medical technician (EMT)—a distinct credentialed position specifically covered by the statute—where another statute under the same chapter, N.C.G.S. § 14-69.3(a)(1), defines EMTs to include paramedics. Moreover, the charging statute, N.C.G.S. § 14-34.6, explicitly applies to assaults on "other emergency health care provider[s]" and "medical responder[s]," as well as EMTs, such that any variance as to the victim's professional classification in the indictment, jury instruction, and verdict sheet was not prejudicial and did not implicate double jeopardy concerns.

2. Constitutional Law—right to unanimous jury verdict—assault on emergency personnel—jury instruction not ambiguous

Defendant's constitutional right to a unanimous verdict was not violated where the jury was instructed that it could return a guilty verdict on a charge under N.C.G.S. § 14-34.6 if it found that the victim assaulted by defendant "was an emergency medical technician, an emergency health care provider, a medical responder, or a licensed health care provider." Because this statute criminalizes a single wrong—assault against emergency personnel attempting to discharge official duties—the actual classification of emergency personnel based on a victim's specific credentials was immaterial.

Appeal by Defendant from judgment entered 5 April 2023 by Judge Henry L. Stevens in Onslow County Superior Court. Heard in the Court of Appeals 19 March 2024.

Attorney General Joshua H. Stein, by Assistant Attorney General Michelle Harris, for the State.

John W. Moss for Defendant.

GRIFFIN, Judge.

Defendant Rachel Shalom Juran appeals from a judgment entered upon a jury verdict finding her guilty of assault on an emergency personnel. Defendant contends the trial court erred in denying her motion to dismiss; plainly erred in its jury instruction and verdict sheet; and violated her right to a unanimous jury verdict. We hold the trial court did not err, let alone commit plain error, or violate Defendant's right to a unanimous jury verdict.

I. Factual and Procedural Background

On 1 September 2019, Defendant called 911 after experiencing intermittent chest pain. K. Lueth, a paramedic for Pender County EMS and Fire Department, along with her partner, responded to Defendant's home. Defendant was placed in an ambulance to be transported to Onslow Memorial Hospital. While in transit, Defendant became agitated and forcefully grabbed and squeezed Lueth's hand.

Lueth's partner, who was driving the ambulance, found a safe place to pull over and called both Lueth's supervisor and the police. A patrol sergeant with Onslow County Sherriff's Office and Lueth's supervisor arrived on scene. Lueth's supervisor rode in the ambulance with Defendant and Lueth the remainder of the way to the hospital. Upon release from the hospital, Defendant was arrested.

On 3 December 2019, Defendant was indicted for assault on an emergency personnel and communicating threats. On 3 April 2023, the matter came on for jury trial before Judge Stevens in Onslow County Superior Court. On 5 April 2023, the jury returned a verdict finding Defendant guilty of assault on an emergency personnel and not guilty of communicating threats. Defendant was sentenced to 6 to 17 months' imprisonment suspended for 24 months' supervised probation.

Defendant timely filed notice of appeal on 6 April 2023 and, on 27 November 2023, Defendant filed a petition for writ of certiorari.[1]

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1. Defendant concedes she failed to comply with Rule 4 of the North Carolina Rules of Appellate Procedure where she neglected to include a certificate of service with her notice of appeal. *See* N.C. R. App. P. 4; N.C. R. App. P. 26. This violation, however, is nonjurisdictional and does not warrant dismissal of Defendant's appeal as all parties had actual notice of the appeal as indicated by their participation. *See Bradley v. Cumberland Cty.*, 262 N.C. App. 376, 381, 822 S.E.2d 416, 420 (2018) (holding the plaintiff's failure to

II. Analysis

Defendant contends the trial court erred in denying her motion to dismiss and plainly erred in its jury instruction and verdict sheet as a fatal variance occurred both between the offense charged and the offense established at trial and between the indictment and the jury instruction and verdict sheet. Defendant further contends the trial court violated her right to a unanimous jury verdict.

A. Fatal Variance

[1] Defendant argues the trial court erred in denying her motion to dismiss as the State failed to provide sufficient evidence of each element of the crime charged where a fatal variance occurred between the offense charged in the indictment and the offense established at trial. Further, Defendant argues the trial court plainly erred in its jury instruction and verdict sheet as a fatal variance occurred between the indictment and the jury instruction and verdict sheet. We disagree.

It is a well-established principle within the administration of criminal law that "a defendant must be convicted, if convicted at all, of the particular offense charged in the bill of indictment." *State v. Jackson*, 218 N.C. 373, 376, 11 S.E.2d 149, 151 (1940). Thus, the allegations in the charging indictment must correspond with the evidence offered at trial. *Id.* Likewise, the allegations must also "conform to the equivalent material aspects of the jury charge[.]" *State v. Williams*, 318 N.C. 624, 631, 350 S.E.2d 353, 357 (1986). A fatal variance may exist where there is a discrepancy between either the allegations and the offense established or the allegations and the jury instruction. "The determination of whether a fatal variance exists turns upon two policy concerns, namely, (1) insuring that the defendant is able to prepare his defense against the crime with which he is charged and (2) protect[ing] the defendant from another prosecution for the same incident." *State v. Glidewell*, 255 N.C. App. 110, 113, 804 S.E.2d 228, 232 (2017) (internal marks and citations omitted). Accordingly, to constitute a fatal variance which warrants reversal, the variance "must be material, meaning it must involve an essential element of the crime charged," and the defendant must establish he suffered prejudice as a result. *Id.*

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include a certificate of service with his notice of appeal in violation of Rule 4 did not warrant dismissal of the appeal as the violation was non-jurisdictional and the defendant had actual notice of the appeal as indicated by their participation in the appeal). Therefore, we dismiss Defendant's petition as moot.

1. Motion to Dismiss

Defendant contends the trial court erred in denying her motion to dismiss as the State failed to provide sufficient evidence of each element of the crime charged where a fatal variance occurred between the offense charged in the indictment and the offense established at trial.

Our North Carolina Rules of Appellate Procedure, Rule 10, prescribes the ways in which a party may preserve an issue for appellate review. *See* N.C. R. App. P. 10. Rule 10(a)(1), defines the general procedure for preserving issues for appellate review:

> 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.

N.C. R. App. P. 10(a)(1). On the other hand, Rule 10(a)(3) delineates the procedure required to specifically preserve a sufficiency of the evidence issue. *See* N.C. R. App. P. 10(a)(3). Under Rule 10(a)(3),a defendant in a criminal case may not make the sufficiency of the State's evidence at trial the basis of his issue on appeal unless he made a motion to dismiss at trial. *Id.* The motion to dismiss may be made at the close of the State's evidence and/or at the close of all evidence. *Id.* However, where the defendant makes a motion to dismiss at the close of the State's evidence and then decides to present evidence of his own, he has waived his motion and is precluded from appealing on the issue of its denial unless he renews his motion at the close of all evidence. *Id.*

In *State v. Golder*, our Supreme Court addressed the distinctions between Rules 10(a)(1) and 10(a)(3), noting, "unlike [Rule 10(a)(1)], Rule 10(a)(3) does not require that the defendant assert a specific ground for a motion to dismiss for insufficiency of the evidence." 374 N.C. 238, 245–46, 839 S.E.2d 782, 788 (2020). Likewise, the Court held, "Rule 10(a)(3) [ ] provides that when a defendant properly moves to dismiss, the defendant's motion preserves all sufficiency of the evidence issues for appellate review." *Id.* at 245, 839 S.E.2d at 787.

Soon after our Supreme Court's decision in *Golder*, the Court, in *State v. Smith*, 375 N.C. 224, 846 S.E.2d 492 (2020), addressed whether a defendant's fatal variance argument was a properly preserved sufficiency of the evidence issue, where he made a general motion to dismiss based on sufficiency of the evidence at the close of the State's evidence and at the close of all evidence. The *Smith* Court, acknowledging *Golder*, addressed the merits of the defendant's case but only

did so after "assuming without deciding that [the] defendant's fatal variance argument was preserved[.]" *Id.* at 231, 846 S.E.2d at 496. After the Court's decision in *Smith*, our Courts, when faced with a similar issue, have continually reviewed the merits of fatal variance arguments—all while assuming without deciding whether a defendant, upon a motion to dismiss pursuant to Rule 10(a)(3), has preserved a fatal variance argument as a sufficiency of the evidence issue. *See State v. Gunter*, 289 N.C. App. 45, 49, 887 S.E.2d 745, 748 (2023); *State v. Mackey*, 287 N.C. App. 1, 7, 882 S.E.2d 405, 409 (2022); *State v. Tarlton*, 279 N.C. App. 249, 253, 864 S.E.2d 810, 813 (2021); *State v. Brantley-Phillips*, 278 N.C. App. 279, 287, 862 S.E.2d 416, 422 (2021).

Thus, it appears our precedent, by "assuming without deciding," has intentionally avoided making a ruling on the preservation of fatal variance issues through general motions to dismiss based on sufficiency of the evidence. Nonetheless, these decisions all effectively require subsequent panels of this Court, under similar circumstances, to address the merits of a defendant's fatal variance argument as a properly preserved sufficiency of the evidence issue.

In the instant case, Defendant made a general motion to dismiss based on sufficiency of the evidence at the close of the State's evidence. Defendant renewed her motion at the close of all evidence. Because Defendant timely moved to dismiss pursuant to Rule 10(a)(3), we, in an effort to stop proverbially kicking the can down the road, explicitly hold her fatal variance arguments, pertaining to the motion to dismiss, are properly preserved sufficiency of the evidence issues.

Having held Defendant's fatal variance argument as to her motion to dismiss was preserved, we address her first contention, in which she argues: The trial court erred in denying her motion to dismiss the charge of assault on an EMT, in violation of N.C. Gen. Stat. § 14-34.6, as a fatal variance occurred where the State exclusively presented evidence tending to show the victim was a paramedic at the time of the incident rather than an EMT.

This Court reviews issues concerning the existence of a fatal variance de novo. *State v. Clagon*, 279 N.C. App. 425, 431, 865 S.E.2d 343, 347 (2021). Moreover, we generally review motions to dismiss de novo to determine whether, in the light most favorable to the State, "there was substantial evidence (1) of each essential element of the offense charged, and (2) that [the] defendant is the perpetrator of the offense." *State v. Collins*, 283 N.C. App. 458, 465, 874 S.E.2d 210, 215 (2022) (internal marks and citations omitted). "Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a

conclusion." *State v. Turnage*, 362 N.C. 491, 493, 666 S.E.2d 753, 755 (2008) (internal marks and citations omitted).

When the State fails to offer sufficient evidence to establish the defendant committed the criminal offense charged, a motion to dismiss is in order. *State v. Barnett*, 368 N.C. 710, 713, 782 S.E.2d 885, 888 (2016). For this reason, "a variance between the criminal offense charged and the offense established by the evidence" also warrants a motion to dismiss as the variance "is in essence a failure of the State to establish the offense charged." *Id.* (quoting *State v. Waddell*, 279 N.C. 442, 445, 183 S.E.2d 644, 646 (1971) (internal marks omitted)). In order to prevail on such a motion, the defendant must show there existed "a fatal variance between the offense charged and the proof as to the gist of the offense." *Id.* (internal marks and citations omitted).

Relevant here, Defendant was charged with violating N.C. Gen. Stat. § 14-34.6, which states:

> A person is guilty of a Class I felony if the person commits an assault or affray causing physical injury on any of the following persons who are discharging or attempting to discharge their official duties:
>
> (1) An emergency medical technician or other emergency health care provider.
>
> (2) A medical responder.
>
> . . .

N.C. Gen. Stat. § 14-34.6 (2023). Likewise, the indictment against Defendant specifically alleged she,

> unlawfully, willfully and feloniously did assault [Lueth], an emergency medical technician, who was employed by Pender County Emergency Services, by grabbing the victim's hand and squeezing it very hard, and cause physical injury to the victim, bruising to the hand. At the time of this offense, the victim of the assault was discharging her official duties: transporting [D]efendant to the hospital.

We note that while the indictment does specifically identify Lueth as an EMT, she testified at trial as to her credentials at the time of the incident, stating she was a paramedic.

Notably, although N.C. Gen. Stat. § 14-34.6 does not specifically define emergency medical technician, other statutes within this same chapter define "emergency medical technician" to include a paramedic.

See N.C. Gen. Stat. § 14-69.3(a)(1) (2023). Nonetheless, even if "emergency medical technician" as applied under N.C. Gen. Stat. § 14-34.6 was not intended to include paramedics, whether the victim was an emergency medical technician or paramedic is a distinction without difference for the purpose of the charging statute. While we recognize the credentials of a paramedic differ from those of an EMT, the gist of the offense at issue remains the same notwithstanding the victim's credentials. *See* N.C. Gen. Stat. § 131E-155(10), (15a) (2023). Moreover, Defendant would be charged under the same statute regardless of whether she assaulted a paramedic or an EMT.

Insofar as Defendant argues there was a fatal variance which required the trial court to grant her motion to dismiss, Defendant has failed to establish in what way she was prejudiced by the variance. Further, the charging indictment was sufficient such that Defendant could prepare her defense as the indictment included, among other things, the date of the offense, the specific statute under which Defendant was charged, Lueth as a named victim, and Lueth's employer. Not only this, but there is no way in which Defendant would be subjected to double jeopardy where, despite the indictment referencing Lueth as an EMT rather than a paramedic, Lueth was named as the victim.

Because there is not an issue concerning prejudice or double jeopardy, the trial court did not err as there was not a fatal variance between the crime charged in the indictment and the crime established by the evidence at trial.

2. Jury instruction and verdict sheet

Defendant contends the trial court committed plain error in its instruction to the jury. Specifically, Defendant argues a fatal variance occurred between the indictment and both the jury instruction and the verdict sheet as the indictment referred to the victim as an EMT; the jury instruction included EMT, emergency healthcare provider, medical responder, and licensed health care provider; and the verdict sheet stated only emergency personnel.

We review a defendant's issue for plain error where, as here, the defendant failed to object to the jury instruction at trial on the basis of the existence of a fatal variance between the indictment and the instruction. *State v. Ross*, 249 N.C. App. 672, 675-76, 792 S.E.2d 155, 158 (2016). "To demonstrate plain error, [the d]efendant must not only show error, but also prejudice—that, but for the error, the jury likely would have reached a different result." *Id.* at 676, 792 S.E.2d at 158; *see also State v. Pate*, 187 N.C. App. 442, 445, 653 S.E.2d 212, 215 (2007) ("Plain error

with respect to jury instructions requires the error be so fundamental that (i) absent the error, the jury probably would have reached a different verdict; or (ii) the error would constitute a miscarriage of justice if not corrected." (citation omitted)).

Our Courts have previously recognized that where the "allegations asserted in an indictment fail to conform to the equivalent material aspects of the jury charge, . . . a fatal variance is created, and the indictment [is] insufficient to support that resulting conviction." *Glidewell*, 255 N.C. App. at 113, 804 S.E.2d at 232. Even so, it remains, as with a plain error review, the alleged fatal variance only warrants reversal where the defendant is able to establish prejudice.

Here, Defendant was charged with assault on an EMT as the indictment stated, in relevant part, Defendant "unlawfully, willfully and feloniously did assault [Lueth], an emergency medical technician[.]" However, at the close of all evidence, the trial court instructed the jury, stating the jury could find Defendant guilty if, among other things, it found "from the evidence beyond a reasonable doubt that on or about the alleged date the alleged victim was an emergency medical technician, an emergency health care provider, a medical responder, or a licensed health care provider[.]" Then, the trial court provided the jury with a verdict sheet from which the jury could select "guilty of assault causing physical injury on emergency personnel."

The indictment, jury instruction, and verdict sheet reference Lueth under various classifications. However, this variance is in no way prejudicial. As noted above, the gist of the offense is the same regardless of the victim's classification based on credentials. Not only this, but the fact that the jury convicted Defendant after being instructed it could find Defendant guilty if it found Lueth was an emergency medical technician, an emergency health care provider, a medical responder, or a licensed health care provider, unequivocally indicates the jury would not have reached a different result if the instruction had referenced Lueth solely as an EMT.

Because the jury would not have reached a different result, Defendant was not prejudiced. Therefore, the trial court did not commit plain error.

B. Unanimous Jury Verdict

[2] Defendant contends the trial court violated her constitutional right to a unanimous jury verdict where the trial court, in its instruction, stated the jury could find Defendant guilty if, among other things, it found "from the evidence beyond a reasonable doubt that on or about

the alleged date the alleged victim was an emergency medical technician, an emergency health care provider, a medical responder, or a licensed health care provider[.]" Specifically, Defendant argues the trial court's instruction was ambiguous and allowed the jury to convict on three separate theories upon which she was not indicted. We disagree.

Notwithstanding a defendant's failure to object, issues concerning a defendant's right to a unanimous jury verdict under Article I, Section 24 of the North Carolina Constitution are preserved for appellate review. *See State v. Wilson*, 363 N.C. 478, 484, 681 S.E.2d 325, 330 (2009) ("While the failure to raise a constitutional issue at trial generally waives that issue for appeal, where the error violates the right to a unanimous jury verdict under Article I, Section 24, it is preserved for appeal without any action by counsel." (internal marks and citation omitted)); *see also* N.C. Gen. Stat. § 15A-1237(b) (2023) ("The verdict must be unanimous, and must be returned by the jury in open court."). We review issues concerning the unanimity of a jury verdict de novo, examining "the verdict, the charge, the jury instructions, and the evidence to determine whether any ambiguity as to unanimity has been removed." *State v. Petty*, 132 N.C. App. 453, 461-62, 512 S.E.2d 428, 434 (1999).

Article I, Section 24 of our State Constitution, provides, "[n]o person shall be convicted of any crime but by the unanimous verdict of a jury in open court." N.C. Const. art. 1, § 24; *see also* N.C. Gen. Stat. § 15A-1237(b). Our Court has previously held the risk of a nonunanimous verdict arises where the trial court submits an issue to the jury in the disjunctive, whereby the jury may find the defendant guilty of the crime charged on several alternative grounds. *State v. Petty*, 132 N.C. App. 453, 460, 512 S.E.2d 428, 433 (1999) (citing *State v. Diaz*, 317 N.C. 545, 553, 346 S.E.2d 488, 494 (1986)); *see also State v. McLamb*, 313 N.C. 572, 577, 330 S.E.2d 476, 480 (1985) (holding a verdict of guilty following submission in the disjunctive of two or more possible crimes to the jury in a single issue is ambiguous and therefore fatally defective). However, our Court in *State v. Petty* held there is no risk of a nonunanimous verdict "where the statute under which the defendant is charged criminalizes a single wrong that may be proved by evidence of the commission of any one of a number of acts because in such a case the particular act performed is immaterial." 132 N.C. App. at 461, 512 S.E.2d at 433–34 (internal marks and citation omitted).

Here, the statute under which Defendant was charged criminalizes a single wrong—an assault or affray—on any of the following persons:

> (1) An emergency medical technician or other emergency health care provider;

> (2) A medical responder;
>
> (3) Hospital employee, medical practice employee, licensed health care provider, or individual under contract to provide services at a hospital or medical practice;
>
> (4) A firefighter;
>
> (5) Hospital security personnel.

N.C. Gen. Stat. § 14-34.6. This statute provides a general list of emergency personnel whom Defendant can be charged with victimizing. *See id*. In applying the Court's reasoning in *Petty*, we note the actual assault or affray on an emergency personnel who was discharging or attempting to discharge their official duties is the gravamen of the offense for which Defendant was charged. *See Petty*, 132 N.C. App. at 461, 512 S.E.2d at 433–34; *see also State v. Hartness*, 326 N.C. 561, 566–67, 391 S.E.2d 177, 180 (1990). The actual classification of the emergency personnel based on their credentials is immaterial.

Although the indictment, jury instruction, and verdict sheet all reference the victim in different terms, the inclusion of additional or similar terms in referencing the victim did not create additional theories on which Defendant could be convicted. Instead, the terms were merely a disjunctive list of emergency personnel classifications. *See* N.C. Gen. Stat. § 14-34.6(a)(1)-(3); *see also* N.C. Gen. Stat. § 131E-155.

Thus, even though the trial court's instruction included reference to Lueth as either an emergency medical technician, an emergency health care provider, a medical responder, or a licensed health care provider, the Defendant's right to unanimity was not violated.

III. Conclusion

The trial court did not err, let alone commit plain error, or violate Defendant's right to a unanimous jury verdict.

NO ERROR.

Judges HAMPSON and THOMPSON concur.

STATE OF NORTH CAROLINA
v.
STEPHON DENARD MELTON, DEFENDANT

No. COA23-411

Filed 21 May 2024

1. Constitutional Law—right to choice of counsel—proper standard employed

In denying a pretrial motion by court-appointed counsel to withdraw from representing defendant in a drug possession and habitual felon prosecution, the superior court committed no structural error because it employed the correct standard by considering whether granting the motion would significantly prejudice defendant or result "in a disruption of the orderly processes of justice unreasonable under the circumstances." Here, there was no constitutional violation given the potential disruption and delay which would have occurred had the motion to withdraw been granted, where the motion was made on the day of trial and defendant reported to the court that, although he desired a private attorney and had contacted several, he had not yet employed another attorney.

2. Courts—overruling a prior superior court judge—change in circumstances—not shown

In defendant's drug possession and habitual felon prosecution, the trial judge did not abuse his discretion in declining to overrule the denial by another superior court judge of a motion to withdraw—made by defendant's court-appointed counsel earlier on the same day—where, upon the trial coming on, appointed defense counsel informed the trial judge of the prior denial and asked to be heard again on the matter but did not argue any substantial change in circumstances since the initial ruling.

Judge STROUD concurring by separate opinion.

Judge THOMPSON dissenting.

Appeal by Defendant from judgment entered 15 September 2022 by Judge Steve R. Warren in Forsyth County Superior Court. Heard in the Court of Appeals 6 February 2024.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Jessica V. Sutton, for the State.

Caryn Strickland for Defendant.

GRIFFIN, Judge.

Defendant Stephon Denard Melton appeals from judgment entered upon a jury's verdict finding him guilty of possession of methamphetamine and attaining habitual felon status. Defendant contends the trial court committed a structural error in denying his court-appointed counsel's motion to withdraw and further erred in failing to exercise its discretion to reconsider the denial of the motion. We hold the trial court did not err.

I. Factual and Procedural Background

This case arises from an incident which occurred on 26 September 2019. The relevant facts are as follows:

On 7 February 2022, Defendant was indicted for felony possession of methamphetamine, possession of methamphetamine on the premises of Forsyth County Jail, and having attained habitual felon status. On 8 July 2022, Defendant, represented by court-appointed counsel, requested a trial. The matter was calendared for trial at the 12 September 2022 Session of Forsyth County Superior Court.

On 23 August 2022, the State provided notice of trial ready status. On 5 September 2022, Defendant indicated, in an administrative hearing, he was also prepared to proceed to trial.

On 9 September 2022, an attorney, who was not Defendant's court-appointed counsel and had not yet been retained as private counsel, contacted the State without notice to Defendant's court-appointed counsel. The attorney requested, on behalf of Defendant, a plea deal or continuance in Defendant's case to allow her to prepare to defend him. The State denied the request for a continuance but did offer a plea deal, which Defendant rejected. Defendant's court-appointed counsel was not immediately informed of the other attorney's requests.

On Sunday, 11 September 2022, Defendant's court-appointed counsel, after hearing of the attorney's request, notified the State he would be filing a motion to withdraw. On Monday, 12 September 2022, Defendant's court-appointed counsel filed the motion, which was heard later that day before Judge Stanley L. Allen in Forsyth Couty Superior Court. Upon hearing arguments from all parties, Judge Allen denied the motion.

On 13 September 2022, Defendant's case came on for trial before Judge Steve R. Warren in Forsyth Couty Superior Court. Prior to jury selection, Judge Warren acknowledged there was a motion to withdraw in the file. Defendant's court-appointed counsel noted the motion had been denied but stated Defendant wished to be heard on the motion again. Judge Warren allowed the parties to be heard on the motion, then repronounced the denial of the motion.

The trial proceeded, and on 15 September 2022, the jury returned a verdict finding Defendant guilty of felony possession of methamphetamine and of having attained habitual felon status. Defendant was found not guilty of possession of methamphetamine on the premises of Forsyth County Jail. Defendant was sentenced to 42 to 63 months' imprisonment.

On 16 September 2022, Defendant timely filed notice of appeal.

II. Analysis

Defendant contends the trial court committed a structural error in denying his court-appointed counsel's motion to withdraw and further erred in failing to exercise its discretion to reconsider the denial of the motion.

A. Motion to Withdraw

Defendant argues the trial court committed a structural error in denying his court-appointed counsel's motion to withdraw where it erroneously applied the ineffective assistance of counsel standard in considering the motion. We disagree.

1. Standard of Review

While we generally review a trial court's decision to either grant or deny a motion to withdraw for abuse of discretion, *State v. Warren*, 244 N.C. App. 134, 142, 780 S.E.2d 835, 841 (2015), our Courts have repeatedly recognized "when [a] motion is based on a right guaranteed by the Federal and State Constitutions, the question presented is one of law and not of discretion[.]" *State v. Little*, 56 N.C. App. 765, 767, 290 S.E.2d 393, 395 (1982) (internal marks and citation omitted); *see also State v. McFadden*, 292 N.C. 609, 611, 234 S.E.2d 742, 744 (1977). Thus, where, as here, the defendant's motion concerns his "right to be defended in all criminal prosecutions by counsel whom he selects and retains[,]" we must review the trial court's decision concerning that motion, de novo. *Little*, 56 N.C. App. at 767, 290 S.E.2d at 395 (internal marks and citation omitted); *see also State v. Speller*, 230 N.C. 345, 351, 53 S.E.2d 294, 298

(1949) ("Both the State and Federal Constitutions secure to every man the right to be defended in all criminal prosecutions by counsel whom he selects and retains." (citation omitted)).

Moreover, Defendant argues the trial court committed a structural error—a rare constitutional error, of which this Court reviews de novo. *See State v. Blake*, 275 N.C. App. 699, 705, 853 S.E.2d 838, 843 (2020). *See also United States v. Gonzalez-Lopez*, 548 U.S. 140, 150 (2006); *State v. Goodwin*, 267 N.C. App. 437, 438, 833 S.E.2d 379, 380 (2019) (explaining the United States Supreme Court and our State Courts, alike, recognize the erroneous deprivation of a defendant's right to counsel of choice, qualifies as a structural error).

2. Application of the proper standard on a motion to withdraw

[1] The Sixth Amendment guarantees the accused, in all criminal prosecutions, the right to have the assistance of counsel in making his defense. *See* U.S. Const. amend. VI; N.C. Const. art. I, § 23 ("In all criminal prosecutions, every person charged with crime has the right to . . . have counsel for defense[.]"). Where the accused is found to be indigent, he is entitled to court-appointed counsel unless he understandingly and voluntarily waives that right. *State v. Pickens*, 20 N.C. App. 63, 65, 200 S.E.2d 405, 406 (1973) (citing *Argersinger v. Hamlin*, 407 U.S. 25 (1972); *State v. Morris*, 275 N.C. 50, 57, 165 S.E.2d 245, 249 (1969)).

While an indigent defendant has the right to court-appointed counsel, his right is not unlimited. Specifically, our Courts have placed certain limitations on an indigent defendant's right to substitute his court-appointed counsel. However, these limitations differ based on whether an indigent defendant seeks to replace his court-appointed counsel with other court-appointed counsel or whether he, no longer being indigent, seeks to replace his court-appointed counsel with private counsel of his choice.

Our precedent is clear when it comes to substituting court-appointed counsel with court-appointed counsel. Our Courts have explicitly recognized, the right to court-appointed counsel "does not include the privilege to insist that counsel be removed and replaced with other [court-appointed] counsel merely because [the] defendant becomes dissatisfied with his attorney's services." *State v. Holloman*, 231 N.C. App. 426, 429, 751 S.E.2d 638, 641 (2013) (*quoting State v. Sweezy*, 291 N.C. 366, 371, 230 S.E.2d 524, 528 (1976) (internal marks omitted)). However, where it appears "representation by counsel originally appointed would amount to denial of [the] defendant's right to effective assistance of counsel[,]" the trial court is required to appoint substitute counsel. *State*

v. Thacker, 301 N.C. 348, 352, 271 S.E.2d 252, 255 (1980). Thus, upon a defendant's request to substitute his court-appointed counsel with other court-appointed counsel, "[t]he trial court's sole obligation . . . is to make sufficient inquiry into [the] defendant's reasons to the extent necessary to determine whether [the] defendant will receive effective assistance of counsel." *State v. Poole*, 305 N.C. 308, 312, 289 S.E.2d 335, 338 (1982).

Less clear, however, is the standard by which the trial court is to determine whether to allow a defendant, previously found to be indigent, the right to substitute his court-appointed counsel with private counsel of his choice.

A defendant's right to counsel under the Sixth Amendment includes the right of a non-indigent defendant to be defended by counsel of his choice. *See* N.C. Const., art. I; U. S. Const. amend. XIV; *see also Powell v. Alabama*, 287 U.S. 45, 53 (1932) ("It is hardly necessary to say that the right to counsel being conceded, a defendant should be afforded a fair opportunity to secure counsel of his own choice."). Still, this right is not unrestricted. *See State v. Gant*, 153 N.C. App. 136, 142, 568 S.E.2d 909, 913 (2002) ("A defendant's right to be defended by chosen counsel is not absolute." (internal marks and citation omitted)).

Our Court recently contemplated this issue in *State v. Goodwin*, 267 N.C. App. 437, 833 S.E.2d 379. In *Goodwin*, the defendant, prior to jury selection, requested new counsel, stating he wished to fire his court-appointed defense counsel and hire a private attorney. *Id.* at 438–39, 833 S.E.2d at 381. The defendant explained he believed his defense counsel "was not competent to represent him because they could not agree on which witness to call and could not properly communicate." *Id.* In response to this statement, the defendant's court-appointed counsel filed a motion to withdraw. *Id.* at 439, 833 S.E.2d at 381. The trial court denied the defendant's request and his counsel's motions stating, "[t]he [trial] [c]ourt deems there not to be an absolute impasse in regards to this case so far." *Id.* The defendant appealed, arguing, inter alia, "the trial court committed a structural error when it denied his request for new, chosen counsel." *Id.* The *Goodwin* Court, adopting our Supreme Court's purported reasoning in *State v. McFadden*, stated the trial court could only deny the defendant's request to substitute his court-appointed counsel for private counsel of his choosing where it determined that granting the motion would "result in significant prejudice to the defendant or in a disruption of the orderly processes of justice unreasonable under the circumstances[.]" *Id.* at 440, 833 S.E.2d at 382 (internal marks and citation omitted). The *Goodwin* Court noted there was no evidence in the record suggesting the trial court made such

a determination as the court "made no findings of fact indicating that the timing or content of [the d]efendant's request may have been improper or insufficient." *Id.* at 441, 833 S.E.2d at 382. Therefore, the Court, upon reviewing the transcript, held the trial court committed a structural error as it "mistakenly relied upon the absolute impasse standard in ruling on his request for new counsel[,]" when the defendant's request was "an assertion of his right to be represented by the counsel of his choice; not an argument regarding the effectiveness of [his defense counsel's] representation." *Id.*

As an aside, we recognize that although the Court's opinion in *Goodwin* suggests the record was void of evidence tending to show the trial court applied the proper standard where the trial court failed to make certain findings of fact, the trial court is not required to make findings of fact. *Id.*; *see Poole*, 305 N.C. at 312, 289 S.E.2d at 338 (holding the trial court was not required to make findings of fact as "[t]he trial court's sole obligation when faced with a request that counsel be withdrawn is to make sufficient inquiry into [the] defendant's reasons to the extent necessary" to a make the required determination). Relying on *State v. Poole*, the Court, in an unpublished opinion, later clarified its holding in *Goodwin* by recognizing, in cases such as this, "[w]hile it is certainly preferable for trial courts to memorialize their findings of fact and conclusions of law either orally, in the transcript, or in a formal order, such memorialization is not a requirement[.]" *State v. Beal*, 272 N.C. App. 577, 844 S.E.2d 626, 2020 WL 4185818, *5 (unpublished) (citing generally *Poole*, 305 N.C. at 312, 289 S.E.2d at 338).

Additionally, while we recognize the *Goodwin* Court relied heavily on our Supreme Court's decision in *State v. McFadden*, it is unclear whether the *Goodwin* Court correctly interpreted *McFadden*. The *Goodwin* Court notes:

> Under our reading of *McFadden*, when a trial court is faced with a [d]efendant's request to substitute his court-appointed counsel for the private counsel of his choosing, it may only deny that request if granting it would cause significant prejudice or a disruption in the orderly process of justice.

Goodwin, 267 N.C. App. at 440, 833 S.E.2d at 382. However, prior panels of this Court, faced with similar issues on appeal, seemingly interpreted *McFadden* otherwise as they, without weighing prejudice against the defendant, applied a balancing test, noting the defendant's right to private counsel of his choice must be "balanced against the need for

speedy disposition of the criminal charges and the orderly administration of the judicial process." *State v. Chavis*, 141 N.C. App. 553, 562, 540 S.E.2d 404, 411 (2000) (internal marks and citation omitted); *see Little*, 56 N.C. App. at 768–89, 290 S.E.2d at 395–96; *see also Gant*, 153 N.C. App. at 142, 568 S.E.2d at 913; *State v. Foster*, 105 N.C. App. 581, 584, 414 S.E.2d 91, 92 (1992).

In *State v. Chavis*, on the morning his case was called for trial, the defendant sought a third continuance to permit him to obtain alternate counsel. 141 N.C. App. at 556, 540 S.E.2d at 408. The trial court denied the defendant's motion. *Id.* On appeal, the Court balanced the defendant's right to private counsel against the need for speedy disposition of his charges and the orderly administration of judicial process and held the trial court did not err. *Id.* at 562, 540 S.E.2d at 411. The Court noted the record showed the defendant made the motion the morning trial was set to begin, without the presence of the private counsel he indicated he wanted to employ and without making any financial arrangements with that counsel. *Id.* Additionally, the Court recognized the State was ready to proceed to trial with all witnesses present and the defendant had failed to indicate any conflict he had with his court-appointed counsel. *Id.*

In *State v. Little*, the defendant was appointed a public defender. 56 N.C. App. at 766, 290 S.E.2d at 394. On the day of trial, the public defender moved to withdraw after he informed the trial court that the defendant's mother had indicated a desire to retain private counsel for the defendant and had, in fact, retained counsel that day. *Id.* at 767, 290 S.E.2d at 349. The defendant moved for a continuance in order to allow the counsel of his choice to prepare his defense, which was denied. *Id.* at 766, 290 S.E.2d at 349. On appeal from the denial of his motion, the Court stated the defendant was dilatory in securing privately retained counsel as his mother had been in contact with the private counsel for several weeks before the counsel was retained on the day of trial. *Id.* at 768, 290 S.E.2d at 395. Further, the Court stated, upon balancing the defendant's "right to have counsel of his choice with the need for speedy disposition of criminal charges and the orderly administration of the judicial process," it was clear the defendant's constitutional rights had not been denied. *Id.* at 768, 290 S.E.2d at 395–96.

Nonetheless, bound by this Court's prior opinion in *Goodwin*, we apply its interpretation of *McFadden* and the standard it requires. *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) (holding that where a panel of this Court has previously decided a legal issue, a subsequent panel of this Court "is bound by that precedent, unless it has been overturned by a higher court").

Here, on Sunday, 11 September 2022, Defendant's court-appointed counsel informed the State he would be filing a motion to withdraw. The motion was filed on 12 September 2022—the morning trial was set to begin. That same day, the motion came on for hearing. The trial court heard arguments from the parties and conducted an inquiry with Defendant who, complaining there had been a lack of communication, expressed he wanted to hire private counsel of his choice. The trial court then asked Defendant's court-appointed counsel whether he and Defendant had any "ideological differences," to which he responded, "I would say there is, Your Honor." Before concluding the hearing, the trial court asked Defendant several additional questions:

> [TRIAL] COURT: And have you usually talked to another lawyer?
>
> DEFENDANT: Yes, I talked to several. As of—after the court date—
>
> [TRIAL] COURT: That was a yes or no question.
>
> DEFENDANT: Yes, I talked to several.
>
> [TRIAL] COURT: And have you employed another lawyer?
>
> DEFENDANT: They won't allow me to—
>
> [TRIAL] COURT: That's not what—just answer yes or no, have you employed another lawyer?
>
> DEFENDANT: No, sir.

The trial court then denied the motion to withdraw.

Unlike the trial court in *Goodwin*, the trial court here conducted an inquiry into more than just whether there existed an absolute impasse between Defendant and his court-appointed counsel. While the trial court did ask Defendant's court-appointed counsel whether he and Defendant had any ideological differences, the court's colloquy with Defendant revolved around Defendant's present failure to retain private counsel despite his supposed desire to do so.

Despite including a mere question about any "ideological differences" between Defendant and his court-appointed counsel, the record reflects, the trial court conducted an inquiry which revolved around issues concerning the further disruption and delay of trial. Thus, the trial court did not apply the incorrect standard in considering the motion to withdraw. *See also State v. Hall*, 287 N.C. App. 394, 881 S.E.2d 762, 2022 WL 17985838, *5 (2022) (unpublished) (holding the trial court did not

erroneously apply the ineffective assistance of counsel standard where the trial court made only a passing reference to the lack of an "impasse," while the majority of the exchange and ruling was centered around the disruption and delay hiring new counsel would cause). Thus, the trial court did not commit a structural error.

B. Reconsideration of the Motion to Withdraw

[2] Defendant argues the trial court erred in failing to exercise its discretion to reconsider the prior denial of his court-appointed counsel's motion to withdraw.

1. Standard of review

We review matters left to the discretion of a trial court for abuse of discretion. *See France v. France*, 224 N.C. App. 570, 577, 738 S.E.2d 180, 185 (2012) ("[W]here matters are left to the discretion of the trial court, appellate review is limited to a determination of whether there was a clear abuse of discretion." (internal marks and citation omitted)). An abuse of discretion occurs where the trial court's ruling "is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *Id.* (internal marks and citation omitted).

2. Discretion to reconsider a prior ruling on a motion

Generally, there lies no appeal from one judge of the superior court to another as they maintain equal and coordinate power. *Michigan Nat'l Bank v. Hanner*, 268 N.C. 668, 670, 151 S.E.2d 579, 580 (1966). As is well-established in our jurisprudence, "one Superior Court judge may [neither] correct another's errors of law; [nor] modify, overrule, or change the judgment of another Superior Court judge previously made in the same action." *State v. Woolridge*, 357 N.C. 544, 549, 592 S.E.2d 191, 194 (2003) (citation omitted). However, there exists an exception to this rule, whereby one judge is authorized to overrule another under certain circumstances. *See Crook v. KRC Mgmt. Corp.*, 206 N.C. App. 179, 189, 697 S.E.2d 449, 456 (2010). Per this exception, "[o]ne superior court judge may only modify, overrule, or change the order of another superior court judge where the original order was (1) interlocutory, (2) discretionary, and (3) there has been a substantial change of circumstances since the entry of the prior order." *Id.* (internal marks and citation omitted). The party seeking the modification bears the burden of showing there has since been a substantial change in circumstances, that being "an intervention of new facts which bear upon the propriety of the previous order." *First Fin. Ins. Co. v. Com. Coverage*, 154 N.C. App. 504, 507, 572 S.E.2d 259, 262 (2002) (internal marks and citation omitted).

Here, Defendant's court-appointed counsel filed a motion to withdraw on 12 September 2022. The same day, the motion came on for hearing before Judge Allen in Forsyth County Superior Court. Judge Allen denied the motion to withdraw. On 13 September 2022, the matter came on for trial, in Forsyth County Superior Court, before Judge Warren. Upon inquiry from Judge Warren, Defendant's court-appointed counsel stated the motion to withdraw had previously been denied but Defendant wished to be heard again on the matter. After hearing arguments from all parties, Judge Warren repronounced the denial of the motion.

While the motion to withdraw, here, was both interlocutory and discretionary, Defendant did not argue there had been a substantial change in circumstances since the day before when Judge Allen denied the motion. Likewise, the record does not reflect a substantial change in circumstances.

Therefore, the trial court did not err in repronouncing the denial of the motion to withdraw.

NO ERROR.

Judge STROUD concurs by separate opinion.

Judge THOMPSON dissents by separate opinion.

STROUD, Judge, concurring by separate opinion.

I concur in the majority opinion except as to any citation of unpublished cases of this Court that were not argued in any brief filed in this case. I would not rely upon an unpublished opinion not argued by a party for the same reasons as in my concurring opinion in *State v. Hensley*, 254 N.C. App. 173, 802 S.E.2d 744 (2017).

THOMPSON, Judge, dissenting by separate opinion.

On appeal, defendant contends that "[t]he trial court committed structural error by denying [court-appointed defense] counsel's motion to withdraw so that [defendant] could hire the counsel of his own choosing." I agree, and for this reason, respectfully dissent.

"A structural error is one that should not be deemed harmless beyond a reasonable doubt because it affects the framework within

which the trial proceeds, rather than being simply an error in the trial process itself." *State v. Goodwin*, 267 N.C. App. 437, 439, 844 S.E.2d 379, 381 (2019) (citation, internal quotation marks, and brackets omitted). "The purpose of the structural error doctrine is to ensure insistence on certain basic, constitutional guarantees that should define the framework of any criminal trial." *Id.* (citation omitted). "The Supreme Court of the United States has repeatedly held that erroneous deprivation of the right to counsel of choice, with consequences that are necessarily unquantifiable and indeterminate, unquestionably qualifies as structural error." *Id.* at 440, 833 S.E.2d at 381 (citation and internal quotation marks omitted).

The Supreme Court of North Carolina has held that the "[S]tate should keep to a necessary minimum its interference with the individual's desire to defend himself in whatever manner he deems best, using any legitimate means within his resources" and "that desire can constitutionally be forced to yield *only when* it will result in *significant prejudice to the defendant* or in *a disruption of the orderly processes of justice unreasonable under the circumstances of the particular case*." *State v. McFadden*, 292 N.C. 609, 613–14, 234 S.E.2d 742, 746 (1977) (emphases added) (citation omitted) (hereinafter, *McFadden* standard). In *Goodwin*, our Court held that "when a trial court is faced with a [d]efendant's request to substitute his court-appointed counsel for the private counsel of his choosing, it may only deny that request if granting it would cause significant prejudice [to defendant] or a disruption in the orderly process of justice." 267 N.C. App. at 440, 833 S.E.2d at 381. However, "[i]t is within the trial court's discretion to decide whether allowing a defendant's request for continuance to hire the counsel of his choice would result in 'significant prejudice . . . or in a disruption of the orderly processes of justice that is unreasonable under the circumstances of the particular case.' " *Id.* at 441, 833 S.E.2d at 382.

Here, court-appointed defense counsel moved to withdraw at the first hearing on September 13 (first hearing) and before a different trial court judge at the second hearing on September 14 (second hearing). I will address each motion in the discussion to follow.

a. First hearing on motion to withdraw

At the first hearing on the motion to withdraw, defendant addressed the court:

> DEFENDANT: I w[a]nt to say that I - - throughout [court-appointed defense counsel] has been a good attorney. It's just throughout Covid and all my other cases,

there's been a lack of communication. The reason I want to seek new counsel is [be]cause, my previous court date there's been a failure to communicate, either with the DA or with my attorney, and it allowed me to have a failure to appear, which would have imposed a $200,000 bail on me and would have jeopardized my job, my liability, and everything, all on a matter of lack of communication. With that being said, *I want to seek new counsel, if you don't mind, Your Honor.*

THE COURT: It doesn't sound like - - your client *didn't say anything about any ideological differences between y'all.* Are there?

[COURT-APPOINTED DEFENSE COUNSEL]: Your Honor - -

THE COURT: With your representation.

[COURT-APPOINTED DEFENSE COUNSEL]: From my understanding, there's an issue a bit more with some of the contents from what he had said and possibly going forward. His posture has been that he does want a trial for this case. To that, we don't disagree. But there are other circumstances that, at least from privileged communication, that I'm not sure would be appropriate to discuss in open court, given the prosecutor is - -

THE COURT: I didn't ask you to discuss them, *I just asked if there were any ideological differences between y'all.* And neither one of you have said yes to that.

[COURT-APPOINTED DEFENSE COUNSEL]: I would say there is, Your Honor.

THE COURT: And have you usually talked to another lawyer?

DEFENDANT: Yes, I talked to several. As of - - after the court date - -

THE COURT: That was a yes or no question.

DEFENDANT: Yes, I talked to several.

THE COURT: And have you employed another lawyer?

DEFENDANT: They won't allow me to - -

> THE COURT: That's not what - - *just answer yes or no*, have you employed another lawyer?
>
> DEFENDANT: No, sir.
>
> THE COURT: Motion to withdraw[] is denied.
>
> [COURT-APPOINTED DEFENSE COUNSEL]: Understood, Your Honor.

(Emphases added).

Upon careful review of the transcript from the first hearing on the denial of court-appointed defense counsel's motion to withdraw—which necessarily implicated defendant's right to counsel of choice—I would conclude that the trial court "misapprehend[ed] the law and employ[ed] the incorrect standard in resolving [d]efendant's request, [and therefore,] the trial court failed to properly exercise discretion." *Id.*

The court's initial line of questioning, whether there were "ideological differences" between defendant and court-appointed defense counsel, cannot be characterized as the trial court considering the *McFadden* standard, that is, whether the motion to withdraw "w[ould] result in significant prejudice" to defendant, or "a disruption of the orderly processes of justice unreasonable under the circumstances of the particular case[,]" as is required not only by our Supreme Court's jurisprudence, but the United States Supreme Court's jurisprudence as well. *See McFadden*, 292 N.C. at 613–14, 234 S.E.2d at 746 (quoting *Powell v. Alabama*, 287 U.S. 45, 53 S. Ct. 457, 77 L. Ed. 158).

Instead, the court's line of questioning, whether "there were any ideological differences between [defendant and court-appointed defense counsel,]" was the court "treat[ing] [defendant's] request as an ineffective assistance of counsel claim, [and the court] evaluat[ed] [d]efendant's request accordingly." *Goodwin*, 267 N.C. App. at 442, 833 S.E.2d at 383. Whether there were "ideological differences[,]" goes to whether there was an "impasse" between defense counsel and defendant, or a disagreement over "tactical decisions[,]" pursuant to North Carolina's ineffective assistance of counsel jurisprudence. *See State v. Ali*, 329 N.C. 394, 404, 407 S.E.2d 183, 189 (1991) (holding that "when counsel and a fully informed criminal defendant client reach an absolute impasse as to such tactical decisions, the client's wishes must control"); *see also State v. Brown*, 339 N.C. 426, 434, 451 S.E.2d 181, 187 (1994), *cert. denied*, 516 U.S. 825, 133 L. Ed. 2d 46 (1995) (holding that "tactical decisions—such as which witnesses to call, which motions to make, and how to conduct cross-examination—normally lie within the attorney's province").

As in *Goodwin*, by employing the ineffective assistance of counsel standard in resolving defense counsel's motion to withdraw, instead of the correct *McFadden standard*, the trial court "misapprehend[ed] the law and . . . failed to properly exercise discretion." *Goodwin*, 267 N.C. App. at 441, 833 S.E.2d at 382.

The trial court's second line of questioning, whether defendant had "employed another lawyer[,]" and the court's subsequent denial of court-appointed defense counsel's motion to withdraw when defendant had failed to "employ[ ] another lawyer[,]" cannot be construed as a well-reasoned consideration of the aforementioned *McFadden* standard, because defendant *could not have employed* private counsel of choice *without* the court granting his court-appointed counsel's motion to withdraw.

Therefore, I would conclude, assuming *arguendo*, that this second line of questioning sought to evaluate whether granting the motion would result in "significant prejudice to the defendant or in a disruption of the orderly processes of justice unreasonable under the circumstances of the particular case[,]" *McFadden*, 292 N.C. at 613–14, 234 S.E.2d at 746, that the trial court abused its discretion in its ruling on court-appointed defense counsel's motion to withdraw. The trial court denied the motion because defendant had failed to "employ[ ] another lawyer[,]" while failing to recognize that defendant's ability to "employ[ ] another lawyer" necessarily required that the court grant the motion. For this reason, I would conclude that the trial court's basis for denial of the motion when applying the *McFadden* standard was so arbitrary that it could not have been the result of a reasoned decision.[1]

Therefore, at the first hearing on the motion to withdraw, at best, the trial court failed to properly exercise discretion in considering the motion to withdraw by applying the incorrect ineffective assistance of counsel standard in resolving defendant's request; at worst, the court

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1. I would also contend that the trial court did not give proper consideration of "the circumstances of the particular case" when considering whether defendant's request would result in a "disruption in the orderly processes of justice" or "significant prejudice to [ ] defendant." This was the *first time* that defendant's case had been calendared for trial; there had been no prior continuances or delays in the matter coming on for trial. Defendant's request to substitute his court-appointed counsel for the private counsel of his choosing was not a request whereby defendant sought to "weaponize his right to chosen counsel for the purpose of obstructing and delaying his trial[,]" *Goodwin*, 267 N.C. App. at 440, 833 S.E.2d at 382 (citation and internal quotation marks omitted), but one where defendant earnestly was "trying to hire an attorney[,] [A.D.,] and they wouldn't allow [defendant] [to hire] one."

abused its discretion by denying the motion on a basis that was manifestly unsupported by reason and could not have been the result of a reasoned decision.

By the second hearing, on 13 September 2022, the structural error had already been committed, and if I were to "affirm[ ] the trial court's denial of [d]efendant's request[,] [I] would implicitly endorse the use of an incorrect standard for the right to counsel of choice[,] [an abuse of discretion,] and a structural error that violated [d]efendant's Sixth Amendment rights." *Goodwin*, 267 N.C. App. at 441–42, 833 S.E.2d at 382–83. Again, "[t]he Supreme Court of the United States has repeatedly held that erroneous deprivation of the right to counsel of choice, with consequences that are necessarily unquantifiable and indeterminate, unquestionably qualifies as structural error." *Id.* at 440, 833 S.E.2d at 381 (citation and internal quotation marks omitted). Therefore, "[I] [would] vacate the judgment and remand for a new trial." *Id.* at 442, 833 S.E.2d at 383.

b. Second hearing on motion to withdraw

Finally, the majority is correct to identify that generally, "one Superior Court judge may [neither] correct another's errors of law; [nor] modify, overrule, or change the judgment of another Superior Court judge previously made in the same action[,]" *State v. Woolridge*, 357 N.C. 544, 549, 592 S.E.2d 191, 194 (2003), but that there exists an exception to this rule, whereby one judge is authorized to overrule another under certain circumstances. *See Crook v. KRC Mgmt. Corp.*, 206 N.C. App. 179, 189, 697 S.E.2d 449, 456 (2010). Those circumstances, as noted by the majority, occur when "the original order was (1) interlocutory, (2) discretionary, and (3) there has been a substantial change of circumstances since the entry of the prior order." *Id.* (internal marks and citation omitted). The majority is also correct to note that the party seeking the modification bears the burden of showing there has since been a substantial change in circumstances, that is, "an intervention of new facts which bear upon the propriety of the previous order." *First Fin. Ins. Co. v. Com. Coverage*, 154 N.C. App. 504, 507, 572 S.E.2d 259, 262 (2002) (internal marks and citation omitted).

However, the majority concludes that although the motion to withdraw "was both interlocutory and discretionary, [d]efendant did not argue that there had been a substantial change in circumstances since the day before when [the trial court] denied the motion. Likewise, the record does not reflect a substantial change in circumstance." I do not agree, and write separately to address the second opportunity for the trial court to correct the structural error committed against defendant at the first hearing on the motion to withdraw.

Unlike the majority, I would contend that defendant met his burden of "introducing new facts which b[ore] upon the propriety of the previous order" and allowed the second judge to overrule the first on the motion to withdraw. At the second hearing, defendant requested that the court reconsider the motion and explained to the court that he had been in contact with a private attorney. This revelation led to the State's acknowledgment, *for the first time before the court*, that the State had *also* been in contact with—and extended a plea deal to—a private attorney who was not defendant's court-appointed attorney. The trial court being made privy to the following facts: (1) that a private attorney was prepared to represent defendant if the State would grant a continuance, (2) that the State had denied the request for a continuance, and (3) that the State had offered a plea deal to the private attorney who had been in contact with the State, was "a substantial change of circumstances since the entry of the prior order" which warranted the trial court judge at the second hearing overruling the denial of the motion to withdraw from the first hearing.

Indeed, on 13 September 2022, the matter came on for hearing a second time before a *different* judge than the judge who had ruled on defense counsel's initial motion to withdraw. Prior to jury selection, defendant again expressed his desire to retain counsel of his choice before the court:

> DEFENDANT: I have - - the severity of my case hasn't been brought to my attention. I've been corresponding with [court-appointed defense counsel] to no avail. I have received no responses. And I have . . . reached out to other lawyers in which there was a deal that was brought on the table that [court-appointed defense counsel] never presented me with the deal. He never told me [nothing], no particulars about the case, whereas another lawyer had presented me with the deal outside of my attorney with the DA. As far as I had been led to believe the jury - - that's grounds for ineffective counsel. And I would like to let that be on the record that I [have] *been trying to hire an attorney and they wouldn't allow me one*. They wouldn't allow me to hire one.

(Emphasis added).

At this point, the State acknowledged, *for the first time before the court*, that a plea offer *had been extended to an attorney*, A.D., who was not defendant's court-appointed counsel, on 9 September 2022:

> [THE STATE]: Yes, Your Honor. First, the State would oppose this matter being re-addressed. It was addressed at the appropriate time at calendar call before the Honorable Stanley Allen.
>
> . . . .
>
> [A] different attorney [A.D.] reached out to me, had asked if I was willing to continue the case [un]til she could get into it. I told her no. I reached back out to her and told her that I did have an issue come up and that she'd also inquired about a potential plea. So I told her if - - based on this new information if [defendant] wants to enter this plea - - and I reduced it to writing - - then I would be willing to do that now.
>
> THE COURT: Okay.
>
> [THE STATE]: She responded to me within a few minutes - - and this all transpired Friday afternoon - - that [defendant] was rejecting the plea.

The court denied the motion, stating that:

> [T]he issue that the [c]ourt's dealing with[,] and that is a superior court judge has already denied this motion. My understanding is one superior court judge can't overrule another. So that's where we are. . . . this was heard on Monday and denied, and *so I think my hands are tied here*. So the motion to continue is denied and the motion to withdraw as counsel is denied.

(Emphasis added).

"When a motion addressed to the discretion of the trial court is denied upon the ground that the trial court had no power to grant the motion in its discretion, the ruling is reviewable." *State v. Barrow*, 350 N.C. 640, 646, 517 S.E.2d 374, 378 (1999). "In addition, there is error when the trial court refuses to exercise its discretion in the erroneous belief that it has no discretion as to the question presented." *Id.*

Although the trial court thought it was without authority to overrule the initial motion to withdraw, stating that "my hands are tied here[,]" it was incorrect, operating under the "erroneous belief that it ha[d] no discretion as to the question presented[,]" *id.*, and thereby failed to exercise its discretion when it reconsidered the initial motion to withdraw. This failure to exercise discretion constituted error and compounded

the structural error that had been committed at the first hearing on the motion to withdraw. For this reason, I would conclude that the trial court erred in failing to overrule the initial motion to withdraw, as that order was interlocutory, discretionary, and there were new facts introduced at the second hearing which bore upon the propriety of the order entered in the initial motion to withdraw.

Again, our Supreme Court has held that the "[S]tate should keep to a necessary minimum its interference with the individual's desire to defend himself in whatever manner he deems best, using any legitimate means within his resources[,]" and defendant's request to substitute counsel "can constitutionally be forced to yield *only when* it will result in *significant prejudice to the defendant* or in *a disruption of the orderly processes of justice unreasonable under the circumstances of the particular case*." *McFadden*, 292 N.C. at 613–14, 234 S.E.2d at 746 (emphases added). For these reasons, I respectfully dissent.

STATE OF NORTH CAROLINA
v.
JOSEPH JOHN RADOMSKI, III, DEFENDANT

No. COA23-340

Filed 21 May 2024

1. Appeal and Error—preservation of issues—firearm regulation—as-applied constitutional challenge—not raised in trial court—Rule 2 invoked

The appellate court invoked Appellate Rule 2 to allow defendant's as-applied challenge regarding the constitutionality of a statute charging him with possession of a firearm on educational property, which defendant failed to properly preserve by presenting to the trial court, in order to prevent manifest injustice and to expedite a decision in the public interest, particularly in light of a recent case issued by the U.S. Supreme Court on firearm regulation.

2. Constitutional Law—North Carolina—as-applied challenge—firearm possession on educational property

Defendant's conviction for possession of a firearm on educational property was vacated because the application of the gun possession statute, N.C.G.S. § 14-269.2(b), was unconstitutional as applied to defendant's circumstances: (1) defendant was

homeless; (2) he kept all of his possessions, including multiple firearms, in his car; (3) he parked his car in a parking lot adjacent to a university hospital when seeking emergency medical care; and (4) the parking lot adjacent to the hospital was not tied closely enough to an educational purpose to be subject to the statute's sensitive-place restriction.

3. Firearms and Other Weapons—possession of firearm on educational property—knowledge of type of property—insufficient evidence

In a prosecution for possession of a firearm on educational property, after determining that the application of the charging statute (N.C.G.S. § 14-269.2(b)) to defendant's case was unconstitutional as applied to his circumstances, the appellate court found as an alternative ground for reversal that the State failed to present substantial evidence that defendant knew he was on educational property when he parked his van—in which, because he was homeless, he lived with all of his possessions, including multiple long guns—in a parking lot adjacent to a university hospital while he sought emergency medical care. Since there were multiple ways of arriving at the parking lot, and no evidence was presented about which route defendant took or what signs he may have seen that would inform him that he was on a university campus, the trial court erred in denying defendant's motion to dismiss the charge.

Chief Judge DILLON concurring in separate opinion.

Appeal by Defendant from judgment entered 7 September 2022 by Judge Craig Croom in Orange County Superior Court. Heard in the Court of Appeals 10 January 2024.

Attorney General Joshua H. Stein, by Solicitor General Ryan Y. Park, Deputy Solicitor General Lindsay Vance Smith, and Solicitor General Fellow Mary Elizabeth D. Reed, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Heidi Reiner, for defendant-appellant.

MURPHY, Judge.

When the application of a statute impedes conduct protected by the plain text of the Second Amendment, it is presumptively unconstitutional.

To overcome this presumption, the State must demonstrate that its regulation is consistent with, or analogous to, this Nation's historical tradition of firearm regulation. The State failed to demonstrate that regulating Defendant's possession of firearms, which were kept within a vehicle that was parked in the university hospital parking lot where Defendant was seeking emergency medical care, is consistent with this Nation's historical tradition of firearm regulation. As an alternative ground for reversal, the State failed to present substantial evidence that Defendant knowingly possessed a firearm on educational property.

BACKGROUND

On 15 June 2021, Defendant drove his motorized vehicle to the University of North Carolina Hospital ("UNC Hospital") for treatment related to a temporary kidney shunt. At this time, Defendant was otherwise homeless and living in his vehicle. As such, all of his personal belongings were inside of the vehicle's back cargo area. Defendant parked in the open-air lot nearest the Taylor Campus Health building—Crescent Lot—in a spot designated as handicapped parking.

Around or about 6:00 a.m., Officer Glenn Powell, a police officer with the UNC Chapel Hill Campus Police Department, received a call from UNC Hospital reporting a suspicious vehicle located in Crescent Lot. After making contact with hospital staff, Officer Powell approached Defendant's vehicle and spoke to its occupant, Defendant. Officer Powell observed that Defendant's vehicle did not have any license plate affixed to it and ran the vehicle's information, upon which Officer Powell learned that Defendant's vehicle had no insurance coverage. Officer Powell questioned Defendant about the vehicle's contents, specifically asking if there were any items in the vehicle which he needed to know about, such as weapons. After a few responses to the contrary, Defendant stated there were firearms inside of the vehicle. At this time, Officer Powell asked Defendant to exit the vehicle. Throughout this interaction, Defendant expressed that he had been unaware he was on educational property.

Officer Powell placed Defendant in handcuffs while he searched the vehicle. Defendant assisted Officer Powell in locating the firearms, and he retrieved a series of firearms from the backseat. Officer Powell recovered an SKS black semi-automatic rifle, a magazine with several rounds of ammunition, several other semi-automatic rifles, and a Winchester 1400 shotgun, totaling to 6 long guns. Each of these guns was stored in or between a soft case without any trigger locks or other safeties. Officer Powell then placed Defendant under arrest for possession of a firearm on educational property.

On 1 November 2021, Defendant was indicted on one count of possession of a firearm on educational property in connection with the SKS black semi-automatic rifle and its magazine. On 6 September 2022, Defendant's jury trial began, and the next day, the jury returned a guilty verdict. The trial court ordered Defendant's sentence of 5 to 15 months to be suspended, and Defendant was placed on 12 months of supervised probation. Defendant appealed.

ANALYSIS

Defendant contends that his judgment should be vacated because (A) the statute under which Defendant was convicted is unconstitutional, both facially and as-applied to the facts of his case, (B) the trial court erred by denying his motion to dismiss for lack of sufficient evidence, and (C) the trial court erred by failing to intervene *ex mero motu* in the State's improper closing argument. We hold that the application of N.C.G.S. § 14-269.2(b) to Defendant's case, where Defendant's vehicle was parked in a parking lot of the university hospital where he sought treatment and his firearms remained within the vehicle, is unconstitutional. As an alternative ground, we hold that the trial court erred by denying Defendant's motion to dismiss for lack of sufficient evidence. We reverse the trial court's denial of Defendant's motion to dismiss, vacate Defendant's conviction, and dismiss each of Defendant's other contentions of error as moot.

A. Constitutionality

First, Defendant argues that N.C.G.S. § 14-269.2(b) is facially unconstitutional, as it impermissibly "burdens conduct protected by the Second Amendment[.]" In the alternative, Defendant argues that the statute is unconstitutional as-applied to the circumstances of his case.

"A party making a facial challenge must establish that a law is unconstitutional in all of its applications. In contrast, the determination whether a statute is unconstitutional as applied is strongly influenced by the facts in a particular case." *State v. Grady*, 372 N.C. 509, 522 (2019). "When confronting a constitutional flaw in a statute, we try to limit the solution to the problem. We prefer, for example, to enjoin only the unconstitutional applications of a statute while leaving other applications in force or to sever its problematic portions while leaving the remainder intact." *Id.* at 549 (quoting *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 328-29 (2006)) (cleaned up). As we conclude that the statute is unconstitutional as-applied to Defendant's circumstances, we do not address Defendant's facial challenge.

1. Rule 2

[1] Defendant acknowledges that he failed to raise these constitutional arguments at trial, and, therefore, they are unpreserved. N.C. R. App. P. 10 (2023). "Constitutional issues not raised and passed upon at trial will not be considered for the first time on appeal, not even for plain error[.]" *State v. Gobal*, 186 N.C. App. 308, 320 (2007) (citations omitted), *aff'd*, 362 N.C. 342 (2008).

Defendant, however, "respectfully requests [that] this Court exercise its discretionary authority under Rule 2 to waive Rule 10's preservation requirements and address his constitutional arguments." Rule 2 permits an appellate court to "suspend or vary the requirements or provisions of any [Rules of Appellate Procedure] in a case pending before it upon application of a party or upon its own initiative" "[t]o prevent manifest injustice to a party, or to expedite decision in the public interest[.]" N.C. R. App. P. 2 (2023). In support of his request for review under Rule 2, Defendant asserts that, in light of the United States Supreme Court's recent opinion in *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1 (2022), "the trial court's decision to enter a judgment against [Defendant] pursuant to a statute that criminalizes constitutionally protected actions constitutes a 'manifest injustice' this Court can correct and prevent by invoking Rule 2."[1] Defendant further argues that review of his case pursuant to Rule 2 "is warranted in the public interest" because the constitutional issues presented are part of a "newly percolating and widely occurring issue[.]"

Defendant also seeks our review of the constitutional issues in a contemporaneously filed *Motion for Appropriate Relief*. We first address Defendant's MAR. "When a motion for appropriate relief is made in the appellate division, the appellate court must decide whether the motion may be determined on the basis of the materials before it . . . . If the appellate court does not remand the case for proceedings on the motion, it may determine the motion in conjunction with the appeal and enter its own ruling on the motion with its determination of the case." N.C.G.S. § 15A-1418(b) (2023). We recently declined to address a defendant's unpreserved constitutional argument pursuant to a MAR in *State v. Stokes*, 289 N.C. App. 631 (2023) (unpublished) (citing *Gobal*, 186 N.C. App. at 320) ("As an initial matter, we note that although [the] defendant attempts to address the constitutionality of [the statute] through a MAR filed separately with this Court and by referencing the MAR briefly in his

1. We note that *Bruen* was decided by the United States Supreme Court on 23 June 2022, only 76 days before the jury's verdict was returned on 7 September 2022.

brief, this issue was not preserved. Therefore, we will not address it as a part of [the] defendant's appeal."). Although it is a non-precedential decision, we apply the same logic as in *Stokes* and deny Defendant's MAR by separate order.

Thus, whether we review Defendant's constitutional argument depends on whether the circumstances support a decision to invoke Rule 2; that is, we must determine whether invoking Rule 2 to permit our review of the unpreserved constitutional issues is necessary "[t]o prevent manifest injustice to a party, or to expedite decision in the public interest[.]" N.C. R. App. P. 2 (2023). Although the State argues that Defendant failed to show that either of these circumstances exist, we are satisfied by Defendant's argument that, due to the proximity of his case to *Bruen* and to the "newly percolating and widely occurring issue" presented in this case, invoking Rule 2 is appropriate under both of the articulated grounds. Thus, we proceed to consider the merits of Defendant's constitutional argument.

2. As-Applied Challenge

[2] "An as-applied challenge represents a party's protest against how a statute was applied in the particular context in which the party acted . . . ." *Lakins v. W. N.C. Conf. of United Methodist Church*, 283 N.C. App. 385, 393 (2022) (cleaned up). N.C.G.S. § 14-269.2(b) reads as follows:

> It shall be a Class I felony for any person knowingly to possess or carry, whether openly or concealed, any gun, rifle, pistol, or other firearm of any kind on educational property or to a curricular or extracurricular activity sponsored by a school . . . .

N.C.G.S. § 14-269.2(b) (2023).

Defendant contends that application of N.C.G.S. § 14-269.2(b) to the facts of his case is unconstitutional, as "[Defendant's] possession of an unloaded rifle and ammunition in a UNC hospital parking lot in his car, which was both his home and the means by which he traveled to the hospital for treatment, unquestionably falls within the purview of the Second Amendment." Defendant argues that "[t]wo factors, independently and collectively, demonstrate why application of N.C.G.S. § 14-269.2(b) to [his] case was unconstitutional[]": (1) the places protected by the statute, "campus or other educational property[,]" N.C.G.S. § 14-269.2(b) (2023), "cannot be fairly understood to encompass a parking lot near a hospital that happens to be affiliated with a nearby university[,]" as this would "severely curtail[] [Defendant's] right to possess and bear arms . . . in numerous places not historically understood to be sensitive

places in violation of his Second Amendment rights and the United States Supreme Court's decision in *Bruen*" and (2) the "central component" of the Second Amendment, "self-defense[,]" *District of Columbia v. Heller*, 554 U.S. 570, 599 (2008), is not forfeited by Defendant's "being unhoused in the traditional sense[,]" as the "right [to bear arms] follows individuals outside of their homes into the areas where they are more likely to need protection, including public parking lots," and to prohibit Defendant's conduct under these circumstances would "force[] [Defendant] to surrender his personal property and suffer a felony criminal conviction for exercising his Second Amendment rights while experiencing housing insecurity." We note Defendant's concerns regarding the equal protection of an individual's Second Amendment rights while experiencing homelessness, though we hold that the statute is unconstitutional as applied due to the non-sensitive nature of the parking lot and need not address whether the statute is unconstitutional as applied due to Defendant's status as a homeless person living in his car.

"When the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct." *Bruen*, 597 U.S. at 24. "The government must then justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation." *Id.* Thus, the State bears the burden to show that prohibiting Defendant's conduct under N.C.G.S. § 14-269.2(b) "is consistent with [this] Nation's historical tradition of firearm regulation." *Id.* We hold that the State fails to meet this burden.

The U.S. Supreme Court held in *Bruen*:

> To determine whether a firearm regulation is consistent with the Second Amendment, *Heller* and *McDonald* point toward at least two relevant metrics: first, whether modern and historical regulations impose a comparable burden on the right of armed self-defense, and second, whether that regulatory burden is comparably justified.
>
> . . . .
>
> To be clear, even if a modern-day regulation is not a dead ringer for historical precursors, it still may be analogous enough to pass constitutional muster. For example, courts can use analogies to "longstanding" "laws forbidding the carrying of firearms in sensitive places such as schools and government buildings" to determine whether modern regulations are constitutionally permissible. That said, respondents' attempt to characterize New York's

> proper-cause requirement as a "sensitive-place" law lacks merit because there is no historical basis for New York to effectively declare the island of Manhattan a "sensitive place" simply because it is crowded and protected generally by the New York City Police Department.

Id. at 3 (citations omitted).

First, the State argues that N.C.G.S. § 14-269.2(b), as applied to the facts of Defendant's case, is constitutional under *Bruen*'s "enthusiastic" holding that "laws forbidding the carrying of firearms in sensitive places such as schools" are constitutional. However, Defendant argues, and we agree, that the purpose of the "open-air parking lot situated between the emergency room entrance, a football arena, and another healthcare building[]" is not educational in nature; rather, its function is to provide "parking access to the health care facilities in the area, including the hospital where [Defendant] was trying to be seen for significant kidney health concerns." Therefore, we disregard the State's argument that N.C.G.S. § 14-269.2(b), as applied to the facts of Defendant's case, merely forbids the carrying of firearms in an "obvious, undisputed, and uncontroversial[]" "gun-free [school] zone[][.]" *See Siegel v. Platkin*, 653 F. Supp. 3d 136, 151 (D.N.J. 2023) (citation and marks omitted) ("In *Bruen* and *Heller*, the [U.S.] Supreme Court expressly identified restrictions at certain sensitive places (such as schools) to be well-settled, even though the 18th-and 19th-century evidence has revealed few categories in number. The inference, the Court suggested, is that some gun-free zones are simply obvious, undisputed, and uncontroversial."); *see also Bruen*, 597 U.S. at 3 (citation and marks omitted) ("To be clear, even if a modern-day regulation is not a dead ringer for historical precursors, it still may be analogous enough to pass constitutional muster. For example, courts can use analogies to longstanding laws forbidding the carrying of firearms in sensitive places such as schools and government buildings to determine whether modern regulations are constitutionally permissible.").

In the alternative, the State argues that, "even applying *Bruen*'s analogical test, [N.C.G.S. § 14-269.2(b)] easily passes constitutional review." The State contends that prohibiting Defendant's possession of a firearm in the parking lot adjacent to the UNC hospital is constitutional as a "modern regulation[] that [was] unimaginable at the founding [of the U.S.]" but analogous enough to "[h]istorical sensitive-place restrictions, [which] barred firearms where people gathered to engage in important activities where firearms could be particularly disruptive" such as "legislative assemblies, polling places, and courthouses[]" to pass constitutional muster. *Bruen*, 597 U.S. at 28, 30. We disagree.

Defendant argues that, although hospitals are often "owned by or otherwise affiliated with colleges and universities[]" due to "[t]he financial and practical realities of modern-day medical administration[,]" "[c]olleges and universities are frequently large landowners[]" and "[t]his affiliation alone[] . . . cannot bring those facilities or the parking lots outside them into the purview of [N.C.G.S. § 14-269.2(b)] without running afoul of the Second Amendment." Defendant emphasizes that, although Officer Powell testified that the hospital is "immediately in the vicinity[,] . . . engulfed by [] campus, [and] . . . considered part of campus[,]" he also testified that it is policed separately by the UNC Hospital Police Department. Defendant further contends, and we agree, that the mere nature of being "in an[] area where there are" "various signs . . . either in Carolina Blue or otherwise saying UNC" does not in and of itself render the parking lot to be fairly and constitutionally included within the statutory language of N.C.G.S. § 14-269.2(b), and "[a]ny conception of N.C.G.S. § 14-269.2[(b)] that folds in any area where there are such signs reads 'campus' far too broadly[]" for the purposes of a sensitive-place restriction. To restrict Defendant's Second Amendment right pursuant to N.C.G.S. § 14-269.2(b) under these facts, where the firearms remained within his vehicle in the parking lot of the hospital where he had gone to seek medical treatment, would be unconstitutional.

B. Motion to Dismiss

[3] Next, Defendant argues that the trial court erred by denying his motion to dismiss because the State failed to present substantial evidence of each element of the charged offense. Defendant argues that the State failed to present substantial evidence both that Defendant *was on* educational property, as defined by the statute, and that Defendant *knew* he was on educational property.

> "In ruling on a motion to dismiss, the trial court need determine only whether there is substantial evidence of each essential element of the crime and that the defendant is the perpetrator." *State v. Winkler*, 368 N.C. 572, 574 (2015) (quoting *State v. Mann*, 355 N.C. 294, 301 (2002)). "Substantial evidence is [the] amount necessary to persuade a rational juror to accept a conclusion." *Id.* (quoting *Mann*, 355 N.C. at 301). In evaluating the sufficiency of the evidence to support a criminal conviction, the evidence must be considered "in the light most favorable to the State; the State is entitled to every reasonable intendment and every reasonable inference to be drawn therefrom." *Id.* (quoting *State v. Powell*, 299 N.C. 95, 99

> (1980)). In other words, if the record developed at trial contains "substantial evidence, whether direct or circumstantial, or a combination, 'to support a finding that the offense charged has been committed and that the defendant committed it, the case is for the jury and the motion to dismiss should be denied.' " *Id.* at 575 (quoting *State v. Locklear*, 322 N.C. 349, 358 (1988)). "Whether the State presented substantial evidence of each essential element of the offense is a question of law; therefore, we review the denial of a motion to dismiss de novo." *State v. Chekanow*, 370 N.C. 488, 492 (2018) (quoting [*State v. Crockett*, 368 N.C. 717, 720 (2016)]).

State v. Golder, 374 N.C. 238, 249-50 (2020) (cleaned up).

1. Educational Property

The term "educational property[,]" as used in N.C.G.S. § 14-269.2(b), refers to "[a]ny school building or bus, school campus, grounds, recreational area, athletic field, or other property owned, used, or operated by any board of education or school board of trustees, or directors for the administration of any school." N.C.G.S. § 14-269.2(a)(1) (2023). Defendant argues that this definition of "educational property" does not apply to Crescent Lot because it is not used "for the administration of any school." *Id.* According to Defendant,

> [t]he lot was situated between a football field, a health center, and the emergency room entrance of a hospital . . . . The plain and strict understanding of this statute should not include a public parking lot unrelated to the educational administration at the university. Rather, it would include the spaces the general public would think of when hearing about this statute—college and school classrooms and hallways—and the scenarios they would call to mind—someone carrying firearms on their person through a school building with nefarious intent. The State's only evidence, instead, showed [Defendant] was in a parking lot adjacent to the hospital at which he was seeking care.

Despite Defendant's contentions to the contrary, a plain reading of the statute does not require that *all* "educational property" be "owned, used, or operated . . . for the administration of any school." *Id.* Rather, only those "other propert[ies]" which do not fall within the earlier categories, "[a]ny school building or bus, school campus, grounds, recreational

area, [or] athletic field," must be "owned, used, or operated . . . for the administration of any school." N.C.G.S. § 14-269.2(a)(1) (2023). Even if we accepted Defendant's proposed reading of the statute requiring each of the enumerated items to be "owned, used, or operated . . . for the administration of any school[,]" such a reading would lend itself to absurd results. *Id.*; *see C Invs. 2, LLC v. Auger*, 277 N.C. App. 420, 430 (2021) (citing *Mazda Motors of Am., Inc. v. Sw. Motors, Inc.*, 296 N.C. 357, 361 (1979)), *aff'd*, 383 N.C. 1 (2022) ("Now, to be sure, if the plain reading of a statute leads to a result so absurd that no reasonable legislator could have intended it, we can ignore that absurd interpretation and find a reasonable one."). For example, to fall within this statute's protections, any school buses or athletic fields would need to be "owned, used, or operated" for administrative purposes. Giving the State the benefit of "every reasonable inference" from the evidence, Defendant's car was located on the UNC Chapel Hill Campus. *See Golder*, 374 N.C. at 249-50 ("In evaluating the sufficiency of the evidence to support a criminal conviction, the evidence must be considered in the light most favorable to the State; the State is entitled to every reasonable intendment and every reasonable inference to be drawn therefrom."). The UNC Chapel Hill Campus squarely falls within the enumerated categories in N.C.G.S. § 14-269.2(a)(1). Defendant's attempt to suggest that the parking lot itself, located on the UNC Chapel Hill Campus, must be used "for the administration of [the] school" fails. The State presented sufficient, substantial evidence that Defendant was on educational property as defined by the statute. However, as we discuss below, the trial court erred by denying Defendant's motion to dismiss because the State failed to present substantial evidence that Defendant *knew* he was on educational property.

2. Knowledge

Pursuant to N.C.G.S. § 14-269.2(b), a person commits a felony when he "*knowingly* [] possess[es] or carr[ies] . . . any . . . firearm of any kind on educational property . . . ." N.C.G.S. § 14-269.2(b) (2023). Defendant's knowledge that he possessed the firearm on educational property is an essential element of the crime, and, therefore, the State was required to present substantial evidence of such knowledge.

To support this element of the offense, the State offered Officer Powell's testimony regarding the events during Defendant's arrest and the seven possible paths by which Defendant could have reached the parking lot. Officer Powell testified that he and Defendant "spoke about" whether he was aware he was on educational property "on and off[,]" that "[a]t one point . . . [Defendant] said that he always forgot that the hospital was on UNC's campus[,]" and that Defendant mentioned

he was unaware that he was on educational property "several times throughout [their] encounter." Officer Powell also testified that "there was not a sign where [Defendant's] vehicle was actually located that indicated [Defendant] was on campus property[,]" nor was there "a sign that indicated you could not possess weapons where his vehicle was actually located[.]"

Officer Powell further testified as to why he arrested Defendant:

> At that point, viewing the totality of the circumstances, I looked at where we were located, our vicinity to Taylor Campus Health with its sign, the Taylor Campus Health hanging sign that's nearby the vehicle; Gate 6 being within eyeshot, which is part of Kenan Stadium, the large football stadium that UNC football plays at. I determined that based on the totality of the circumstances that there was no way that any reasonable person would not recognize the area as part of campus, that he was – that there were firearms in the possession of [Defendant], ammunition, and they were not secured. So I determined at this point that I was going to place [Defendant] under arrest for felony possession of a firearm on educational property.

Officer Powell's testimony explicitly indicates that Defendant expressed numerous times that he was unaware he was on educational property, but that Officer Powell arrested him based on his belief "that there was no way that any reasonable person would not recognize the area as part of campus . . . ." Officer Powell also testified that "everything on campus is very clearly labeled so that any layperson with limited familiarity can navigate campus effectively[]" and that "[t]here is a hanging sign for Taylor Campus Health . . . [which] would have been immediately to the left of the vehicle's front headlight at an angle where it would be within your line of sight." Notably, at no point did Officer Powell testify that he had any further reasons, specific to Defendant, to believe that Defendant knew he was on educational property.

The State also questioned Officer Powell about the number of means by which Defendant could have reached the parking lot in his vehicle. The exchange between the State and Officer Powell was as follows:

> [OFFICER POWELL:] If you are coming from Highway 54 area and you are turning onto the eastern part of Manning Drive, heading from Manning Drive up toward Ridge Road, Skipper Bowles vicinity.

[THE STATE:] Okay. Along that path . . . is there any signage that references the . . . legality of possessing firearms?

[OFFICER POWELL:] There is one sign.

[THE STATE:] Okay. What does it say?

[OFFICER POWELL:] "No weapons on educational property."

[THE STATE:] Okay. So that's . . . one path. Are there any other paths that someone could take to get to where he was?

[OFFICER POWELL:] Yes, sir. There's a few other paths.

[THE STATE:] Okay. Tell us about them.

[OFFICER POWELL:] So in the same vicinity as you are cutting through Carrboro, you can take an offshoot to pick up 15/501 over South Columbia. That labels the area heading toward the hospital and the university with a street sign which will have you riding on South Columbia until you pick up the western part of Manning Drive. That's in the vicinity of Pittsboro Street. You would turn right there and then follow the road past the hospital, past Cardinal Deck, past the Dogwood Deck, going past East and West Drive as well as the dental school, Koury.

. . . .

[THE STATE:] Once you get onto campus, all the signs switch from the normal green that you are used to seeing in regular areas to the Carolina blue color. They have an Old Well or . . . the Carolina NC stamp that is familiar and commonly used for sporting occasions. And then the large parking structures, all the buildings along that, past Mary Ellen Jones as well, the cancer research, have black signs with white letters and either the Old Well or some other University-affiliated emblem on the signage in a light blue color.

. . . .

You can use South Road as well. So without describing how to get completely to South Road from the various points . . . . [Y]ou either have to come up from Raleigh Road where it turns into South Road and there's a "Welcome to UNC"

sign where you would turn left onto County Club and then turn right down Ridge Road going past the School of Government and the law school, Van Hecke-Wettach, which are both clearly labeled.

. . . .

So then you would proceed down Ridge Road, past that point, the football indoor practice facility; and on the left would be Boshamer Baseball Stadium.

. . . .

And then from there you have two options on how to get where [Defendant] was located. Most people would continue straight down Ridge Road until it hits Manning Drive, going past SASP South and North. It's the administrative buildings where payoffs and things like that are located; clear signage there as well. You would turn right onto Manning Drive, go past Hardin Dorm, which has a sign as well as for Morrison Dorm, which would be on your right-hand side.

On your left side you go past Craige and Craige North. Craige North being the closest to the road, and there's a sign for that as well. Go past Paul Hardin Drive where the public safety building is located as well as our P2P, which has buses and bus stops in the vicinity. And then you would turn right onto Emergency Room Drive. Follow that past the emergency room, up toward Gate 6; and then when you face Gate 6, you would turn to the left, and that would take you to the handicapped spot by Taylor Campus Health, which is where [Defendant's] vehicle was located in.

The other way would be right in the same vicinity of Boshamer Stadium. There is a Rams Head parking deck. If you turn right, there's a tunnel. You go through that tunnel, go down past the entrance -- visiting team entrance gates for the football team, up a hill; and it will put you right at Gate 6 at Kenan Stadium. This is not an area where most people are familiar with or allowed to drive on; however, people do it fairly regularly if they are familiar with the area. You would pop up literally at Gate 6. It's meant for deliveries and things like that, and honestly, the

> football team's golf carts and things like that and emergency vehicles. And emergency vehicles use it all the time.
>
> So you would pop up at Gate 6 where it would be clearly labeled as Gate 6 of Kenan Stadium, and you would go to the left and then turn right immediately. And that would put you in that same vicinity at Taylor Campus Health.
>
> . . . .
>
> Going from the opposite direction of South Road, coming from South Columbia Street, you would go down past the Bell Tower, past Bell Tower Drive, past the Stone Center in the same vicinity as the student stores and Wilson Library, Kenan Laboratory area, all labeled in the same fashion with the white letters, the black sign, and the Carolina blue logo with either an Old Well or some other affiliated symbol.
>
> You would turn right onto Stadium Drive, go past Gates 1, 2, and 3 of the Kenan Stadium as well as Carmichael, Parker, Teague; and then Avery is where you pick up at Ridge Road. And then you would turn right down there from Stadium Drive. You can still see the same, like, vicinity as Boshamer Stadium. And then from there you would either take the back route I referenced earlier, cutting through to Gate 6, or the main route of Ridge Road to Manning Drive.
>
> [THE STATE:] Okay. Now have we covered all the ingress and egress?
>
> . . . .
>
> [OFFICER POWELL:] Yes, sir.

Defendant argues that "there was no evidence whatsoever that [Defendant], while sick and seeking emergency medical care, visually saw and mentally took in or understood those signs such that he *knew* he was on educational property as required under N.C.G.S. § 14-269.2(b)[,]" and "[t]here was no evidence which of the seven roads [Defendant] took into the parking lot." Defendant contends, and we agree, that "[d]riving past signs that may be blue or say UNC is not the same as knowingly being on campus."

Our Supreme Court has held that

> [t]here is no logical reason why an inference which naturally arises from a *fact proven by circumstantial evidence* may not be made. Therefore, it is appropriate for a jury to make inferences on inferences when determining whether the facts constitute the elements of the crime. Thus, circumstantial evidence may withstand a motion to dismiss and support a conviction even when the evidence does not rule out every hypothesis of innocence.

State v. Dover, 381 N.C. 535, 547 (2022) (cleaned up) (emphasis added). However, "[a] motion to dismiss should be granted . . . when the facts and circumstances warranted by the evidence do no more than raise a suspicion of guilt or conjecture since there would still remain a reasonable doubt as to [the] defendant's guilt." *State v. Simpson*, 235 N.C. App. 398, 403-04 (2014) (quoting *State v. McDowell*, 217 N.C. App. 634, 636 (2011)).

The State failed to present any evidence, direct or circumstantial, as to which path Defendant took, what signs he saw, or any other indication of personal knowledge that he was on educational property. The State did not "prove[] by circumstantial evidence" any fact from which the jury could infer Defendant's knowledge, and the jury was left only to speculate as to Defendant's mens rea at the time of the actus reus. *See Dover*, 381 N.C. at 547. The trial court erred in denying Defendant's motion to dismiss, as "the facts and circumstances warranted by the [State's] evidence [did] no more than raise a suspicion of guilt or conjecture[,]" and "a reasonable doubt as to [Defendant's] guilt[]" remained. *See Simpson*, 235 N.C. at 403-04.

CONCLUSION

The application of N.C.G.S. § 14-269.2(b) to Defendant's conduct under these facts unconstitutionally restricts Defendant's Second Amendment protections. Furthermore, the State failed to demonstrate that Defendant knew he possessed a firearm on educational grounds. We reverse the trial court's denial of Defendant's motion to dismiss and vacate Defendant's conviction.

REVERSED AND VACATED.

Judge CARPENTER concurs.

Chief Judge DILLON concurs in a separate opinion.

DILLON, Chief Judge, concurring.

I agree in the majority opinion that the gun possession statute under which Defendant was convicted is unconstitutional as applied to him in this case. The evidence shows that Defendant is homeless; that everything in the world he owns, including his firearm, was in his car; and that he drove his car to UNC Hospital to seek emergency medical attention. There was no evidence that Defendant had the opportunity or means to store his firearm before proceeding to the hospital.

I do not agree with the majority's conclusion that there was insufficient evidence that Defendant knew that he was on educational property. Indeed, there was evidence that Defendant would have passed signs indicating that he was on UNC's campus. He was near Kenan Stadium, where UNC plays its home football games. The officer testified that Defendant told him that he "always forgot" that the hospital was on UNC's campus, suggesting that he has been there and/or at least was admitting that had known at some point in the past that the hospital was on UNC's campus. One cannot forget what he did not once know. But, further, it may be that the jury simply did not believe Defendant's statement that he forgot what he admitted he once knew, that the hospital was on UNC's campus. In sum, I conclude the State presented enough evidence from which the jury could find that Defendant knew he was on educational property.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 21 MAY 2024)

COGGIN v. BRENNAN No. 23-802	Mecklenburg (14CVD17981)	Affirmed
COX v. SADOVNIKOV No. 23-657	Moore (20CVD532)	Affirmed in Part; Vacated and Remanded in Part.
IN RE A.D. No. 23-1143	Wake (22JT42)	Affirmed
IN RE A.S.C. No. 23-1018	Mecklenburg (22JT210)	Vacated and Remanded
IN RE B.B.P. No. 23-1086	Durham (20JT88)	Affirmed
IN RE D.B.R. No. 23-985	Johnston (23SPC1331-500)	Reversed
IN RE G.H. No. 23-939	Mecklenburg (10JB713)	Dismissed
IN RE J.H. No. 23-543	Johnston (21JA146)	Affirmed
IN RE K.L.D. No. 23-903	Davidson (21JA42)	Affirmed
IN RE M.R. No. 23-904	Guilford (22JA615) (22JA624) (22JA625)	Affirmed
STATE v. ANDERSON No. 22-970	Hyde (17CRS50135-36)	No Error
STATE v. BROWN No. 23-393	Forsyth (17CRS52401) (17CRS52702) (19CRS54463)	No Error
STATE v. BURGESS No. 23-846	Craven (18CRS53146-47) (18CRS53528-29) (21CRS50613)	Vacated and Remanded

STATE v. COCHRAN No. 22-885	Davidson (19CRS50195)	Appeal Dismissed in Part; No Error in Part
STATE v. DAVIS No. 23-931	Beaufort (20CRS50610) (20CRS695)	No Plain Error
STATE v. GILMORE No. 23-300	Forsyth (21CRS57545) (21CRS820)	No Error
STATE v. JACKSON No. 22-982	Perquimans (18CRS50196)	Affirmed
STATE v. LOVE No. 23-1123	Robeson (22CR53350)	Vacated
STATE v. MacKAY No. 23-718	Mecklenburg (21CRS222465)	No Error
STATE v. PICA No. 23-873	Surry (21CRS52074)	No Error
STATE v. THOMAS No. 23-736	Guilford (19CRS81734)	Affirmed
STATE v. WATROUS No. 23-668	McDowell (21CRS134-135)	No Plain Error
STATE v. WILSON No. 23-525	New Hanover (21CRS53673)	No Error
STATE v. YOUNG No. 23-952	Cabarrus (21CRS52380)	No Error

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