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ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

JULY 20, 2022

MAILING ADDRESS: The Judicial Department
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OF
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SUPREME COURT OF NORTH CAROLINA

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CHILD ABUSE, DEPENDENCY, AND NEGLECT

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Permanency planning—guardianship—constitutionally protected parental status—indefinitely ceding custody to nonparent—The trial court properly awarded guardianship of two neglected children to their paternal grandmother where the court's findings supported its conclusion that their mother had acted inconsistently with her constitutionally protected status as a parent by voluntarily ceding custody of the children—then ages one and four years old—to the grandmother for three years until social services assumed custody. Although the mother made demonstrable progress in her family services plan, the fact that she made minimal contact with the children throughout that three-year period (during which the children developed a stronger bond with the grandmother than with the mother) and made no attempts to regain custody until social services got involved indicated that she intended for the grandmother to serve indefinitely as the children's primary caregiver. **In re B.R.W., 61.**

CIVIL PROCEDURE

Motion to dismiss—matters outside the pleadings—arguments of counsel not evidence—no conversion to motion for summary judgment—On a motion to dismiss a medical negligence claim pursuant to Civil Procedure Rule 12(b)(6), where the trial court did not consider matters outside the pleadings, it was not required to convert the motion to one for summary judgment under Civil Procedure Rule 56, which would have necessitated giving the parties additional time to conduct discovery and present evidence. Although plaintiff's counsel made several factual assertions in his memorandum of law and during the hearing, arguments of counsel

CIVIL PROCEDURE—Continued

are not evidence, and no evidentiary materials were submitted. The matter was remanded to the Court of Appeals for consideration of two remaining issues. **Blue v. Bhiro, 1.**

CONSTITUTIONAL LAW

Right to speedy trial—Barker factors—evaluation of prejudice to defendant—misapplication of correct standard—In a prosecution for charges stemming from a fatal car accident, where more than six years passed before defendant's case was brought to trial, the trial court misapplied the proper standard for determining whether the delay prejudiced defendant pursuant to *Barker v. Wingo*, 407 U.S. 514 (1972), by first finding that the State had been prejudiced by the delay, and by determining that the prejudice factor weighed against defendant because he did not demonstrate actual prejudice. The constitutional right to a speedy trial is granted to defendants to protect against prosecutorial delay, and prejudice may be shown by presumptive rather than actual prejudice. **State v. Farook, 170.**

CRIMINAL LAW

Guilty plea—multiple assault charges—insufficient factual basis—remedy—entire plea vacated—Where there was an insufficient factual basis to support defendant's plea of guilty to multiple assaults—because defendant committed one continuous assault—the appropriate remedy was to vacate the entire plea and remand to the trial court for further proceedings. **State v. Robinson, 207.**

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Attorney-client privilege—speedy trial claim—defense attorney testified for State regarding trial strategy—plain error—In a prosecution for charges stemming from a fatal car accident, where more than six years passed before defendant's case was brought to trial, during which he was represented by four different attorneys, the trial court committed plain error by allowing one of defendant's attorneys to testify for the State regarding trial strategy to counter defendant's claim that his right to a speedy trial was violated. The attorney's testimony regarding delay tactics divulged privileged communications in the absence of any waiver by defendant of the attorney-client privilege; defendant's pro se claim for ineffective assistance of counsel regarding his attorney's delays was invalid for having been filed when defendant was represented by counsel and therefore could not constitute a waiver or justification. The matter was remanded for the trial court to reweigh any admissible evidence submitted by the State to justify the delay as part of the balancing test set forth in *Barker v. Wingo*, 407 U.S. 514 (1972). **State v. Farook, 170.**

Lay opinion—assumed error—prejudice analysis—Even assuming that admission of an officer's allegedly improper lay opinion testimony—his belief that a crashed moped was driven by defendant—was error, defendant could not prove prejudice where other evidence admitted at his trial for driving while impaired included substantially similar information. Specifically, the warrant application (to draw defendant's blood) and defense counsel's cross-examination of the officer put essentially the same information before the jury. **State v. Delau, 226.**

REAL PROPERTY

Good faith purchaser for value—fraudulent intention—imputation of knowledge—agency principles—In plaintiff's action pursuant to the Uniform Voidable Transactions Act—in which plaintiff, a nonprofit community organization, challenged a real estate transfer of land which it had previously owned and to which it had a potential claim under a separate lawsuit—defendants were not entitled to the protections afforded good faith purchasers for value where they purchased the land in a private sale from another developer with which defendants had formed a joint real estate development venture. Pursuant to principal-agent law and the doctrine of imputed knowledge, defendants were charged with the knowledge of their co-principal's fraudulent intent to shield the land from plaintiff as a creditor, which was accomplished by transferring title of the subject property—the co-principal's last substantial asset—to defendants without public notice, appraisal, or negotiation during the pendency of plaintiff's appeal from the related lawsuit. **Cherry Cmty. Org. v. Sellars, 239.**

SEARCH AND SEIZURE

Vehicle checkpoint—reasonableness—Brown factors—A police checkpoint was lawful under the Fourth Amendment pursuant to *Brown v. Texas*, 443 U.S. 47 (1979), where the checkpoint's purpose—ensuring that each driver had a valid driver's license and was not intoxicated—operated to advance public safety and was reasonable; the checkpoint was conducted on a major thoroughfare during early morning hours conducive to catching intoxicated drivers; and the checkpoint caused only a small amount of traffic backup, it was visible to approaching drivers, and it was conducted in accordance with a plan under a supervising officer with specific restraints on time, location, and officer conduct. **State v. Cobb, 161.**

TERMINATION OF PARENTAL RIGHTS

Best interests of the child—support for written findings—variation from oral findings—The trial court did not abuse its discretion by determining that it was in the child's best interests to terminate his mother's parental rights, where the court's findings of fact (with one exception) were supported by competent evidence and where those findings demonstrated a proper analysis of the dispositional factors set forth in N.C.G.S. § 7B-1110(a). The court was not bound by its oral statements at the dispositional hearing—regarding the parent-child bond and the mother's efforts toward reunification—when entering its final order, and therefore there was no error where the court's oral findings varied from its written findings. Further, the court was not required to enter any findings regarding dispositional alternatives to termination, such as guardianship. **In re S.D.C., 152.**

Findings of fact—sufficiency of evidence—compliance with case plan—In an appeal from an order terminating a father's parental rights in his daughter, many of the trial court's findings of fact were disregarded because they lacked the support of clear, cogent, and convincing evidence—including findings that the father failed to comply with portions of his case plan, that he lied about his drug use, that he failed to demonstrate the ability to provide appropriate care for his daughter, that he was in arrears in child support payments, and that he failed to seek assistance to find appropriate housing. **In re A.N.H., 30.**

Grounds for termination—neglect—failure to make reasonable progress—compliance with case plan—some drug use—An order terminating a father's parental rights on the grounds of neglect and failure to make reasonable progress

was vacated and remanded where, after unsupported factual findings were disregarded, the remaining factual findings showed that the father complied with almost all of the requirements of his case plan, and no findings supported a conclusion that his continued drug use would result in the impairment or a substantial risk of impairment of his daughter. **In re A.N.H., 30.**

Grounds for termination—neglect—inability to parent—likelihood of future neglect—The trial court's order terminating a mother's parental rights on the grounds of neglect was affirmed where the court's finding that she was incapable of parenting her child (who had been adjudicated as neglected) was supported by clear, cogent, and convincing evidence—including testimony from her therapist and her own admission to her social worker—and where the court's determination that there was a likelihood of future neglect was supported by numerous findings—including those related to her inability to care for the child at the time of the hearing and her failure to make progress on her case plan. **In re B.R.L., 56.**

Grounds for termination—neglect—likelihood of future neglect—pattern of domestic violence—In an order terminating respondent-father's parental rights to his four-year-old son on the ground of neglect (N.C.G.S. § 7B-1111(a)(1)), the trial court's determination that there was a likelihood of repetition of neglect if the child were returned to respondent's care was supported by unchallenged findings regarding the long history of domestic violence between respondent and the child's mother, respondent's violation of domestic violence protective orders, and respondent's aggression toward a social worker and display of a knife at a supervised visit. Although respondent made some progress on his case plan, his repeated denials that domestic violence occurred or that it was the reason for the child's removal gave rise to a justifiable concern about the possibility of future neglect. **In re K.Q., 137.**

Grounds for termination—willful abandonment—sufficiency of findings—The trial court properly terminated a father's parental rights to his daughter on the ground of willful abandonment (N.C.G.S. § 7B-1111(a)(7)) where its findings, which were supported by clear, cogent, and convincing evidence, showed respondent's willful intention to forego all parental responsibilities by his complete lack of contact with his daughter for far longer than the determinative six-month period, his failure to inquire about the child by contacting her mother despite having multiple avenues to do so, and his written response to the mother that he was unwilling to provide any financial support. **In re B.E.V.B., 48.**

Motion to continue—beyond ninety days after initial petition—extraordinary circumstances—notice of hearing—In a private termination of parental rights action, the trial court did not abuse its discretion in denying a mother's motion for a continuance beyond the statutory ninety-day period where there were no extraordinary circumstances to justify a continuance. While the mother claimed that it was difficult for her to travel from Ohio on such short notice (she claimed she received notice of the hearing date only five days in advance), she knew more than sixty days in advance which week the hearing would occur. **In re L.A.J., 147.**

Motion to continue—extraordinary circumstances—incarcerated parent—COVID-19 lockdown—The trial court erred by denying a father's motion to briefly continue the adjudicatory hearing on a petition to terminate his parental rights where the prison in which the father was incarcerated was under lockdown due to COVID-19, preventing him from preparing for the hearing with his attorney and testifying on his own behalf. The lockdown at the prison was an "extraordinary

circumstance" allowing the hearing to be continued beyond the statutory ninety-day period; the father's absence created a meaningful risk of error that undermined the fundamental fairness of the hearing because the father could not meet with counsel before the hearing, each of the four grounds for termination required a careful assessment of his conduct in prison, and no other witness was available to testify as to that information; and the error was prejudicial. **In re C.A.B., 105.**

WORKERS' COMPENSATION

Jurisdiction—timeliness of filing—N.C.G.S. § 97-24—standard of review—de novo—The Industrial Commission's determination of whether an injured employee's application for worker's compensation benefits was timely filed pursuant to N.C.G.S. § 97-24 constituted a jurisdictional fact and, therefore, was subject to de novo review on appeal. **Cunningham v. Goodyear Tire & Rubber Co., 10.**

Timeliness of filing—last payment of medical compensation—chronic back pain—related to prior injury—A claim for worker's compensation benefits filed by a press operator at a tire factory (plaintiff) was not time-barred pursuant to N.C.G.S. § 97-24 because she filed it within two years of the last payment of medical compensation by her employer—for a back injury she suffered in 2014—which occurred in 2017, not 2015 as found by the Industrial Commission. Records and testimony from plaintiff and multiple doctors demonstrated that plaintiff's medical treatment for chronic back pain in 2017 was related to her 2014 injury and was not due solely to injuries she sustained in 2011 (claims for which were settled in 2012). **Cunningham v. Goodyear Tire & Rubber Co., 10.**

SCHEDULE FOR HEARING APPEALS DURING 2022

NORTH CAROLINA SUPREME COURT

Appeals will be called for hearing on the following dates, which are subject to change.

January 5, 6
February 14, 15, 16, 17
March 21, 22, 23, 24
May 9, 10, 11, 23, 24, 25, 26
August 29, 30, 31
September 1, 19, 20, 21, 22
October 3, 4, 5, 6

CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

CHARLES BLUE
v.
THAKURDEO MICHAEL BHIRO, P.A., DIXIE LEE BHIRO, P.A., AND LAUREL HILL MEDICAL CLINIC, P.C.

No. 26A21

Filed 6 May 2022

Civil Procedure—motion to dismiss—matters outside the pleadings—arguments of counsel not evidence—no conversion to motion for summary judgment

On a motion to dismiss a medical negligence claim pursuant to Civil Procedure Rule 12(b)(6), where the trial court did not consider matters outside the pleadings, it was not required to convert the motion to one for summary judgment under Civil Procedure Rule 56, which would have necessitated giving the parties additional time to conduct discovery and present evidence. Although plaintiff's counsel made several factual assertions in his memorandum of law and during the hearing, arguments of counsel are not evidence, and no evidentiary materials were submitted. The matter was remanded to the Court of Appeals for consideration of two remaining issues.

Justice EARLS concurring in part and dissenting in part.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 275 N.C. App. 1, 853 S.E.2d 258 (2020), reversing and remanding an order granting defendants' motion to dismiss plaintiff's complaint entered on 10 December 2019 by Judge Gale

M. Adams in Superior Court, Scotland County. Heard in the Supreme Court on 23 March 2022.

Ward and Smith, P.A., by Christopher S. Edwards and Alex C. Dale, for plaintiff-appellee.

Batten Lee, PLLC, by Gary Adam Moyers and Gloria T. Becker, for defendant-appellants.

NEWBY, Chief Justice.

¶ 1 In this case we determine whether the trial court was required to convert a motion to dismiss under N.C. R. Civ. P. 12(b)(6) to a motion for summary judgment under Rule 56. A motion to dismiss under Rule 12(b)(6) asserts that the complaint, even when the allegations are taken as true, fails to state a claim upon which relief can be granted. If, however, a trial court considers matters outside the pleading, then it must convert the motion to a motion for summary judgment. Here the trial court did not consider matters outside the pleading and thus was not required to convert the motion. Therefore, we reverse the decision of the Court of Appeals and remand to the Court of Appeals for consideration of plaintiff's remaining arguments.

¶ 2 Because this case arises from a motion to dismiss under Rule 12(b)(6), we take the following allegations from the complaint as true. Defendants Thakurdeo Michael Bhiro and Dixie Lee Bhiro were physician assistants licensed to practice in North Carolina and were employed by defendant Laurel Hill Medical Clinic, P.C. (the Clinic). The Clinic "is a family practice located in Laurel Hill, North Carolina . . . comprised of family medicine practitioners who provide comprehensive care to patients of all ages."

¶ 3 The Bhiros were plaintiff's primary care providers. The Bhiros treated plaintiff "for a variety [of] ailments" and provided "routine physical examinations, medic[ation] management, and preventative medicine." On 24 January 2012, Mr. Bhiro ordered a prostate specific antigen (PSA) test to screen plaintiff for prostate cancer. Generally, a PSA test result of 4 nanograms per milliliter of blood "is considered abnormally high for most men and may indicate the need for further evaluation with a prostate biopsy." The results from this test, which were provided to the Bhiros, indicated that plaintiff's PSA level was 87.9 nanograms per milliliter, significantly higher than the normal range. Though the Bhiros continued to treat plaintiff for other issues, they never "provided any follow

up care or referrals as a result of the elevated PSA test result." The results from another PSA test performed six years later on 22 March 2018 indicated that plaintiff's PSA level was 1,763 nanograms per milliliter. Plaintiff was diagnosed with metastatic prostate cancer soon thereafter. The Bhiros "continued as [p]laintiff's primary medical care providers until January, 2019." Plaintiff filed his complaint on 17 June 2019, contending that the Bhiros were negligent by failing to provide follow-up care after learning the results of the 24 January 2012 PSA test and failing to diagnose plaintiff with prostate cancer. Moreover, plaintiff alleged that the Clinic was vicariously liable for the Bhiros' negligence.

¶ 4 All defendants jointly filed a motion to dismiss plaintiff's complaint under Rule 12(b)(6), arguing that plaintiff's action was barred by the three-year statute of limitations and the four-year statute of repose in N.C.G.S. § 1-15(c). In response, plaintiff contended that his complaint was timely filed in 2019 despite his delay because the Bhiros continuously treated him since the allegedly negligent act occurred in 2012. Both defendants and plaintiff submitted memoranda of law in support of their positions. At the hearing on defendants' motion on 12 November 2019, defendants' counsel argued that "when a motion to dismiss is brought, we must look at the four corners of the complaint." Plaintiff's counsel agreed, focusing on the allegations in the complaint throughout his argument. At the end of the hearing, plaintiff's counsel made an oral motion for leave to amend the complaint, stating that "if Your Honor does not believe I included enough factual information in the complaint, we'd request leave to amend the complaint." On 10 December 2019, the trial court entered an order granting defendants' Rule 12(b)(6) motion and implicitly denying plaintiff's motion for leave to amend the complaint, stating in part that:

> The [c]ourt, having heard arguments of parties and counsel for the parties and having reviewed the court file, pleading[ ], and memorand[a] of law submitted by both parties, . . . finds that Plaintiff failed to state a claim upon which relief can be granted and the Defendants' Motion to Dismiss should be allowed pursuant to N.C. R. Civ. P. 12(b)(6).

Thus, the trial court dismissed plaintiff's claims with prejudice. Plaintiff appealed.

¶ 5 At the Court of Appeals, plaintiff argued that the trial court (1) converted the Rule 12(b)(6) motion to a Rule 56 motion and thus erred by not giving the parties sufficient opportunity for discovery and to present

evidence; (2) erred by granting the Rule 12(b)(6) motion, assuming it was not converted; and (3) erred by denying his oral motion for leave to amend the complaint. *Blue v. Bhiro*, 275 N.C. App. 1, 3, 6–7, 853 S.E.2d 258, 260, 262 (2020). A divided panel of the Court of Appeals agreed with plaintiff that the trial court converted the motion to dismiss to one for summary judgment and should have provided additional time for discovery and the presentation of evidence. *Id.* at 2, 853 S.E.2d at 259–60.

¶ 6 The Court of Appeals began its analysis by "determin[ing] whether the trial court reviewed the [c]omplaint under Rule 12(b)(6) . . . or the pleadings and facts outside the pleadings under Rule 56." *Id.* at 3, 853 S.E.2d at 260–61 (emphasis omitted). To determine whether the motion was converted, the Court of Appeals looked to whether the trial court "consider[ed] . . . matters outside the pleading[ ]." *Id.*, 853 S.E.2d at 261. The Court of Appeals acknowledged that "memoranda of law and arguments of counsel are generally 'not considered matters outside the pleading[ ].' " *Id.* at 5, 853 S.E.2d at 261 (quoting *Privette v. Univ. of N.C. at Chapel Hill*, 96 N.C. App. 124, 132, 385 S.E.2d 185, 189 (1989)). The Court of Appeals, however, also noted an apparent exception, that "the consideration of memoranda of law and arguments of counsel can convert a Rule 12 motion into a Rule 56 motion if the memoranda or arguments 'contain[ ] any factual matters not contained in the pleading[ ].' " *Id.*, 853 S.E.2d at 262 (first alteration in original) (quoting *Privette*, 96 N.C. App. at 132, 385 S.E.2d at 189). The Court of Appeals reasoned that the terms of the trial court's order expressly indicated that the trial court considered the parties' memoranda and arguments of counsel, "both of which contained facts not alleged in the [c]omplaint." *Id.* at 4, 853 S.E.2d at 261 (emphasis omitted). According to the Court of Appeals, the trial court did not expressly exclude those facts which were not alleged in the complaint. *Id.* at 6, 853 S.E.2d at 262. Thus, the Court of Appeals concluded that the trial court "considered matters beyond the pleading[ ]" and converted the Rule 12(b)(6) motion to a Rule 56 motion. *Id.*

¶ 7 The Court of Appeals then noted that when a Rule 12(b)(6) motion is converted to a Rule 56 motion, Rule 12(b) provides that "all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56." *Id.* (quoting N.C.G.S. § 1A-1, Rule 12(b), (c) (2019)). Because the trial court did not give the parties such an opportunity, the Court of Appeals concluded that "it would be improper for [this court] to make a determination of the statute of limitations issue on the current evidence." *Id.* For the same reason, the Court of Appeals declined to discuss plaintiff's argument that the trial court erred by denying his motion for leave to amend the complaint. *Id.* at 6–7, 853 S.E.2d at 262. Thus, the Court of Appeals reversed the trial court's order

and remanded the case to the trial court to give the parties "a reasonable opportunity to gather and present evidence on a motion for summary judgment." *Id.* at 7, 853 S.E.2d at 263.

¶ 8 The dissenting opinion at the Court of Appeals, however, would have affirmed the trial court's order. *Id.* (Hampson, J., dissenting). The dissent argued that the trial court did not convert defendants' motion to dismiss. *Id.* at 7–8, 853 S.E.2d at 263. The dissent noted that although the parties' memoranda and arguments of counsel may have referenced "facts not alleged in the [c]omplaint, these were merely arguments of counsel." *Id.* at 8, 853 S.E.2d at 263. The dissent noted that "[n]o evidentiary materials—discovery, exhibits, affidavits, or the like—were offered or submitted to the trial court." *Id.* Thus, the dissent would have held that the trial court did not consider matters outside the pleading and did not convert the motion. *Id.*

¶ 9 Accordingly, the dissent also addressed plaintiff's remaining arguments. *Id.* at 8–11, 853 S.E.2d at 263–65. The dissent argued that the claim was barred by the statute of limitations or the statute of repose in N.C.G.S. § 1-15(c) and thus the trial court properly granted the motion to dismiss. *Id.* at 8–10, 853 S.E.2d at 263–65. Further, the dissent contended that the trial court did not err by denying plaintiff's oral motion for leave to amend the complaint. *Id.* at 10–11, 853 S.E.2d at 265. Therefore, the dissent would have affirmed the trial court's order. *Id.* at 11, 853 S.E.2d at 265. Defendants appealed to this Court based upon the dissenting opinion at the Court of Appeals.

¶ 10 Defendants argue the Court of Appeals erred by holding that the trial court considered matters outside the pleading and thus converted the motion to dismiss to a motion for summary judgment. We agree.

¶ 11 Whether a Rule 12(b)(6) motion has been converted to a Rule 56 motion is a question of law subject to de novo review. *See Eastway Wrecker Serv., Inc. v. City of Charlotte*, 165 N.C. App. 639, 642, 599 S.E.2d 410, 412 (2004), *aff'd per curiam*, 360 N.C. 167, 622 S.E.2d 495 (2005); *see also Green v. Freeman*, 367 N.C. 136, 141, 749 S.E.2d 262, 267 (2013). A Rule 12(b)(6) motion focuses on the legal sufficiency of the allegations in the complaint. *See Bridges v. Parrish*, 366 N.C. 539, 541, 742 S.E.2d 794, 796 (2013) ("We consider 'whether the allegations of the complaint, if treated as true, are sufficient to state a claim upon which relief can be granted under some legal theory.' " (quoting *Coley v. State*, 360 N.C. 493, 494, 631 S.E.2d 121, 123 (2006))). As such, when considering a Rule 12(b)(6) motion, the trial court is limited to reviewing the allegations made in the complaint. *See Kessing v. Nat'l Mortg.*

Corp., 278 N.C. 523, 533, 180 S.E.2d 823, 829 (1971) ("[U]nder Rule[ ] 12(b)(6) . . . the motion is decided on the pleading[ ] alone . . . ."). Rule 12(b) addresses a trial court's consideration of matters not included in the complaint, providing that

> [i]f, on a motion asserting the defense numbered (6), to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56.

N.C.G.S. § 1A-1, Rule 12(b) (2021). Thus, "[a] Rule 12(b)(6) motion to dismiss . . . is indeed converted to a Rule 56 motion for summary judgment when matters outside the pleading[ ] are presented to and not excluded by the court." *Stanback v. Stanback*, 297 N.C. 181, 205, 254 S.E.2d 611, 627 (1979) (citing *Kessing*, 278 N.C. at 533, 180 S.E.2d at 829).

¶ 12 The phrase "matters outside the pleading" refers to evidentiary materials used to establish facts. *See Carlisle v. Keith*, 169 N.C. App. 674, 689, 614 S.E.2d 542, 552 (2005) ("While extraneous matter usually consists of affidavits or discovery documents, it may also consist of live testimony, stipulated facts, [or] documentary evidence in a court's file." (alteration in original) (emphasis omitted) (quoting G. Gray Wilson, 1 North Carolina Civil Procedure § 12-3, at 210–11 (2d ed. 1995))). Notably, "it is axiomatic that the arguments of counsel are not evidence." *State v. Collins*, 345 N.C. 170, 173, 478 S.E.2d 191, 193 (1996). Accordingly, "[m]emoranda of points and authorities as well as briefs and oral arguments . . . are not considered matters outside the pleading." *Privette*, 96 N.C. App. at 132, 385 S.E.2d at 189 (second alteration in original) (quoting 5 Wright & Miller, Federal Practice and Procedure § 1366, at 682 (1969)). Finally, it is a "well[-]established principle that there is a presumption in favor of the regularity and validity of the proceedings in the lower court." *Phelps v. McCotter*, 252 N.C. 66, 67, 112 S.E.2d 736, 737 (1960) (citing *Durham v. Laird*, 198 N.C. 695, 153 S.E. 261 (1930)).

¶ 13 Here the trial court's order stated that it considered the "arguments of parties and counsel for the parties and . . . reviewed the court file, pleading[ ], and memorand[a] of law submitted by both parties." Nothing in the trial court's order indicates any additional documents were presented apart from the memoranda submitted by the parties. Defendants' memorandum included the pleadings, a statute, and case law as exhibits, but it did not include any evidentiary materials. Plaintiff did not include any exhibits with his memorandum. Though plaintiff's counsel made

several factual assertions in his memorandum and during the hearing, these statements by plaintiff's counsel were not evidence and thus are not matters outside the pleading. Accordingly, the trial court did not consider any matters outside the pleading.

¶ 14 Because the trial court's review was limited to the pleading, it did not convert the Rule 12(b)(6) motion to a Rule 56 motion. Therefore, the Court of Appeals erred by reversing the trial court's order. Further, the Court of Appeals majority did not determine whether the trial court properly denied plaintiff's motion for leave to amend his complaint nor whether the trial court properly granted defendants' motion to dismiss. Accordingly, we remand this case to the Court of Appeals to address these issues in the first instance. *See Wilkie v. City of Boiling Spring Lakes*, 370 N.C. 540, 540, 809 S.E.2d 853, 854 (2018) (reversing a decision of the Court of Appeals and remanding the case for the Court of Appeals to consider the defendant's remaining arguments in the first instance).

REVERSED AND REMANDED.

Justice EARLS concurring in part and dissenting in part.

¶ 15 I agree with the majority that the Court of Appeals erred in concluding that defendants' motion to dismiss had been or needed to be converted into a Rule 56 motion for summary judgment. I write separately to express my disagreement with the majority's decision to remand this case to the Court of Appeals. There are two remaining issues in this case—whether the trial court properly granted defendants' motion to dismiss and whether the trial court should have granted Mr. Blue leave to amend his complaint. Both are pure questions of law that have been fully briefed before this Court. There are no disputed issues of fact that need to be resolved to address these issues. There are meaningful prudential reasons why we should endeavor to resolve this dispute quickly —according to his complaint, Mr. Blue was diagnosed with metastatic prostate cancer in 2018, allegedly due to defendants' negligence. Thus, I believe resolving the outstanding legal questions rather than remanding for further proceedings would be the disposition most consistent with our responsibility to foster the fair, evenhanded, efficient, open, and meaningful administration of justice.

¶ 16 It is indisputable that this Court possesses the authority to resolve this case now under these circumstances. Indeed, it is routine for this Court to address dispositive issues not resolved by the Court of Appeals when doing so requires making purely legal determinations. *See*, *e.g.*, *Morris Commc'ns Corp. v. City of Bessemer City Zoning Bd.*

of Adjustment, 365 N.C. 152, 158 (2011) ("Remand is not automatic when 'an appellate court's obligation to review for errors of law can be accomplished by addressing the dispositive issue(s).' " (quoting *N.C. Dep't of Env't & Nat. Res. v. Carroll*, 358 N.C. 649, 664 (2004))); *see also Meza v. Div. of Soc. Servs.*, 364 N.C. 61, 73 (2010) ("We now proceed to the substantive issues in the interests of judicial economy and fairness to the parties."); *N.C. Farm Bureau Mut. Ins. Co. v. Cully's Motorcross Park, Inc.*, 366 N.C. 505, 514 (2013) ("[W]hen the new analysis relies upon conclusions of law rather than findings of fact, and when the findings of fact made by the trial court are unchallenged, this Court may elect to conduct the analysis rather than to remand the case.").

¶ 17 As we explained in *Carroll*, there are multiple prudential factors that counsel in favor of fully resolving an appeal when it comes before this Court:

> In the present case, the trial court's erroneous articulation and application of the *de novo* standard of review in no way interferes with our ability to assess how that standard *should have been applied* to the particular facts of this case. Moreover, the status of [the plaintiff's] employment and salary has remained unsettled during the past six years of ongoing litigation. Thus, in the interests of judicial economy and fairness to the parties, we proceed to consider the substantive issues on appeal.

358 N.C. at 665. While it is also certainly within this Court's discretion to decide to remand the case for the Court of Appeals to resolve remaining legal issues in these circumstances, we should explain why we are choosing to remand this case rather than reach outstanding legal issues by reference to neutral principles, and we should consistently apply those principles in considering whether a remand is necessary in this case and in future cases. In addition to the prudential factors noted in *Carroll*, such neutral and consistent principles might include the length of time the case has been pending to date, the extent to which any party is prejudiced by further delay, whether deciding the issue will result in a final disposition of the case, whether the parties have had the opportunity to fully brief the remaining issues, and whether the issue requires the routine application of well-established law such that remand would likely result in a quick resolution unlikely to engender further appeal, as opposed to an issue of first impression for this Court such that immediate guidance from this Court will be useful and more expeditious than multiple appeals.

¶ 18 In this case, although the majority in the Court of Appeals did not reach the two outstanding questions presented in Mr. Blue's appeal, the dissent did. And as the dissent and the parties' briefs make clear, the legal question the Court of Appeals will need to reach on remand is not one this Court has previously addressed. In particular, answering the question of whether Mr. Blue's complaint is time-barred will involve interpreting how the continuing course of treatment exception to the three-year statute of limitations for personal injury claims applies to care provided by a primary-care physician. This Court recognized the continuing course of treatment exception for the first time in *Horton v. Carolina Medicorp, Inc.*, 344 N.C. 133 (1996). We have not revisited the doctrine since. There are numerous Court of Appeals opinions interpreting the doctrine in ways that are arguably internally contradictory. *Compare Whitaker v. Akers*, 137 N.C. App. 274, 277–78 (2000) (concluding that the doctrine applies when a physician continues a particular course of treatment over a period of time, so long as the doctor continues to fail to diagnose and to treat the condition), *with Glover v. Charlotte-Mecklenburg Hosp. Auth.*, 261 N.C. App. 345, 355–56 (2018) (concluding that the plaintiff need not show the treatment rendered subsequent to the original negligent act was also negligent), *writ denied*, *review denied*, 372 N.C. 299 (2019). Accordingly, it appears that the chances of this case coming back to this Court after the Court of Appeals answers the precise legal question presently before us, all prior to discovery and a trial, are not trivial.

¶ 19 Nor is the cost to the parties trivial, both financially and otherwise. Mr. Blue filed his complaint almost three years ago. The remaining questions before us have already been briefed and argued at least twice. If Mr. Blue prevails in the appellate process and his claim is not time-barred, his case will be remanded to the trial court for further proceedings. As a litigant with a serious life-threatening illness, justice delayed may be justice denied in this case. Here, an unnecessarily prolonged appellate process is inconsistent with the prompt and efficient administration of justice, an aim to which we all and always aspire. By contrast, these factors and considerations were not present in the case relied upon by the majority, *Wilkie v. City of Boiling Spring Lakes*, 370 N.C. 540 (2018). In *Wilkie*, the issues not decided by this Court were not briefed in the first place because this Court denied discretionary review specifically as to those issues. *See* Special Order, *Wilkie v. City of Boiling Spring Lakes*, No. 44PA17 (N.C. May 3, 2017). Nor did those remaining issues implicate any novel or particularly complex legal principles: the ultimate question was whether property owners would be compensated by the government for flood damage to their home. *Wilkie*, 370 N.C. at 540. While

Wilkie confirms the indisputable notion that this Court possesses the authority to remand cases to the Court of Appeals to decide purely legal issues in the first instance, *Wilkie* does nothing to demonstrate why doing so is necessary or appropriate in this case.

¶ 20 Under the circumstances of this case, jurisprudential and administrative reasons justify proceeding to resolve the two remaining outstanding issues, which were both addressed by the dissent below, briefed by the parties, and are thus properly before us. Therefore, I respectfully concur in part and dissent in part.

DORIS G. CUNNINGHAM, EMPLOYEE
v.
THE GOODYEAR TIRE & RUBBER COMPANY, EMPLOYER, LIBERTY MUTUAL INSURANCE COMPANY, CARRIER

No. 465A20

Filed 6 May 2022

1. Workers' Compensation—jurisdiction—timeliness of filing—N.C.G.S. § 97-24—standard of review—de novo

The Industrial Commission's determination of whether an injured employee's application for worker's compensation benefits was timely filed pursuant to N.C.G.S. § 97-24 constituted a jurisdictional fact and, therefore, was subject to de novo review on appeal.

2. Workers' Compensation—timeliness of filing—last payment of medical compensation—chronic back pain—related to prior injury

A claim for worker's compensation benefits filed by a press operator at a tire factory (plaintiff) was not time-barred pursuant to N.C.G.S. § 97-24 because she filed it within two years of the last payment of medical compensation by her employer—for a back injury she suffered in 2014—which occurred in 2017, not 2015 as found by the Industrial Commission. Records and testimony from plaintiff and multiple doctors demonstrated that plaintiff's medical treatment for chronic back pain in 2017 was related to her 2014 injury and was not due solely to injuries she sustained in 2011 (claims for which were settled in 2012).

Chief Justice NEWBY dissenting.

Justice BARRINGER joins in this dissenting opinion.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 273 N.C. App. 497 (2020), reversing and remanding an opinion and award entered 30 July 2019 by the North Carolina Industrial Commission. Heard in the Supreme Court on 4 October 2021.

Law Offices of Kathleen G. Sumner, by Kathleen G. Sumner and David P. Stewart; and Jay Gervasi, for plaintiff.

Young Moore & Henderson, PA, by Angela Farag Craddock, for defendant-appellant.

The Sumwalt Group, by Vernon Sumwalt; and Lennon, Camak & Bertics, PLLC, by Michael Bertics, for North Carolina Advocates for Justice, amicus curiae.

HUDSON, Justice.

¶ 1 The Goodyear Tire & Rubber Company (defendant-employer) and Liberty Mutual Insurance Company (defendant-carrier) (together, defendants) appeal as of right on the basis of a dissenting opinion from a decision of the Court of Appeals, in which the majority held the North Carolina Industrial Commission erred in denying Doris G. Cunningham (plaintiff) her claim for disability compensation from defendants. On appeal, defendants argue the Court of Appeals erred in holding plaintiff's claim was not time-barred under N.C.G.S. § 97-24 thereby reversing the Full Commission's dismissal of plaintiff's claim based on an alleged 27 May 2014 injury, and by remanding the case to the Commission to determine whether plaintiff suffered a compensable injury under the Workers' Compensation Act. We affirm the decision of the Court of Appeals reversing the opinion and award of the Commission and remand for further remand to the Commission for consideration of the merits of plaintiff's 27 May 2014 claim.

I. Factual and Procedural Background[1]

¶ 2 Plaintiff, now 59 years old, began working for defendant-employer, the Goodyear Rubber and Tire Company, in 1999, was laid off and rehired

1. Although in a workers' compensation case, our summary of the facts is ordinarily taken from unchallenged findings of the Industrial Commission, here we are called upon

in 2001, and worked continuously thereafter for at least 17 years. Since 2014, when the relevant events began, plaintiff has been working as a press operator. This physically demanding job requires plaintiff to walk at least eight miles a day, pick up tires, place them in a loader pan, and clear out jams when the tires backed up. Due to her height, she frequently has to reach, climb, and lift. She is personally responsible for 15 machines that "cook" the tires, and when other workers are on break, she handles twice that amount. She picks up "anywhere from one thousand to fourteen hundred tires" during her typical 12-hour shift. Her production quota, or "expectancy" from defendant-employer, is the processing of fourteen-hundred tires per shift.

¶ 3 Plaintiff picks the tires up from a flatbed truck and places them into a loading pan, in order to scan them. When she lifts the tire off the flat bed, she pulls it towards her, stands it up, and flips it over to turn the barcode up, which she scans along with the paperwork to ensure the tire is the correct one for the mold. At that point a machine picks up the tires from the loading pan where they are molded and pressed and then returned to a conveyor belt. The tires sometimes get stuck in this process and, on a bad day, ten tires an hour might get stuck. Plaintiff had injured her back twice while lifting tires in 2011; she filed claims with the Commission and both claims were settled in 2012.

¶ 4 On 27 May 2014 during a twelve-hour shift, plaintiff attempted to pick a tire up off the truck, but the tire was stuck, causing plaintiff to hurt her back. She immediately notified her supervisor that she was hurt. The next morning when she woke up, she could not move. She filed an internal report titled a Form F159, or "Associate Report of Incident and Associate Statement of Work Related Accident." Plaintiff was placed on light duty for six weeks, and she returned to full-time work on 8 July 2014 without missing any work.

¶ 5 When defendant-employer received plaintiff's F159, it sent the information to defendant-carrier, Liberty Mutual, plaintiff-employer's insurance carrier for workers' compensation. Defendant-carrier used the information received from defendant-employer to complete a Form 19, Employer's Report of Employee's Injury, and filed it with the Commission. Defendant-carrier mailed a packet including the completed Form 19 and a blank Form 18, "Notice of Accident to Employer and

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to re-find facts in order to determine an underlying but dispositive jurisdictional issue. Accordingly, we are not bound by those findings, as explained below, and base this summary on the evidence.

Claim of Employee," to plaintiff. However, plaintiff testified that she never received these forms and that she believed her workers' compensation claim was already accepted because she had been placed on light duty, unlike for her 2011 injuries. She testified she was prepared to fill out a Form 18 in 2014 but was told by her union representative that "they" had already received her form.

¶ 6 After her 27 May 2014 injury, plaintiff received medical treatment through an onsite medical facility (the dispensary), as well as from Frank Murray, a physical therapist who contracts with defendant-employer to provide physical therapy treatment to defendant-employer's employees. Mr. Murray had treated Ms. Cunningham once on 10 October 2011 following her 18 September 2011 back injury and determined that "she had low-back pain, but it was beginning to resolve. She had no real limitations in range of motion or strength." Mr. Murray did not treat plaintiff again for back pain until after the 27 May 2014 injury on 3 June 2014.

¶ 7 On 3 June 2014, plaintiff reported to Mr. Murray that her pain was at a level of ten out of ten. By 9 June 2014, plaintiff's pain was "five out of ten at worse [sic], to two out of ten at best." Mr. Murray testified he treated plaintiff on 10, 13, 18, 23, and 24 June 2014, and by the last visit, plaintiff's "[r]ange of motion was full and painless."

¶ 8 On 23 February 2015, however, plaintiff returned to Mr. Murray, reporting that her back pain had never completely subsided since the 2014 injury, and that she felt a recent increase in pain, describing it as "eight out of ten down to four out of ten." Mr. Murray diagnosed plaintiff with lower back pain. On 3 March 2015, Mr. Murray saw plaintiff again and she reported her pain as between "three out of ten to five out of ten."

¶ 9 Plaintiff did not return to the dispensary and Mr. Murray again until 25 April 2017. She testified that the reason she did not return until 2017 was that she began experiencing foot pain in addition to back pain and was referred to a podiatrist, Dr. Mark Thomas Eaton, in March 2016. Dr. Eaton initially diagnosed her with plantar fasciitis. However, following extensive treatment for plantar fasciitis, Dr. Eaton informed plaintiff that she had been misdiagnosed and that her problems did not come from her feet, but were caused by her back problems stemming from her 27 May 2014 injury.

¶ 10 Plaintiff returned to Mr. Murray for treatment for her back pain on 25 April 2017. Mr. Murray testified that "[plaintiff] didn't indicate that there was anything new or that something happened [in 2017]. Her response was, no, nothing happened. It—this never has completely gone away." Mr. Murray testified there was "no precipitating episode" of her

back pain in 2017 and that her pain reflected "episodic increases and decreases from the first time that [he] saw her."

¶ 11 On 28 April 2017, plaintiff visited Kelly Avants, the nurse case manager, at the dispensary. Ms. Avants told plaintiff that defendant-carrier closed her file because "she reached the statute of limitations in regard to her back claims" and they would not cover further treatment. On 8 May 2017, plaintiff reported that she had been injured again on 25 April 2017 from a stuck tire and she felt pain in her lower back.

¶ 12 David Jones, a neurosurgeon who had previously seen plaintiff for her 2011 injury, evaluated plaintiff on 19 June 2017 and 18 July 2019, following an MRI. Based on the MRI, Dr. Jones concluded that plaintiff had degeneration in the last two discs of her spine, that one of the discs had a "small far lateral disc bulge," that the second "had a more focal right-sided disc protrusion," and that both could irritate nerve roots. Dr. Jones testified it was "more than likely" that a 2017 injury exacerbated plaintiff's 27 May 2014 injury, and that "once you hurt your back the first time you are more likely to injure your back again," but there was no way to determine to what extent each injury caused her current condition.

¶ 13 On 19 May 2017, plaintiff filed separate Form 18s with the Commission for the alleged incidents on 27 May 2014 and on 25 April 2017, respectively. Defendants filed a Form 61 denying the 27 May 2014 claim and moving to dismiss the claim, arguing that the action was time-barred because it was not filed within two years of the date of the alleged injury. The matters were consolidated and on 13 December 2018, the Deputy Commissioner entered an opinion and award denying the 25 April 2017 claim and dismissing the 27 May 2014 claim for lack of jurisdiction. Regarding the 27 May 2014 injury, the Deputy Commissioner found that plaintiff did not file a claim for compensation until 29 May 2017 and that plaintiff last received medical treatment related to that injury on 3 March 2015. The Deputy Commissioner concluded plaintiff failed to file her claim within two years of either the date of the incident or the last payment of medical compensation and the claim was therefore time-barred under N.C.G.S. § 97-24(a). Regarding the 25 April 2017 claim, the Deputy Commissioner concluded the evidence in the record did not support a compensable injury.

¶ 14 Plaintiff appealed to the Full Commission, specifically arguing that she last received payment for her 27 May 2014 injury on 25 April 2017 and, therefore, had filed her claim within two years of the last payment of medical compensation. On 30 July 2019, the Full Commission entered an opinion and award dismissing the 27 May 2014 claim for lack of

jurisdiction and denying the 25 April 2017 claim. Plaintiff appealed to the Court of Appeals.

¶ 15 In a divided opinion authored by Judge Brook, the Court of Appeals reversed the opinion and award entered by the Commission after holding that compliance with the requirement of N.C.G.S. § 97-24(a) is a jurisdictional fact reviewed for the greater weight of the evidence, finding "that the 25 April 2017 visit was related to Plaintiff's May 2014 injury," and on that basis holding that the Commission erred in concluding that plaintiff's claim was time-barred by N.C.G.S. § 97-24(a). *Cunningham v. Goodyear Tire & Rubber Co.*, 273 N.C. App. 497, 506–07 (2020). Judge Tyson dissented from the majority opinion, arguing that whether a claim is time-barred by N.C.G.S. § 97-24(a) is governed by the same standard of review as other conclusions in an order and award from the Industrial Commission: "(1) whether competent evidence exists to support the Commission's findings of fact, and (2) whether the Commission's findings of fact justify its conclusions of law and decision." *Id.* at 510 (quoting *Simmons v. Columbus Cty. Bd. of Educ.*, 171 N.C. App. 725, 727–28 (2005)). Judge Tyson concluded that "[t]he majority's opinion exceeds its lawful scope of appellate review, reweighs the evidence and credibility of the testimony as finders of fact, to reverse the Commission's opinion and award." *Id.* at 513.

¶ 16 Defendants timely appealed on the basis of the dissenting opinion as of right under N.C.G.S. § 7A-30.

II. Analysis

¶ 17 On appeal, defendants argue the Court of Appeals (1) exceeded its lawful scope of appellate review by reweighing the evidence and assessing credibility of the testimony as finders of fact in order to reverse the Industrial Commission's Opinion and Award determining that Plaintiff's workers' compensation claim of injury on 27 May 2014 was barred under N.C.G.S. § 97-24; and (2) erred by failing to determine that the Industrial Commission's conclusion that Plaintiff's claim is barred under N.C.G.S. § 97-24 is supported by findings of fact, which are based upon competent evidence such that the Commission's Opinion and Award should have been affirmed. First, we hold that whether a workers' compensation claim was barred because the claim was filed after the two-year limit set by N.C.G.S. § 97-24 is a jurisdictional matter that is subject to de novo review, including of the facts, on appeal. Second, we hold the Court of Appeals properly determined that the Industrial Commission erred in concluding that plaintiff's claim is barred. Accordingly, we affirm the judgment of the Court of Appeals.

A. Standard of Review

¶ 18 **[1]** Defendants first argue the Court of Appeals erred in holding that whether a plaintiff complied with the requirements of N.C.G.S. § 97-24 is a "jurisdictional fact" subject to a de novo standard of review. In a question of first impression for this Court, defendants argue the standard of review on appeal for Commission findings on compliance with the statute's timely filing requirement is a competent evidence standard of review, rather than de novo review as applied by the Court of Appeals below.[2] We disagree.

¶ 19 Under our precedents, we ordinarily review an order of the Full Commission to determine "whether any competent evidence supports the Commission's findings of fact and whether the findings of fact support the Commission's conclusions of law." *Medlin v. Weaver Const., LLC*, 367 N.C. 414, 423 (2014) (quoting *Deese v. Champion Int'l Corp.*, 352 N.C. 109, 116 (2000)). Ordinarily, "on appeal, this Court 'does not have the right to weight the evidence and decide the issue on the basis of its weight. The court's duty goes no further than to determine whether the record contains any evidence tending to support the finding.' " *Adams v. AVX Corp.*, 349 N.C. 676, 681 (1998) (quoting *Anderson v. Lincoln Const. Co.*, 265 N.C. 431, 434 (1965)). However, when reviewing findings of fact by the Commission on which the scope of its jurisdiction depends, we apply a de novo standard of review. *See Richards v. Nationwide Homes*, 263 N.C. 295, 303–04 (1965) ("When a [party] challenges the jurisdiction of the Industrial Commission, the findings of fact made by the Commission, on which its jurisdiction is dependent, are not conclusive on the superior court, but the superior court has the power . . . on appeal, to consider all the evidence in the record, and to make therefrom independent findings of jurisdictional facts."); *id.* at 304 (" 'As a general rule the court will not accept as conclusive findings of fact of the Commission concerning a jurisdictional question, but will weigh evidence relating thereto and make its own independent findings of fact.' " (quoting 100 C.J.S. Workmen's Compensation § 763(7),

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2. Although defendants in their notice of appeal framed their first issue generally as the Court of Appeals "reweighing" the evidence, in their brief they only argue that findings regarding the timely-filing requirement are not "jurisdictional facts" and, accordingly, are subject to a competent-evidence standard of review. That precise issue was not specifically set out in the dissenting opinion below, which instead expressed the view that all findings made by the Commission are to be subject to a competent-evidence standard without distinguishing findings that are jurisdictional. *See Cunningham*, 273 N.C. App. at 513. Although defendants' argument appears to exceed the scope of review under Appellate Rule 16(b), we exercise our discretion to suspend the rules and reach it. *See* N.C. R. App. P. 2 (2021).

p. 1216)). Accordingly, we have held that "the finding of a jurisdictional fact by the Industrial Commission is not conclusive upon appeal even though there be evidence in the record to support such finding. The reviewing court has the right, and the duty, to make its own independent findings of such jurisdictional facts from its consideration of all the evidence in the record." *Lucas v. L'il General Stores*, 289 N.C. 212, 218 (1976).

¶ 20 N.C.G.S. § 97-24(a) provides that a claim is

> forever barred unless (i) a claim or memorandum of agreement as provided in G.S. 97-82 is filed with the Commission or the employee is paid compensation as provided under this Article within two years after the accident or (ii) a claim or memorandum of agreement as provided in G.S. 97-82 is filed with the Commission within two years after the last payment of medical compensation when no other compensation has been paid and when the employer's liability has not otherwise been established under this Article.

N.C.G.S. § 97-24(a) (2021). Defendants argue the Court of Appeals erred in holding that compliance with N.C.G.S. § 97-24(a) is a jurisdictional fact subject to de novo review, contending instead that this Court expressly rejected the view that a finding regarding compliance with the timely filing requirement under N.C.G.S. § 97-24 is a jurisdictional fact in *Gore v. Myrtle/Mueller*, 362 N.C. 27 (2007). Plaintiff, in turn, argues the Court of Appeals correctly held that a finding on compliance with N.C.G.S. § 97-24 is a jurisdictional fact and *Gore* provides no support for defendants' position.

¶ 21 In *Biddix v. Rex Mills*, 237 N.C. 660 (1953), this Court described the role of N.C.G.S. § 97-24's timely-filing requirement in giving rise to the jurisdiction of the Commission:

> The underlying spirit and purpose of the [Workers' Compensation] Act is to encourage and promote the amicable adjustment of claims and to provide a ready means of determining liability under the Act when the parties themselves cannot agree. The Industrial Commission stands by to assure fair dealing in any voluntary settlement and to act as a court to adjudicate those claims which may not be adjusted by the parties themselves.
>
> But the Commission has no authority—statutory or otherwise—to intervene and make an award

> of any type until its jurisdiction as a judicial tribunal has been invoked in the manner prescribed in the Act under which it operates.
>
> The claim is the right of the employee, at his election, to demand compensation for such injuries as result from an accident. If he wishes to claim compensation, he must notify his employer within thirty days after the accident, G.S. §§ 97-22, 97-23, and if they cannot agree on compensation, he, or someone on his behalf, must file a claim with the Commission within twelve months after the accident, in default of which his claim is barred. G.S. § 97-24. *Thus the jurisdiction of the Commission, as a judicial agency of the State, is invoked.*

Biddix, 237 N.C. at 662–63 (emphasis added). Moreover, despite holding the employer in that case should not be estopped from raising the timely-filing requirement, this Court noted that it did not "hold an employer may not by his conduct waive the filing of a claim within the time required by law. The law of estoppel applies in compensation proceedings as in all other cases." *Id.* at 665. Accordingly, in *Biddix* long before *Gore*, this Court recognized both that estoppel may in some circumstances bar assertion of the timely-filing requirement and that the timely-filing requirement under N.C.G.S. § 97-24 is jurisdictional in nature.

¶ 22 Contrary to defendants' argument, we did not deviate from that view in *Gore*. In *Gore*, we held that a party may be equitably estopped from asserting the two-year filing requirement under N.C.G.S. § 97-24 as an affirmative defense. *Gore*, 362 N.C. at 40. The plaintiff in *Gore* had alleged that she experienced two work-related injuries but did not file a Form 18 for either incident with the Commission within the two-year filing limit under N.C.G.S. § 97-24. The Commission found that the plaintiff had filled out the Form 18 with the employer's human resources manager, but that the manager lost the forms unintentionally, and furthermore that "[t]he plaintiff was under the reasonable belief and reasonably relied on her perception that the forms would be properly filed with the Industrial Commission." *Id.* at 30. The Court of Appeals reversed, holding the timely-filing requirement was not satisfied and, therefore, the plaintiff's claims were barred.

¶ 23 This Court disagreed, reversing the Court of Appeals and holding the doctrine of equitable estoppel may bar a defendant from raising the timely-filing requirement as an affirmative defense. *Id.* at 40. This Court

in *Gore* advanced several rationales for its holding. First, we reasoned that "[t]his principle is consistent with the general guideline that the Workers' Compensation Act requires liberal construction to accomplish the legislative purpose of providing compensation for injured employees, and that this overarching purpose is not to be defeated by the overly rigorous 'technical, narrow and strict interpretation' of its provisions." *Id.* at 36 (quoting *Guest v. Brenner Iron & Metal Co.*, 241 N.C. 448, 452 (1955)). Second, we noted that the Court of Appeals addressed the question 22 years before *Gore* in *Belfield v. Weyerhauser Co.*, 77 N.C. App. 332 (1985), and held that equitable estoppel could prevent a party from invoking the timely-filing requirement and reasoned that "[w]e have been particularly reluctant to interfere with past precedents when . . . litigants have arranged their affairs and 'rights have become vested which will be seriously impaired if the rule thus established is reversed.' " *Gore*, 362 N.C. at 37 (quoting *Hill v. Atlantic & N.C. R.R. Co.*, 143 N.C. 539, 573 (1906)). Finally, we observed that the rule was consistent with the approach of a majority of courts in other states, citing *Larson's Workers Compensation Law* for the statement that "modern application of estoppel and waiver in the present context serves 'as an antidote to the earlier approach, which was the highly conceptual one of saying that timely claim (and sometimes even notice) was "jurisdictional[.]" ' " *Id.* at 38 (quoting *Larson's*, 7 § 126.13[1]).

¶ 24 Defendants seize on this last rationale and our reliance on *Larson's* to argue that in *Gore* we necessarily held that a finding as to whether the plaintiff satisfied the timely-filing requirement is not a "jurisdictional fact" which is subject to de novo review. A close examination of our reasoning in that decision reveals that defendants' reliance is misplaced. In our discussion of the approaches of other states on the question presented in *Gore*, we cited *Larson's*, which characterized the minority approach to the issue of whether equitable estoppel could bar a defendant's invocation of the timely-filing requirement as "jurisdictional" and described that approach as one that exalted the timely-filing requirement as "a defense outside the reach of waiver, estoppel, or anything else." *Id.* But simply because we cited *Larson's* for the analysis of caselaw from other states and its characterization of the minority view, it does not follow that, based on the treatise's description of that view as "jurisdictional," we abandoned well-established caselaw that the timely-filing requirement is a condition precedent for the exercise of jurisdiction by the Commission. To the contrary, in *Gore* itself, we reaffirmed that "if the employee follows this procedure [of timely filing under the statute], "the jurisdiction of the Commission, as a judicial agency of the State, is invoked." *Id.* at 34. Accordingly, our discussion of the analysis in *Larson's*

is limited to acknowledgment of the minority view among other states that assertion of the timely-filing requirement as a bar to a workers' compensation claim is not limited by the doctrine of equitable estoppel.

¶ 25 These seemingly contradictory statements in *Gore*—recognition of the jurisdictional nature of the timely-filing requirement as a condition precedent and rejection of a "jurisdictional" approach to equitable estoppel—can be reconciled. Under North Carolina law, satisfaction of the timely-filing requirement is a condition precedent to the exercise of the Commission's jurisdiction and, accordingly, implicates the subject-matter jurisdiction of the Commission.[3] However, under *Gore*, unlike questions of subject-matter jurisdiction in other contexts, a defendant may be barred by equitable estoppel from raising lack of jurisdiction for failure to comply with the timely-filing requirement of N.C.G.S. § 97-24 as an affirmative defense. The reason for this exception to the general rule that a defense of lack of jurisdiction is not barred by estoppel is the primary rationale of *Gore*: the legislative purpose underpinning the Workers' Compensation Act, which is the statutory source of the Commission's jurisdiction. As we explained in *Gore*, "[t]his principle is consistent with the general guideline that the Workers' Compensation Act requires liberal construction to accomplish the legislative purpose of providing compensation for injured employees, and that this overarching purpose is not to be defeated by the overly rigorous 'technical, narrow and strict interpretation' of its provisions." *Id.* at 36. As an overly strict reading of the timely-filing requirement would frustrate this purpose, we reasoned that the jurisdiction conferred by the Workers' Compensation Act on the Commission was more generous than that which a fastidious adherence to the timely-filing requirement would entail and, accordingly, equitable estoppel could bar assertion of lack of jurisdiction as a defense. Indeed, procedural requirements

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3. Defendants also rely on our statement in *Gore* that "We have long held that a condition precedent, unlike subject matter jurisdiction, may be waived by the beneficiary party by virtue of its conduct." *Gore*, 362 N.C. at 38 (citing *Johnson & Stroud v. R.I. Ins. Co.*, 172 N.C. 142, 147-48 (1916)). We concede this sentence is an inaccurate statement in the context of the Workers' Compensation Act because here, at least, the timely-filing requirement is a condition precedent *to the invocation of the Commission's jurisdiction.* Accordingly, it implicates the subject-matter jurisdiction of the Commission. The provision in *Johnson & Stroud* was a term of a contract that was a condition precedent to liability under the contract and, accordingly, went to the merits of that case, not to the judicial power of a court or other body. By this anomalous sentence in *Gore* we did not abandon the view to which we have hewn since *Biddix* that assertion of the timely-filing requirement may be barred by estoppel *despite* implicating the subject-matter jurisdiction of the Commission, which after all is a creature of statute, since this interpretation best accomplishes the purpose of that statute.

are somewhat relaxed elsewhere in the Workers' Compensation Act. *See Belfield v. Weyerhauser Co.*, 77 N.C. App. 332, 336–37 (1985) (collecting examples). Although we acknowledged the legislative purpose of compensating workers for their injuries demanded a liberal construction in holding equitable estoppel may bar a defendant from assertion of the timely-filing requirement, this decision merely construed the reach of the Commission's jurisdiction consistent with the Act's legislative purpose; it did not convert a jurisdictional provision into a non-jurisdictional one. We conclude that *Gore* fails to support defendants' argument that a finding regarding the timely-filing requirement is not jurisdictional.

¶ 26 Finally, while this Court is not bound by decisions of the Court of Appeals, that court has consistently applied a de novo standard of review to the Commission's findings under N.C.G.S. § 97-24, treating them as jurisdictional. *See*, *e.g.*, *Hall v. U.S. Xpress*, *Inc.*, 256 N.C. App. 635, 640 (2017); *Craver v. Dixie Furniture Co.*, 115 N.C. App. 570, 577 (1994); *Weston v. Sears Roebuck & Co.*, 65 N.C. App. 309, 314 (1984), *disc. rev. denied*, 311 N.C. 407 (1984).

¶ 27 In summary, we hold that a finding by the Commission as to whether an employee seeking workers' compensation complied with N.C.G.S. § 97-24's timely-filing requirement is a jurisdictional fact and, as such, is subject to de novo review.

B. Application of the Timely-Filing Requirement

¶ 28 **[2]** Having determined the Court of Appeals used the appropriate, de novo standard of review for review of jurisdictional facts, we now consider whether it erred in applying that standard in its review of the Commission's findings. In its (jurisdictional) findings of fact below, the Commission determined that the 2014 claim was barred because defendant-employer "did not pay for medical treatment beyond April 2015," and plaintiff did not file a claim within two years. The Court of Appeals held the Commission erred in so finding because evidence in the record showed that "plaintiff's return visit to Mr. Murray on 25 April 2017—which he related back to his 2014–15 treatment of [p]laintiff and was paid for by [d]efendant-[e]mployer—was related to her alleged 27 May 2014 injury." *Cunningham*, 273 N.C. App. at 507.

¶ 29 We agree. Applying a de novo standard of review and freely substituting our own judgment, the evidence in the record tends to show that plaintiff's 25 April 2017 visit to Mr. Murray for treatment was related to her 27 May 2014 injury. Specifically, Mr. Murray testified that plaintiff returned for treatment in April 2017 because "[s]he continued to have some back pain." Furthermore, plaintiff had received treatment from

another doctor for plantar fasciitis and, as Mr. Murray testified, "at some point . . . towards the end of that treatment, the doctor . . . felt that maybe the pain she was having in her feet was coming from her back." Finally, in his notes from the 25 April 2017 visit, Mr. Murray stated "plaintiff is familiar with me for treatment of a previous episode of back pain about two years ago. She reports that her symptoms never completely went away." In addition to Mr. Murray's testimony, Dr. Dave also testified that when he saw plaintiff in July 2017 for treatment for chronic back pain, "her current presentation was chronic pain involving the lower back for about three and a half years," which coincides with the 27 May 2014 injury. Furthermore, when plaintiff went to Dr. Jones in July 2017, she reported her chronic back pain had an onset date of 19 June 2014, coinciding with the 27 May 2014 injury.

¶ 30 The Commission, on the other hand, points to no evidence in the record in its findings to support its conclusion that plaintiff's last medical treatment for the 27 May 2014 injury was in 2015. The Court of Appeals surmised that the Commission's finding may have been based on the "discontinuation note" Mr. Murray placed in plaintiff's file after she did not return after the March 2015 visit, which he testified occurs when "people don't come back [for treatment]." Although this discontinuation note taken in isolation may be some evidence that plaintiff's medical treatment for the 27 May 2014 injury was completed in 2015, the Commission erred in relying on it for several reasons. First, the discontinuation note is contradicted by Mr. Murray's own subsequent testimony, which all showed that plaintiff continued to suffer chronic back pain stemming from the 27 May 2014 injury and that she sought and obtained subsequent treatment from several doctors and from Mr. Murray himself for that pain. Second, overwhelmingly, the greater weight of the evidence, including Dr. Dave's testimony and plaintiff's testimony, supports the contrary conclusion that plaintiff's back pain was chronic and stemmed from the 27 May 2014 injury. Finally, as the Court of Appeals reasoned, elevating the discontinuation note above other contradictory testimony in the record, and the greater weight of the evidence, "is the sort of 'technical, narrow[,] and strict interpretation' of workers' compensation provisions our case law warns against." *Id*. at 507–08 (quoting *Gore*, 362 N.C. at 36).

¶ 31 Defendants rely principally on the testimony of Dr. Jones, who opined "that plaintiff's current pain, more likely than not, was related to her 2011 injury." However, Dr. Jones' testimony does not support defendants' argument that "consequences from the May 2014 incident had resolved, and that after March 2015, [p]laintiff's spine returned to its baseline level of abnormality and chronic pain she had suffered ever

since settling her 2011 injuries," which were settled. The proposition that chronic back pain following any new back injury is attributable solely to an old one is unsupported by evidence in the record and, moreover, would frustrate the beneficent purposes of the Workers' Compensation Act of ensuring compensation for every injury attributable to the employee's work.

¶ 32 Applying the de novo standard of review to the Commission's findings regarding the timely-filing requirement, we hold the greater weight of the evidence supports that plaintiffs' 2017 medical treatment was for the 27 May 2014 injury. Accordingly, since she filed her Form 18 on 19 May 2017, her claim was not barred by N.C.G.S. § 97-24.

III. Conclusion

¶ 33 We conclude (1) findings by the Commission regarding the timely-filing requirement under N.C.G.S. § 97-24 are subject to de novo review; and (2) the Court of Appeals properly held the Commission erred in finding that plaintiffs' last medical treatment for her 27 May 2014 injury was in 2015, not 2017. Accordingly, we affirm the decision of the Court of Appeals, and remand for further remand to the Commission for consideration of the merits of plaintiff's 27 May 2014 injury claim.

AFFIRMED.

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

Chief Justice NEWBY dissenting.

¶ 34 This case requires us to determine whether the Full Commission properly dismissed plaintiff's claim because she did not timely file her claim with the Industrial Commission. As relevant to this case, an injured plaintiff must file a claim with the Industrial Commission within two years of a defendant's last payment of medical compensation for a prior injury. Here the Full Commission found that defendant last paid plaintiff medical compensation for her prior injury in April of 2015. Moreover, the Full Commission found that plaintiff did not file her claim within two years of that payment. Thus, the Full Commission concluded that plaintiff's claim was barred and dismissed the claim. The Full Commission's findings of fact are supported by competent evidence, and those findings in turn support the Full Commission's conclusions of law. Therefore, the opinion of the Court of Appeals should be reversed, and the Full Commission's order should be affirmed. I respectfully dissent.

¶ 35 "Under our Workers' Compensation Act, 'the [Industrial] Commission is the fact finding body.' " *Gore v. Myrtle/Mueller*, 362 N.C. 27, 40, 653 S.E.2d 400, 409 (2007) (quoting *Brewer v. Powers Trucking Co.*, 256 N.C. 175, 182, 123 S.E.2d 608, 613 (1962)). This Court reviews "an order of the Full Commission only to determine 'whether any competent evidence supports the Commission's findings of fact and whether the findings of fact support the Commission's conclusions of law.' " *Medlin v. Weaver Cooke Constr., LLC*, 367 N.C. 414, 423, 760 S.E.2d 732, 738 (2014) (quoting *Deese v. Champion Int'l Corp.*, 352 N.C. 109, 116, 530 S.E.2d 549, 553 (2000)). "Because the Industrial Commission is the sole judge of the credibility of the witnesses and the weight of the evidence[,] [w]e have repeatedly held that the Commission's findings of fact are conclusive on appeal when supported by competent evidence, even though there [may] be evidence that would support findings to the contrary." *Id.* (first and second alterations in original) (internal quotations omitted).

¶ 36 Plaintiff's claim is governed by N.C.G.S. § 97-24, which states that

> [t]he right to compensation under this Article shall be forever barred unless . . . (ii) a claim . . . is filed with the Commission within two years after the last payment of medical compensation when no other compensation has been paid and when the employer's liability has not otherwise been established under this Article.

N.C.G.S. § 97-24(a) (2021). This requirement "has repeatedly been held to be a condition precedent to the right to compensation." *Gore*, 362 N.C. at 38, 653 S.E.2d at 408 (citing *Montgomery v. Horneytown Fire Dep't*, 265 N.C. 553, 555, 144 S.E.2d 586, 587 (1965) (per curiam)). This "condition precedent establishes a time period in which suit must be brought in order for the [claim] to be recognized." *Boudreau v. Baughman*, 322 N.C. 331, 340–41, 368 S.E.2d 849, 857 (1988).

¶ 37 Here it was undisputed that defendant paid no other compensation and that defendant's liability had not otherwise been established. Accordingly, for plaintiff's claim to be timely under N.C.G.S. § 97-24(a)(ii), plaintiff must have filed her claim within two years of defendant's last payment of medical compensation. Plaintiff argues that her 25 April 2017 visit with Frank Murray, the on-site physical therapist, was related to her 27 May 2014 injury. Defendant paid for this treatment in May of 2017; therefore, plaintiff contends that her claim, filed on 19 May 2017, was filed within two years of defendant's last payment of medical

compensation. Thus, the Full Commission was tasked with determining whether plaintiff's treatment with Frank Murray on 25 April 2017 was related to her 27 May 2014 injury such that her claim was timely. This analysis requires the Full Commission to make numerous credibility and weight determinations—a task it is designed to do. In resolving this issue, the Full Commission found as follows:

> 5. Following the 27 May 2014 incident, plaintiff received medical treatment from defendant-employer's dispensary, an on-site medical facility that treats employees' injuries and ailments that are work-related and non-work-related. Plaintiff received no indemnity benefits. Plaintiff last received medical treatment for the 27 May 2014 incident on 3 March 2015. Per protocol, defendant[ ] paid for this treatment in April 2015 at the latest. Defendant[ ] did not pay for medical treatment for the 27 May 2014 incident beyond April 2015.
>
> . . . .
>
> 16. . . . . In this matter, the last payment for medical treatment consequent of the 27 May 2014 incident was made in April 2015. Plaintiff did not file an Industrial Commission Form 18 until May 2017.
>
> 17. Plaintiff's testimony regarding the circumstances surrounding the 25 April 2017 alleged injury and related facts conflicts with a preponderance of the testimony and documentary evidence.

¶ 38 The Full Commission's resolution of this factual dispute is supported by competent evidence. Frank Murray testified that he first treated plaintiff on 10 October 2011 after she "reported that she lifted a tire and felt a sharp pain in [her] low back at that time." Plaintiff and defendant settled the claims arising from this injury. Frank Murray then saw plaintiff again on 3 June 2014, when she reported "that she had an onset of low-back pain one week previous [on 27 May 2014] . . . as she was reaching and pulling a tire from the bottom of the flatbed." Frank Murray testified that he provided treatment for this injury until 3 March 2015. Defendant paid for this final treatment in April of 2015. Frank Murray later marked the note from the 3 March 2015 visit as a "discontinuation note" because plaintiff had not returned for additional treatment. Frank Murray further testified that plaintiff returned for an additional visit on 25 April 2017 after plaintiff's podiatrist thought that "the pain that she

was having in her feet was coming from her back, so he recommended that she go and see about her back." Frank Murray described plaintiff's pain in 2017 as "a[n] ongoing, continuation of low-back pain. I mean, it kind of sounds as if, like, she's had . . . a baseline level of low-back pain with episodic increases and decreases since the first time that I saw her."

¶ 39 Kelly Avant, a case manager at the on-site medical clinic, testified that plaintiff visited her twice on 28 April 2017. Kelly Avant's note recorded plaintiff's statements during her first visit that day as follows:

> I went and saw Frank (Murray MSPT) for my back on Tuesday and he said I might need an[ ] x[-]ray or something, so he told me to come see you. You remember Leslie (Byrne NP) when I hurt my back the first time, she never ordered an x[-]ray or anything, the second time I hurt my back I saw [another doctor] and did therapy with Frank [Murray]. My pain level has always been a level [three], I can only remember being pain free for [two] days. I got to the point where I couldn't walk, so I went to see the podiatrist (Dr. Eaton/Cape Fear Podiatry) and he gave me injections . . . . I went back to see Dr. Eaton a couple weeks ago and he said that plantar fasciitis is not my problem and he thinks it is my back . . . . When I got hurt before I was on the 1300 row and that is the worst row . . . .

When plaintiff returned later that day, Kelly Avant informed plaintiff she would have to pay for diagnostic treatment with her own insurance. Plaintiff returned to the medical clinic a third time that evening, "stating 'I need to file an injury from 4/25/17. I didn't know that if I had another injury that I could file a claim. There was a tire stuck in the press and caused my lower back to hurt.' "

¶ 40 Several of the doctors who treated plaintiff also testified. Dr. David S. Jones, a neurologist who treated plaintiff in 2011 and 2017, attributed plaintiff's low-back pain to her 2011 injury. Dr. Nailesh Dave, a neurologist who treated plaintiff for pain management beginning on 19 July 2017, acknowledged that plaintiff's symptoms could have been related to her previous injury in 2011 or a general deterioration of her spine. Dr. Gurvinder Deol, an orthopedic surgeon who treated plaintiff on 29 March 2018, testified that plaintiff's pain "relates back to this initially picking up the tire in 2011."

¶ 41 Thus, competent evidence demonstrates that plaintiff began having low-back pain starting at least with her injury on the 1300 row in

2011. Plaintiff then settled workers' compensation claims arising from that injury. After settling those claims, plaintiff continued to experience low-back pain. Allegedly, plaintiff subsequently suffered another injury on 27 May 2014. Defendant paid for treatment related to this alleged injury through its on-site medical clinic until April of 2015. When plaintiff did not return for further treatment, her file was marked as discontinued. Plaintiff did not file a workers' compensation claim and defendant did not pay for further treatment until 2017. After plaintiff's podiatrist suggested the pain in plaintiff's feet could be related to her low-back pain, plaintiff returned to Frank Murray on 25 April 2017. Defendant paid for this treatment with Frank Murray in May of 2017. As the Full Commission found, though, this treatment was not related to the alleged incident on 27 May 2014, but rather resulted from a continuation of plaintiff's ongoing low-back pain that started as early as 2011. Plaintiff's own statements from 28 April 2017 demonstrate that since her injury in 2011, "[m]y pain level has always been a level [three], I can only remember being pain free for two days."

¶ 42 The Full Commission's supported findings demonstrate that defendant's "last payment for medical treatment consequent of the 27 May 2014 incident was made in April 2015." Moreover, the Full Commission found that plaintiff "did not file an Industrial Commission Form 18 until May 2017," more than two years later. Accordingly, the Full Commission concluded that plaintiff failed to satisfy the condition precedent in N.C.G.S. § 97-24 and her claim was barred. Because this conclusion is supported by the findings of fact, the Full Commission's order should be affirmed.

¶ 43 To broaden appellate review, the majority holds that whether a plaintiff timely files a claim under N.C.G.S. § 97-24 is a "jurisdictional fact" subject to de novo review. Contrary to the majority's characterization, in *Gore* this Court flatly rejected the jurisdictional approach to N.C.G.S. § 97-24. 362 N.C. at 38, 653 S.E.2d at 407–08. In *Gore*, the plaintiff sought to estop the defendant from asserting that N.C.G.S. § 97-24 barred the claim. *Id.* at 32, 653 S.E.2d at 404. In response, the defendant argued that the plaintiff's failure to timely file under N.C.G.S. § 97-24 had deprived the Industrial Commission of jurisdiction over the plaintiff's claim. *Id.* at 38, 653 S.E.2d at 407–08. The defendant then contended that once the Industrial Commission was deprived of jurisdiction by a plaintiff's failure to timely file, a defendant cannot restore jurisdiction to the Industrial Commission through its actions. *Id.* Thus, because the defendant saw N.C.G.S. § 97-24 as jurisdictional, the defendant contended estoppel could not apply. *Id.* at 38, 653 S.E.2d at 408. In rejecting this approach, we stated in full as follows:

> In contrast, defendants urge this Court to resurrect an antiquated approach extinguished by modern estoppel principles in all but a few jurisdictions. As a leading treatise explains, modern application of estoppel and waiver in the present context serves 'as an antidote to the earlier approach, which was the highly conceptual one of saying that timely claim (and sometimes even notice) was "jurisdictional[.]" ' *Larson's* [*Workers' Compensation Law*], 7 § 126.13[1]. Defendants' argument tracks this 'jurisdictional' approach, and relies entirely on cases decided before the adoption of modern principles of waiver and estoppel designed to ameliorate its harsh effects. The overwhelming majority of modern cases 'belie[ ] the present validity of the ["jurisdictional"] idea,' however, which continues to survive in only a tiny minority of jurisdictions amidst strong criticism. *See*, *e.g.*, *id.* (describing the minority rule as 'curious word-magic' designed to exalt the statutory claims' filing requirement as 'a defense outside the reach of waiver, estoppel, or anything else'). To be sure, *Biddix* and *Belfield* have made clear that this outdated procedural hurdle has no place in our modern jurisprudence.

Id. at 38, 653 S.E.2d at 407–08 (first, third, and fourth alterations in original) (referencing *Biddix v. Rex Mills, Inc.*, 237 N.C. 660, 75 S.E.2d 777 (1953); *Belfield v. Weyerhaeuser Co.*, 77 N.C. App. 332, 335 S.E.2d 44 (1985)).

¶ 44 We then noted that N.C.G.S. § 97-24 "has repeatedly been held to be a condition precedent to the right to compensation." *Id.* at 38, 653 S.E.2d at 408 (citing *Montgomery*, 265 N.C. at 555, 144 S.E.2d at 587). We also noted that this Court has "long held that a condition precedent, unlike subject matter jurisdiction, may be waived by the beneficiary party by virtue of its conduct." *Id.* Thus, we held that the timely filing requirement under N.C.G.S. § 97-24 was not jurisdictional and that a "defendant[ ] could waive the two[-]year condition precedent laid out in N.C.G.S. § 97-24." *Id.*

¶ 45 Nonetheless, the majority "resurrect[s this] antiquated [jurisdictional] approach," *id.* at 38, 653 S.E.2d at 407, because, in its view, the timely filing requirement "implicates the subject-matter jurisdiction of the Commission." Jurisdiction, however, "rests upon the law and the

law alone. It is never dependent upon the conduct of the parties." *In re T.R.P.*, 360 N.C. 588, 595, 636 S.E.2d 787, 793 (2006) (quoting *Feldman v. Feldman*, 236 N.C. 731, 734, 73 S.E.2d 865, 867 (1953)). The Industrial Commission's jurisdiction "is limited and conferred by statute." *Pearson v. C.P. Buckner Steel Erection Co.*, 348 N.C. 239, 241, 498 S.E.2d 818, 819 (1998). Though a party invokes the Industrial Commission's authority by timely filing a claim, the party does not confer jurisdiction upon the Industrial Commission. *See Letterlough v. Atkins*, 258 N.C. 166, 168, 128 S.E.2d 215, 217 (1962) (stating that the Industrial Commission's "jurisdiction may not be enlarged or extended by act or consent of the parties, nor may jurisdiction be conferred by agreement or waiver"). Accordingly, whether a party timely filed is not a jurisdictional question. Moreover, holding that the timely filing requirement is jurisdictional theoretically seems to put it beyond the reach of estoppel. *See Hart v. Thomasville Motors, Inc.*, 244 N.C. 84, 88, 92 S.E.2d 673, 676 (1956) ("Jurisdiction [of the Industrial Commission] cannot be obtained by consent of the parties, waiver, or estoppel."). Though the majority claims their approach is "consistent with the Act's legislative purpose" of "providing compensation for injured employees," *Gore*, 362 N.C. at 36, 653 S.E.2d at 406, it could in fact work to hinder that purpose. Broadening appellate judicial authority to allow de novo fact finding brings increased uncertainty to the process.

¶ 46 Under the proper standard of review, the Full Commission's finding that defendant did not pay for medical treatment related to plaintiff's 27 May 2014 injury beyond April of 2015 was supported by competent evidence. That finding, in turn, supported the conclusion of law that plaintiff's claim was barred because she did not timely file her claim. Accordingly, this Court should reverse the Court of Appeals, which reversed the Full Commission's dismissal of plaintiff's claim. I respectfully dissent.

Justice BARRINGER joins in this dissenting opinion.

IN RE A.N.H.

[381 N.C. 30, 2022-NCSC-47]

IN THE MATTER OF A.N.H.

No. 123A21

Filed 6 May 2022

1. Termination of Parental Rights—findings of fact—sufficiency of evidence—compliance with case plan

In an appeal from an order terminating a father's parental rights in his daughter, many of the trial court's findings of fact were disregarded because they lacked the support of clear, cogent, and convincing evidence—including findings that the father failed to comply with portions of his case plan, that he lied about his drug use, that he failed to demonstrate the ability to provide appropriate care for his daughter, that he was in arrears in child support payments, and that he failed to seek assistance to find appropriate housing.

2. Termination of Parental Rights—grounds for termination—neglect—failure to make reasonable progress—compliance with case plan—some drug use

An order terminating a father's parental rights on the grounds of neglect and failure to make reasonable progress was vacated and remanded where, after unsupported factual findings were disregarded, the remaining factual findings showed that the father complied with almost all of the requirements of his case plan, and no findings supported a conclusion that his continued drug use would result in the impairment or a substantial risk of impairment of his daughter.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from order entered on 19 January 2021 by Judge Emily Cowan in District Court, Henderson County. This matter was calendared in the Supreme Court on 18 March 2022 but determined on the record and briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

Assistant County Attorney Susan F. Davis for petitioner-appellee Henderson County Department of Social Services.

Ryan H. Niland and John R. Still for Guardian ad Litem.

Edward Eldred for respondent-appellant father.

IN RE A.N.H.

[381 N.C. 30, 2022-NCSC-47]

EARLS, Justice.

¶ 1 Respondent-father appeals from a trial court order terminating his parental rights in his daughter, A.N.H. (Annie).[1] Respondent was found by the trial court to have completed a required substance abuse assessment, completed 20 hours of substance abuse treatment, completed a parenting program, attended 78 of 80 possible visits with Annie, paid child support in an amount consistent with the child support guidelines, resided in a home safe and appropriate for Annie, attended court regularly, and maintained requested contact with the social worker. Petitioners sought to terminate respondent's parental rights based on the fact that respondent failed some of the many drug screens he submitted to between 2018 and 2020 and failed to submit to others.

¶ 2 We find that some of the trial court's findings of fact are not supported by the record, while others are. Thus, the issue here is whether the findings of fact that are supported by clear, cogent, and convincing evidence in the record are sufficient to support the trial court's conclusion that grounds existed to terminate respondent's parental rights for neglect and failure to make reasonable progress under the circumstances to correct the conditions that led to Annie's placement in foster care. We conclude that the findings of fact supported by clear, cogent, and convincing evidence in the record are insufficient to support the trial court's conclusion that respondent's parental rights in Annie were subject to termination. Accordingly, consistent with our precedents, we remand this matter for further proceedings rather than reversing the judgment and remanding for dismissal of the petition. *See In re N.D.A.*, 373 N.C. 71, 84 (2019) (vacating and remanding for further proceedings where factual findings were insufficient to support grounds for termination).

I. Background

¶ 3 When Annie was born on 9 April 2018, her cord blood tested positive for cocaine, and she experienced suboxone withdrawal. Annie spent two weeks in the hospital being treated with methadone before being discharged to the custody of her mother. On 24 April 2018, the mother entered into a safety plan with Henderson County Department of Social Services (HCDSS) in which she agreed to continue with her substance abuse treatment and to reside with Annie at the maternal grandmother's home.

1. We use a pseudonym to protect the juvenile's identity and for ease of reading.

¶ 4 Around 13 May 2018, the mother moved with Annie to temporary housing with a friend after being kicked out of the maternal grandmother's home. The mother missed multiple substance abuse group therapy sessions throughout May 2018 and was discharged from her suboxone treatment on 4 June 2018 after failing to attend her treatment.

¶ 5 On 5 June 2018, HCDSS filed a petition alleging Annie to be a neglected juvenile. The petition alleged that the mother did not have stable income, was unemployed, and was not attending treatment for her substance abuse or mental health issues. Respondent was not listed on Annie's birth certificate. He was listed as the putative father on the petition, in which it was alleged that respondent provided no care or support for Annie, was unemployed, and had a history of criminal activity, drug use, and domestic violence with Annie's mother.

¶ 6 In early July 2018, the mother could no longer stay with her friend. On 10 July 2018, she and Annie spent the night at respondent's home; they spent the next two nights at the Rescue Mission. On 13 July 2018, HCDSS was unable to locate the mother or Annie. The social worker contacted respondent looking for the mother, but respondent did not have any information regarding her whereabouts. HCDSS located Annie later that day in the care of respondent and his family. At this point paternity had not yet been established.

¶ 7 HCDSS obtained nonsecure custody of Annie on 13 July 2018 and filed a supplemental petition alleging neglect. The petition alleged that the mother expressed concern about respondent being left alone with Annie because of his domestic violence history. Respondent submitted to paternity testing on 30 July 2018 and was found to have a 99.99% probability of being Annie's father. In a child support order filed on 28 September 2018, respondent acknowledged that he was Annie's father.

¶ 8 Following a hearing, the trial court entered a Consent Adjudication Order on 13 September 2018 concluding that Annie was a neglected juvenile based on the parents' stipulated facts. In a separate disposition order entered 17 January 2019, the trial court ordered respondent to do the following in order to achieve reunification with Annie: obtain a comprehensive clinical assessment (CCA) from a certified provider and provide the assessor with truthful and accurate information; follow and successfully complete all the recommendations of the CCA; submit to random drug screens; complete an anger management/domestic violence prevention program; successfully complete a parenting class that addresses the ability to identify age-appropriate behaviors, needs, and discipline for the juvenile; cooperate and pay child support; attend visitations and demonstrate the ability to provide appropriate care for

the juvenile; obtain stable income sufficient to meet the family's basic needs; obtain and maintain an appropriate and safe residence; maintain face-to-face contact with HCDSS; and provide HCDSS with updated information and sign any releases of information necessary to allow the exchange of information between HCDSS and the providers. The court granted respondent one hour of supervised visitation per week.

¶ 9 The trial court held a permanency planning hearing on 11 April 2019. In an order entered 17 May 2019, the court set the permanent plan for Annie as reunification with a secondary plan of adoption. The court found that respondent obtained a CCA, completed a parenting class, obtained sufficient income, and began mental health treatment on 7 November 2018. From July 2018 to the date of the hearing, respondent submitted to nine drug screens, seven of which were negative. However, respondent tested positive for marijuana on 18 July and 23 October 2018 and did not take requested drug screens on 28 August 2018 and 8 January 2019. The court ordered respondent to comply with the components of his case plan and allowed him six hours of unsupervised visitation per week.

¶ 10 On 3 June 2019, HCDSS filed a Motion for Review requesting respondent's visitation be changed back to supervised visits after respondent's 21 May 2019 hair follicle test came back positive for amphetamines, methamphetamines, and cocaine. Following a hearing on 11 July 2019, the trial court entered an order on 3 September 2019 continuing the permanent plans.

¶ 11 Respondent himself requested additional hair follicle tests on 25 and 26 September and 2 October 2019. However, respondent testified that he could not submit samples for these tests because he was working two hours away in Maggie Valley and could not get to the testing site before it closed. On 10 October 2019, a second hair follicle test came back positive for methamphetamine, cocaine, and benzoylecgonine, the main metabolite of cocaine. Respondent's unsupervised visitation was suspended on 15 October 2019 due to his positive hair follicle screens.

¶ 12 In a review order entered 14 February 2020, the trial court changed the permanent plan to adoption with a secondary plan of guardianship, finding that respondent had not made adequate progress within a reasonable time under the plan. The court found that respondent had not engaged with individual therapy to comply with his substance abuse requirements, and that he was extremely dependent on his grandmother for assistance in caring for Annie. The court also found that respondent had threatened family members who offered to help with Annie or provide information to HCDSS about Annie. The court allowed respondent a minimum of one hour of supervised visitation per week.

¶ 13 On 12 March 2020, HCDSS filed a motion to terminate respondent's parental rights on the grounds of neglect and willful failure to make reasonable progress to correct the conditions that led to Annie's removal from the home.[2] N.C.G.S. § 7B-1111(a)(1)–(2) (2021). Following multiple continuances, the trial court held a termination of parental rights hearing on 15 October, 12 November, and 10 December 2020. On 19 January 2021, the trial court entered an order concluding that HCDSS had proven both alleged grounds to terminate respondent's parental rights and that termination of respondent's parental rights was in Annie's best interests. Accordingly, the trial court terminated respondent's parental rights. Respondent appealed.

II. Analysis

¶ 14 On appeal, respondent challenges the trial court's adjudication of grounds for termination of his parental rights under N.C.G.S. § 7B-1111(a)(1) and (2). He contends that of the twenty-seven findings of fact relied upon by the trial court, the entirety of finding of fact 38 and significant portions of eleven others are not supported by the evidence and that the remaining findings do not support the trial court's conclusions that grounds existed to terminate his rights.

¶ 15 We review a trial court's adjudication that grounds exist to terminate parental rights "to determine whether the findings are supported by clear, cogent and convincing evidence and the findings support the conclusions of law." *In re E.H.P.*, 372 N.C. 388, 392, (2019) (quoting *In re Montgomery*, 311 N.C. 101, 111 (1984)). "A trial court's finding of fact that is supported by clear, cogent, and convincing evidence is deemed conclusive even if the record contains evidence that would support a contrary finding." *In re R.G.L.*, 2021-NCSC-155, ¶ 12. "Findings of fact not challenged by respondent are deemed supported by competent evidence and are binding on appeal." *In re T.N.H.*, 372 N.C. 403, 407, (2019) (citing *Koufman v. Koufman*, 330 N.C. 93, 97 (1991)). "Moreover, we review only those findings necessary to support the trial court's determination that grounds existed to terminate respondent's parental rights." *Id.* "The trial court's conclusions of law are reviewable de novo on appeal." *In re C.B.C.*, 373 N.C. 16, 19 (2019).

¶ 16 A trial court may terminate parental rights if it concludes that the parent has neglected the juvenile within the meaning of N.C.G.S.

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2. HCDSS also sought to terminate the parental rights of Annie's mother, but she did not appeal and is not a party to this appeal.

§ 7B-101. N.C.G.S. § 7B-1111(a)(1). A neglected juvenile is defined, in pertinent part, as one "whose parent, guardian, custodian, or caretaker . . . does not provide proper care, supervision, or discipline . . . [or whose parent, guardian, custodian, or caretaker] allows to be created a living environment that is injurious to the juvenile's welfare." N.C.G.S. § 7B-101(15) (2021).

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

In re R.L.D., 375 N.C. 838, 841 (2020) (cleaned up).

¶ 17 A trial court also may terminate parental rights if it concludes that a parent has willfully left his or her child in foster care or in a placement outside 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 juvenile." N.C.G.S. § 7B-1111(a)(2). In order for a respondent's noncompliance with a case plan to support termination of parental rights, there must be a nexus between the components of the court-approved case plan allegedly not met and the conditions which led to the child's removal from the home. *In re B.O.A.*, 372 N.C. 372, 387 (2019). The "reasonable progress" standard does not require respondent "to completely remediate the conditions that led to" the child's removal. *In re J.S.*, 374 N.C. 811, 819 (2020).

¶ 18 Respondent contends that the trial court's findings that are supported by the record evidence do not support its determination that there was a likelihood of future neglect and do not support the determination that he failed to make reasonable progress to correct the conditions that led to Annie's removal. Because the trial court's legal conclusions regarding both grounds for termination were based on the same facts, we will first examine respondent's contentions regarding the trial court's findings and then analyze the two grounds for termination found by the trial court.

A. Findings of Fact

¶ 19 **[1]** In support of its determination that respondent's parental rights were subject to termination based on neglect and failure to make reasonable progress, the court made the following pertinent findings of fact:

> 29. Father has failed to make reasonable progress under the circumstances in correcting those conditions which led to the removal of the juvenile or on the requirements to obtain placement and custody of the juvenile. Specifically, father has not made significant or reasonable progress on his case plan in the past two and one-half years as shown by the following:
>
> a. Father completed his [CCA] through Family Preservation Services on 4 June 2019 and was recommended to successfully complete substance abuse treatment and individual therapy. Father was also recommended to abstain from all illicit substances.
>
> b. Father was referred to Highland Medical, but Highland Medical would not accept his insurance. Therefore, HCDSS referred father back to Family Preservation Services to obtain a Substance Abuse assessment. Instead of obtaining a substance abuse assessment at Family Preservation Services, Father indicated he would pay for half of the cost if HCDSS would pay for half the cost, and HCDSS agreed.
>
> c. Father obtained a substance abuse assessment with A New Day on 15 October 2019 was to provide the assessor with truthful and accurate information and was to complete all recommendations of the Substance Abuse assessment. Father denied use of illegal substances and did not disclose that he submitted to a random hair follicle test on 21 May 2019 that was positive for amphetamines, methamphetamines, and cocaine.
>
> d. Father was recommended to complete sixteen (16) hours of a short term substance abuse program. Father completed twenty (20) hours of Substance Abuse Treatment on 10 December 2019. Father was also recommended to abstain from all illicit substances. Father was sent to Blue Ridge Community

Health Services, Inc. and was seen by Barry Beavers for individual counseling and left in good standing in the fall of 2019, to be seen on an "as needed" basis.

e. Father contacted HCDSS on 21 July 2020 asking for a referral for another CCA. The social worker referred father to DC Wellness and Behavioral Health. Father did not go to DC Wellness and Behavioral Health and texted the social worker on 3 August 2020 to tell HCDSS he had obtained a SAA at October Road in Asheville. Father's new SAA has been delivered to HCDSS, and Father testified the S[A]A had no recommendations for needed services.

. . . .

g. Although there were numerous positive tests for illegal substances and the main metabolite for cocaine was found in father's results, father, in each substance abuse assessment, in the CCA, and in testimony at the TPR hearing, denied ever using illegal substances while providing no other evidence as to how such positive results were returned multiple times.

h. Father has completed the domestic violence intervention program at Safelight, a provider acceptable to HCDSS.

i. Father completed a parenting program with Safelight, a provider acceptable to HCDSS.

j. Father is paying Child Support through the Child Support Enforcement Agency in an amount consistent with the guidelines. Father's last payment was 14 September 2020, and Father is in arrears One Hundred and Nineteen Dollars and eight cents ($119.08).

. . . .

l. Father has attended seventy eight (78) visits with the juvenile out of a possible eighty (80) visits. The two visits father missed were in 2018. Father was on time for his visits with the juvenile, and father's visits with the juvenile were never cut short. From 17 May 2019 to 14 February 2020, the Court had ordered father to have unsupervised visitation with the juvenile which

went well until the unsupervised visitation ended on 15 October 2019 with father's positive hair follicle screen. A motion to address the change in visitation was not filed due to the next Permanency Planning and Review Hearing being already scheduled within thirty (30) days. Father never attended a single visit alone as the juvenile's grandmother . . . was always present at the visitations. [The grandmother] is part of father's support network, and her time with the juvenile was appropriate. However, father has never cared for or attempted to care for the juvenile on his own without the presence of a third party. Therefore, the father has not demonstrated the ability to provide appropriate care for the juvenile.

m. Father was employed at JB's Heating and Cooling, but father was laid off in September of 2019 and stated he started back working there three weeks later. On 17 December 2019, father stated he had been laid off from JB's Heating and Cooling and was looking for a job. Father was unemployed from 17 December 2019 to July of 2020. Father states he has now gone back to work at JB's Heating and Cooling and provided the social worker a check stub on 30 July 2020. Social Worker called and verified that Father is employed at JB's Heating and Cooling on 5 October 2020. Father testified at the TPR Hearing that he was employed but was waiting for a call to go to work. Therefore, father's employment has been sporadic over the time this case has been in Court, and said employment has not been consistent. Father cannot say he is working full time as he is waiting for a call from JB's Heating and Cooling for him to come into work.

n. Father is residing with his Aunt, and the Aunt's home is safe and appropriate. . . .

. . . .

30. Father did not have a driver's license when the matter was filed but has since obtained a driver's license.

31. Mother and father are not currently in a relationship with each other.

32. The father told the assessor for the New Day CCA that father had never used illegal substances, and that CCA returned no recommendations for father. Father admitted to substance abuse use in the consent Adjudication Order and has multiple positive drug screens for Marijuana, Amphetamines, Methamphetamines, Cocaine, and benzoylecgonine, the main metabolite of cocaine, during the course of this case. The Court finds the CCA at New Day and the others where father denied use of illegal substances to be invalid as truthful and accurate information was not given to the assessor.

33. Father did not complete intensive out-patient substance abuse treatment which was ordered in the original CCA. Father's 16-hour classes does not qualify as intensive out-patient substance abuse treatment, and father has not completed this recommendation of the CCA.

. . . .

35. The adjudication order found father to have admitted to drug use as an issue leading to the juvenile being declared a neglected juvenile as defined under N.C.G.S. § 7B-101(15). The disposition order documents and found that, with regard to the father, . . . there were issues of the use of alcohol and/or controlled or illegal substances and/or mental health issues by a parent and that part of the case plan father had to successfully complete to obtain return of the juvenile was to obtain a [CCA], provide truthful information to the assessor, submit to random drug screens, and follow all recommendations of the comprehensive clinical assessment-which included remaining free of illicit substances.

36. Father did not complete individual therapy, did not complete intensive out-patient substance abuse therapy, and denied any illicit drug use in court and to the assessor performing the CCA while testing positive for Amphetamines, Methamphetamines, Cocaine, and benzoylecgonine, the main metabolite of Cocaine.

> 37. Father has not addressed the issues of the use of alcohol and/or controlled or illegal substances and/or mental health issues by a parent as he has not shown substantial progress in a reasonable amount of time and has not completed, to the satisfaction of the court, the first three requirements of his case plan:
>
> i. Father shall obtain a [CCA] from a certified provider acceptable to HCDSS and provide the assessor with truthful and accurate information;
>
> ii. Father shall follow and successfully complete all the recommendations of the [CCA]; or
>
> iii. Father shall submit to random drug screens.

The court also found that respondent tested positive for marijuana on 18 July and 23 October 2018; tested positive for amphetamines, methamphetamines, and cocaine on 21 May and 10 October 2019, and 1 September 2020; and tested positive for benzoylecgonine, the main metabolite of cocaine, on 10 October 2019 and 1 September 2020. Respondent also failed to submit to three urine drug screens requested by HCDSS and did not submit samples for three hair follicle screens that he had requested on 25 and 26 September and 2 October 2019. The trial court further documented the ten drug screens respondent completed during this period that showed a negative result.

¶ 20 Respondent first challenges the trial court's findings that he denied illegal substance use during his assessments and failed to provide truthful and accurate information to the assessors. Specifically, respondent challenges the portions of finding of fact 29(c) stating that he denied use of illegal substances during his substance abuse assessment with A New Day on 15 October 2019 and failed to disclose to New Day that he submitted to a random hair follicle test on 21 May 2019 that was positive for amphetamines, methamphetamines, and cocaine. Respondent also challenges the portions of findings of fact 29(g) and 36 stating that "in each substance abuse assessment, [and] in the CCA" respondent "denied ever using illegal substances" and denied any illicit drug use "to the assessor performing the CCA." Respondent argues the evidence and testimony about New Day's recommendation for basic substance abuse treatment contradicts the finding that he denied illegal substance use during the assessment. He also contends that there is no evidence he did not disclose the 21 May 2019 hair follicle test to New Day, or that he denied illegal substance use in the CCA and his assessments with New Day and October Road. Respondent argues that although the social worker

testified October Road did not know about a hair follicle test respondent took after completing the assessment, there is no testimony regarding anything respondent "said or did not say to the assessor *during* the assessment."

¶ 21 The social worker testified that respondent completed a substance abuse assessment with New Day on 15 October 2019, which recommended respondent complete sixteen hours of a short-term substance abuse program. She further testified that respondent completed the New Day twenty-hour substance abuse program on 10 December 2019. Respondent also testified that the New Day assessment recommended basic substance abuse treatment and that his assessment with October Road had no recommendations.

¶ 22 Because the undisputed evidence shows New Day recommended basic substance abuse treatment, it would be unreasonable to infer that respondent denied the use of illegal substances to New Day. *See In re N.P.*, 374 N.C. 61, 65 (2020) ("The [trial] court has the responsibility of making all reasonable inferences from the evidence presented."). Additionally, there is no evidence or testimony regarding respondent's disclosures to New Day or any other assessment, and thus no evidence that respondent failed to disclose the positive results of his 21 May 2019 hair follicle test during the New Day assessment, or that he denied using illegal substances during each substance abuse assessment and CCA.

¶ 23 HCDSS cites to the GAL report as support for the trial court's findings. However, the GAL report was admitted into evidence during the dispositional hearing "to support best interest[s]" after the trial court had already rendered its adjudicatory decision. As a result, the report cannot be used as competent evidence to support the trial court's adjudicatory findings. *See In re Z.G.J.*, 378 N.C. 500, 2021-NCSC-102, ¶ 28 ("[W]e have previously held that dispositional evidence cannot be used to support the trial court's adjudicatory determinations." (citing *In re Z.J.W.*, 2021-NCSC-13, ¶ 17)).[3] Thus, we must disregard the challenged portions of findings 29(c), (g), and 36. *See In re S.M.*, 375 N.C. 673, 691 (2020).

¶ 24 The second sentence of finding of fact 29(j) finds that respondent last made a child support payment on 14 September 2020 and that he was in arrears in the amount of $119.08. Respondent is correct that there was no testimony or other evidence in the record that respondent had

3. HCDSS's court report was not admitted into evidence at the hearing and is not included in the record on appeal.

any arrearage. The social worker testified that respondent "pays his child support" and that respondent "satisfied that part of his case plan on paying child support." HCDSS concedes that the only evidence in this case is that respondent paid his child support. Thus, the second sentence of this finding must be disregarded as unsupported by the evidence.

¶ 25 Respondent challenges the portion of finding of fact 29(l) stating that he has "not demonstrated the ability to provide appropriate care" for Annie. Respondent asserts that the evidence shows he was appropriate during every visit with Annie and that no visits were cut short due to any problematic behavior. He contends that he demonstrated he could take care of Annie because the trial court allowed him unsupervised visits in May 2019.

¶ 26 The fact that respondent was approved for unsupervised visitation at a prior hearing did not preclude the trial court from later finding that he has not demonstrated the ability to provide appropriate care. Respondent's supervised visitation was suspended after he twice tested positive for amphetamines, methamphetamines, and cocaine, but there is no evidence in the record that he was ever in Annie's presence while under the influence of any drug. The social worker testified that respondent's visits went well and that he played with age-appropriate toys with Annie. The evidentiary support for the trial court's conclusion that respondent had not shown the ability to care for Annie is thin at best and falls short of the clear, cogent, and convincing evidence standard that we must apply.

¶ 27 Findings of fact 29(n) and 29(q) relate to whether respondent appropriately sought help with housing. Respondent correctly notes that there was no evidence in the record concerning respondent's contacts with Thrive, WCCA, or Hendersonville Housing Authority regarding housing assistance. HCDSS concedes this point and argues that it is in any event irrelevant because of the uncontradicted record testimony from the social worker that the residence where respondent was currently living was appropriate for Annie. Therefore, we must disregard any implication that respondent failed to make reasonable efforts to find suitable housing for Annie. To the extent that it relates to whether the conditions that led to Annie's removal have been addressed, the record evidence indicates that respondent had obtained a safe and suitable living situation.

¶ 28 Respondent challenges the portion of finding of fact 32 stating that he told the assessor for the New Day CCA that he had never used illegal substances and the CCA returned no recommendations. The evidence and unchallenged findings show that respondent obtained CCAs

from Family Preservation Services and October Road and obtained a substance abuse assessment through New Day. Both the social worker and respondent testified that the CCA from October Road had no substance abuse recommendations for respondent. Thus, we disregard this finding insomuch as it suggests the CCA without recommendations was obtained from New Day.

¶ 29 Respondent also challenges the portion of finding of fact 32 in which the court found that the CCAs where respondent denied use of illegal substances were invalid "as truthful and accurate information was not given to the assessor." Respondent argues the evidence does not support the finding that he did not give "truthful and accurate" information during any assessment. We agree. As stated previously, there is no adjudicatory evidence or testimony about respondent's disclosures during his assessments. Although both the social worker and respondent testified that the October Road CCA did not have any recommendations, it does not necessarily follow that respondent did not provide truthful information to the assessor. As a result, we disregard this portion of finding of fact 32.

¶ 30 Respondent challenges the portion of finding of fact 33 stating that intensive outpatient substance abuse treatment was ordered in the original CCA, and that respondent failed to complete this recommendation. Respondent argues that there is conflicting evidence regarding the recommendations from the first CCA, and that "while there is some evidence, in the form of the social worker's testimony, that [respondent] was recommended to complete intensive outpatient at some point during this case, the clear and convincing evidence is that [respondent] was recommended to complete 'basic' substance abuse treatment."

¶ 31 The social worker testified that respondent completed a CCA through Family Preservation Services on 4 June 2019, and "another one" with October Road in August 2020 which "did not have any recommendations." During direct examination, the social worker testified that the 4 June 2019 CCA recommended "basic substance abuse treatment and individual therapy." However, during later questioning from the trial court, the social worker testified that respondent "originally was recommended to go through the intensive outpatient program[,]" but completed the New Day substance abuse classes instead, and that those classes were not equivalent to intensive outpatient treatment. Based on this testimony, there is evidence respondent was "originally" recommended to go to intensive outpatient treatment and did not do so. Thus, we uphold that portion of the finding. However, the evidence does not show that the recommendation was necessarily from the CCAs respondent

completed on 4 June 2019 or August 2020. As there is no other evidence of any additional CCA's completed by respondent, we disregard the finding to the extent that it indicates the recommendation for intensive outpatient therapy was from a CCA.

¶ 32 Respondent also challenges the part of finding of fact 36 stating that respondent "did not complete individual therapy[.]" Respondent asserts that this finding is contradicted by finding of fact 29(d), which found that respondent left individual counseling "in good standing in the fall of 2019, to be seen on an 'as needed' basis." We agree. The social worker acknowledged during cross-examination that the therapist's letter recommended respondent continue with individual therapy "as needed." Because the record reflects that respondent completed individual therapy "in good standing" and there was no evidence respondent required further "as needed" therapy, we disregard the portion of finding of fact 36 finding that respondent did not complete individual therapy.

¶ 33 Respondent next challenges finding of fact 37. He first takes exception to the portion of the finding stating that he did not address the issues of alcohol use or mental health. Respondent argues there is no evidence that alcohol use was an issue for respondent. The social worker testified that the issues respondent needed to address before reunification could occur included "substance abuse and mental health of a parent." There is no testimony or evidence that respondent had any issues with alcohol during the case. Therefore, we disregard the portion of finding of fact 37 to the extent it suggests respondent had issues with alcohol use and failed to address those issues.

¶ 34 Respondent also challenges the portion of finding of fact 37 stating that he did not complete the first three requirements of his case plan. Respondent argues that the evidence establishes he completed a CCA with an acceptable provider and that the CCA recommended "basic substance abuse treatment and individual therapy." Respondent again argues there is no evidence to support a finding that he did not provide truthful information during his CCA. He further argues that he completed twenty hours of substance abuse treatment, left individual counseling in good standing, and failed to submit to only three of the eighteen requested drug screens.

¶ 35 The unchallenged findings show that respondent completed a CCA with Family Preservation Services on 4 June 2019, which recommended respondent complete substance abuse treatment and individual therapy and abstain from using illicit substances. However, respondent tested positive for amphetamines, methamphetamines, and cocaine on three

occasions. Respondent also failed to submit to three drug screens requested by HCDSS and to three hair follicle screens that he requested. The social worker testified that respondent initially was ordered to complete intensive outpatient substance abuse treatment and failed to do so. Thus, the evidence and other findings support the finding that respondent did not follow and successfully complete all of the recommendations from his CCA and failed to submit to all random drug screens. But, as stated previously, there is no evidence regarding what disclosures respondent may or may not have made to the assessors. Accordingly, we disregard the portion of the finding specifying that respondent did not complete the requirement that he provide the assessor with truthful and accurate information.

¶ 36 Respondent contends that there is no evidentiary support whatsoever in the record for the entirety of finding of fact 38, which finds that he failed to participate in most permanency planning action team (PPAT) meetings between 2018 and 2020. Respondent is correct that there was no testimony about PPAT meetings at any point during the hearing. Indeed, finding of fact 29 states that respondent "has maintained face to face visits with the social worker as may have been limited by the COVID-19 pandemic. As limited by the pandemic, father has maintained other contact, as requested and has attended court regularly." Additionally, the trial court made the following finding of fact in every permanency planning order: "[f]ather maintains face-to-face contact with the Social Worker as requested, including but not limited to Child & Family Team Meetings and Permanency Planning Meetings." Neither HCDSS nor the Guardian ad litem makes any response to this contention. Respondent is correct that there is no factual basis for finding of fact 38 and it must be disregarded.

¶ 37 In sum, we uphold as supported by the evidence the findings that respondent failed to go to intensive outpatient treatment as ordered and failed to successfully complete all recommendations from his CCA. We disregard as unsupported by the evidence the court's findings that respondent denied use of illegal substances during his New Day assessment, failed to complete individual therapy, failed to provide "truthful and accurate" information to the assessors, failed to attend PPAT meetings, failed to demonstrate the ability to provide appropriate care for Annie, was in arrears in child support payments, and failed to seek assistance to find appropriate housing.

¶ 38 Having reviewed respondent's challenges to the trial court's relevant findings of fact, we next consider the trial court's adjudication of grounds for termination.

B. Grounds for Termination

¶ 39 **[2]** Respondent argues the trial court erred in concluding grounds existed to terminate his parental rights under N.C.G.S. § 7B-1111(a)(1) because the trial court's remaining findings of fact do not support its determination of a likelihood of repetition of neglect if Annie were placed in respondent's care. Respondent contends that the court's conclusions that grounds existed "are based almost entirely on a finding not supported by any evidence: that [respondent] gave untruthful information in the CCA and in the substance use assessments." We agree.

¶ 40 "A parent's failure to make progress in completing a case plan is indicative of a likelihood of future neglect." *In re M.A.*, 374 N.C. 865, 870 (2020) (quoting *In re M.J.S.M.*, 257 N.C. App. 633, 637 (2018)). At the same time, "a parent's compliance with his or her case plan does not preclude a finding of neglect." *In re J.J.H.*, 376 N.C. 161, 185 (2020) (citing *In re D.W.P.*, 373 N.C. 327, 339–40 (2020) (noting the respondent's progress in satisfying the requirements of her case plan while upholding the trial court's determination of a likelihood of future neglect because the respondent had failed "to recognize and break patterns of abuse that put her children at risk")); *see also In re Y.Y.E.T.*, 205 N.C. App. 120, 131 (explaining that a "case plan is not just a check list" and that "parents must demonstrate acknowledgment and understanding of why the juvenile entered DSS custody as well as changed behaviors"), *disc. review denied*, 364 N.C. 434 (2010). In this case, however, respondent actually complied with almost all of the requirements of his case plan. At the time Annie was removed from respondent's custody, he had not yet established paternity and the consent adjudication of neglect identified the mother's drug use, not his, as the condition needing remediation. By the time the termination petition was filed, respondent had visited with Annie on 78 occasions, was paying child support, had a home she could live in, had completed substance abuse, domestic violence, and parenting programs, and had addressed the conditions that led to Annie's placement in HCDSS's custody.

¶ 41 To be sure, respondent's substance abuse was recognized as a concern from the initiation of the case, and he was required to address it as part of his case plan. Respondent completed twenty hours of basic substance abuse treatment (four hours more than required by the assessment), but he also continued to test positive for amphetamines, methamphetamines, and cocaine on occasion after completing that treatment, and he denied using methamphetamine or any other drug at the termination hearing despite those positive test results. Respondent's denial of drug use despite the positive drug screens is some support

for the trial court's finding that he failed to completely address his substance abuse issues. But given the trial court's other findings of fact that are supported by the evidence, this says very little about his ability to parent his daughter. There are no findings to support the conclusion that respondent's drug use will result in "some physical, mental, or emotional impairment of the juvenile or a substantial risk of such impairment . . . ." *In re Stumbo*, 357 N.C. 279, 283 (2003); *cf. In re K.B.*, 378 N.C. 601, 2021-NCSC-108, ¶ 22 (affirming termination order on ground of neglect where "the trial court made express findings that [the juveniles] were impaired or at a substantial risk of impairment as a result of respondent mother's neglect"). Thus, disregarding the trial court's findings that were not supported by evidence in the record, the trial court's conclusion that Annie would likely be neglected if returned to her father's care is not supported by the remaining findings of fact. As a result, the trial court's order adjudicating neglect as a ground for termination of respondent's parental rights under N.C.G.S. § 7B-1111(a)(1) must be vacated.

¶ 42 Similarly, given the remaining findings of fact, we cannot conclude that a ground exists for termination under N.C.G.S. § 7B-1111(a)(2). The remaining findings indicate some positive drug screens but also reflect respondent's completion of most of the other requirements of respondent's case plan, including having employment and suitable housing; paying child support; attending almost all visitations; and completing substance abuse, domestic violence, and parenting programs. On these undisturbed findings, we cannot conclude that respondent failed to make reasonable progress towards correcting the conditions that led to Annie's removal. *Cf. In re J.M.*, 373 N.C. 352, 356 (2020) (affirming order terminating parental rights where "[t]he record is clear that at the time of the termination hearing . . . [respondent-mother] had failed to comply with the services outlined for her to complete").

¶ 43 Therefore, we hold that the trial court's findings of fact are insufficient to support its determination that respondent's parental rights in Annie were subject to termination on the grounds of neglect and failure to make reasonable progress in correcting the conditions that led to her removal from his custody.[4] We vacate the trial court's termination order

4. As a prudential matter, a remand under these circumstances is appropriate because adjudicating the asserted grounds requires making various fact-intensive subjective judgments, such as whether respondent exhibited "reasonable progress under the circumstances" and whether there existed a "substantial probability of the repetition of such neglect." Because we cannot say with certainty whether the erroneous factual findings were central or incidental to the trial court's ultimate resolution of these questions, a remand ensures that these questions are answered by the trial court, the tribunal tasked with "assign[ing] weight to particular evidence and . . . draw[ing] reasonable inferences therefrom." *In re K.L.T.*, 374 N.C. 826, 843 (2020).

and remand this case to the District Court, Henderson County for further proceedings consistent with this opinion. In its discretion, the trial court may receive additional evidence on remand. *See In re T.M.H.*, 186 N.C. App. 451, 456 (2007).

VACATED AND REMANDED.

IN THE MATTER OF B.E.V.B.

No. 328A21

Filed 6 May 2022

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

The trial court properly terminated a father's parental rights to his daughter on the ground of willful abandonment (N.C.G.S. § 7B-1111(a)(7)) where its findings, which were supported by clear, cogent, and convincing evidence, showed respondent's willful intention to forego all parental responsibilities by his complete lack of contact with his daughter for far longer than the determinative six-month period, his failure to inquire about the child by contacting her mother despite having multiple avenues to do so, and his written response to the mother that he was unwilling to provide any financial support.

On writ of certiorari pursuant to N.C.G.S. § 7A-32(b) to review orders entered on 1 March 2021 and 26 April 2021 by Judge Pauline Hankins in District Court, Brunswick County. This matter was calendared for argument in the Supreme Court on 18 March 2022 but determined on the record and briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

James W. Lea III for petitioner-appellee mother.

Anné C. Wright for respondent-appellant father.

BARRINGER, Justice.

IN RE B.E.V.B.

[381 N.C. 48, 2022-NCSC-48]

¶ 1 Respondent petitioned the Court to review orders terminating his parental rights to his minor child B.E.V.B. (Becky).[1] According to respondent, the trial court wrongly adjudicated that a ground existed to terminate his parental rights due to willful abandonment pursuant to N.C.G.S. § 7B-1111(a)(7). After careful review, we hold that the trial court did not err in adjudicating that this ground existed. Accordingly, we affirm the trial court's orders terminating respondent's parental rights.

I. Factual and Procedural Background

¶ 2 At the time of Becky's birth in 2012, respondent and petitioner were in a relationship and living together. They continued living together until approximately April 2017.

¶ 3 On 17 April 2017, petitioner sent respondent a message concerning child support, to which respondent replied:

> Well we will have to go to court first. But it's okay I'm gone to make this money as fast as I can then just quit like I always do. An you won't know were I am. I see you're just like [respondent's children's other mothers]. I'm never giving you my number at all. Goodbye. I'm done Snapchat with you ok I see you never loved me at all have fun o wait your so stress no break from the girls. Me I'm doing good getting to hang with all my guy friends know. Come an go [ ]as I please it's fun[ ].

Despite being physically and mentally able to work and paying child support for two of his other children, respondent has not provided any financial support for Becky since 2017.

¶ 4 Subsequently, on 31 May 2017, petitioner obtained an ex parte domestic violence protective order (DVPO) against respondent. Respondent had no interaction with Becky during the period of time between his moving out of the residence in April 2017 and the entry of the ex parte DVPO. After respondent received notice of the proceeding and a hearing occurred, petitioner secured a DVPO against respondent that was effective from 19 July 2017 to 19 July 2018. Petitioner later married on 17 December 2017.

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

¶ 5 Approximately two years later, petitioner filed a petition to terminate respondent's parental rights on 7 May 2020. After a hearing, the trial court adjudicated that a ground existed to terminate respondent's parental rights on the basis that he willfully abandoned Becky for the six consecutive months immediately preceding the filing of the termination-of-parental-rights petition, pursuant to N.C.G.S. § 7B-1111(a)(7). In its dispositional order, the trial court found that termination of respondent's parental rights was in Becky's best interests and so terminated respondent's parental rights.

¶ 6 Respondent filed a notice of appeal. However, respondent later filed a petition for writ of certiorari after discovering that the notice of appeal was possibly deficient. This Court allowed the petition for writ of certiorari.

II. Analysis

A. Standard of Review

¶ 7 The North Carolina Juvenile Code sets out a two-step process for termination of parental rights: an adjudicatory stage and a dispositional stage. N.C.G.S. §§ 7B-1109 to -1110 (2021). At the adjudicatory stage, the trial court takes evidence, finds facts, and adjudicates the existence or nonexistence of the grounds for termination set forth in N.C.G.S. § 7B-1111. N.C.G.S. § 7B-1109(e). If the trial court adjudicates that one or more grounds for termination exist, the trial court then proceeds to the dispositional stage where it determines whether terminating the parent's rights is in the juvenile's best interests. N.C.G.S. § 7B-1110(a).

¶ 8 Appellate courts review a trial court's adjudication that a ground existed to terminate parental rights to determine whether the findings of fact are supported by clear, cogent, and convincing evidence and whether the findings of fact support the conclusions of law. *In re E.H.P.*, 372 N.C. 388, 392 (2019). In doing so, we limit our review to "only those findings necessary to support the trial court's determination that grounds existed to terminate respondent's parental rights." *In re T.N.H.*, 372 N.C. 403, 407 (2019). "A trial court's finding of fact that is supported by clear, cogent, and convincing evidence is deemed conclusive even if the record contains evidence that would support a contrary finding." *In re B.O.A.*, 372 N.C. 372, 379 (2019). Further, "[f]indings of fact not challenged by respondent are deemed supported by competent evidence and are binding on appeal." *In re T.N.H.*, 372 N.C. at 407. We review the trial court's conclusions of law de novo. *In re C.B.C.*, 373 N.C. 16, 19 (2019).

B. Adjudication of Willful Abandonment

¶ 9 The trial court adjudicated that the ground of willful abandonment existed to terminate respondent's parental rights to Becky pursuant to N.C.G.S. § 7B-1111(a)(7). In relevant part, N.C.G.S. § 7B-1111(a)(7) provides that the trial court may terminate respondent's parental rights upon finding that he "willfully abandoned the juvenile for at least six consecutive months immediately preceding the filing of the petition." N.C.G.S. § 7B-1111(a)(7) (2021). "Wilful [sic] intent is an integral part of abandonment and this is a question of fact to be determined from the evidence." *In re C.B.C.*, 373 N.C. at 19 (alteration in original) (quoting *Pratt v. Bishop*, 257 N.C. 486, 501 (1962)). "Abandonment implies conduct on the part of the parent which manifests a willful determination to forego all parental duties and relinquish all parental claims to the child." *Id.* (quoting *In re Young*, 346 N.C. 244, 251 (1997)). "If a parent withholds that parent's presence, love, care, the opportunity to display filial affection, and willfully neglects to lend support and maintenance, such parent relinquishes all parental claims and abandons the child." *Id.* (cleaned up). "[A]lthough the trial court may consider a parent's conduct outside the six-month window in evaluating a parent's credibility and intentions, the 'determinative' period for adjudicating willful abandonment is the six consecutive months preceding the filing of the petition." *In re K.N.K.*, 374 N.C. 50, 54 (2020) (alteration in original) (quoting *In re N.D.A.*, 373 N.C. 71, 77 (2019)).

¶ 10 Petitioner filed the termination-of-parental-rights petition on 7 May 2020. Therefore, the relevant six-month period ran from 7 November 2019 to 7 May 2020. In support of its conclusion that respondent had willfully abandoned Becky for at least the relevant six-month period, the trial court stated and found as follows:

> 7. That the parties lived together until approximately April of 2017.
>
> 8. That during the course of their relationship, the parties had a minor child, [Becky]. The minor child's date of birth is [in] 2012.
>
> 9. On May 31, 2017, [p]etitioner secured an Ex Parte Domestic Violence Order against [r]espondent. Subsequent to the Ex Parte [order], [p]etitioner secured a Domestic Violence Protective Order against [r]espondent which went into effect July 19th, 2017 and expired July 19th, 2018.

10. That [p]etitioner married her current husband . . . on December 17th, 2017.

11. That grounds exist for the termination of parental rights as it relates to [Becky] under N.C.G.S. [§] 7B-1111(a)(7) where . . . [r]espondent has willfully abandoned the minor child for at least (6) six months immediately preceding the filing of this action, with the relevant (6) six month [ ] period commencing November 7, 2019 and continuing until the filing of the petition on May 7, 2020.

12. That the [trial c]ourt further finds that [r]espondent has exhibited an intent to forego all parental duties or relinquish any parental claim to the minor child, to wit:

A. That [r]espondent has willfully abandoned the minor child since 2017 in that he has shown no interest in assuming responsibility for her care for at least six (6) months prior to the filing of this action;

B. That [r]espondent has willfully abandoned the minor child since 2017 in that he has not been in contact with . . . [p]etitioner or the minor child, nor has he visited, inquired upon, or provided cards, letters, or correspondence to the minor child;

C. That [r]espondent has willfully failed without justification to provide for the care, support, maintenance, and education of the minor child since 2017;

D. That [r]espondent has continued to abandon the minor child by his complete failure to provide the personal contact, love[,] and affection that inheres in the parental relationship since 2017;

13. That on January 12th, 2020, [r]espondent posted pictures of the minor child on his Face[b]ook page, those pictures were taken in April of 2019 by [p]etitioner's husband . . . and were taken from the Face[b]ook page of [p]etitioner's husband evidencing that he had the name of . . .

[p]etitioner's husband but failed to attempt to make contact to see and/or establish a relationship with the minor child. The address of . . . petitioner and her husband was of public record.

14. That on or about April 17th, 2017, [p]etitioner sent a message to [r]espondent concerning child support. Respondent[ ] responded immediately via text as follows: "Well we will have to go to court first. But it's okay I'm gone to make this money as fast as I can then just quit like I always do. An you won't know were I am. I see you're just like [respondent's children's other mothers]. I'm never giving you my number at all. Goodbye. I'm done Snapchat with you ok I see you never loved me at all have fun o wait your so stress no break from the girls. Me I'm doing good getting to hang with all my guy friends know. Come an go [ ]as I please it's fun[."]

15. That as indicated in the April 17, 2017 text message referenced above, [respondent] clearly indicated that he would not provide any financial support to provide for the care of the parties['] minor child; [p]etitioner made [respondent] aware of the need for the child support. [Respondent] willfully refused and failed to provide any support for the minor child. That [respondent] stated in his April 17, 2017 referenced above text that he would quit working to avoid paying child support evidencing his willful disregard for the financial needs of the minor child.

. . . .

19. That since July 18, 2018, the expiration of the Domestic Violence Protective Order and during the six consecutive months prior to the filing of this Termination of Parental Rights Petition, [r]espondent has failed to make contact with [petitioner], has failed to inquire as to the welfare of the minor child or establish a relationship with the minor child in any way, failed to

> send cards or gifts for holidays, birthdays, and any special occasion or milestone in the minor child's life evidencing a willful intent to forego all parental duties and relinquish all parental claims during the six consecutive (6) months prior to the filing of this Termination of Parental [Rights] Petition.

¶ 11 As these findings show, respondent had no contact with Becky after April of 2017, including the relevant six-month period. Respondent does not argue otherwise. Instead, respondent challenges the trial court's findings that respondent's failure to have any contact with Becky during that period was willful, contending that his conduct cannot be willful when respondent had no way to contact or locate Becky. Respondent argues that his access to petitioner's husband's Facebook page or the availability of petitioner's address in the public record would "not necessarily give rise to a conclusion that he had the ability to locate Becky or her mother." Additionally, while conceding that he expressed an unwillingness to pay child support in a text message in 2017, respondent discounts this communication given that it occurred three years prior to the filing of the petition and shortly after the couple broke up.

¶ 12 However, "it is well-established that a [trial] court has the responsibility to pass upon the credibility of the witnesses and the weight to be given their testimony and the reasonable inferences to be drawn therefrom." *In re A.R.A.*, 373 N.C. 190, 196 (2019) (cleaned up). Thus, the trial court did not err to the extent that it gave considerable weight to the text message from respondent expressing his unwillingness to pay child support. *See id.*; *In re K.N.K.*, 374 N.C. at 54. Further, the trial court had the responsibility to weigh the testimony at the hearing concerning respondent's ability to contact Becky given his access and use of Facebook and the fact that petitioner and her husband's address was in the public record.

¶ 13 At the termination hearing, petitioner testified that both she and her husband have Facebook pages and that she could check respondent's Facebook page and send him messages. Petitioner's Facebook page displayed her maiden name and birthdate, two pieces of identifying information that were known to respondent. Further, when checking respondent's Facebook page, petitioner found that respondent had taken pictures of Becky from petitioner's husband's Facebook page and posted them on his own Facebook page in January of 2020. Accordingly, the trial court could reasonably infer that respondent had access to petitioner's husband's Facebook page on or before this date. While petitioner's

husband's Facebook page may not have contained his address, it was a public Facebook profile under his name and provided a channel through which respondent could have attempted to get into contact with Becky. Respondent, however, never reached out to petitioner's husband through Facebook to get into contact with Becky.

¶ 14 In addition, respondent failed to utilize several other means of contacting Becky that, according to testimony at the hearing, were available to him during the relevant six-month period. For instance, despite knowing petitioner's family and getting along well with them, respondent never reached out to them to try to get in contact with Becky. Nor did respondent file a custody lawsuit. Petitioner and petitioner's husband's address was also available under both of their names through the Brunswick County Register of Deeds since June of 2019. Finally, despite testimony that respondent and petitioner's main means of communication was Snapchat and that respondent contacted petitioner through Snapchat as late as October of 2017, respondent never attempted to get into contact with Becky by reaching out to petitioner through Snapchat.

¶ 15 Therefore, contrary to respondent's contentions, he had various means to contact Becky, but he did not use them. As a result, the trial court's findings that respondent acted willfully—that he had an intent to forego all parental duties and relinquish any parental claim to Becky—during the relevant six-month period were supported by clear, cogent, and convincing evidence. Since the evidence supported the trial court's findings that respondent acted willfully, and the other unchallenged findings supported the trial court's conclusion that a ground existed to terminate respondent's parental rights, we affirm the trial court's orders and need not address respondent's challenges to findings of fact 16 and 17.

III. Conclusion

¶ 16 The trial court did not err when it adjudicated that the ground of willful abandonment existed to terminate respondent's parental rights pursuant to N.C.G.S. § 7B-1111(a)(7). In addition, respondent does not challenge the trial court's best interests determination. Accordingly, we affirm the orders terminating respondent's parental rights.

AFFIRMED.

IN RE B.R.L.

[381 N.C. 56, 2022-NCSC-49]

IN THE MATTER OF B.R.L.

No. 141A21

Filed 6 May 2022

Termination of Parental Rights—grounds for termination—neglect—inability to parent—likelihood of future neglect

The trial court's order terminating a mother's parental rights on the grounds of neglect was affirmed where the court's finding that she was incapable of parenting her child (who had been adjudicated as neglected) was supported by clear, cogent, and convincing evidence—including testimony from her therapist and her own admission to her social worker—and where the court's determination that there was a likelihood of future neglect was supported by numerous findings—including those related to her inability to care for the child at the time of the hearing and her failure to make progress on her case plan.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) (2019) from an order entered on 18 February 2021 by Judge J.H. Corpening, II, in District Court, New Hanover County. This matter was calendared for argument in the Supreme Court on 18 March 2022 but determined on the record and briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

Jane R. Thompson for petitioner-appellee New Hanover County Department of Social Services.

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

Sydney Batch for respondent-appellant mother.

BARRINGER, Justice.

¶ 1 Respondent appeals from an order terminating her parental rights to her minor child B.R.L. (Brian).[1] After careful consideration, we affirm the trial court's order terminating respondent's parental rights.

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

I. Factual and Procedural Background

¶ 2 On 14 August 2018, the New Hanover County Department of Social Services (DSS) filed a petition alleging Brian to be a neglected juvenile. Since January 2018, DSS had been working with Brian's family regarding issues of domestic violence, substance abuse, mental health, stability, parenting, employment, and medical care for Brian. DSS alleged that respondent stabbed Brian's father[2] during a domestic violence altercation, both parents admitted to a history of heroin use and current alcohol use, and respondent was unemployed.

¶ 3 On 28 November 2018, Brian was adjudicated a neglected juvenile. To achieve reunification, the trial court ordered respondent to complete a substance abuse assessment and comply with all recommendations, submit to random drug screens, complete a comprehensive clinical assessment (CCA) and comply with all recommendations, complete a parenting education program and demonstrate learned skills during interactions with Brian, obtain and maintain safe and stable housing, complete the Reproductive Life Planning Education class, and complete a Domestic Violence Offender Program (DVOP).

¶ 4 For the first year of her case, respondent did not participate in her case plan. After a permanency planning hearing on 25 July 2019, the trial court found that respondent had failed to complete any portion of her case plan, failed to maintain contact with DSS and the guardian ad litem, and failed to appear for three requested drug screens. The trial court set the permanent plan as adoption with a concurrent plan of reunification. On 24 September 2019, DSS petitioned to terminate respondent's parental rights to Brian on the grounds of neglect, pursuant to N.C.G.S. § 7B-1111(a)(1), and willfully leaving Brian in foster care for more than twelve months without making reasonable progress under the circumstances in correcting the conditions that led to Brian's removal, pursuant to N.C.G.S. § 7B-1111(a)(2). After the termination-of-parental-rights hearing, the trial court adjudicated that both grounds for termination alleged by DSS existed. The trial court then concluded it was in Brian's best interests that respondent's parental rights be terminated and terminated respondent's parental rights.

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2. Brian's father is not a party to this appeal.

II. Analysis

A. Standard of Review

¶ 5 The North Carolina Juvenile Code sets out a two-step process for termination of parental rights: an adjudicatory stage and a dispositional stage. N.C.G.S. §§ 7B-1109 to -1110 (2021). At the adjudicatory stage, the trial court takes evidence, finds facts, and adjudicates the existence or nonexistence of the grounds for termination set forth in N.C.G.S. § 7B-1111. N.C.G.S. § 7B-1109(e). If the trial court adjudicates that one or more grounds for termination exist, the trial court then proceeds to the dispositional stage where it determines whether terminating the parent's rights is in the juvenile's best interests. N.C.G.S. § 7B-1110(a).

¶ 6 Appellate courts review the adjudication to determine whether the findings of fact are supported by clear, cogent, and convincing evidence and whether the findings of fact support the conclusions of law. *In re E.H.P.*, 372 N.C. 388, 392 (2019). In doing so, we limit our review to "only those findings necessary to support the trial court's determination that grounds existed to terminate respondent's parental rights." *In re T.N.H.*, 372 N.C. 403, 407 (2019). "A trial court's finding of fact that is supported by clear, cogent, and convincing evidence is deemed conclusive even if the record contains evidence that would support a contrary finding." *In re B.O.A.*, 372 N.C. 372, 379 (2019). Further, "[f]indings of fact not challenged by respondent are deemed supported by competent evidence and are binding on appeal." *In re T.N.H.*, 372 N.C. at 407. We review the trial court's conclusions of law de novo. *In re C.B.C.*, 373 N.C. 16, 19 (2019).

B. Adjudication of Neglect

¶ 7 The trial court concluded that grounds existed to terminate respondent's parental rights to Brian for neglect pursuant to N.C.G.S. § 7B-1111(a)(1). The Juvenile Code authorizes the trial court to terminate parental rights if "[t]he parent has abused or neglected the juvenile" as defined in N.C.G.S. § 7B-101. N.C.G.S. § 7B-1111(a)(1) (2021). A neglected juvenile is defined, in pertinent part for this matter, as a juvenile "whose parent . . . [d]oes not provide proper care, supervision, or discipline . . . [or c]reates or allows to be created a living environment that is injurious to the juvenile's welfare." N.C.G.S. § 7B-101(15) (2021).

¶ 8 "[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 (1984). "The trial court must also consider any evidence of changed

conditions in light of the evidence of prior neglect and the probability of a repetition of neglect." *Id.* "The determinative factors must be the best interests of the child and the fitness of the parent to care for the child at the time of the termination proceeding." *Id.* (emphasis omitted).

¶ 9 On appeal, respondent does not challenge the trial court's finding of past neglect but does challenge portions of findings of fact 52, 78, and 80 along with the trial court's determination that there was a probability of repetition of neglect. Below, we address only those challenges that are necessary to support the trial court's adjudication that neglect existed as a ground for termination. Since a single ground for termination is sufficient, we need not address respondent's challenges to the other ground adjudicated by the trial court.

¶ 10 Respondent challenges the portion of finding of fact 78 that states she was not capable of parenting Brian as of the date of her testimony at the termination hearing on 21 September 2020. However, this finding was supported by clear, cogent, and convincing evidence. At the termination hearing, respondent's therapist testified that respondent was not capable of parenting as she could only parent for a day or two. Further, the therapist testified that it would take about six months of consistent therapy before respondent would be able to parent Brian, and if respondent fell into her old habits at any point during that time, the entire six-month period would need to restart. Additionally, respondent does not challenge finding of fact 118 that in early September 2020, she herself admitted to her social worker that she was not ready to parent Brian. Thus, finding of fact 78 is supported by clear, cogent, and convincing evidence.

¶ 11 While respondent also challenges the trial court's determination that there was a likelihood of future neglect, that determination was clearly supported by numerous unchallenged findings as well as finding of fact 78. If a respondent cannot parent at the time of the termination hearing, then there is a substantial likelihood of future neglect because the respondent lacks the fitness to care for the juvenile at the time of the termination hearing. *See In re Ballard*, 311 N.C. at 715. Here, respondent was not capable of parenting Brian at the time of the termination-of-parental-rights hearing. Additionally, "[a] parent's failure to make progress in completing a case plan is indicative of a likelihood of future neglect." *In re M.A.*, 374 N.C. 865, 870 (2020) (cleaned up). As discussed below, respondent failed to complete many key aspects of her case plan.

¶ 12 DSS created a case plan to help respondent address the issues that led to Brian entering DSS custody, including domestic violence,

substance abuse, mental health concerns, need for stability, parenting skills, and consistent medical care for Brian. Respondent's case plan included but was not limited to completing a substance abuse assessment and following its recommendations, submitting to random drug screens, completing a CCA and complying with all recommendations, obtaining and maintaining safe and stable housing, completing a parenting education program and demonstrating skills learned from it during interactions with Brian, and completing a DVOP.

¶ 13 However, respondent did not follow the case plan and address the issues that led to Brian's removal. First, respondent never successfully completed a DVOP. Nor did respondent obtain appropriate housing. Respondent also did not address her mental health needs. In addition, while respondent obtained CCAs, she did not fully follow the recommendations she received from them, such as completing a substance abuse intensive outpatient program. Respondent's visitation with Brian was sporadic. Finally, respondent refused to submit to several requested drug screens and repeatedly tested positive for alcohol use despite respondent's alcohol abuse being one of the reasons for Brian's removal. Thus, the trial court found that the concerns that originally brought Brian into DSS's care remained unaddressed. Given these findings, the trial court's determination that there was a likelihood of repetition of neglect was supported. Furthermore, because the findings detailed above are more than sufficient to support the determination that there was a likelihood of repetition of neglect, we need not address respondent's challenges to portions of findings of fact 52 and 80.

III. Conclusion

¶ 14 The trial court did not err when it determined that a ground existed to terminate respondent's parental rights for neglect pursuant to N.C.G.S. § 7B-1111(a)(1). Further, respondent does not challenge the trial court's determination that terminating her parental rights was in Brian's best interests. Accordingly, we affirm the order terminating respondent's parental rights.

AFFIRMED.

IN RE B.R.W.

[381 N.C. 61, 2022-NCSC-50]

IN THE MATTER OF B.R.W., B.G.W.

No. 310A21

Filed 6 May 2022

1. Child Abuse, Dependency, and Neglect—permanency planning—guardianship—constitutionally protected parental status—indefinitely ceding custody to nonparent

The trial court properly awarded guardianship of two neglected children to their paternal grandmother where the court's findings supported its conclusion that their mother had acted inconsistently with her constitutionally protected status as a parent by voluntarily ceding custody of the children—then ages one and four years old—to the grandmother for three years until social services assumed custody. Although the mother made demonstrable progress in her family services plan, the fact that she made minimal contact with the children throughout that three-year period (during which the children developed a stronger bond with the grandmother than with the mother) and made no attempts to regain custody until social services got involved indicated that she intended for the grandmother to serve indefinitely as the children's primary caregiver.

2. Child Abuse, Dependency, and Neglect—guardianship—best interests of the child standard—findings of fact—support for conclusions

The trial court in a neglect case properly applied the "best interests of the child" standard in awarding guardianship of a mother's two children to the paternal grandmother after properly determining that the mother had acted inconsistently with her constitutionally protected parental status. Further, the guardianship award was appropriate where the court's factual findings supported its conclusions that the conditions leading to the children's removal continued to exist (the mother's substantial compliance with her family services agreement did not overcome the initial concerns prompting the children's removal—her relinquishment of custody to the grandmother for three years—and she failed to obtain suitable housing until nineteen months after social services' involvement) and that social services had made reasonable efforts toward reunifying the children with their mother (regardless of social services "abruptly" moving for guardianship after initially recommending a trial home placement).

Justice EARLS dissenting.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 278 N.C. App. 382 (2021), affirming, in part, and reversing, in part, a permanency planning order entered on 27 March 2020 by Judge Jeanie Houston in District Court, Yadkin County. Heard in the Supreme Court on 22 March 2022.

James N. Freeman, Jr., for petitioner-appellee Yadkin County Human Services Agency.

Paul W. Freeman, Jr., for appellee Guardian ad Litem.

J. Thomas Diepenbrock for respondent-appellant mother.

ERVIN, Justice.

¶ 1 Respondent-mother Kimberly S. appeals from the decision of a divided panel of the Court of Appeals affirming, in part, and reversing, in part, a permanency planning order awarding legal guardianship of respondent-mother's two minor children, B.R.W. and B.G.W.[1] to Shonnie W., the children's paternal grandmother. After careful consideration of respondent-mother's challenges to the Court of Appeals' decision in light of the record and the applicable law, we affirm the Court of Appeals' decision.

I. Factual Background

A. Substantive Facts

¶ 2 On 1 May 2018, the Yadkin County Human Services Agency received a child protective services report alleging that Brittany and Brianna, ages four and seven, respectively, were neglected juveniles. At that time, Brittany and Brianna were living in a house with their father, Matthew W.; the paternal grandmother; and a paternal great-grandmother. According to the allegations contained in the report, the father "was intoxicated and busting plates and throwing glass in the home." After the paternal grandmother removed the children from the home and contacted law enforcement officers, the father was placed under arrest for drunk and

1. B.R.W. and B.G.W. will be referred to throughout the remainder of this opinion, respectively, as "Brittany" and "Brianna," which are pseudonyms used to protect the children's identities and for ease of reading.

disorderly conduct, resisting a public officer, and violating probation. The father was expected to be incarcerated for the next two years.

¶ 3 On 14 June 2018, HSA filed a petition alleging that Brittany and Brianna were neglected juveniles in that they "live[d] in an environment injurious to [their] welfare." On the same date, Judge William F. Brooks entered an order placing the children in the custody of the paternal grandmother and great-grandmother pending further proceedings. After a hearing held on 25 June 2018, Judge Brooks entered an order on 19 July 2018 finding that respondent-mother was living in Alexander County with her husband, John S., who "has an extensive criminal history including drug-related convictions, assault on a female, larceny, and multiple DWIs" and struggles with alcohol abuse. Judge Brooks further found that, after separating from the father and leaving his home in 2015, respondent-mother had "occasionally visited" with Brittany and Brianna at the father's home and at family gatherings but that she had "not made decisions regarding the minor children's education or welfare, contributed financially to their support and maintenance, or otherwise filled the role of parent/caretaker of the minor children since she and [the father] separated." As a result, Judge Brooks sanctioned the children's continued placement with the paternal grandmother and paternal great-grandmother and authorized both respondent-mother and the father to visit with the children on the condition that they not currently be incarcerated. Judge Brooks also ordered HSA to coordinate with the Alexander County Department of Social Services to conduct a home study of respondent-mother's residence and authorized HSA to place the children in respondent-mother's home if the agency determined the home to be "a suitable and appropriate placement for the minor children."

¶ 4 On 13 July 2018, respondent-mother and the stepfather entered an Out of Home Family Services Agreement with HSA pursuant to which they were required to (1) "[c]omplete a psychological assessment and complete any recommendations made by the assessor," (2) "[p]articipate in a substance abuse assessment and complete any recommendations made by the assessor," (3) "[s]ubmit to random drug screens," (4) "[c]omplete a parenting education program and present [HSA] with a certificate of completion," and (5) "[d]emonstrate stable employment." On 27 July 2018, HSA reported that respondent-mother and the stepfather still lived in Alexander County, had full-time employment, had been attending parenting classes, and had been visiting with the children and that respondent-mother had spoken with the children by phone as well. According to the guardian ad litem, the children "say

they like seeing their [m]om" but also express that they "like living with their grandmothers."

¶ 5 After a hearing held on 2 August 2018, Judge Brooks entered an order on 31 August 2018 adjudicating Brittany and Brianna to be neglected juveniles. According to Judge Brooks, respondent-mother and the stepfather had visited with the children on multiple occasions since entering HSA custody, with "[t]hese visits hav[ing] gone well and [with] their interactions with the children hav[ing] been appropriate." Although Judge Brooks "[took] note of the fact that a significant period of time [had] elapsed since [respondent-mother] [had] been involved in the lives of the minor children on a regular basis," it nevertheless found that she appeared to have "some bond" with her daughters. After keeping the existing placement and visitation orders in effect, Judge Brooks authorized HSA to increase the frequency and duration of respondent-mother's visits with Brittany and Brianna. Finally, Judge Brooks established a primary permanent plan for the children of reunification, with a secondary permanent plan of guardianship.

¶ 6 On 16 August 2018, respondent-mother informed the Alexander County Department of Social Services that her landlord was selling the mobile home in which she and the stepfather had been living, that they were being forced to move, and that she did not know how the required home study could be conducted. On 29 August 2018, the Alexander County Department of Social Services declined to approve the home that respondent-mother and the stepfather occupied in light of their lack of stable housing and the stepfather's extensive criminal history.

¶ 7 After a 90-day review hearing held on 25 October 2018, Judge Robert J. Crumpton entered an order on 6 December 2018 finding that respondent-mother had made significant progress in satisfying the requirements of her family services agreement in light of the fact that she had secured temporary housing in Wilkes County, maintained stable employment, had access to reliable transportation, visited with the children regularly, remained in contact with HSA, submitted to random drug screenings, and completed a psychological assessment. On the other hand, Judge Crumpton found that respondent-mother had failed to complete a substance abuse assessment or a parenting education program. In addition, Judge Crumpton found that the stepfather had also been visiting with the children regularly, had remained in contact with HSA, and had submitted to random drug screenings; that he was unemployed "due to a back injury"; and that he had not completed either a substance abuse assessment or a parenting education program. After noting that respondent-mother and the stepfather "have consistently attended

visitation with the minor children" and "appear to be bonded with the children," so that HSA had exercised its authority to increase the amount of visitation to which respondent-mother and the stepfather were entitled, Judge Crumpton retained the existing visitation arrangement while authorizing HSA to increase the frequency and duration of the visits between respondent-mother, the stepfather, and the children and to allow unsupervised visitation. Finally, Judge Crumpton determined that the primary permanent plan for the children should remain reunification, with the secondary permanent plan being one of guardianship.

¶ 8 On 14 May 2019, HSA submitted a revised court report noting that respondent-mother had been "working diligently on her" family services agreement, that she had participated in parenting classes, and that she had an "agree[ment] to increase the hours she works so that her income can increase in order to best meet the needs of her child[ren]." Similarly, HSA reported that the stepfather had "made substantial progress" in satisfying the requirements of his own family services agreement despite the fact that he did not have a regular income. HSA noted that respondent-mother and the stepfather had been participating in unsupervised visitation with the children on Saturday afternoons, that they took the children to church on the last Sunday of each month, and that respondent-mother was in compliance with her obligation to make court-ordered child support payments, having even made payments against an existing arrearage. After acknowledging the progress that both parents had made in satisfying the requirements of their family service agreements, HSA observed that "[p]arenting classes need to be completed and the home is not yet ready to house the children." As a result, HSA recommended that Brittany and Brianna remain in their current placement with the paternal grandmother and paternal great-grandmother and that it be authorized, in the exercise of its discretion, to allow overnight visitation between the children, on the one hand, and respondent-mother and the stepfather, on the other.

¶ 9 On 3 May 2019, the guardian ad litem submitted a report indicating that, while she "would like to support and encourage [respondent-mother's] relationship with" Brittany and Brianna, she had "serious concerns" relating to the stepfather. More specifically, the guardian ad litem stated that she had witnessed the stepfather "become increasingly angry with [HSA] social workers" at a Child and Family Team meeting, held on 26 April 2019, before "storming out mad and ordering [respondent-mother] [to] come with him." In light of this experience, the guardian ad litem stated that she was "extremely concerned about the safety of the girls, as well as [respondent-mother,]" and expressed

the opinion that the "primary" motivation underlying the attempts that respondent-mother and the stepfather had been making to obtain custody of the children was gaining access to thousands of dollars in custody-related tax benefits. The guardian ad litem explained that, according to the paternal grandmother, respondent-mother had told the paternal grandmother upon leaving the children with her in 2015 that "she would take the girls if [the father] and [the paternal grandmother] didn't allow [respondent-mother] and stepfather to claim the girls for [a] tax refund even though [the girls] did not live with them," with such an arrangement having continued to exist for three years prior to the beginning of HSA's involvement with the children. As a result, the guardian ad litem recommended that the stepfather be required to obtain a domestic violence and anger-related assessment and that respondent-mother be required to obtain an assessment for possible effects of domestic violence.

¶ 10 After a hearing held on 16 May 2019, Judge David V. Byrd entered a permanency planning order on 16 July 2019 in which he found that the Wilkes County residence occupied by respondent-mother and the stepfather was "safe and appropriate for the minor children" and that respondent-mother and the stepfather were "active participant[s]" in parenting classes and had been "implementing the lessons [that they] [were] learning during [their] interactions with the minor children." Judge Byrd endorsed the children's continued placement with the paternal grandmother and paternal great-grandmother and retained the existing visitation plan, subject to the understanding that HSA had the authority to authorize additional overnight visitation. In addition, Judge Byrd ordered respondent-mother and the stepfather to obtain domestic violence assessments and determined that the primary permanent plan for the children should remain one of reunification, with the secondary permanent plan for the children being one of guardianship.

¶ 11 On 13 July 2019, Brittany and Brianna began overnight visits with respondent-mother and the stepfather at their residence in Wilkes County. On 23 August 2019, the counselor who performed the anger and domestic violence assessments for respondent-mother and the stepfather reported that, "after a very extensive domestic violence evaluation of both individuals and an anger management assessment of the [stepfather] plus having interviewed the couple separately and together, there is no indication of any domestic violence or anger issues." On 29 August 2019, Judge Brooks entered an order continuing the case until 26 September 2019 for the purpose of "allow[ing] [respondent-mother] to have stable housing" subject to the understanding that there would be no further continuances.

¶ 12 On 12 September 2019, HSA submitted a report stating that respondent-mother had "completed all objectives" set out in her family services agreement and recommended the commencement of a trial home placement. On the other hand, a revised report submitted by the guardian ad litem on 17 September 2019 indicated that, despite the fact that respondent-mother was working and had access to reliable transportation, the residence that she occupied with the stepfather was "not appropriate for full time care of the girls." According to the guardian ad litem, respondent-mother and the children slept in one bedroom, the stepfather's mother slept in the second bedroom, the stepfather slept in a recliner in the living room, and the stepfather's uncle slept on the couch. The guardian ad litem reported that, while respondent-mother and the stepfather had "said they are looking for a home for themselves and the girls," they had "made no progress in a year," and that, even though respondent-mother had stated that she "[didn't] want to take [Brittany] out of the Jonesville [Yadkin County] school district 'because she loves it so much,' " there was "no evidence" that respondent-mother and the stepfather had sought to obtain housing in Jonesville.

¶ 13 In addition, the guardian ad litem stated that (1), according to Brianna, the two children had ridden in the back of respondent-mother's pickup truck, an allegation that respondent-mother subsequently confirmed; (2), on 6 September 2019, a Friday, respondent-mother had been late in picking up Brianna from school and that, when Brianna complained of a headache and did not go to school on the following Monday, respondent-mother dropped Brianna off with the paternal grandmother instead of staying with Brianna, an action that caused the paternal grandmother to miss a day of work; (3), on the same date, Brittany's teacher reported that the child "would not sit down at her desk to work and also wouldn't talk," which was "unusual behavior for her;" (4), on 13 September 2019, when the school lost power and could not reach respondent-mother to pick up the children, the paternal grandmother had been required to do so; and (5), on 18 September 2019, Brianna told the guardian ad litem that the stepfather had stated that, "from now on[,] he would be sleeping in the bed with [respondent-mother] rather than on the recliner and [that] [Brittany and Brianna] could sleep at the bottom of the bed[.]" In light of this information, the guardian ad litem concluded that respondent-mother was continuing a "lifelong pattern of pushing responsibility for the children off on the [paternal] grandmother," with "multiple sources" having informed the guardian ad litem that, "throughout these little girls' lives[,] [respondent-mother] has left them in [the] care of [the] paternal grandmother for long stretches of time, only visiting sporadically when convenient for her," while

simultaneously "collect[ing] tax refunds of at least $7,000 each year for at least three years prior to [the upcoming permanency planning hearing] despite not providing primary care." According to the guardian ad litem, it was "very unlikely that either parent can be responsible for the girls without support from their own parents," with it being "in the best interest of the children that someone more dependable ha[ve] legal custody, while still allowing them to have a relationship with their parents." As a result, the guardian ad litem recommended awarding custody or guardianship to the paternal grandmother.

¶ 14 After a hearing held on 26 September 2019, Judge Brooks entered a consent permanency planning order on 6 November 2019 finding that, while respondent-mother had complied with most of the requirements of her family services agreement, the two-bedroom residence in which respondent-mother lived with the stepfather was "currently occupied by no less than four adults and lacks sufficient space for the minor children to return to on a permanent basis under these circumstances." Similarly, Judge Brooks found that the stepfather had complied with the requirements of his family services agreement with the exception of its housing-related provisions and his continued unemployment "due to a back injury," and that both respondent-mother and the stepfather had obtained domestic violence assessments. As a result, Judge Brooks concluded that, "in light of [respondent mother's] and [the stepfather's] near-completion of their [family services agreements], it is likely that the minor children can be returned home within the next six months." Judge Brooks continued the existing visitation arrangements and retained the existing primary and secondary permanent plans for the children.

¶ 15 On 21 November 2019, HSA filed a motion for review and requested a new permanency planning hearing for the purpose of "finalizing and obtaining permanency for" Brittany and Brianna in which it indicated that it would request that the paternal grandmother be made the children's guardian. On 17 December 2019, HSA submitted a report to the trial court in which it detailed the reasons that it believed that the implementation of its revised proposed permanent plan would be appropriate. According to HSA, Brianna, who was then in third grade,

> has displayed some attachment and adjustment issues after weekend visitation with her mother. [Brianna] is having transition issues on Mondays at school once she had spent the weekend with [respondent-mother]. The school guidance counsel[lor], the princip[al] and [Brianna's] therapist Amber Dillard have reported issues with school transitions on

> Monday[s] and lasting all day. [Brianna] cr[ies] and ask[s] for her grandmother and is sad until time to be picked up. When [Brianna] is ask[ed] what is wrong she states that she misses her grandmother and wants to be with her. [Brianna] has stated to [HSA] at the last couple of home visits, and at a permanency planning meeting, that she want[s] to live with her grandmother and visit with her mother.

Similarly, HSA reported that Brittany "has displayed some attachment and adjustment issues after weekend visitation with her mother" and that, even though Brittany was seeing Ms. Dillard for therapy, she "does not talk a lot." As a result of "the continued statements and reports from other professionals, that [Brianna] has made in regards to [wanting] to remain in her grandmother['s] home[,] [HSA] request[ed] that Guardianship of both girls be granted to [the paternal grandmother] on this date and that the agency be released of any further efforts."

¶ 16 On 20 December 2019, the guardian ad litem submitted an additional report indicating that both Brittany and Brianna "are having very concerning emotional problems that seem to be tied to their weekend visits with their mother and stepfather," with Brianna's teacher reporting that Brianna "is often so distraught on [Mondays] that she cannot focus on classwork and often breaks into tears" and with Brittany's teacher having noticed that, after these weekend visits, Brittany "would not sit down at her desk to work and also wouldn't talk," which was "unusual behavior for her." The guardian ad litem stated that, when she questioned Brianna about her behavior, Brianna said that "she likes seeing her mother but misses her grandmother." The guardian ad litem further reported that both girls expressed a desire to live with the paternal grandmother and great-grandmother, although they wanted to continue seeing respondent-mother and the father as well. However, Brianna told the guardian ad litem that respondent-mother "pays more attention to [the stepfather] than to us" and "sometimes doesn't even talk to [us]." As a result, the guardian ad litem concluded that it was not possible for the children to be returned to respondent-mother "within a reasonable period of time" given that

> [t]he children have been in [HSA] custody for over a year now and overnight visits only began in July with [respondent-mother]. After these visits, the girls exhibit extreme emotional distress. On at least two occasions—involving the girls riding in the back of the pickup truck, and involving the [stepfather] sleeping

> on the couch rather than the bedroom—[respondent-mother] was less than forthcoming about what was happening in her home and only discussed it after one of the children told [the guardian ad litem]. Because of this, [the guardian ad litem] has concerns about [respondent-mother] putting the girls' best interest above her husband's.
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> . . . .
>
> In addition, the girls' primary care bond is to their grandmother, who has essentially raised them their entire lives. Even when their mother and father were married, they lived with their grandmother. When [respondent-mother] left 3-4 years ago, she only visited sporadically, and often only for an afternoon.
>
> It is in the best interest of the children that they remain in their current home, where they are most secure—their grandmother's.

As a result, the guardian ad litem recommended that the court award guardianship of the children to the paternal grandmother.

¶ 17 In anticipation of the new permanency planning hearing requested in its motion for review, HSA submitted a new report in which it expressed many of the same concerns outlined in the report submitted by the guardian ad litem. In recommending that the paternal grandmother be made the children's guardian, HSA noted that it

> recognizes that [respondent-mother] has completed all requirements of her [family services agreement]. However, while the children do have a bond with [respondent-mother], their bond and connection is primarily with their [paternal] grandmother. Both [Brittany] and [Brianna] primarily have always resided with their [paternal] grandmother who has provided the most stability and consistency regarding their care and supervision. [Respondent-mother] was absent from the children's lives for approximately three years (prior to the children coming into foster care) and during this time the children were cared for by their paternal grandmother.
>
> The children have continued to make statements to their social worker, [the guardian ad litem], and

> other professionals that they wish to reside with their [paternal] grandmother but have visits with their parents. [HSA] is requesting that Guardianship of both girls be granted to [the paternal grandmother] on this date and that the agency be released of any further efforts.

On the other hand, HSA recommended respondent-mother continue to have weekend visits with the children.

¶ 18 On 30 January 2020, the trial court held a permanency planning review hearing. At that hearing, the paternal grandmother testified that she had been with Brittany and Brianna since they were born and described the children as "my life." The paternal grandmother testified that, after leaving the children with her in 2015, respondent-mother only visited the children on holidays and birthdays and failed to provide any child support despite the fact that respondent-mother and the paternal grandmother resided in the same county and the fact that respondent-mother had continued to claim the children as dependents for tax purposes until they entered HSA custody.

¶ 19 Respondent-mother testified that she and the stepfather had recently moved into a three-bedroom, two-bathroom house in Surry County and that she had full-time employment. Respondent-mother explained that she left the children with the paternal grandmother because the father, who had recently been released from prison, had resumed drug and alcohol use and because she had "been abused." Respondent-mother claimed that she had "seen the girls a lot more than what was said" and that, on certain occasions when she was scheduled to visit with the children, the paternal grandmother would take the children and leave the house. Similarly, respondent-mother claimed that, in the years before she began making court-ordered child support payments, she had given the paternal grandmother between $2,000 and $3,000 in financial assistance and denied that she had claimed the children as dependents for tax purposes. Respondent-mother asserted that she had completed the requirements set out in her family services agreement and that she had been visiting with the girls on weekends for approximately five months. Respondent-mother testified that she had a "great" bond with her daughters, that they "have a really good time" together, and that both Brittany and Brianna were comfortable with both her and the stepfather. In conclusion, respondent-mother emphasized that she had "been there" for her daughters and that "[t]hey're my girls and I love them."

¶ 20 Steven Corn, a social worker employed by HSA, testified that one of the reasons that the agency had decided to change its recommendation

relating to the children's primary permanent plan from reunification to guardianship was Brianna's statements to HSA staff and other professionals that, while "she has a bond with her mother," "she feels more secure with her grandmother and wants to live with her grandmother and continue just to have visitation with her mother." In addition, Mr. Corn stated that Ms. Dillard, who served as the children's therapist, had expressed concern that "on Monday mornings transitions [were] very hard" for the girls and that, even though sometimes "Monday afternoons seemed to be better," on other occasions, "those transition episodes would last into maybe Tuesday also."

¶ 21 At the conclusion of the hearing, the trial court announced its intention to award guardianship of the children to the paternal grandmother and to allow respondent-mother to visit with the children every other weekend from Friday through Sunday in attempt to alleviate some of the transition-related problems that the girls were experiencing at school on Monday mornings. On 27 March 2020, the trial court entered a written permanency planning review order in which it found the following pertinent facts, among others, "by clear, cogent and convincing evidence:"

> 24. The Court finds requiring the children to live with [respondent-mother] and [the stepfather] is not in their best interest and is contrary to their health, safety and welfare. Therefore it is not possible for the children to be reunified to [respondent-mother's] home immediately or within the next six months.
>
> . . . .
>
> 30. At this time reunification efforts clearly would be unsuccessful and/or would be inconsistent with [Brittany] and [Brianna]'s health or safety and need for a safe, permanent home within a reasonable period of time.
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> . . . .
>
> 34. The Court finds [respondent-mother] and [Father] by clear and convincing evidence are unfit to provide for [Brittany] and [Brianna]'s needs and have acted in a manner inconsistent with their constitutionally protected status as a parent. [Brittany] and [Brianna] have been in non-secure custody for 19 months. Respondent-mother] has completed her [family services agreement] but the children have, since birth,

> resided in the home of [the paternal grandmother] and wish to remain there. [Respondent-mother] has not resided with the girls for now five years. [Father] is incarcerated again and has not completed a family services agreement.

As a result, the trial court concluded that placement of the children with either respondent-mother or the father would be "contrary to their health, safety, welfare and best interest" because the "[c]conditions that led to the custody of the children by [HSA] and removal from the home of the parent(s) continue(s) to exist." Finally, the trial court concluded that "the best interest of the minor children, [Brittany] and [Brianna], would be served by awarding guardianship to [the paternal grandmother]" while making it clear that either party had the right to file a motion for review at any time. Respondent-mother noted an appeal to the Court of Appeals from the trial court's order.

B. Court of Appeals Decision

¶ 22 In seeking relief from the trial court's order before the Court of Appeals, respondent-mother argued that the trial court had erred by awarding guardianship of the children to the paternal grandmother on the grounds that its determination that respondent mother was "unfit" and had "acted in a manner [inconsistent with] her constitutionally protected status as a parent" was "not supported by clear and convincing evidence, and [was] inconsistent with other findings of fact in the order." In addition, respondent-mother contended that the trial court had erred "when it applied a best interest standard in making its guardianship decision" because that standard "is not applicable to an order granting custody or guardianship to a non-parent until after the court has properly found that the parent was unfit or has acted inconsistently with [her] constitutionally-protected rights." Finally, respondent-mother argued that the trial court's conclusion that placing the children in her home would be "contrary to their health, safety, welfare and best interest" was not supported by adequate findings of fact.

¶ 23 In evaluating the validity of respondent-mother's challenges to the trial court's order, the majority at the Court of Appeals began by observing that, in its findings of fact, the trial court had "treat[ed] unfitness and acting inconsistently with constitutionally protected rights as a single determination" despite the fact that they are "are two separate determinations" that "must be reviewed independently." *In re B.R.W. & B.G.W.*, 278 N.C. App. 382, 2021-NCCOA-343, ¶ 32 (citing *Peterson v. Rogers*, 337 N.C. 397, 403–404 (1994)). After acknowledging that "[p]rior cases have

often not been clear on whether the determination of unfitness or acting inconsistently with a constitutionally protected right is a conclusion of law or a finding of fact," the Court of Appeals concluded that the issues of fitness and conduct inconsistent with one's parental rights were conclusions of law subject to de novo review. *Id.* ¶ 34 (citing *In re V.M.*, 273 N.C. App. 294, 298 (2020); *Raynor v. Odom*, 124 N.C. App. 724, 731 (1996); *Boseman v. Jarrell*, 364 N.C. 537, 549 (2010)).

¶ 24 In examining whether respondent-mother had acted inconsistently with her constitutionally protected status as the children's parent, the Court of Appeals noted that, "[e]ven where there is no question of a parent's fitness, a parent may act inconsistently with her parental rights by voluntarily ceding her parental rights to a third party," such as "where a parent voluntarily allows her children to reside with a nonparent and allows the nonparent to support the children and make decisions regarding the children's care and education[.]" *Id.* ¶ 42 (citing *Owenby v. Young*, 357 N.C. 142, 146 (2003); *In re Gibbons*, 247 N.C. 273, 280 (1957)). In making this determination, the majority at the Court of Appeals held that "[t]he trial court [had] properly considered [respondent-mother's] absence from the home and her lack of involvement with the children for three years prior to [the father's] arrest to support its conclusion that [respondent-mother] had acted inconsistently with her constitutionally protected rights." *Id.* ¶ 45. In the majority's view, "[respondent-mother] chose to forgo her constitutionally protected rights when she left her daughters in the care of [the paternal grandmother] for an indefinite period of time with no express or implied intention that the arrangement was temporary," *id.* ¶ 46 (citing *Boseman*, 364 N.C. at 552; *Price v. Howard*, 346 N.C. 68, 83 (1997)), and that the trial court's decision was "supported by the findings of fact, considering the totality of the circumstances," *id.* ¶ 46 (citing *Adams v. Tessener*, 354 N.C. 57, 66 (2001)).

¶ 25 In addressing the issue of whether respondent-mother was unfit to parent the children, the Court of Appeals observed that "[m]any of the findings of fact regarding [respondent-mother] addressed her compliance with most of the requirements of [her family services agreement]," including the fact that she had completed parenting classes; obtained assessments for domestic violence and anger management, neither of which resulted in recommendations for additional services; submitted to random drug screenings, all of which had been negative; engaged in unsupervised visitation with the children, including overnight and weekend visitation; and secured stable housing that was appropriate for children. *Id.* ¶ 48. As a result, the majority at the Court of Appeals held that "the trial court's findings of fact did not support a conclusion

that [respondent-mother] is unfit" and reversed the trial court's order with respect to this issue. *Id.* Nevertheless, the Court of Appeals majority determined that, "because the trial court's determination that [respondent-mother] acted in a manner inconsistent with her constitutionally protected status was supported by the findings of fact, the trial court did not err in its grant of guardianship to [the paternal grandmother]." *Id.* (citing *Bennett v Hawks*, 170 N.C. App. 426, 429 (2005)). Accordingly, the majority held that the trial court did not err in determining that the "best interests of the child" supported an award of guardianship of the children to the paternal grandmother. *Id.* ¶ 49.

¶ 26 Finally, the Court of Appeals considered respondent-mother's contention that several of the trial court's conclusions of law were not supported by its findings of fact or else rested on a misapplication of the law. After noting that, to the extent that respondent-mother's arguments to this effect rested on a belief that the trial court had erred by concluding that she had acted inconsistently with her constitutionally protected status as the children's parent, any such argument would lack merit, the majority of the Court of Appeals held that the challenged conclusions of law had ample support in the trial court's findings of fact. *Id.* ¶ 50. In reaching this conclusion, the Court of Appeals noted that the fact that respondent-mother had made significant progress in satisfying the requirements of her family services agreement "does not automatically lead to a conclusion that the conditions which led to [the] removal [of Brittany and Brianna from her custody] do not continue to exist" and that, while it was true that, "by the time of the permanency planning hearing, [respondent-mother's] circumstances had changed in many ways," the trial court's conclusions were nevertheless supported by adequate findings of fact. *Id.* ¶¶ 52–53. In addition, the Court of Appeals rejected respondent-mother's contention that the trial court had erred by making an "abrupt" change to the permanent plan for the children despite the nature and extent of her success in satisfying the requirements of her family services agreement, reasoning that "[respondent-mother] cites no authority regarding the timing or 'abruptness' of a change in the plan to achieve permanence" and, "as long as the trial court considers the factors as required by [N.C.G.S.] § 7B-901(c) and makes appropriate findings, we can find no abuse of discretion by the trial court's decision to change to guardianship." *Id.* ¶ 55.

¶ 27 Although Judge Carpenter expressed agreement with his colleagues' determination that the trial court's findings of fact had sufficient evidentiary support, he declined to join their determination that those findings supported certain of the trial court's conclusions of law. *Id.* ¶ 59

(Carpenter, J., concurring, in part, and dissenting, in part). More specifically, Judge Carpenter would have held that the trial court's findings of fact did not suffice to support the trial court's conclusions that "[p]lacement of the children, [Brittany] and [Brianna], to the mother or father's home at this time is contrary to their health safety, welfare, and best interests" and that the "[c]onditions that led to the custody of the children by [HSA] and removal from the home of the parent[s] continue(s) to exist." *Id.* Judge Carpenter noted that, even though the majority had relied upon respondent-mother's delay in obtaining suitable housing in support of its determination that respondent-mother had acted inconsistently with her constitutionally protected right to parent, the trial court had failed to make any findings of fact with respect to this issue and had, on the contrary, found that respondent-mother "has participated with the service plan and has made adequate progress within a reasonable period of time." *Id.* ¶ 62. In addition, Judge Carpenter pointed out that "adequate housing for the children was ultimately obtained before the 30 January 2020 permanency planning hearing." *Id.* According to Judge Carpenter, "if [respondent-mother] had completed her family services agreement and was presumably in compliance with [that] agreement, including housing requirements, then the conditions that led to children's removal from their parents' home would surely have been eliminated in [respondent-mother's] home." *Id.* ¶ 65. As a result, Judge Carpenter would have held that the trial court's findings did not suffice to support its conclusion that respondent-mother had "act[ed] in a manner inconsistent with the health or safety of" her children, so that the trial court had erred by authorizing the cessation of efforts to reunify respondent-mother with the children. *Id.* (quoting N.C.G.S. § 7B-906.2(3)(4) (2019)).

¶ 28 In addition, Judge Carpenter disagreed with the majority's determination that respondent-mother had forfeited her constitutionally protected right to parent her children when she left Brittany and Brianna in the paternal grandmother's care for an extended and indefinite period of time. *Id.* ¶ 66. After acknowledging that "the record reveals that [respondent-mother] did indeed leave the father's home in 2015 while the minor children remained in the [paternal] grandmother's and father's care," Judge Carpenter pointed out that respondent-mother had "signed and completed [a family services agreement] on 13 July 2018, with which she made reasonable progress throughout the course of the plan;" that various trial judges had maintained reunification as the primary plan until the most recent hearing; and that the trial court had "failed to make findings of fact that reunification would be inconsistent with the children's health and safety." *Id.* ¶¶ 68–70. In Judge Carpenter's

view, a decision "[t]o ignore compliance with a case plan would serve to discourage parents who, like [respondent-mother], comply with [social services] requirements and recommendations and seek reunification with their children" and would be "detrimental to the success of the [HSA] program and similar programs." *Id.* at ¶ 70.

II. Substantive Legal Analysis

A. Standard of Review

¶ 29 According to well-established North Carolina law, appellate review of a permanency planning order "is limited to whether there is competent evidence in the record to support the findings of fact and whether the findings support the conclusion of law," *In re L.M.T.*, 367 N.C. 165, 168 (2013) (cleaned up), with the trial court's findings of fact being "conclusive on appeal if supported by any competent evidence," *id.*; *see also Owenby*, 357 N.C. at 147 (noting that "the trial court's findings of fact are conclusive on appeal if there is evidence to support them, even though the evidence might sustain findings to the contrary"). A trial court's determination that a parent has acted inconsistently with his or her constitutionally protected status as the parent is subject to de novo review, *Boseman*, 364 N.C. at 549, and "must be supported by clear and convincing evidence," *Adams*, 354 N.C. at 63.

B. Acting in a Manner Inconsistent with Constitutionally Protected Status

¶ 30 **[1]** The Due Process Clause of the Fourteenth Amendment to the United States Constitution protects "a natural parent's paramount constitutional right to custody and control of his or her children" and ensures that "the government may take a child away from his or her natural parent only upon a showing that the parent is unfit to have custody" or "where the parent's conduct is inconsistent with his or her constitutionally protected status." *Adams*, 354 N.C. at 62 (citing *Troxel v. Granville*, 530 U.S. 57, 72–73 (2000)). In view of the fact that no party has challenged the validity of the Court of Appeals' determination that the trial court's factual findings had sufficient record support and that the trial court's findings did not support a determination that respondent-mother was an unfit parent before this Court, the principal issue that we must decide in this case is whether the trial court's findings of fact support its determination that respondent-mother had acted in a manner that was "inconsistent with [her] constitutionally protected status." *Id.*

¶ 31 In seeking to persuade us that this question should be answered in the negative, respondent-mother directs our attention to the trial court's

factual findings concerning the nature and extent of her compliance with her family services agreement, in which the trial court stated that:

> 3. [Respondent-mother] entered an Out of Home Family Services Agreement on July 13, 2018. The mother is employed . . . and has no known mental health or substance abuse issues. She resides with her husband, [the stepfather], who also entered a Family Services Agreement on July 13, 2018. [The stepfather] has applied for social security disability benefits and is not employed at this time.
>
> 4. [Respondent-mother] and her husband have completed parenting classes and a Domestic Violence and Anger Management Assessment. The assessment had no recommendations for further services.
>
> 5. [Respondent-mother] has submitted to random drug screens; all have been negative for substances.
>
> 6. [Respondent-mother] and [the stepfather] have had unsupervised visitation including overnight and weekend visitation (every Friday – Monday morning). They have moved to a home that allows the children to have a bedroom.
>
> 7. [Respondent-mother] has participated with the service plan and has made adequate progress within a reasonable period of time. She has generally attended court hearings and has stayed in contact with [HSA] and the [Guardian ad Litem] Program.

In respondent-mother's view, "[t]here can be little doubt that these findings describing [her] compliance with her case plan do not support the conclusion that she acted in a manner inconsistent with her constitutionally protected status." Respondent-mother places considerable emphasis on the fact that the trial court had authorized her to have unsupervised overnight visitation with Brittany and Brianna given the fact that the entry of such an order must follow "a hearing at which the court finds the juvenile will receive proper care and supervision in a safe home," citing N.C.G.S. § 7B-903.1(c) (providing, in pertinent part, that, "[i]f a juvenile is removed from the home and placed in the custody or placement responsibility of a county department of social services, the director shall not allow unsupervised visitation with or return physical custody of the juvenile to the parent, guardian, custodian, or

caretaker without a hearing at which the court finds that the juvenile will receive proper care and supervision in a safe home").

¶ 32 After acknowledging the Court of Appeals' determination, in reliance upon *Boseman*, that "[her] actions related to leaving the home in 2015, allowing [the] paternal grandmother to care for her children and living separately from the children for three years constitutes actions inconsistent with her constitutionally-protected status," respondent-mother argues that "the facts of [*Boseman*] bear little resemblance to those [at issue] here." In *Boseman*, two women who had cohabited as domestic partners decided to have a child using a process pursuant to which the defendant became impregnated by means of artificial insemination and then allowed the plaintiff to adopt the child. *Boseman*, 364 N.C. at 539–40. After the couple separated and the plaintiff sought custody of the minor child, this Court concluded that, by bringing the plaintiff into the "family unit" and holding her out as the child's parent, the defendant had "acted inconsistently with her paramount parental status." *Id.* at 550–51. More specifically, this Court observed that

> [t]he record in the case *sub judice* indicates that defendant intentionally and voluntarily created a family unit in which plaintiff was intended to act—and acted—as a parent. The parties jointly decided to bring a child into their relationship, worked together to conceive a child, chose the child's first name together, and gave the child a last name that "is a hyphenated name composed of both parties' last names." The parties also publicly held themselves out as the child's parents at a baptismal ceremony and to their respective families. The record also contains ample evidence that defendant allowed the plaintiff and the minor child to develop a parental relationship. . . . Moreover, the record indicates that defendant created no expectation that this family unit was only temporary.

Id. at 552.

¶ 33 Respondent-mother argues that in this case, unlike the defendant in *Boseman*, she "did not intentionally create a family unit including [the paternal grandmother], did not jointly name the children with [the paternal grandmother], and did not hold out [the paternal grandmother] to be a parent of the children." In addition, respondent-mother contends that, "after HSA became involved with her daughters, [she]

fully pursued reunification, substantially completed her [family services agreement], and had been awarded unsupervised overnight visitation every weekend."

¶ 34 In a similar vein, respondent-mother attempts to distinguish this case from *Price* on factual grounds. In *Price*, after giving birth to a daughter, the defendant mother gave her daughter the plaintiff's last name on the child's birth certificate but did not name the plaintiff as the child's father on that document. *Price*, 346 N.C. at 70–71. In addition, "from the time of the child's birth, [the] defendant represented that [the] plaintiff was the child's natural father." At the time that the couple separated and the defendant moved to Eden, the child remained in the primary physical custody of the plaintiff and attended her first year of school in Durham, where the plaintiff resided. *Id.* at 71. In a subsequent custody dispute during which a blood test demonstrated that the plaintiff was not the child's biological father, the trial judge determined that the best interests of the child would be served by awarding primary custody of the child to the plaintiff even though both parties were deemed "fit and proper persons to exercise the exclusive care and custody of the child." *Id.* at 71. On appeal, this Court held that, while "[u]nfitness, neglect, and abandonment clearly constitute conduct inconsistent with the protected status parents may enjoy," "[o]ther types of conduct, which must be viewed on a case-by-case basis, can also rise to this level so as to be inconsistent with the protected status of parents." *Id.* at 79. In light of this fact, we concluded that

> [i]t is clear from the record that [the] defendant created the existing family unit that includes [the] plaintiff and the child, but not herself. Knowing that the child was her natural child, but not [the] plaintiff's she represented to the child and to others that [the] plaintiff was the child's natural father. She chose to rear the child in a family unit with the plaintiff being the child's de facto father. The testimony at trial shows that the parties disputed whether [the] defendant's voluntary relinquishment of custody to [the] plaintiff was intended to be temporary or indefinite and whether she informed [the] plaintiff and the child that the relinquishment of custody was temporary.

Id. at 83. As a result of the trial court's failure to make findings of fact addressing the length of time over which the defendant intended to relinquish custody of the child, we remanded this case to the trial court for a determination concerning whether the plaintiff and the defendant

had reached any agreement about the length and scope of the custodial arrangement. *Id.* at 84.

¶ 35 According to respondent-mother, the facts at issue in *Price* "are completely distinct from those of this case" because "[t]his case does not involve a situation where [she] represented to the children and others that [the paternal grandmother], and not she, was the girls' parent." Instead, respondent-mother argues that she simply allowed the children to live with and be cared for by the paternal grandmother, continued to visit her children, and fully pursued reunification once HSA got involved. Respondent-mother concludes that, "[b]ecause the trial court's finding that [she] is unfit to provide for her daughter[s'] needs and has acted in a manner inconsistent with her constitutionally protected status as a parent is not supported by the findings of fact, the trial court erred when it applied a best interest standard" in determining that the paternal grandmother should be made the children's guardian.

¶ 36 In response, HSA argues that the Court of Appeals correctly determined that the trial court's conclusions of law were supported by its factual findings. More specifically, HSA points out that "one of the conditions that led to Brianna and Brittany's placement into [HSA] custody was [respondent-mother's] lack of contact and involvement in the [girls'] lives for three years prior to [HSA] involvement and inappropriate housing." HSA contends that, even though respondent-mother "was never denied visitation or extended visits with the children" during the three years after she left the father's home, "she only exercised visitation on holidays and birthdays" and "provided no support to the paternal grandmother [while] continu[ing] to claim the children as dependents on her taxes," resulting in a situation in which the paternal grandmother "provided all financial support and made all parental decisions for Brittany and Brianna essentially from their birth forward." Arguing in reliance upon *Price*, HSA asserts that "a period of 'voluntary nonparent custody' may provide sufficient evidence of conduct inconsistent with the parent's constitutionally protected status, such that the best interest standard for custody determination is then employed." In addition, arguing in reliance upon *Speagle v. Seitz*, 354 N.C. 525 (2001), HSA claims that "a trial court should view a parent's conduct cumulatively, reviewing both past and present conduct by the parent and how it impacted the child," with there never having been "any agreement between [respondent-mother] and the paternal grandmother that the ceding of all custodial duties and responsibilities was temporary in nature."

¶ 37 According to HSA, "the only distinction in [respondent-mother's] actions and those of the complaining parent in *Boseman* and *Price* is that

in those cases there was evidence *those parents* had provided primary parenting for the juveniles at some point in the past," while, in this case, "[b]oth Brianna and Brittany had lived with [the paternal grandmother] since birth, and the trial court's unchallenged findings show [that] '[the paternal grandmother] has provided all care for the children for much of their lives and especially the past 19 months.' " As a result, in light of "the totality of the circumstances," HSA contends that "the trial court's findings of fact thus supported its conclusion that [respondent-mother] acted in a manner inconsistent with her constitutionally protected status as a parent."[2]

¶ 38 A careful review of the record satisfies us that the trial court's findings suffice to support its conclusion that respondent-mother had "acted in a manner inconsistent with [her] constitutionally protected status as a parent." As an initial matter, we recognize that, despite the fact that the trial court labeled this determination as a finding of fact, it is, in reality, a conclusion of law, *see Boseman*, 364 N.C. at 549 (describing the trial court's determination that the defendant "has acted inconsistent[ly] with her paramount parental rights and responsibilities" as a "conclusion" of law subject to de novo review); *Adams*, 354 N.C. at 65 (labeling the trial court's determination that the father's conduct "has been inconsistent with his protected interest in the minor child" a "legal conclusion"), to which "[w]e are obliged to apply the appropriate standard of review . . . regardless of the label which it is given by the trial court," *In re J.S.*, 374 N.C. 811, 818 (2020) (citing *State v. Burns*, 287 N.C. 102, 110 (1975)). For that reason, we will examine the trial court's remaining findings of fact for the purpose of determining if they support its conclusion that respondent-mother had acted inconsistently with her constitutionally protected right to parent the children.

¶ 39 As we have already discussed, "[u]nfitness, neglect, and abandonment clearly constitute conduct inconsistent with the protected status parents may enjoy," but "[o]ther types of conduct, *which must be viewed on a case-by-case basis*, can rise to this level so as to be inconsistent with the protected status of natural parents." *Price*, 346 N.C. at 79 (emphasis added). For that reason, "there is no bright line rule beyond which a parent's conduct meets this standard;" instead, we examine each case individually in light of all of the relevant facts and circumstances and the applicable legal precedent. *Boseman*, 364 N.C. at 549. *See also Estroff v. Chatterjee*, 190 N.C. App. 61, 64 (2008) (acknowledging that "[n]o

2. The guardian ad litem has filed a brief urging us to affirm the Court of Appeals' decision advancing arguments that echo those advanced by HSA.

litmus test or set of factors can determine whether this standard has been met."). In conducting the required analysis, "evidence of a parent's conduct should be viewed cumulatively." *Owenby*, 357 N.C. at 147 (citing *Speagle*, 354 N.C. at 534–35).

¶ 40 The majority at the Court of Appeals upheld the challenged trial court order on the grounds that respondent mother had "act[ed] inconsistently with her parental rights by ceding her parental rights to a third party." *B.R.W.*, ¶ 42. As we held in *Price*, "a period of voluntary nonparent custody[ ] may constitute conduct inconsistent with the protected status of natural parents and therefore result in the application of the 'best interest of the child' test." *Price*, 346 N.C. at 79. In deciding *Price*, we placed substantial reliance upon *In re Gibbons*, in which we drew upon common law principles in holding that a parent's right to custody of his or her child may yield to the child's best interests in the event that the parent

> has voluntarily permitted the child to remain continuously in the custody of others in their home, and has taken little interest in it, thereby substituting such others in his own place, so that they stand in loco parentis to the child, and continuing this condition of affairs for so long a time that the love and affection of the child and the foster parents have become mutually engaged, to the extent that a severance of this relationship would tear the heart of the child, and mar his happiness.

247 N.C. 273, 280 (1957). In addition, we quoted, with approval, from a decision by the Supreme Court of Maine:

> "This petitioner for a period of more than four years showed not much more than a formal interest in his child. Circumstances were such that perhaps this was inevitable. He knew that the child was well cared for and was content to let the natural ties which bound him to his offspring grow very tenuous. Since the death of his wife there is little evidence that he has had any great yearning to have his child with him, to sacrifice for her, or to lavish on her the affection which would have meant so much to her in her tender years. Instead he surrendered this high privilege to the grandmother, who with the help of her unmarried daughters has given to this child the same devotion

> as it would have received from its own mother. Now having permitted all this to happen he claims the right, because he is the father, to sever the ties which bind this child to the respondent. In this instance the welfare of the child is paramount. The dictates of humanity must prevail over the whims and caprice of a parent."

Id. at 280–81 (quoting *Merchant v. Bussell*, 139 Me. 118, 124, 27 A.2d 816, 819 (1942)). Finally, we reiterated in *Owenby* that a parent's " 'failure to maintain personal contact with the child or failure to resume custody when able' could amount to conduct inconsistent with the protected parental interests[.]" *Owenby*, 357 N.C. at 146 (quoting *Price*, 346 N.C. at 84).

¶ 41 In *Price*, we directed trial courts, in evaluating cases involving nonparental custodial arrangements, to consider "the degree of custodial, personal, and financial contact [the parent] maintained with the child" after the parent left the child in the nonparent's care. *Price*, 346 N.C. at 84. In addition, we emphasized the importance of the issue of whether a nonparent custodial arrangement was intended to be temporary or indefinite:

> This is an important factor to consider, for, if defendant had represented that plaintiff was the child's natural father and voluntarily had given him custody of the child for an indefinite period of time with no notice that such relinquishment of custody would be temporary, defendant would have not only created the family unit that plaintiff and the child have established, *but also induced them to allow that family unit to flourish in a relationship of love and duty with no expectations that it would be terminated.*

Price, 346 N.C. at 83 (emphasis added); *see also Boseman*, 364 N.C. at 552 (noting that "the record indicates that defendant created no expectation that this [custody arrangement] was only temporary."). Finally, in *Speagle*, we held that, when a trial court resolves the issue of custody as between parents and nonparents, "any past circumstance or conduct which could impact either the present or the future of a child is relevant, notwithstanding the fact that such circumstance or conduct did not exist or was not being engaged in at the time of the custody proceeding." *Speagle*, 354 N.C. at 531.

¶ 42 In examining the facts of this case, we begin by reiterating that, even though respondent-mother challenged a number of the trial court's findings of fact as lacking in sufficient evidentiary support before the Court of Appeals, that court unanimously determined that this aspect of respondent-mother's argument to the trial court's order lacked merit, *see B.R.W.*, ¶ 56; *id.*, ¶ 59 (Carpenter, J., dissenting), and respondent-mother has not sought discretionary review of that aspect of the Court of Appeals' decision by this Court. As a result, the trial court's factual findings are deemed conclusive for the purposes of our evaluation of respondent-mother's challenge to the validity of the trial court's determination that she had acted inconsistently with her constitutionally protected right to parent Brittany and Brianna. *See In re T.N.H.*, 372 N.C. 403, 407 (2019) (noting that "[f]indings of fact not challenged by [the] respondent are deemed supported by competent evidence and are binding on appeal").

¶ 43 According to the trial court's findings of fact, respondent-mother left the father's home in 2015. At that time, respondent-mother surrendered custody of the children to the paternal grandmother and made no attempt to reunify with the children until after they had been taken into HSA custody. In the course of that three-year period, respondent-mother visited the children on holidays and birthdays without ever having taken the children to her home overnight or visiting with them on other than special occasions. Although respondent-mother has taken a more active role in the children's lives in recent years, including paying child support and engaging in overnight and weekend visitation, she was unable to obtain suitable housing for the children until approximately one month prior to the relevant permanency planning review hearing, at which point the children had been in HSA custody for over 19 months. In addition, the trial court found that, "although [respondent-mother] and [the stepfather] have completed their family service agreement and have a bond with the children, the strongest bond is with [the paternal grandmother]"; that both girls had experienced "adjustment issues" following weekend visitations with respondent-mother and the stepfather; and that the children want to live in the paternal grandmother's home. In light of our cumulative view of respondent-mother's conduct, *Owenby*, 357 N.C. at 147, as described in the trial court's findings of fact, we hold that the relevant findings support the trial court's conclusion that respondent-mother acted in a manner inconsistent with her constitutionally protected rights as a parent by voluntarily ceding the custody and care of her children to the parental grandmother for a period of three years.

¶ 44 In contradistinction to the situation at issue in *Price*, the trial court's findings of fact in this case reflect that respondent-mother had a minimal "degree of custodial, personal, and financial contact" with her children following their placement in the paternal grandmother's custody. *Price*, 346 N.C. at 84. The minimal degree of contact that respondent-mother had with the children prior to their placement in HSA custody indicates that respondent-mother intended for the paternal grandmother to continue to provide primary care for the children for "an indefinite period of time with no notice that such relinquishment of custody would be temporary," *id.*, 346 N.C. at 83, particularly given respondent-mother's failure to take any steps to regain custody of Brittany and Brianna until after they entered HSA custody, *see id.* (noting that, "to preserve the constitutional protection of parental interests in such a situation, the parent should notify the custodian upon relinquishment of custody that the relinquishment is temporary, and the parent should avoid conduct inconsistent with the protected parental interests"). As a result, the trial court's findings of fact show that respondent-mother "induced [the children and the paternal grandmother] to allow that family unit to flourish in a relationship of love and duty with no expectations that it would be terminated." *Id.*

¶ 45 The facts at issue in this case bear a strong resemblance to those that were before us in *Gibbons*, in which the child's adoptive father placed the child in the home of a nonparent married couple after the death of the father's wife at a time when the child was just two years old. *Gibbons*, 247 N.C. at 275. The child remained in the couple's home for the next five years with the exception of "short visits with the [father]," with the father having made occasional small financial contributions for the child's support, paid some medical bills, and given the child a few small presents. *Id.* During the time, the child "became greatly attached to the [custodial couple], considering them as his father and mother," and resisted being returned to his father's home. *Id.* at 279. After the father petitioned to regain custody of the child, the trial court found that both the custodial couple and the father, who had since remarried, were "fit and proper persons to have custody of the [child]" and that, since the father had legally adopted the child, it was in the child's best interest to be returned to his father. *Id.* at 276–77. In reversing the trial court's order, this Court emphasized that the father had voluntarily left the child in the couple's custody for five years and had shown little interest in him during that time, so that "the love and affection of the child and the foster parents have become mutually engaged," *id.* at 280, before holding that the trial court had failed to give sufficient consideration to the child's wishes and remanding the case to the trial court for further proceedings, *id.* at 282–83.

¶ 46 In this case, respondent-mother left the children with the paternal grandmother when they were one and four years old, respectively, and only paid them occasional visits over the course of the next few years. In other words, like the father in *Gibbons*, respondent-mother left responsibility for the children's care and wellbeing in the hands of the paternal grandmother, "where the sweet tendrils of childhood [had] first clung to all [they] [knew] of home," and where Brittany and Brianna developed a strong bond with the paternal grandmother, so that removing the children from the paternal grandmother's custody "would tear the heart of the child[ren], and mar [their] happiness." *Id.* at 280.[3] Although we acknowledge that *Gibbons* was decided well before the enactment of the current North Carolina Juvenile Code and our decisions in cases like *Adams* and *Troxel*, its reasoning is consistent with the logic that we adopted in *Price* and reinforces our conclusion that the trial court did not err by holding that respondent-mother had acted inconsistently with her constitutionally protected parental right to parent Brittany and Brianna.

¶ 47 In respondent-mother's view, the trial court's determination that she had acted inconsistently with her constitutionally protected right to parent her children cannot be squared with the trial court's determination that respondent-mother substantially complied with the provisions of her family services agreement. To be sure, respondent-mother's efforts to regain custody of her children following their placement into HSA custody are relevant to the issue of parental fitness, as the Court of Appeals recognized when it overturned the trial court's determination that respondent-mother was unfit. *B.R.W.*, ¶ 48.[4] As we held in *Price*, however, a lack of fitness is only one of the means by which a parent may act inconsistently with her constitutionally protected status as a parent, with a determination that the parent is not unfit being insufficient to compel a conclusion that the parent had not acted inconsistently with his or her constitutional right to parent his or her child in other ways. *Price*, 346 N.C. at 79; *see also David N. v. Jason N.*, 359 N.C. 303, 307 (2005) (holding that "the trial court's finding of [the father's] fitness in the instant case did not preclude it from granting joint or paramount

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3. Although the record contains conflicting evidence concerning the nature and extent of respondent-mother's involvement in the children's lives in the years after she placed them in the care of the paternal grandmother, the trial court resolved that factual dispute against respondent-mother's position.

4. As was the case with its determination that respondent-mother had acted inconsistently with her constitutionally protected status as a parent, the trial court labeled its determination that respondent-mother was "unfit" as a finding of fact. However, for the reasons discussed above, unfitness is more properly understood as a question of law, so we treat it as such. *See Raynor v. Odom*, 124 N.C. App. 724, 731 (1996).

custody to [the child's grandparents], based upon its finding that [the father's] conduct was inconsistent with his constitutionally protected status."); *Gibbons*, 247 N.C. at 276 (concluding that, even though the father was a "fit and proper person" to have custody of his son, he was not necessarily entitled to custody given that he had left his son in the custody of a non-parent for five years).

¶ 48 In addition, as we have recently observed, "a parent's compliance with his or her case plan does not preclude a finding of neglect." *In re J.J.H.*, 376 N.C. 161, 185 (2020) (citing *In re D.W.P.*, 373 N.C. 327, 339–40 (2020)). On the basis of similar logic, we hold that the fact that respondent-mother complied with the provisions of her family services agreement does not overcome the effect of her prior decision to surrender custody of her children to the paternal grandmother, particularly given the trial court's findings that the children's paramount bond was with the paternal grandmother rather than with respondent-mother and the difficulties that the children have experienced in being away from their grandmother. *See Speagle*, 354 N.C. at 531 (concluding that "any past circumstance or conduct which could impact either the present or future of the child is relevant[.]"). Although nothing in our opinion in this case should be understood to preclude any possibility that a parent who has taken affirmative steps, including compliance with the directives of a district court or social services agency, would be able to overcome the effects of past behavior that would be otherwise inconsistent with his or her constitutionally protected right to parent his or her child, we see nothing in the trial court's findings, in light of its analysis of the best interests of the children, that would prevent it from making the paternal grandmother the children's guardian in this case, notwithstanding respondent-mother's compliance with the provisions of her family services agreement.

¶ 49 In addition, we are not persuaded by respondent-mother's attempts to distinguish *Price* and *Boseman* from this case on essentially factual grounds. Simply put, nothing in either *Price* or *Boseman* suggests that the general principles enunciated in those decisions should be limited to the factual context in which those cases were decided. On the contrary, as a long line of precedent from both this Court and the Court of Appeals makes clear, a parent may, in fact, act inconsistently with his or her constitutional right to parent his or her child in the event that he or she voluntarily cedes custody of a child to a nonparent party for an indefinite period of time. *See*, *e.g.*, *David N.*, 359 N.C. at 305–07; *Owenby*, 357 N.C. at 146; *Gibbons*, 247 N.C. at 280; *Estroff*, 190 N.C. App. at 73–75; *Mason v. Dwinnell*, 190 N.C. App. 209, 224–26 (2008). Even if respondent-mother

never represented that the paternal grandmother had obtained parental status,[5] the absence of such a determination should not obscure the fact that respondent-mother "voluntarily permitted the child[ren] to remain continuously in the custody of [the paternal grandmother]," "continu[ed] this condition of affairs for so long a time that the love and affection of the child[ren] and [the paternal grandmother] [had] become mutually engaged," *Gibbons*, 247 N.C. at 280, and "created the existing family unit that includes [the paternal grandmother] and the child[ren], but not herself," *Price*, 346 N.C. at 83. As a result, we hold that the trial court made sufficient factual findings to support its conclusion that respondent-mother had acted in a manner inconsistent with her constitutionally protected status as the children's parent, so that the Court of Appeals did not err by upholding the trial court's decision with respect to this issue.

C. Best Interest of the Child

¶ 50 **[2]** In her second challenge to the Court of Appeals' decision to uphold the challenged trial court order, respondent-mother contends that the trial court's decision to make the paternal grandmother the children's guardian is not supported by its findings of fact or conclusions of law. In advancing this argument, respondent-mother begins by focusing upon Conclusion of Law No. 2, in which the trial court states that:

> [p]lacement of the children, [Brittany] and [Brianna], to [respondent-mother] or father's home at this time is contrary to their health, safety, welfare, and best interest. Conditions that led to the custody of the

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5. In view of our recognition in *Price* that the defendant had "represented to the child and to others that [the] plaintiff was the child's natural father," 346 N.C. at 83, respondent-mother argues that "it was clear to all involved that [the paternal grandmother] was the paternal grandmother of the children, not their parent." *Price* did not, however, hinge upon the extent to which the defendant specifically represented that the plaintiff was the child's parent. Instead, our decision in that case rested upon the defendant's "voluntary relinquishment of custody to [the] plaintiff," who had assumed the status of "the child's *de facto* father." *Id.* In addition to the *biological* relationship between the children and the paternal grandmother in this case, the trial court's findings clearly show that the paternal grandmother stood *in loco parentis* to Brittany and Brianna. *See Gibson v. Lopez*, 273 N.C. App. 514, 519 (2020) (defining "*in loco parentis*" as "one who has assumed the status of a parent without formal adoption.") (citations and quotation marks omitted); *Black's Law Dictionary* (11th ed. 2019) (defining "person in loco parentis" as "[s]omeone who acts in the place of a parent" or "a person who has assumed the obligations of a parent without formally adopting the child."). This fact, combined with respondent-mother's voluntary relinquishment of custody to the paternal grandmother for three years, makes *Price* the appropriate analytical framework through which to view this case. *See Price*, 346 N.C. at 83; *see also Gibbons*, 247 N.C. at 280.

> children by [HSA] and removal from the home of the parent(s) continue(s) to exist.

In respondent-mother's view, the trial court erred by making this determination because (1) the best-interests standard has no application in this instance given that she did not act inconsistently with her constitutional right to parent Brittany and Brianna and (2) the challenged conclusion of law is not supported by the trial court's findings of fact. More specifically, respondent-mother argues that her compliance with the provisions of her family services agreement, HSA's recommendation that a trial home placement be authorized in September 2019, and the trial court's decision to allow unsupervised visitation between respondent-mother and the children deprived the trial court's determination that "placement in [her] home [would be] contrary to the girls' health, safety and welfare" and that "the conditions that led to the custody of the children and removal from the home of the parent continue to exist" of sufficient support in the trial court's findings.

¶ 51 In addition, respondent-mother challenges the validity of Conclusion of Law No. 3, in which the trial court states that

> [HSA] has made reasonable efforts to finalize the permanent plan to timely achieve permanence for the children and prevent placement in foster care, reunify this family, and implement a permanent plan for the children. Foster placement has been avoided by placement with the paternal grandmother.

Consistent with her earlier arguments, respondent-mother directs our attention to the fact that she completed the requirements of her family services agreement before arguing that, since "HSA abruptly moved the [trial] court to award guardianship to the paternal grandmother, the trial court erred when it concluded that HSA's efforts to finalize the permanent plan of reunification were reasonable."

¶ 52 Finally, respondent-mother challenges the validity of Conclusion of Law No. 4, in which the trial court states that

> after considering priority placement of the minor child[ren] with a relative who is willing and able to provide proper care and supervision in a "safe home," the best interest of the minor children, [Brittany] and [Brianna], would be served by awarding guardianship to [the paternal grandmother].

As was the case with respect to Conclusion of Law No. 2, respondent-mother argues that the "best interest of the child" standard has no application in this case given that she had not acted inconsistently with her constitutionally protected right to parent Brittany and Brianna.

¶ 53 In responding to these arguments, HSA points out that neither Judge Carpenter nor respondent-mother appear to dispute the validity of the trial court's determination that making the paternal grandmother the guardian for the children was in their best interests and that, instead, respondent-mother appears to simply challenge the analytical rubric that the trial court utilized in making that determination. HSA argues that the children "had been in [HSA] custody for nineteen months at the [time of the 30 January 2020] hearing;" that "[t]hey deserved permanence with the relative who had shouldered all parental responsibilities and provided care, custody, and support for them since their birth;" that respondent-mother had "ceded all custody, control, and responsibility for the girls to [the paternal grandmother] when she left the girls in 2015;" and that, for all of these reasons, "it was in the [girls'] best interest to be in the guardianship of their grandmother."

¶ 54 Arguing in reliance upon *J.J.H.*, HSA contends that the fact that respondent-mother satisfied the requirements of her family services agreement does not, in and of itself, suffice to overcome the concerns that had initially prompted the children's placement in HSA custody, with those concerns having included respondent-mother's "lack of contact and involvement in the girls[']' lives for three years prior to [HSA] involvement and inappropriate housing." In addition, HSA argues that "[t]he lack of appropriate housing for [respondent-mother] continued up and through the time just prior to the [30 January 2020] permanency planning hearing" and that the trial court's findings with respect to this issue, coupled with its findings that the children continued to experience problems after spending the weekend with respondent-mother, that the children had lived with the paternal grandmother for most of their lives, and that the children had expressed a desire to continue living with the paternal grandmother "provide[d] ample support for the trial court's conclusion that placement of the children in [respondent-mother's] home would be contrary to their health, safety, welfare[,] and best interest."

¶ 55 A careful review of the record satisfies us that HSA has the stronger hand in this dispute. To the extent that respondent-mother's arguments rest upon a contention that she had not acted inconsistently with her constitutionally protected right to parent her children, we conclude, for the reasons set forth above, that this argument lacks merit, with it having been perfectly appropriate for the trial court to have applied the

"best interest of the child" standard in resolving the guardianship issue. *See Owenby*, 357 N.C. at 146 (noting that, "[o]nce a court determines that a parent has actually engaged in conduct inconsistent with the protected status, the 'best interest of the child test' may be applied without offending the Due Process Clause."). In addition, we hold that the trial court's findings of fact suffice to support its determination that the "[c]onditions that led to the custody of the children by [HSA] and removal from the home of the parent(s) continue(s) to exist." Although, as the Court of Appeals correctly noted, "the immediate impetus for removal of the children from the home where they had resided since birth—Father's intoxication and violence in the home—did not continue to exist" once the father had been arrested and the children had been placed with the paternal grandmother, *B.R.W.*, ¶ 53, the initial decision to place the children in HSA custody also rested upon respondent-mother's absence from the home for the last three years and her failure to obtain adequate housing for the children. As a result of the fact that respondent-mother's abdication of responsibility for the children in 2015 clearly contributed to their placement in HSA custody and the fact that respondent-mother had failed to obtain suitable housing until shortly before the 30 January 2020 permanency planning hearing despite the fact that HSA's involvement began in early to mid-2018, we hold that the trial court's findings of fact provide adequate support for its conclusion that the conditions that had led to the children's removal from the family home continued to exist.

¶ 56 Finally, as the Court of Appeals noted, respondent-mother has cited no authority, and we are aware of none, suggesting that a sudden change in the permanency planning recommendation made by a social service agency establishes that the agency had failed to make reasonable efforts toward reunifying the children with one or the other of their parents. On the contrary, the trial court's findings clearly demonstrate that HSA worked diligently to reunify respondent-mother with her children for well over a year and only changed its recommendation after receiving information concerning the children's negative reactions to their weekend visits with respondent-mother and the stepfather and the children's living preferences that HSA deemed relevant to their best interests. As a result, the trial court's findings of fact were more than adequate to support the challenged conclusions of law concerning the adequacy of HSA's reunification efforts.

III. Conclusion

¶ 57 Thus, for the reasons set forth above, we hold that the trial court's factual findings suffice to support its conclusion that respondent-mother

had acted inconsistently with her constitutionally protected right to parent her children and that the trial court did not err in applying the "best interest of the child" standard in awarding guardianship over the children to the paternal grandmother. As a result, we affirm the decision of the Court of Appeals.

AFFIRMED.

Justice EARLS dissenting.

¶ 58 Not every parent who leaves her child in someone else's care, even for an extended period of time, acts inconsistently with her constitutional status as a parent. Sometimes, a child needs something more or something different than what a parent can provide at a given moment. In these circumstances, a parent who cedes physical custody of a child to another trusted adult—for example, a child's grandparent—may be making the painful but necessary choice that protects that child from harm and puts that child in a better place. Recognizing these complexities, this Court has "emphasize[d] . . . that there are circumstances where the responsibility of a parent to act in the best interest of his or her child would require a temporary relinquishment of custody, such as under a foster-parent agreement or during a period of service in the military, a period of poor health, or a search for employment." *Price v. Howard*, 346 N.C. 68, 83 (1997).

¶ 59 And not every family looks like two parents and a child. *Cf. Michael H. v. Gerald D.*, 491 U.S. 110, 141 (1989) ("We are not an assimilative, homogeneous society, but a facilitative, pluralistic one . . . . Even if we can agree, therefore, that 'family' and 'parenthood' are part of the good life, it is absurd to assume that we can agree on the content of those terms and destructive to pretend that we do.") (Brennan, J., dissenting). Grandparents, aunts and uncles, siblings, cousins, faith leaders, trusted friends—all have been called upon at various times in many communities to perform a vital function caring for children other than their own. *Moore v. City of East Cleveland*, 431 U.S. 494, 508 (1977) ("The Constitution cannot be interpreted . . . to tolerate the imposition by government upon the rest of us of white suburbia's preference in patterns of family living. The 'extended family' that provided generations of early Americans with social services and economic and emotional support in times of hardship . . . remains not merely still a pervasive living pattern, but under the goad of brutal economic necessity, a prominent pattern virtually a means of survival for large numbers of the poor and deprived minorities of our society.") (Brennan, J., concurring). In

these circumstances, the involvement of other adults in childrearing does not make that child's parent any less of a parent. Consistent with the reality that family life takes many different forms, a parent's conduct in a situation involving nonparental caregivers "need[s] to be viewed on a case-by-case basis" to determine if it justifies overriding "the constitutional protection of parental interests in such a situation." *Price*, 346 N.C. at 83.

¶ 60 In its decision today, this Court chooses to look away from the complexities and realities of family life in this state. Its choice is not compelled by our precedents, which recognize that a trial court must conduct a case-specific inquiry and enter factual findings addressing the circumstances surrounding a parent's departure before determining that a parent who has left her children in someone else's care has acted inconsistently with her constitutional status as a parent. Our precedents are clear that absent sufficient findings, the proper course is to vacate and remand for further proceedings. *See Price*, 346 N.C. at 84. Nevertheless, the majority chooses to affirm an order that is devoid of findings addressing questions that needed to be answered before dislodging respondent-mother's parental rights. The majority proceeds to compound the error by concluding that the trial court order contains adequate findings of fact to support its conclusion that the conditions leading the Yadkin County Human Services Agency (HSA) to take custody of respondent-mother's children "continue[ ] to exist," notwithstanding respondent-mother's uncontroverted success in completing the terms of her family services agreement and securing a safe and stable home for her children.

¶ 61 This Court's decision puts parents who are trying to navigate challenging circumstances, including those who are experiencing domestic violence, in an impossible bind: while a parent who chooses to remain in an unsafe living environment with her children risks having her children adjudicated neglected or her parental rights terminated, a parent who escapes a dangerous living environment but needs time to get back on her feet risks having her parental rights displaced precisely because of her efforts to seek out a safe and stable home. *Compare In re T.B.*, 2022-NCSC-43, ¶ 26 (affirming order terminating parental rights on ground of neglect in part because "[r]espondent-mother did not immediately end the relationship and separate from respondent-father" after respondent-father committed acts of domestic violence) *with In re I.K.*, 377 N.C. 417, 2021-NCSC-60, ¶ 35 (affirming order determining that respondent acted inconsistently with his constitutionally protected status as a parent after he "voluntarily placed [his child] with [the child's]

maternal grandmother 'until [his] housing situation was resolved' "). This Court's decision also potentially signals to parents that even if they comply with every element of a case plan or family services agreement developed during a juvenile proceeding, their parental rights are always subject to displacement should a court decide that another caregiver offers a "better" home for their child. That is contrary to what our statutes provide and what the constitution requires. Therefore, I respectfully dissent.

I. The trial court's determination that respondent-mother acted inconsistently with her constitutional parental status

¶ 62 On an appeal from a permanency planning order, our review is limited to "determin[ing] whether the [trial court's] findings are supported by clear, cogent, and convincing evidence and . . . whether [the] trial court's *findings of fact* support its conclusions of law." *In re S.R.F.*, 376 N.C. 647, 2021-NCSC-5, ¶ 9 (quoting *In re J.S.*, 374 N.C. 811, 814–15 (2020) (emphasis added)). As an appellate court, we are charged with applying the law in light of the undisturbed *findings* the trial court enters. *Coble v. Coble*, 300 N.C. 708, 713 (1980) ("[A] conclusion of law . . . must itself be based upon supporting *factual findings*.") (emphasis added). Our task is not to root around in the record to fill in gaps based on what we think the trial court could or should have found but did not. *Id.* at 713–14 ("It is true that there is evidence in the record from which findings could be made which would in turn support the [trial court's legal] conclusion . . . . What all this evidence does show, however, is a matter for the trial court to determine in appropriate factual findings."). This limitation on the scope of appellate review reflects both our lack of institutional competence to find facts and our recognition that a trial court may choose *not* to find a particular fact even when there is evidence in the record that could support a particular finding. *Id.* at 712–13 ("It is not enough that there may be evidence in the record sufficient to support findings which could have been made. The trial court must itself determine what pertinent facts are actually established by the evidence before it, and it is not for an appellate court to determine de novo the weight and credibility to be given to evidence disclosed by the record on appeal.").

¶ 63 It is undoubtedly correct that, as the majority recites, "a period of voluntary nonparent custody[ ] *may* constitute conduct inconsistent with the protected status of natural parents and therefore result in the application of the 'best interest of the child' test." *Price*, 346 N.C. at 79. But a period of voluntary nonparent custody also may *not* constitute

conduct inconsistent with a parent's constitutional status. As this Court recognized in *Price*, "there are circumstances where the responsibility of a parent to act in the best interest of his or her child would require a temporary relinquishment of custody, such as under a foster-parent agreement or during a period of service in the military, a period of poor health, or a search for employment." *Id.* at 83. To decide what legal significance to assign to a parent's actions, courts look to a variety of factors indicative of the parent's conduct and intentions at the time custody is ceded to a third-party, including "whether [the parent's] voluntary relinquishment of custody to [a caregiver] was intended to be temporary or indefinite and whether [the parent] informed [the caregiver] and the child that the relinquishment of custody was temporary." *Id.* "[W]hen a parent 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, the parent has acted inconsistently with her paramount parental status." *Boseman v. Jarrell*, 364 N.C. 537, 550–51 (2010).

¶ 64 Accordingly, an order determining that a parent has acted inconsistently with his or her parental status should contain findings addressing the factors that must be considered in order to distinguish between conduct that does, and conduct that does not, comprise a forfeiture of that parent's parental rights. When the order does not contain those findings and the record is inconclusive, remand is necessary. Thus, in *Price*, we vacated a custody order and remanded to the trial court for further proceedings "because the trial court made no findings about whether [the parent] and [the caregiver] agreed that the surrender of custody [to the caregiver] would be temporary, or about the degree of custodial, personal, and financial contact [the parent] maintained with the child after the parties separated." *Id.* at 84. Even though it was "clear from the record" that the parent "created the existing family unit that includes [the caregiver] and the child, but not herself," "represented to the child and to others that [the caregiver] was the child's natural father," and "chose to rear the child in a family unit with plaintiff being the child's de facto father," we held that a remand was necessary because the record evidence "shows that the parties disputed whether defendant's voluntary relinquishment of custody to plaintiff was intended to be temporary or indefinite[.]" *Id.* at 83. Because the *trial court* did not enter any findings addressing this question, we explained that "we cannot conclude whether [the parent] should prevail based upon the constitutionally protected status of a natural parent or whether the 'best interest of the child' test should be applied." *Id.* at 84; *see also Powers v. Wagner*, 213 N.C. App. 353, 363 (2011) ("While the record contains evidence related

to the scenarios identified in *Price*, it was the responsibility of the trial court to make the necessary factual findings. Without the necessary findings, there can be no determination that [the mother] acted inconsistently with her constitutional right to parent.").

¶ 65 I certainly agree with the majority that "the general principles enunciated" in *Price* and subsequent cases are applicable in this case. That is why it is so puzzling that the majority chooses to affirm the trial court's order in this case in the absence of any finding addressing whether respondent-mother intended, and the paternal grandmother understood, the paternal grandmother's caregiving arrangement to be temporary or permanent. The only findings the trial court entered that address the circumstances of respondent-mother's leaving the children with the paternal grandmother are as follows:

> 13. [Brittany] and [Brianna] have been placed with their paternal grandmother . . . since June 14, 2018 (now 19 months). Both children have actually resided in [the paternal grandmother's] home since birth – prior to June 14, 2018 either both or one of their parents also resided in the home. The mother and father resided in the home together with the children until September 2015 when the mother left (the parents separated).
>
> 14. After September 2015 the mother would visit the children on holidays [and] birthdays but did not take the children overnight.
>
> . . . .
>
> 28. When the mother left the [family] home in September 2015 she was scared. She did not take the children with her because of being frightened and because she did not have a stable home to provide the children. The mother married [her current husband] is [sic] 2016. She has not had a stable home that was large enough for the girls until recently.
>
> . . . .
>
> 34. The [c]ourt finds the [respondent-mother] . . . by clear and convincing evidence . . . ha[s] acted in a manner inconsistent with [her] constitutionally protected status as a parent.

These findings tell us why and when respondent-mother left the home; they say nothing "about whether [the parent] and [the caregiver] agreed that the surrender of custody [to the caregiver] would be temporary." *Price*, 346 N.C. at 83. Furthermore, respondent-mother's intentions upon leaving the home were disputed; respondent-mother testified that she did not take her children with her "[b]ecause [she] didn't have a stable place" to live, so she left them with their paternal grandmother "until I could find me something stable." The same unresolved factual issue that compelled us to remand in *Price* went unresolved by the trial court in this case.

¶ 66 The trial court's order also tells us nothing about whether respondent-mother "represent[ed] that" the paternal grandmother was "a parent" to Brittany and Brianna, whether the paternal grandmother understood herself to be the children's parent, and what the children understood the situation to be. *Boseman*, 364 N.C. at 550–51. Confronted with an order containing insufficient findings, this Court should follow its own precedent and remand, just as we did in *Price*.

¶ 67 The majority attempts to obscure the absence of necessary factual findings from the trial court's order by ascribing outsized meaning to the findings the trial court actually made. For example, the majority states that the

> minimal degree of contact that respondent-mother had with the children prior to their placement in HSA custody further indicates that respondent-mother intended for the paternal grandmother to continue to provide primary care for the children for "an indefinite period of time with no notice that such relinquishment of custody would be temporary," particularly given respondent-mother's failure to take any steps to regain custody of Brittany and Brianna until after they entered HSA custody[.]

That is quite a leap from the trial court's finding that "the mother would visit the children on holidays [and] birthdays but did not take the children overnight." It is unclear precisely how or why respondent-mother's maintenance of consistent (although somewhat infrequent) contact with her children while they were in the paternal grandmother's care demonstrates she intended the paternal grandmother to be the children's caregiver indefinitely. If it is because respondent-mother "did not take the children overnight," well, consider the alternative: if respondent-mother had hosted her children for overnight visits despite not having a "stable"

place to live, it is easy to imagine a court finding that she had jeopardized their welfare by doing so. *Cf. In re M.A.*, 378 N.C. 462, 2021-NCSC-99, ¶ 30 (affirming a termination order on the basis of neglect in part because "[a]t the time of the termination hearing, respondent was . . . sharing a studio apartment with an unknown roommate, was not listed on the lease as a tenant, and was not paying utilities for the apartment").

¶ 68 In the alternative, the majority implies that the requirements of *Price* have been met because "the trial court's findings clearly show that [the children's paternal grandmother] stood *in loco parentis* to Brittany and Brianna." Putting aside the majority's lack of an explanation as to which findings "clearly show" this to be true, it cannot be the case that determining whether the paternal grandmother stood *in loco parentis* to Brittany and Brianna is "the relevant inquiry for purposes of our analysis" under *Price*. As the Court of Appeals has correctly explained,

> [t]he fact that a third party provides caretaking and financial support, engages in parent-like duties and responsibilities, and has a substantial bond with the children does not necessarily meet the requirements of *Price* . . . . Those factors could exist just as equally for . . . a step-parent or simply a significant friend of the family, who might not meet the *Price* standard.

Estroff v. Chatterjee, 190 N.C. App. 61, 74 (2008). Presumably, the majority does not mean to imply that every parent who has allowed another adult to stand *in loco parentis* to his or her child has acted inconsistently with his or her status as a parent. *See Drum v. Miller*, 135 N.C. 204, 216 (1904) (stating that a teacher stands *in loco parentis* to students when they are present at school); *Craig v. Buncombe Cty. Bd. of Educ.*, 80 N.C. App. 683, 686 (1986) (explaining that "the need to control the school environment and the school board's position *in loco parentis*" allows school authorities to regulate students' conduct while at school).

¶ 69 The majority also relies on *In re Gibbons*, 247 N.C. 273 (1957), a case that, as the majority acknowledges, "was decided well before the enactment of the current North Carolina Juvenile Code and our decisions in cases like *Adams* and *Troxel*[.]" According to the majority, "[t]he facts at issue in this case bear a strong resemblance to those that were before us in *Gibbons*, in which the child's adoptive father placed the child in the home of a nonparent married couple after the death of the father's wife at a time when the child was just two years old." Notably, the majority overlooks a crucial factual distinction between *Gibbons* and this case: in the former, the trial court entered a "finding[ ] of fact" that

shortly after taking custody of the child, the nonparent married couple "requested [the father] to take [the child], but [the father] declined to do so and *indicated at the time that he desired that the boy should remain permanently* with the [nonparent married couple]." *Gibbons*, 247 N.C. at 279 (emphasis added). *Gibbons* confirms rather than detracts from *Price*'s conclusion that a remand is appropriate in the absence of findings addressing what a parent intended when ceding custody to a nonparental caregiver and what the nonparental caregiver agreed to when taking custody of the parent's child.

¶ 70 *Gibbons* is also unlike this case in another important way. In *Gibbons*, it appears that the father asserted his interest in parenting his son by going "into the Sunday School Room of the New Hope Baptist Church, and carr[ying] this boy away with him, in spite of his screaming, protests and efforts to escape." *Id.* at 279–80. That bears no resemblance to how respondent-mother asserted her interest in parenting Brittany and Brianna. Here, respondent-mother indicated her desire to reassume custody of her children when HSA got involved in their lives. Over the next two years, she did everything HSA asked of her—as the trial court found, she "completed [her] family service agreement" and secured a stable home for her children. The very purpose of a family services agreement or case plan is to inform a parent of what he or she needs to do in order to "address[ ] the barriers to reunification between [a] respondent-[parent] and [the parent's child]." *In re S.D.*, 374 N.C. 67, 73 (2020). If "evidence of a parent's conduct should be viewed cumulatively," *Owenby v. Young*, 357 N.C. 142, 147 (2003), then respondent-mother's undisputed progress in eliminating the barriers HSA identified to reunification with Brittany and Brianna must count for something. Yet in the majority's analysis, respondent-mother's demonstrable progress towards reunification is essentially meaningless.

¶ 71 The majority's rejoinder to this argument is that just as "a parent's compliance with his or her case plan does not preclude a finding of neglect,"

> the fact that respondent-mother complied with the provisions of her family services agreement does not overcome the effect of her prior decision to surrender custody of her children to the paternal grandmother, particularly given the trial court's findings that the children's paramount bond was with the paternal grandmother rather than with respondent-mother and the difficulties that the children have experienced in being away from their grandmother.

I agree that a parent's compliance with a case plan does not, on its own, necessarily negate the claim that a parent has acted inconsistently with her parental status. Still, if a parent's completion of the terms of a family services agreement is a complete non-factor when it comes time to decide whether or not the parent can exercise her parental rights, it calls into question the value of these family services agreements as tools to help parents address the conditions leading to the removal of a child and to ultimately achieve reunification. HSA told respondent-mother she needed to do various things to reunite with her children; respondent-mother did everything HSA asked of her; today, this Court tells respondent-mother that she cannot reunify with her children because of something she did before she ever entered into the agreement with HSA. It is difficult to imagine what else respondent-mother could have done to reestablish herself as a parent to her children.

¶ 72 Separately, it is notable that even when the majority is purporting to assess whether respondent-mother acted inconsistently with her constitutional parental status—a question that is necessarily analytically prior to the question of whether placing the children with respondent-mother is in the children's best interests—the majority slips into reasoning based upon its view of the children's best interests by comparing the relative strength of the children's bond with their mother and their paternal grandmother. Although all courts administering North Carolina's Juvenile Code share an interest in achieving the best possible outcome for all children, a parent's constitutional rights cannot be disturbed based solely upon a court's subjective beliefs regarding the comparative benefits of two different placement options. *Owenby v. Young*, 357 N.C. 142, 146 (2003) (explaining that it is only "[o]nce a court determines that a parent has actually engaged in conduct inconsistent with the protected status[that] the 'best interest of the child test' may be applied without offending the Due Process Clause"). In concluding that respondent-mother has acted inconsistently with her parental status in part because the children have a stronger bond with their paternal grandmother—even though the undisputed findings establish that the children also feel bonded to respondent-mother—the majority collapses the threshold inquiry concerning whether a parent's constitutional parental rights can be displaced into the subsequent judgment regarding whether a parent's parental rights should be displaced.

¶ 73 In light of the profound importance of a trial court's threshold determination that a parent has acted inconsistently with her parental status, this Court should at least adhere to our precedents requiring trial courts to enter adequate findings of fact to support this determination. When

presented with a trial court order lacking adequate findings, our precedents dictate that we remand for further factfinding rather than assuming an answer in the absence of necessary information.

¶ 74 "The purpose of the requirement that the court make findings of those specific facts which support its ultimate disposition of the case . . . is [ ] not a mere formality or a rule of empty ritual." *Coble*, 300 N.C. at 712. Rather, the purpose of the requirement "is to allow a reviewing court to determine from the record whether the judgment and the legal conclusions which underlie it represent a correct application of the law" and to "to allow the appellate courts to perform their proper function in the judicial system." *Id.* (cleaned up). Requiring the factfinder to find facts during an adversarial proceeding is at the heart of ensuring a rigorous and disciplined search for the truth, based on evidence presented in court and subject to cross-examination. *State v. Bartlett*, 368 N.C. 309, 313 (2015) ("The trial judge who presides at a [ ] hearing sees the witnesses, observes their demeanor as they testify and by reason of his [or her] more favorable position, he [or she] is given the responsibility of discovering the truth.") (cleaned up). It is a core feature of our system of justice and the only way meaningful review by an appellate court can ensure that all parties are treated fairly and equally under the law. In this context, vacating an order that does not contain findings of fact addressing "both the legal parent's conduct and his or her intentions" is necessary to accurately determine the legal significance of respondent-mother's actions and "to 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." *Estroff*, 190 N.C. App. at 70. Accordingly, consistent with our precedents, we should vacate the trial court's order and remand for further proceedings.

II. The trial court's determination that awarding guardianship to the children's paternal grandmother is in the children's best interests

¶ 75 Because the trial court's findings do not support its conclusion that respondent-mother acted inconsistently with her parental status, I would not reach the question of whether to affirm the trial court's determination that awarding guardianship to Brittany's and Brianna's paternal grandmother was in the children's best interests. Still, I write to note my disagreement with one aspect of the majority's reasoning on this issue.

¶ 76 The majority holds that the trial court's conclusion that "[c]onditions that led to the custody of the children by [HSA] and removal from

the home of the parent(s) continue(s) to exist" is supported by the trial court's findings of fact. Specifically, the majority reasons that

> [a]s a result of the fact that respondent-mother's abdication of responsibility for the children in 2015 clearly contributed to their placement in HSA custody and the fact that respondent-mother had failed to obtain suitable housing until shortly before the 30 January 2020 permanency planning hearing despite the fact that HSA's involvement began in early to mid-2018, we hold that the trial court's findings of fact provide adequate support for its conclusion that the conditions that had led to the children's removal from the family home continued to exist.

But another way of saying that "respondent-mother had failed to obtain suitable housing until shortly before the 30 January 2020 permanency planning hearing" would be to say that "respondent-mother obtained suitable housing before the 30 January 2020 permanency planning hearing." If the trial court had entered findings indicating that respondent-mother was dilatory in seeking out housing options or otherwise refused to take necessary steps to secure and maintain a suitable home, then the fact that she had only recently secured suitable housing might have been relevant. Absent such findings, there is no way for this Court to know if the reason respondent-mother did not more rapidly obtain suitable housing was because of her own actions or because of factors out of her control, such as the difficulty many families face when attempting to locate and secure affordable housing. If respondent-mother could not obtain suitable housing because of her lack of resources, her inability to obtain suitable housing would not be a permissible basis for displacing her constitutional parental rights. *Cf. In re M.A.*, 374 N.C. 865, 881 (2020) ("[Parental rights are not subject to termination in the event that [a parent's] inability to care for her children rested solely upon poverty-related considerations."). Regardless, it is wrong to state that respondent-mother's lack of suitable housing was a condition that "continue[d] to exist" at the time of the termination hearing when the trial court's own findings confirm she had obtained suitable housing prior to the termination hearing.

III. Conclusion

¶ 77 Respondent-mother left her children and her family home after the children's father, who had just been released from prison, returned and resumed using drugs and alcohol. She was "scared" of the children's father and "did not take [her two] children with her because of being frightened

and because she did not have a stable home to provide the children." Instead, she left the children in the care of their paternal grandmother, who had lived with respondent-mother and the children in their home and with whom respondent-mother maintained a constructive relationship. Over the next three years, respondent-mother visited the children for birthdays and holidays but did not host them for overnight visits. After the children's father was arrested again, local authorities got involved to ensure the children's well-being. At this point, respondent-mother indicated that she wanted to take the children back into her care, agreed to a case plan specifying what she needed to do to achieve reunification, and subsequently complied with every term of that agreement and secured the safe and stable home she previously lacked.

¶ 78 That is, essentially, the sum total of what the trial court's findings of fact tell us with respect to the question of whether respondent-mother acted inconsistently with her constitutional status as a parent. On the basis of these findings, the majority concludes that respondent-mother's parental rights can be displaced and affirms an order awarding guardianship to the children's paternal grandmother over the respondent-mother's wishes. These circumstances certainly could encompass a situation where respondent-mother by her conduct forfeited her parental rights. But they could also encompass a situation where respondent-mother responsibly safeguarded her children's interests by making a difficult decision under trying circumstances. Absent sufficient findings, it is improper for this Court to presume it was the former situation and not the latter.

¶ 79 The majority's decision potentially sends an unfortunate message to parents who have experienced difficulties raising their children but who are nonetheless working diligently towards reunification. Although this Court's decision today displaces her legal status as Brittany and Brianna's parent, respondent-mother's efforts to reunify with her children cannot be diminished. As respondent-mother testified at the permanency planning hearing:

> I mean, I just want to make it clear – I mean it seems like I been – I feel like you put me out here to – like I've never been there. I mean, I – I'm the one that had them. Yes, I've been there. I'm the one that stayed in the hospital with [Brittany] after I had a C section and caught two infections. I was out for over two weeks. Had to have a blood transfusion. Nobody else there was with me. He left me there. Nobody was with me. I've been there. They're my girls and I love them.

Accordingly, I respectfully dissent.

IN RE C.A.B.

[381 N.C. 105, 2022-NCSC-51]

IN THE MATTER OF C.A.B.

No. 138A21

Filed 6 May 2022

Termination of Parental Rights—motion to continue—extraordinary circumstances—incarcerated parent—COVID-19 lockdown

The trial court erred by denying a father's motion to briefly continue the adjudicatory hearing on a petition to terminate his parental rights where the prison in which the father was incarcerated was under lockdown due to COVID-19, preventing him from preparing for the hearing with his attorney and testifying on his own behalf. The lockdown at the prison was an "extraordinary circumstance" allowing the hearing to be continued beyond the statutory ninety-day period; the father's absence created a meaningful risk of error that undermined the fundamental fairness of the hearing because the father could not meet with counsel before the hearing, each of the four grounds for termination required a careful assessment of his conduct in prison, and no other witness was available to testify as to that information; and the error was prejudicial.

Chief Justice NEWBY dissenting.

Justices BERGER and BARRINGER join in this dissenting opinion.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from an order terminating respondent-father's parental rights entered on 2 February 2021 by Judge Kathryn Whitaker Overby in District Court, Alamance County. Heard in the Supreme Court on 22 March 2022.

Jamie L. Hamlett for petitioner-appellee Alamance County Department of Social Services.

Christina Freeman Pearsall for appellee Guardian ad Litem.

Mercedes O. Chut for respondent-appellant father.

EARLS, Justice.

IN RE C.A.B.

[381 N.C. 105, 2022-NCSC-51]

¶ 1 In this case we consider whether a parent who was incarcerated at the time of an adjudicatory hearing on a motion to terminate his parental rights was entitled to a continuance in order to have the opportunity to be present at the hearing. Respondent-father was incarcerated when he first learned that he was the father of a newborn, Caleb,[1] and he remained in detention throughout the duration of Caleb's juvenile proceedings. He expressed a desire to parent Caleb upon his release and opposed the effort to terminate his parental rights. On the day of the adjudicatory hearing, respondent-father was unable to appear due to a lockdown at his prison necessitated by the COVID-19 pandemic. According to respondent-father's counsel, the lockdown was set to expire in five days. Nonetheless, the trial court denied respondent-father's motion to continue the hearing and ultimately entered an order terminating his parental rights.

¶ 2 Parents, including incarcerated parents, possess a "fundamental liberty interest[ ]" which "includes the right of parents to establish a home and to direct the upbringing and education of their children." *Owenby v. Young*, 357 N.C. 142, 144 (2003) (cleaned up). Thus, "[w]hen the State moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures." *In re Murphy*, 105 N.C. App. 651, 653 (quoting *Santosky v. Kramer*, 455 U.S. 745, 753–54 (1982)), *aff'd per curiam*, 332 N.C. 663 (1992). In this case, respondent-father was denied the opportunity to present testimony at the termination hearing and to work with his counsel to develop and execute a strategy to oppose termination of his parental rights. Furthermore, the substantive findings in support of the trial court's decision to terminate respondent-father's parental rights all directly related to his conduct in prison, a subject respondent-father's testimony would have aided the court in assessing. Accordingly, the trial court's denial of respondent-father's motion to continue the adjudicatory hearing undermined the fairness of that hearing. We conclude that the trial court prejudicially erred and we vacate the order terminating respondent-father's parental rights.

I. Background.

¶ 3 On 28 January 2019, the Alamance County Department of Social Services (DSS) assumed custody of Caleb, who was four days old, after his mother tested positive for cocaine at Caleb's birth. No father was listed on Caleb's birth certificate, but Caleb's mother identified respondent-father as a possible biological father. At the time of Caleb's

1. We use a pseudonym to protect the identity of the juvenile and for ease of reading. *See* N.C. R. App. P. 42(b). The juvenile's mother is not a party to this appeal.

birth, respondent-father was detained on federal charges including obtaining property by false pretenses, possession of stolen goods, and possession of a firearm by a felon. Eleven days after DSS took custody of Caleb, respondent-father took a paternity test which established to a near certainty that he was Caleb's biological father.

¶ 4 On 14 March 2019, a DSS social worker visited respondent-father at the Alamance County Detention Center, where he was being held pending the resolution of the federal charges against him. At the time, respondent-father told the social worker that he thought he was "looking at three years in prison," but that he "would like for his son to be with family" and "would like to work to regain custody of his son when he is released from prison." He identified three relatives as potential alternative caregivers. None of the three relatives agreed to take custody of Caleb; however, the social worker subsequently learned that respondent-father's sister, Larissa, was willing to care for Caleb if she could also adopt him. DSS ordered a home study to determine if Larissa would be a suitable placement.

¶ 5 Before the home study was completed, Caleb was adjudicated to be a neglected and dependent juvenile. DSS retained nonsecure custody. The court approved a case plan proposed by DSS requiring respondent-father to:

- Develop a sufficient source of income to support himself and the child and use funds to meet basic needs. He can work to achieve this goal by applying for a minimum of five jobs a week, submitting monthly job search log[s] and taking part in job-readiness programs.
- Provide a safe, stable and appropriate home environment. He can work to achieve this goal by applying for housing at five locations a week and providing a monthly log to the social worker, saving sufficient funds for deposits, complying with the terms of his lease, maintaining the home in a fit and habitable condition and keeping working utilities.
- Refrain from allowing his substance abuse to affect his parenting of his child and provide a safe, appropriate home by not exposing his child to an injurious environment.

- Obtain and follow the recommendations of a substance abuse assessment, refrain from using illegal or illicit substances or abusing prescription medication[s], provide a home environment free of illegal or illicit substances and/or persons who are using or under the influence of such.
- Demonstrate the ability to implement age-appropriate disciplinary practices and parenting skills.
- Attend a parenting curriculum and demonstrate appropriate skills during visitation.

Although the trial court noted that respondent-father's "visitation is suspended due to the limits of visits in the Alamance County [detention center]," the court did not otherwise adapt respondent-father's case plan to reflect the circumstances of his incarceration.[2]

¶ 6 Subsequently, DSS received a favorable home study for Larissa and her husband, and Caleb was placed in their home on 3 May 2019. To facilitate Caleb's adoption by Larissa, respondent-father executed a relinquishment of his parental rights specifically to his sister and brother-in-law. Caleb's mother also relinquished her parental rights. Both parents were released as parties to Caleb's juvenile proceedings. In April 2020, DSS received final approval for Larissa and her husband to adopt Caleb.

¶ 7 But, later that same month, Larissa informed DSS that she "feels overwhelmed with everything that is going on in her life right now." She also expressed concern that, notwithstanding their relinquishments, respondent-father and Caleb's mother "are going to want to be in and out of his life because [they are] family once [Caleb's] adopted." Larissa explained that she had arrived at the conclusion "that she just couldn't keep [Caleb]" and that it was "in his best interest . . . to go to a deserving family . . . where his birth parents couldn't mess up his life." On 4 May 2020, DSS notified respondent-father and Caleb's mother that Larissa's adoption of Caleb would not go forward. Respondent-father subsequently revoked his specific relinquishment of his parental rights. Caleb was removed from Larissa's home and placed with foster parents.

¶ 8 On 15 July 2020, the trial court restored respondent-father as a party to Caleb's juvenile proceedings and appointed him an attorney. DSS had difficulty establishing contact with respondent-father, who by this time

2. The trial court also developed a separate case plan for Caleb's mother but that plan is not at issue in this appeal.

was being held at the Beckley Federal Correctional Institution in West Virginia. Eventually, respondent-father notified DSS and the court that he "no longer wanted [Caleb] to be adopted by someone new because he had already gotten a full year closer to being released since he initially executed his specific relinquishment." Respondent-father asserted that he "has not had any write-ups or engaged in any trouble since his incarceration in May of 2018," "has taken courses at the prison in order to be a better father for [Caleb]," and "has a job in the penitentiary kitchen"; in addition, he stated that he "started a rehabilitation program for drug abuse" and signed up to "take a parenting class" but that both had been suspended due to COVID-19. Respondent-father also provided the names of additional relatives to be considered as potential placements for Caleb, including respondent-father's own parents.

¶ 9 On 12 August 2020, the trial court approved an updated case plan requiring respondent-father to

> participate in Parenting classes through the prison . . . demonstrate appropriate and safe parenting choices . . . maintain communication with [DSS] . . . engage in Mental Health services provided through the prison . . . demonstrate good coping skills . . . participate in his 100-hour rehab program through the prison . . . help provide for the needs of [Caleb] . . . give consent for his case manager to provide [DSS with] information regarding his stay in prison . . . [and] upon [his] release from prison . . . engage in activities to obtain and maintain an appropriate home for he and [Caleb]; . . . maintain a way to meet the[ir] daily needs . . . [and] refrain from illegal activities that could cause him to be arrested and incur more prison time . . . .

The court maintained a primary plan of adoption with a secondary plan of guardianship and ordered DSS to perform a home study of Caleb's paternal grandparents. The trial court later determined that "though the paternal grandparents have a suitable home and the financial ability to provide for the Juvenile . . . [Caleb] should remain in the current foster placement progressing to adoption by the [f]oster [f]amily."

¶ 10 On 28 August 2020, DSS filed a motion in the cause seeking termination of respondent-father's parental rights. DSS asserted that termination was warranted on four grounds: neglect pursuant to N.C.G.S. § 7B-1111(a)(1); willful failure to make reasonable progress to correct the conditions that led to Caleb's removal pursuant to

N.C.G.S. § 7B-1111(a)(2); willful failure to pay a reasonable portion of Caleb's cost of care pursuant to N.C.G.S. § 7B-1111(a)(3); and incapability to provide for Caleb's proper care and supervision pursuant to N.C.G.S. § 7B-1111(a)(6). A hearing on the motion to terminate parental rights was initially set for 21 October 2020; however, this hearing was continued at respondent-father's counsel's request because counsel was "not available for [the] hearing." A subsequent hearing scheduled for 16 December 2020 was continued until 20 January 2021 due to the renewal of an Emergency Directive issued by then-Chief Justice Beasley in response to the ongoing COVID-19 pandemic.

¶ 11 On 12 January 2021, respondent-father's counsel filed a motion to continue the upcoming adjudicatory hearing on DSS's motion to terminate. In the motion, respondent-father's counsel explained that respondent-father's case manager had informed him

> that the federal penitentiary [where respondent-father was being held] was under lockdown due to COVID-19 until January 25, 2021 and no movement is permitted until that date. As such, [respondent-father] will not be available to call-in nor in any other way participate in the hearing scheduled for January 20, 2021.

At the adjudicatory hearing, the trial court heard from respondent-father's counsel in support of the motion, and from DSS and the guardian ad litem (GAL) in opposition. The trial court denied respondent-father's motion to continue the hearing. In a subsequent written order, the trial court explained:

> 3. That this motion to terminate parental rights was filed August 28, 2020 and initially scheduled for hearing on October 12, 2020. That hearing was continued at the request of the father's attorney and scheduled for December 16, 2020. That hearing was continued at no fault of anyone involved in this matter.
>
> 4. [Respondent-father's counsel] reports the lock down is scheduled to be lifted January 25, 2021. However, no one knows for sure how COVID-19 will continue to impact the prison system.
>
> 5. That hearings on motions to terminate parental rights are required to be heard within 90 days of

> filing. This case is already outside the required timeframe. The father and his attorney have had an extended period of time to prepare for this matter.
>
> 6. That the Respondent Father's attorney will be present at the hearing and permitted to cross exam witnesses and present evidence. That the father's report is admitted into evidence as well as his exhibits by the consent of the parties. These processes assure the due process rights of the father are being honored and the adversar[ial] nature of the proceeding is preserved.
>
> 7. The Respondent Father and the Alamance County Department of Social Services both have a commanding interest in this proceeding.
>
> 8. That due to the fundamental fairness of the process, representation of counsel for the father and other processes, the risk of error by not having the father present is low.

Based on these findings, the trial court concluded that the motion to continue should be denied because respondent-father's "due process and constitutional safeguards are being adequately observed and protected through the nature of these proceedings."

¶ 12 After denying respondent-father's motion to continue, the trial court conducted an adjudicatory hearing on DSS's motion to terminate respondent-father's parental rights. During the hearing, DSS presented testimony from a DSS social worker. Respondent-father's counsel presented testimony from Caleb's paternal grandfather, Larry, who stated that respondent-father had called him on the morning of the hearing because respondent-father had been "let . . . out" of lockdown for about thirty minutes. At the dispositional stage, the court heard testimony from Caleb's GAL. The trial court also considered a three-page report prepared by counsel which asserted that respondent-father had attained an "unblemished discipline history while incarcerated;" was "actively engaging in classes to better himself so that he can be a better parent to [Caleb];" and had "sent [Caleb] thirty-five dollars" and "two hand-made cards." In addition, the report further argued it was "not in [Caleb's] best interests for [respondent-father's] parental rights to be terminated." On the basis of this evidence, the trial court concluded that DSS had

proven the existence of all four grounds for termination and that terminating respondent-father's parental rights was in Caleb's best interests.

¶ 13 On 11 February 2021, respondent-father timely filed a notice of appeal pursuant to N.C.G.S. § 7B-1001(a1)(1).

II. Standard of review.

¶ 14 The standard of review utilized by an appellate court in reviewing a trial court's denial of a party's motion to continue varies depending on the reason the party sought the continuance. "Ordinarily, a motion to continue is addressed to the discretion of the trial court, and absent a gross abuse of that discretion, the trial court's ruling is not subject to review." *State v. Walls*, 342 N.C. 1, 24 (1995). "If, however, the motion is based on a right guaranteed by the Federal and State Constitutions, the motion presents a question of law and the order of the court is reviewable" de novo. *State v. Baldwin*, 276 N.C. 690, 698 (1970); *see also State v. Johnson*, 379 N.C. 629, 2021-NCSC-165, ¶ 16 ("Defendant's motion to continue raised a constitutional issue, requiring de novo review by this Court.").

¶ 15 "[A] parent enjoys a fundamental right 'to make decisions concerning the care, custody, and control' of his or her children under the Due Process Clause of the Fourteenth Amendment to the United States Constitution." *Adams v. Tessener*, 354 N.C. 57, 60 (2001) (quoting *Troxel v. Granville*, 530 U.S. 57, 66 (2000)). Accordingly, as noted above, "[w]hen the State moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures." *In re Murphy*, 105 N.C. App. at 653 (quoting *Santosky*, 455 U.S. at 753–54). At an adjudicatory hearing, a respondent-parent must be afforded an adequate opportunity to present evidence "enabl[ing] the trial court to make an independent determination" regarding the facts pertinent to the termination motion. *In re T.N.H.*, 372 N.C. 403, 409 (2019). Thus, when a parent is unable to attend a termination hearing as a result of the trial court's refusal to grant a continuance, that parent's constitutional due process rights may be implicated.

¶ 16 Nonetheless, even if a motion to continue implicates a parent's constitutional parental rights, a reviewing court will only review a denial of the motion de novo if the respondent-parent "assert[ed] before the trial court that a continuance was necessary to protect a constitutional right." *In re S.M.*, 375 N.C. 673, 679 (2020). If the respondent-parent fails to assert a constitutional basis in support of his or her motion to continue, "that position is waived and we are constrained to review the trial court's denial of [a] motion to continue for abuse of discretion." *Id.* In

this case, the constitutional basis for respondent-father's motion to continue was apparent from the motion itself, in which respondent-father's counsel expressly argued that

> the proper administration of justice and any reasonable understanding of due process demands [respondent-father's] presence at this hearing to determine if the state will strip him of his constitutionally protected parental rights. [Respondent-father] has a fundamental right to participate in the state's efforts to deny him his constitutional rights to care for his child. [Respondent-father] strenuously objects to the state's efforts to terminate his parental rights over his minor child. In order to defend his rights [respondent-father] will testify at this hearing. This will be an impossibility if a continuance is not granted.

Accordingly, we review the trial court's denial of respondent-father's motion to continue the termination hearing de novo.

III. Analysis.

¶ 17 To establish that a termination order entered after a trial court has denied a motion to continue should be overturned, a respondent-parent must "show[ ] both that the denial was erroneous, and that [the respondent-parent] suffered prejudice as a result of the error." *In re A.L.S.*, 374 N.C. 515, 517 (2020) (quoting *Walls*, 342 N.C. at 24–25). In support of their assertion that the trial court did not err, DSS and the GAL echo two justifications the trial court relied upon in support of its denial of respondent-father's request for a continuance. First, they argue that the trial court did not err in denying the motion because "the matter was outside of the [ninety]-day statutory period, with two continuances having already been granted, one of which was requested by respondent[-]father's attorney." Second, they argue that the trial court did not err in denying the motion because the court appropriately "weighed and balanced the rights and interest[s] of all involved, assuring the father's due process rights were secured" by conducting the hearing in a manner that "preserved the adversarial nature of the proceedings and assured the father had more than adequate representation." With respect to prejudice, they argue that respondent-father has failed to demonstrate that his testimony "would have presented any evidence not already provided to the court," especially given that respondent-father's rights "were protected by counsel." We address each argument in turn.

A. The trial court erred to the extent it determined that the lockdown at respondent-father's detention facility was not an "extraordinary circumstance[ ]" within the meaning of the Juvenile Code.

¶ 18 Under North Carolina's Juvenile Code, a trial court may continue an adjudicatory hearing on a motion or petition to terminate a parent's parental rights for up to ninety days "for good cause shown." N.C.G.S. § 7B-1109(d) (2021). A trial court may also continue an adjudicatory hearing to a date more than ninety days past the date the motion or petition was filed, but "[c]ontinuances that extend beyond 90 days after the initial petition shall be granted only in *extraordinary circumstances* when necessary for the proper administration of justice." *Id.* (emphasis added). In this case, when respondent-father filed the motion to continue at issue on appeal, more than ninety days had already passed since DSS initially filed its termination motion. Indeed, the trial court had already determined that "extraordinary circumstances" justified continuing two previously scheduled adjudicatory hearings beyond the statutory ninety-day period: first, when respondent-father's counsel noted a scheduling conflict, and second, when then-Chief Justice Beasley renewed a COVID-19 Emergency Directive.

¶ 19 The trial court did not expressly state that respondent-father's motion failed to present an "extraordinary circumstance[ ]" within the meaning of N.C.G.S. § 7B-1109(d). But the trial court did refer to this statutory requirement in noting that "[t]his case is already outside the required timeframe." Still, even if it is correct that a trial court should consider the overall amount of time that has elapsed when ruling on a motion to continue filed more than ninety days after the filing of a termination motion, a trial court is not entitled to ignore the nature of the circumstances presented in support of the continuance motion. "Extraordinary circumstances" may occur both within and beyond ninety days after the filing of a termination motion or petition.

¶ 20 Here, the trial court had previously concluded that a disruption caused by the COVID-19 pandemic was an "extraordinary circumstance[ ]" permitting it to exercise its authority to grant a continuance pursuant to N.C.G.S. § 7B-1109(d). Logically, another disruption caused by the COVID-19 pandemic, one which precluded respondent-father from attending the adjudicatory hearing, was also an "extraordinary circumstance[ ]" permitting the trial court to exercise its authority to grant a continuance pursuant to N.C.G.S. § 7B-1109(d). While the trial court was certainly correct in noting that "no one knows for sure how COVID-19 will continue to impact the prison system," the fact that the court was

confronted with an unprecedented and rapidly evolving situation supports rather than detracts from the conclusion that respondent-father's motion presented an "extraordinary circumstance[ ]" within the meaning of N.C.G.S. § 7B-1109(d).

¶ 21 This conclusion does not necessarily mean that the trial court reversibly erred in denying respondent-father's motion to continue. As previously noted, determining that a motion to continue presents an "extraordinary circumstance[ ]" does not *require* a trial court to continue the hearing under N.C.G.S. § 7B-1109(d). But our conclusion that respondent-father's motion to continue did present an "extraordinary circumstance[ ]" does foreclose upon the argument that the trial court necessarily could not have erred because it lacked the authority to continue an adjudicatory hearing beyond ninety days under our Juvenile Code. Accordingly, we reject the contention that the trial court properly denied respondent-father's motion because the lockdown at his prison occasioned by the COVID-19 pandemic was not an "extraordinary circumstance[ ]" within the meaning of N.C.G.S. § 7B-1109(d).

B. The adjudicatory hearing held in respondent-father's absence did not meet the requirements of due process.

¶ 22 We next consider whether the trial court's decision to deny respondent-father's motion to continue the adjudicatory hearing violated respondent-father's due process rights. As explained above, the Due Process Clause of the United States Constitution requires the State to "provide [ ] parents with fundamentally fair procedures" when seeking to terminate their parental rights. *In re Murphy*, 105 N.C. App. at 653 (quoting *Santosky*, 455 U.S. at 754). The requirements of due process are "flexible and call[ ] for such procedural protections as the particular situation demands." *Jones v. Keller*, 364 N.C. 249, 256 (2010) (quoting *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)). When assessing whether the requirements of due process have been met, courts consider "the private interests affected by the proceeding; the risk of error created by the State's chosen procedure; and the countervailing governmental interest supporting use of the challenged procedure." *Santosky*, 455 U.S. at 754 (citing *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)).

¶ 23 It is indisputable that respondent-father has a "commanding" interest "in the accuracy and justice of the decision to terminate his [ ] parental status." *Lassiter v. Dep't of Soc. Servs. of Durham Cty.*, N.C., 452 U.S. 18, 27 (1981); *see also Price v. Howard*, 346 N.C. 68, 79 (1997) (recognizing "[a] natural parent's constitutionally protected paramount interest in the companionship, custody, care, and control of his or her child"). This

interest "weighs against the respondent's absence from the adjudicatory hearing." *In re Murphy*, 105 N.C. App. at 654. At the same time, it is indisputable that DSS possessed an "equally commanding" interest in the outcome of the proceeding. *Id.* at 655.

¶ 24 To be clear, the "countervailing government interest" at stake here was *not* an interest in rapidly terminating respondent-father's parental rights to facilitate Caleb's adoption. *Id.* Rather, DSS's interest was in protecting Caleb's welfare through a proceeding that reaches "a correct decision" regarding whether respondent-father's parental rights could and should be terminated. *Id.* While it may be the case that terminating respondent-father's parental rights was both legally permissible and in Caleb's best interest, neither proposition could be assumed; the reason a trial court conducts an adjudicatory hearing is to determine if grounds exist to lawfully terminate a parent's parental rights, and one of the purposes of the procedures created by our Juvenile Code is to "prevent [ ] the unnecessary or inappropriate separation of juveniles from their parents." N.C.G.S. § 7B-100(4) (2021); *cf. In re A.C.F.*, 176 N.C. App. 520, 527 (2006) (recognizing "the State's interests in preserving the family" of a child whose parents are subject to termination proceedings). The State's interest in this proceeding necessarily partially overlapped with respondent-father's interest, in that both had a commanding interest in ensuring that the adjudicatory hearing helped the trial court reach the correct disposition of DSS's motion to terminate respondent-father's parental rights. *See In re K.M.W.*, 376 N.C. 195, 208 (2020) (recognizing that "fundamentally fair procedures" are "an inherent part of the State's efforts to protect the best interests of the affected children by preventing unnecessary interference with the parent-child relationship").

¶ 25 Because the parties largely agree that all parties to the adjudicatory hearing possessed a substantial interest in its outcome, "determination of whether respondent's federal due process rights have been violated turns upon the second *Eldridge* factor, risk of error created by the State's procedure." *In re Murphy*, 105 N.C. App. at 655. Respondent-father argues that his absence significantly increased the risk of an erroneous termination of his parental rights because (1) he was deprived of the opportunity to testify regarding topics central to the resolution of DSS's termination motion, and (2) his counsel did not have the opportunity to obtain the information about which respondent-father would have testified to at the hearing given that respondent-father was in lockdown for weeks preceding the hearing. In response, DSS and the GAL contend that the risk of error was minimal because respondent-father was represented by counsel and the trial court admitted into evidence a report

summarizing respondent-father's conduct while in prison. Although it is well established that "an incarcerated parent does not have an absolute right to be transported to a termination of parental rights hearing in order that he [or she] may be present under either statutory or constitutional law," *id.* at 652–53, we conclude that respondent-father's absence created a meaningful risk of error that undermined the fundamental fairness of this adjudicatory hearing.

¶ 26 The crux of DSS's termination motion—and the central factual basis for the trial court's termination order—was respondent-father's conduct while in prison. Each of the grounds asserted by DSS required an assessment of his conduct in light of the constraints imposed by his incarceration. Naturally, respondent-father possessed firsthand information regarding his conduct in prison that would have been relevant to the trial court's adjudication of these asserted grounds. This information included the availability of programs and services in his detention facility addressing the various components of his case plan, the effects of the COVID-19 pandemic on the availability of those programs, his efforts to avail himself of any existing programs and services during the time he was not a party to Caleb's juvenile proceeding, the progress he has made while enrolled in any programs or services, and his personal financial situation. The trial court needed this information to ensure that its adjudication was based on the specific facts of respondent-father's conduct in prison, as opposed to facts necessarily attendant to the fact of respondent-father's incarceration in general. *Cf. In re A.G.D.*, 374 N.C. 317, 327 (2020) ("[T]he fact of incarceration is neither a sword nor a shield for purposes of a termination of parental rights proceeding."). Denying respondent-father's motion to continue deprived the court of a crucial source of information about a topic central to the court's resolution of the termination motion.

¶ 27 The presence of counsel representing respondent-father may have partially mitigated the unfairness of proceeding without respondent-father's participation. Counsel's representation ensured that someone would be at the adjudicatory hearing to advocate on respondent-father's behalf. Yet under the circumstances of this case, counsel's presence did not obviate the risk of error created by respondent-father's absence. Counsel was severely limited in his ability to elicit up-to-date information from respondent-father at or near the time of the hearing because respondent-father was incarcerated in West Virginia in a facility under COVID-19 lockdown. Indeed, when respondent-father's counsel e-mailed a prison official to schedule a meeting with respondent-father to prepare for the adjudicatory hearing, the official responded that

respondent-father could not be made available for a meeting because the facility was under "lock down until Jan 25. No movement is available until then[.]"

¶ 28 Furthermore, while respondent-father's counsel did submit a report to the trial court containing a summary of respondent-father's conduct while in prison, the report was admitted "so [respondent-father's] wishes will be known today," not to provide factual information rebutting the allegations DSS made in support of its termination motion. In addition, because respondent-father's counsel was unable to meet with respondent-father before the hearing, it is unclear whether the report provided up-to-date information regarding respondent-father's conduct in prison. Accordingly, even with the report, counsel could not adequately bridge the informational gaps created when respondent-father was unable to testify at the adjudicatory hearing.

¶ 29 The facts of this case stand in stark contrast to the facts of *In re Murphy*, upon which both DSS and the GAL rely. In *In re Murphy*, "respondent's attorney did not argue that his client would be able to testify concerning any defense to termination," and counsel "could point to no reason that the respondent should be transported to the hearing other than for respondent to contest his sexual assault convictions, an impermissible reason." 105 N.C. App. at 655. Denying the respondent-parent the opportunity to testify in that case did not deprive the court of any information relevant to the disposition of any legal claims. In addition, because the respondent-father in *In re Murphy* was incarcerated "[a]s the result of his being convicted of sexual offenses he committed against his own children," the Court of Appeals reasoned that "[r]espondent's presence at the hearing combined with his parental position of authority over his children may well have intimidated his children and influenced their answers if they had been called to testify." *Id.* Allowing the respondent-parent to be present would have *exacerbated* the risk of error. By contrast, in this case respondent-father possessed information relevant to the legal question before the trial court, and there is no reason to believe that respondent-father's presence at the adjudicatory hearing would have interfered with the trial court's efforts to elicit truthful and candid testimony from other witnesses.

¶ 30 Under a different set of circumstances, the risk of error created by a respondent-parent's absence from an adjudicatory hearing might be outweighed by the State's interest in ensuring the efficient and orderly attainment of permanency for a juvenile. The State has a compelling interest in protecting a juvenile's welfare, and this interest both demands and justifies adherence to an expeditious process for determining when

a natural parent's rights should be terminated. *Cf. In re D.L.H.*, 364 N.C. 214, 219 n.2 (2010) (noting in a juvenile delinquency matter that "the mandates of [a provision of the Juvenile Code] . . . encourage expeditious handling of juvenile matters"). But, under these circumstances, this interest was not meaningfully implicated by respondent-father's motion to continue the adjudicatory hearing. Respondent-father did not ask for an indefinite continuance, nor did he ask for a continuance until the end of the COVID-19 pandemic, whenever that may be. He asked to continue a hearing calendared for 20 January 2021 until some date after 25 January 2021 because the lockdown at his prison was scheduled to be lifted at that time. Under these circumstances, "[t]he State's interest in prompt resolution of [termination] proceedings would not have been significantly affected by a brief continuance." *In re K.D.L.*, 176 N.C. App. 261, 265 (2006).

¶ 31 Similarly, under a different set of circumstances, the risk of error created by a respondent-parent's absence from an adjudicatory hearing might be negated by the presence of other witnesses who could provide the court with the same information the parent possesses. A trial court is required to "receive *some* oral testimony at the [adjudicatory] hearing," *In re T.N.H.*, 372 N.C. at 410 (emphasis added), but there is no requirement that the respondent-parent himself or herself be its source. Thus, in this case, had the trial court received testimony from a prison official or some other individual who could speak directly to respondent-father's conduct in prison, the presence of counsel might have adequately protected respondent-father's interest in avoiding an erroneous termination of his parental rights. *Cf. In re Barkley*, 61 N.C. App. 267, 270 (1983) (concluding that the trial court did not err by excluding a respondent-mother from the courtroom because her counsel was allowed to cross-examine a different witness possessing the same relevant substantive information). But no witness who could compensate for the informational deficiency created by respondent-father's absence was available at this adjudicatory hearing.

¶ 32 Procedural due process "is a flexible, not fixed, concept governed by the unique circumstances and characteristics of the interest sought to be protected." *Peace v. Emp. Sec. Comm'n of N. Carolina*, 349 N.C. 315, 323 (1998). The procedure necessary "to [e]nsure fundamental fairness" will vary given the particular context of each case. *State v. Tolley*, 290 N.C. 349, 364 (1976) (cleaned up); *cf. In re D.W.*, 202 N.C. App. 624, 628 (2010) ("[A] case-by-case analysis is more appropriate than the application of rigid rules."). In this case the trial court's denial of respondent-father's motion for a brief continuance,

which prevented respondent-father from testifying at a hearing where his parental rights were adjudicated, undermined the fairness of that hearing. Given respondent-father's inability to meet with counsel before the hearing because of the lockdown at his prison, the lack of any other testimony regarding respondent-father's conduct in prison, the centrality of factual questions regarding respondent-father's activities in prison to the court's examination of the asserted grounds for termination, and the magnitude of respondent-father's interest in avoiding an erroneous termination of his parental rights (which DSS shared), the trial court's denial of respondent-father's motion to continue was legal error.

C. Respondent-father was prejudiced by the trial court's erroneous denial of his motion to continue the adjudicatory hearing.

¶ 33 Furthermore, we agree with respondent-father that he was prejudiced by the trial court's denial of his motion to continue the adjudicatory hearing. Although it is correct that reversal is warranted only upon a showing of prejudice "whether the motion raises a constitutional issue or not," *Walls*, 342 N.C. at 24, our prejudice analysis is different when the trial court commits a constitutional error. When the trial court's denial of a respondent-parent's motion to continue violates that parent's due process rights, the "harmless error" standard applies: specifically, the challenged order must be overturned unless "the error was harmless beyond a reasonable doubt," and DSS bears the "burden" of proving that the error was harmless. *State v. Scott*, 377 N.C. 199, 2021-NCSC-41, ¶ 10; *cf. In re T.D.W.*, 203 N.C. App. 539, 545 (2010) (applying harmless error analysis to a due process violation in termination of parental rights context). Under these circumstances, we are unpersuaded that the trial court's denial of respondent-father's motion to continue the adjudicatory hearing was harmless beyond a reasonable doubt.

¶ 34 In general, to demonstrate prejudice resulting from the denial of a motion to continue an adjudicatory hearing, a respondent-parent should indicate what the parent's "expected testimony" will address and "demonstrate its significance" to the trial court's adjudication of the grounds for termination. *In re A.L.S.*, 374 N.C. at 518. The "better practice [is] to support a motion for continuance with" an "affidavit or other offer of proof." *Id.* (citing and quoting *State v. Cody*, 135 N.C. App. 722, 726 (1999)). Respondent-father's counsel did not submit an affidavit or other offer of proof in support of the continuance motion here. Yet respondent-father's counsel had no means of eliciting the information necessary to support such an affidavit or other offer of proof—counsel's inability to contact respondent-father and arrange for his testimony

at the hearing because of circumstances beyond the control of either of them was a principal justification for seeking the continuance.[3] Trial counsel did state that respondent-father "is standing behind testifying before the [c]ourt" and that he would "vociferously refute the . . . position to terminate [his] parental rights." In addition, in a brief to this Court, appellate counsel described the information respondent-father would have provided had he been permitted to testify. Accordingly, in assessing prejudice, we consider these arguments regarding the consequences of the trial court's refusal to grant a continuance.

¶ 35 As the Court of Appeals has correctly observed, although parents do not have an absolute right to be present and testify at a hearing where their parental rights are being adjudicated, "[g]enerally, we consider the testimony of a parent to be a vital source of information regarding the nature of the parent/child relationship and the necessity of terminating parental rights." *In re D.W.*, 202 N.C. App. at 629. Parental testimony is especially vital when it addresses facts that are central to the trial court's adjudication of asserted grounds for termination and when no other witness is available who can accurately convey to the court the information the parent possesses.

¶ 36 Here, the trial court's decision to terminate respondent-father's parental rights necessarily depended upon its assessment of respondent-father's conduct within the context of his case plan and the constraints of his incarceration. Every ground asserted by DSS and found by the trial court required careful parsing of these facts to ensure that respondent-father's parental rights were being terminated because of his conduct, not because of his incarceration. *Cf. In re K.N.*, 373 N.C. 274, 283 (2020) ("[R]espondent's incarceration, by itself, cannot serve as clear, cogent, and convincing evidence of neglect. Instead, the extent to which a parent's incarceration or violation of the terms and conditions

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3. DSS argues that it is "disconcerting" that respondent-father called his own father on "the morning of the termination hearing . . . but did not take the initiative to call his attorney." Although the transcript of the adjudicatory hearing does indicate that respondent-father spoke with his own father on the morning of the hearing, there is no evidence in the record suggesting respondent-father had the means or opportunity to appear at the adjudicatory hearing or otherwise meaningfully participate in preparing for the hearing with his attorney. As noted above, when respondent-father's counsel attempted to contact respondent-father at his detention facility, a prison official told counsel that any such contact would be impossible due to the lockdown. Even respondent-father's father's testimony supports the conclusion that the lockdown significantly inhibited efforts to communicate with respondent-father—according to the testimony, respondent-father was only able to call his father during a brief window when he was released from lockdown earlier that morning.

of probation support a finding of neglect depends upon an analysis of the relevant facts and circumstances, including the length of the parent's incarceration."). Respondent-father asserts that he would have testified to "the fitness of *all* appropriate caregivers" he identified as alternative placements for Caleb, "[e]vidence of [his] ability and efforts to work toward reunification with Caleb when he was not a party to the case," "[e]vidence of [his] ability to pay a reasonable portion toward Caleb's cost of care in the six months preceding the filing of the termination motion," "[e]vidence of [his] progress in the rehabilitative programs he was taking in prison to the date of the termination hearing," and "updated evidence about his release date." No other witness was present who could supply the court with this factual information.

¶ 37 The absence of information regarding respondent-father's conduct while in prison plainly had a "possible impact upon the actual hearing or the ensuing order by the trial court." *In re T.H.T.*, 362 N.C. 446, 453 (2008). DSS and the GAL have not met their burden of proving beyond a reasonable doubt that the trial court's violation of respondent-father's due process rights was harmless. Accordingly, respondent-father was prejudiced when he was denied the opportunity to be heard at the adjudicatory hearing "in a meaningful manner." *Goldberg v. Kelly*, 397 U.S. 254, 267 (1970) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)).

IV. Conclusion.

¶ 38 In this case, respondent-father was unable to attend the hearing during which his parental rights were adjudicated because the prison in which he was living was under lockdown due to the COVID-19 pandemic. He requested a brief continuance until the lockdown was lifted to enable him to prepare for the hearing with his attorney and to testify on his own behalf. The grounds for terminating respondent-father's parental rights all required the trial court to carefully assess his conduct while in prison. No other witness with direct knowledge of that information was available to testify at the hearing. Ultimately, the trial court terminated respondent-father's parental rights.

¶ 39 The purpose of an adjudicatory hearing is to determine whether the State's interest in protecting the welfare of a child requires displacing a parent's "constitutionally[ ] protected paramount right . . . to custody, care, and control of [his or her] children." *Owenby*, 357 N.C. at 145 (quoting *Petersen v. Rogers*, 337 N.C. 397, 403–04 (1994). That right "is a 'fundamental liberty interest' which warrants due process protection." *In re Montgomery*, 311 N.C. 101, 106 (1984) (quoting *Santosky*, 455 U.S. at 759). By denying respondent-father's motion to continue the

adjudicatory hearing, the trial court violated respondent-father's due process rights and undermined the fundamental fairness of the hearing. Accordingly, we vacate the order terminating respondent-father's parental rights and remand this case to the trial court for further proceedings not inconsistent with this opinion.

VACATED AND REMANDED.

Chief Justice NEWBY dissenting.

¶ 40 The task here is to determine whether the trial court erred in terminating respondent-father's parental rights. Respondent presents two bases for why the trial court's order should be vacated. He first argues that the trial court's denial of his motion to continue the termination of parental rights (TPR) hearing violated his right to due process because he was unable to attend the hearing virtually. Additionally, respondent contends that sufficient grounds did not exist for the trial court to terminate his parental rights under N.C.G.S. § 7B-1111(a)(1), (2), (3), or (6). In order for respondent to prevail on appeal, however, he must establish that if he were virtually present at the hearing, the trial court would not have terminated his parental rights under *any* of the alleged grounds. Here respondent is unable to show that but for his absence, the trial court would not have terminated his parental rights for willful failure to pay a reasonable portion of Caleb's cost of care for the six-month period immediately preceding the filing of the TPR motion. *See* N.C.G.S. § 7B-1111(a)(3) (2021). Thus, he cannot prevail on appeal. The trial court's order terminating respondent's parental rights should be affirmed. I respectfully dissent.

¶ 41 On 28 August 2020, the Alamance County Department of Social Services (DSS) filed a motion to terminate respondent's parental rights to Caleb based, *inter alia*, upon respondent's willful failure to pay a reasonable portion of Caleb's cost of care pursuant to N.C.G.S. § 7B-1111(a)(3). Notably, during the relevant six-month period preceding the filing of the TPR motion, respondent contributed zero dollars toward Caleb's cost of care despite being employed in the dining room of the prison facility where he was incarcerated and receiving funds from his family. A hearing on the TPR motion was originally scheduled for 21 October 2020 but continued to 16 December 2020 and again continued to 20 January 2021.

¶ 42 On 12 January 2021, respondent moved to continue the TPR hearing for a third time, arguing he would otherwise be unable to attend the

hearing virtually due to a COVID-19 lockdown at the prison. In respondent's motion to continue, he argued that "due process demands [his] presence at th[e] hearing to determine if the state will strip him of his constitutionally protected parental rights." Respondent further contended that denying the requested continuance would render him unable to testify and thus unable to defend his constitutional right to care for his child. The trial court made the following findings with respect to respondent's motion:

> 2. That at the call of the hearing, [respondent's counsel] was heard on his written motion to continue the hearing on termination of parental rights. He indicated to the court that [respondent] could not attend the hearing due to the prison being on lock down due to the COVID-19 pandemic.
>
> 3. That this motion to terminate parental rights was filed August 28, 2020 and initially scheduled for hearing on October [21], 2020. That hearing was continued at the request of [respondent's] attorney and scheduled for December 16, 2020. That hearing was continued at no fault of anyone involved in this matter.
>
> 4. [Respondent's counsel] reports the lock down is scheduled to be lifted January 25, 2021. However, no one knows for sure how COVID-19 will continue to impact the prison system.
>
> 5. That hearings on motions to terminate parental rights are required to be heard within 90 days of filing. This case is already outside the required timeframe. [Respondent] and his attorney have had an extended period of time to prepare for this matter.
>
> 6. That [respondent's] attorney will be present at the hearing and permitted to cross exam[ine] witnesses and present evidence. That [respondent's] report is admitted into evidence as well as his exhibits by the consent of the parties. These processes assure the due process rights of [respondent] are being honored and the adversary nature of the proceeding is preserved.

7. [Respondent] and [DSS] both have a commanding interest in this proceeding.

8. That due to the fundamental fairness of the process, representation of counsel for [respondent] and other processes, the risk of error by not having [respondent] present is low.

The trial court denied respondent's motion. After the hearing on 20 January 2021, the trial court determined that grounds existed to terminate respondent's parental rights based upon neglect, willfully leaving Caleb in foster care or placement outside the home without correcting the conditions which led to his removal, willfully failing to pay a reasonable portion of the cost of Caleb's care, and dependency. *See* N.C.G.S. § 7B-1111(a)(1), (2), (3), (6).

¶ 43 On direct appeal before this Court, respondent now argues the trial court violated his right to due process when it denied his motion to continue the TPR hearing because it rendered him unable to testify at the hearing. Even assuming, without deciding, that the trial court erred in denying respondent's motion, respondent cannot prevail on appeal because he cannot show that he was prejudiced by such an error.[1]

¶ 44 " 'When the State moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures,' which meet the rigors of the due process clause." *In re Murphy*, 105 N.C. App. 651, 653, 414 S.E.2d 396, 397 (quoting *Santosky v. Kramer*, 455 U.S. 745, 753–54, 102 S. Ct. 1388, 1394 (1982)), *aff'd per curiam*, 332 N.C. 663, 422 S.E.2d 577 (1992). Nonetheless, an incarcerated parent does not have an absolute right to be present at a TPR hearing. *In re Murphy*, 105 N.C. App. at 652–53, 414 S.E.2d at 397. As such, "[w]hen . . . a parent is absent from a termination proceeding and the trial court preserves the adversarial nature of the proceeding by allowing the parent's counsel to cross examine witnesses, with the questions and answers being recorded, the parent must demonstrate some actual prejudice in order to prevail upon appeal." *Id.* at 658, 414 S.E.2d at 400. In other words, a respondent must show that "there is a reasonable probability that, but for [his absence], there would have been a different result in the proceedings." *In re T.N.C.*, 375 N.C. 849, 854, 851 S.E.2d 29, 33 (2020) (quoting *State v. Braswell*, 312 N.C. 553, 563, 324 S.E.2d 241, 248 (1985)).

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1. The analysis required to determine prejudice is comparable to that required by the second *Eldridge* factor—i.e., the risk of error caused by respondent's absence. Because this Court should decide this case under the prejudice analysis, an analysis of the *Eldridge* factors is unnecessary.

¶ 45 Here the trial court preserved the adversarial nature of the proceedings because respondent was represented by counsel, who presented evidence, called a witness, and cross-examined witnesses at the TPR hearing. Though "a finding of only one ground is necessary to support a termination of parental rights," *In re A.R.A.*, 373 N.C. 190, 194, 835 S.E.2d 417, 421 (2019), the trial court found that grounds existed to terminate respondent's parental rights under N.C.G.S. § 7B-1111(a)(1), (2), (3), and (6). Therefore, to prevail on appeal, respondent must show that if he were permitted to testify at the hearing, the trial court would not have terminated his parental rights based upon *any* of the above grounds.

¶ 46 Respondent's presence at the hearing would not have changed the trial court's adjudication under N.C.G.S. § 7B-1111(a)(3). A trial court may terminate a parent's parental rights under this ground when

> [t]he juvenile has been placed in the custody of a county department of social services, a licensed child-placing agency, a child-caring institution, or a foster home, and the parent has for a continuous period of six months immediately preceding the filing of the petition or motion willfully failed to pay a reasonable portion of the cost of care for the juvenile although physically and financially able to do so.

N.C.G.S. § 7B-1111(a)(3). We have recently explained that termination under N.C.G.S. § 7B-1111(a)(3) is proper "where the trial court finds that the respondent has made no contributions to the juvenile's care for the period of six months immediately preceding the filing of the petition and that the respondent had income during this period." *In re J.E.E.R.*, 378 N.C. 23, 2021-NCSC-74, ¶ 18.

¶ 47 Here the trial court found that

> 13. [Respondent] entered into the Alamance County Jail on May 21, 2018 and has not left incarceration since that date.
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> . . . .
>
> 16. The juvenile has been alive 726 days. Out of these 726 days, he has been in DSS custody 725 days. He has never lived with [respondent].
>
> . . . .
>
> 46. [Respondent] receives financial assistance while incarcerated from his mother and other

> family members/friends. He also works within the prison and receives a small amount of pay.
>
> 47. [DSS] has expended over $10,000.00 for the cost of care of the juvenile.
>
> 48. The petition to terminate parental rights was filed August 28, 2020. The relevant six month period for determination if [respondent] has paid his reasonable portion of the cost of care is from February 28, 2020 until August 28, 2020. During that period of time, [respondent] paid zero dollars towards the cost of care for the juvenile.
>
> 49. [Respondent] has the ability to pay more than zero towards the cost of care for the juvenile, as demonstrated by the money he provided in September of 2020, and has willfully failed to pay such.

¶ 48 Respondent challenges finding of fact 49, arguing the record does not support any finding that he had the ability to pay an amount greater than zero dollars toward Caleb's cost of care during the relevant period. The record, however, includes two individualized needs plans for respondent, which indicate that respondent was employed in the dining room of the prison facility at least from 12 November 2019 to 22 July 2020, almost the entirety of the relevant six-month period. Moreover, Christy Roessler, a DSS social worker, testified that respondent had access to money to help with Caleb's cost of care because respondent was being paid for his work at the prison and was receiving funds from his family. Though respondent sent thirty-five dollars to Caleb on 9 September 2020, demonstrating his ability to pay some amount, he paid nothing during the relevant six-month period. Therefore, the trial court's finding that respondent had the ability to pay more than zero dollars during the relevant period is supported by the record evidence. Since respondent made no contributions to the cost of Caleb's care during the relevant period despite having some income, the trial court properly terminated his parental rights pursuant to N.C.G.S. § 7B-1111(a)(3).

¶ 49 The majority states that the trial court was required to consider "up-to-date" testimony from respondent regarding his good behavior in prison. According to the majority,

> the trial court's decision to terminate respondent-father's parental rights necessarily depended upon

> its assessment of respondent-father's conduct within the context of his case plan and the constraints of his incarceration. Every ground asserted by DSS and found by the trial court required careful parsing of these facts to ensure that respondent-father's parental rights were being terminated because of his conduct, not because of his incarceration.

As such, the majority erroneously concludes that respondent's absence "created a meaningful risk of error that undermined the fundamental fairness of this adjudicatory hearing" because the trial court was unable to consider relevant, up-to-date information regarding respondent's conduct in prison.

¶ 50 As explained above, however, the trial court's adjudication under N.C.G.S. § 7B-1111(a)(3) did not require an understanding of respondent's current conduct.[2] Rather, it merely required the trial court to find two facts: (1) that respondent had some income during the relevant period and thus the ability to pay something; and (2) that respondent contributed zero dollars toward Caleb's cost of care. Since the relevant period for adjudication under N.C.G.S. § 7B-1111(a)(3) consisted of the six months immediately preceding the filing of the TPR motion, the facts necessary to support termination under this ground were finalized on the date the TPR motion was filed. As such, the trial court did not need to hear "up-to-date" testimony from respondent about his subsequent good behavior in prison.

¶ 51 The majority is thus unable to articulate what evidence respondent's testimony would have offered that could have altered the trial court's adjudication under N.C.G.S. § 7B-1111(a)(3). Respondent presented no offer of proof before the trial court. On appeal, respondent also failed to specify any facts showing that he did not have income during the relevant period. Rather, respondent, and now the majority, merely asserts that respondent would have presented "[e]vidence of [his] ability to pay a reasonable portion toward Caleb's cost of care in the six months preceding the filing of the termination motion." What exactly such evidence is remains unknown. This conclusory assertion is not sufficient to show that respondent's testimony would have rendered a different result under N.C.G.S. § 7B-1111(a)(3). It is clear that respondent had income but

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2. Though respondent's conduct at the time of the hearing may have been relevant to adjudication of some of the other grounds alleged, his conduct after 28 August 2020 had no bearing on the trial court's N.C.G.S. § 7B-1111(a)(3) determination.

paid nothing. Notably, if contrary evidence existed, then respondent could have included it in his report, which was admitted into evidence.

¶ 52 The majority excuses respondent's counsel's failure to present an offer of proof by claiming that "[c]ounsel was severely limited in his ability to elicit up-to-date information from respondent-father at or near the time of the hearing because respondent-father was incarcerated in West Virginia in a facility under COVID-19 lockdown." However, all of the information needed to defend against the termination of respondent's parental rights under N.C.G.S. § 7B-1111(a)(3) had been available since the TPR motion was filed on 28 August 2020. Certainly, in preparing for the two previously scheduled TPR hearings in October and December of 2020, any relevant information would have been available to respondent's counsel. Therefore, the 145-day period between the filing of the TPR motion and the hearing, including the two scheduled hearings, provided respondent and his counsel sufficient time and incentive to prepare a defense to termination under N.C.G.S. § 7B-1111(a)(3).

¶ 53 Furthermore, the trial court found that

> [respondent] called [the paternal grandfather] before this hearing and they spoke for approximately thirty minutes. Although the federal penitentiary is on a COVID shutdown right now and would not allow [respondent] to participate in this hearing via WebEx, they do allow some telephone communication with the outside world. [Respondent] did not call his attorney during this time.

This finding is supported by the paternal grandfather's testimony that he spoke to respondent the morning of the TPR hearing for about thirty minutes. As such, it is binding on appeal. *See In re C.H.M.*, 371 N.C. 22, 28, 812 S.E.2d 804, 809 (2018) ("[A] trial court's findings of fact 'are conclusive on appeal if there is competent evidence to support them.' " (quoting *In re Skinner*, 370 N.C. 126, 139, 804 S.E.2d 449, 457 (2017))). Instead of calling the paternal grandfather on the morning of the TPR hearing, respondent could have called his counsel to prepare for the hearing. Therefore, the majority's contention that respondent's counsel was unable to sufficiently prepare for the hearing is without merit.

¶ 54 Moreover, the majority concludes that the COVID-19 lockdown constituted an "extraordinary circumstance" under N.C.G.S. § 7B-1109(d), which *required* the trial court to continue the hearing. *See* N.C.G.S. § 7B-1109(d) (2021). N.C.G.S. § 7B-1109(d), however, does not require

that a trial court grant a continuance but merely gives a trial court the authority to do so if it finds that extraordinary circumstances exist. *See State v. Phillip*, 261 N.C. 263, 266, 134 S.E.2d 386, 389 (1964) ("Ordinarily a motion for continuance is addressed to the sound discretion of the trial judge and his ruling thereon is not subject to review on appeal except in a case of manifest abuse."). Here the trial court acted within its discretion when it considered the circumstances surrounding the COVID-19 lockdown and determined that a continuance was not necessary.[3]

¶ 55 The trial court in the present case appropriately found that grounds existed to terminate respondent's parental rights under N.C.G.S. § 7B-1111(a)(3). Even if respondent testified regarding his "up-to-date" conduct while incarcerated, the trial court's adjudication under N.C.G.S. § 7B-1111(a)(3) would have remained the same. Respondent cannot show prejudice and thus cannot prevail on appeal. Since a finding of only one ground was necessary to support the trial court's TPR order, there is no need to address the remaining grounds. The trial court's order terminating respondent's parental rights should be affirmed. I respectfully dissent.

Justices BERGER and BARRINGER join in this dissenting opinion.

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3. In reaching a contrary conclusion, the majority gives weight to the fact that respondent only requested a five-day continuance. Unlike the trial court, however, the majority has no familiarity with the court calendar in Alamance County and thus cannot know when this case could have been rescheduled. Thus, such a consideration is better left to the sound discretion of the trial court.

IN RE J.N.

[381 N.C. 131, 2022-NCSC-52]

IN THE MATTER OF J.N. & L.N.

No. 132PA21

Filed 6 May 2022

Appeal and Error—preservation of issues—constitutional issue—child abuse and neglect proceeding

In an abuse and neglect proceeding, a father failed to preserve his constitutional argument that it was error for the trial court to grant guardianship to his children's grandparents without first concluding that the father was an unfit parent or had acted inconsistently with his constitutional right to parent. The father had ample notice that the department of social services was recommending that the permanent plan be changed from reunification to guardianship, he failed to make any argument that guardianship with the grandparents would be inappropriate on constitutional grounds, and the issue was not automatically preserved.

Justice EARLS concurring.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 276 N.C. App. 275, 2021-NCCOA-76, vacating and remanding an order entered on 8 January 2020 by Judge Lisa V. Menefee in District Court, Forsyth County. Heard in the Supreme Court on 22 March 2022.

Theresa A. Boucher for petitioner-appellee Forsyth County Department of Social Services.

Rosenwood, Rose & Litwak, PLLC, by Nancy S. Litwak, for appellee Guardian ad Litem.

Troy Shelton and R. Daniel Gibson for appellees juveniles' guardians.

Benjamin J. Kull for respondent-appellant father.

BERGER, Justice.

IN RE J.N.

[381 N.C. 131, 2022-NCSC-52]

¶ 1 Respondent-father petitioned the Court for discretionary review of a Court of Appeals decision vacating the trial court's permanency planning order and remanding the case for additional findings.[1] We affirm.

I. Background

¶ 2 On April 10, 2018, the Forsyth County Department of Social Services (DSS) filed juvenile petitions alleging that J.N. (Jimmy) was an abused and neglected juvenile and L.N. (Lola) was a neglected juvenile.[2] The trial court granted nonsecure custody to DSS on the same day. On May 8, 2019, the trial court adjudicated Jimmy to be an abused and neglected juvenile and Lola to be a neglected juvenile.

¶ 3 The trial court held a permanency planning hearing on September 9, 2019. At the hearing, DSS sought to change the primary plan from reunification to guardianship with an approved caregiver. Respondent's sole argument to the trial court was that reunification should remain the primary plan. Respondent did not argue or otherwise contend that the evidence failed to demonstrate he was an unfit parent or that his constitutionally-protected right to parent his children had been violated. As a result of the evidence presented at the hearing, the trial court granted guardianship of the children to the maternal grandparents. Respondent appealed.

¶ 4 In the Court of Appeals, respondent argued that the trial court erred in granting guardianship to the maternal grandparents without first finding that he was an unfit parent or he had acted inconsistently with his constitutional right to parent. In addition, respondent asserted that the trial court erred by failing to make required findings under N.C.G.S. § 7B-906.1(n) in the permanency planning order before ceasing further permanency planning review hearings.

¶ 5 On March 16, 2021, the Court of Appeals vacated the trial court's permanency planning order and remanded the case to the trial court for additional findings. *In re J.N. & L.N.*, 276 N.C. App. 275, 2021-NCCOA-76, ¶ 15. The Court of Appeals agreed with respondent that the trial court erred by failing to make necessary findings under N.C.G.S. § 7B-906.1(n). *Id.* ¶ 10. However, the Court of Appeals concluded that respondent had waived his argument that the trial court erred by granting guardianship without first concluding that respondent was an unfit parent or had acted inconsistently with his constitutional right to parent. *Id.* ¶ 9.

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1. The mother of the juveniles is deceased.

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

Respondent petitioned this Court for discretionary review, arguing that the Court of Appeals erred by holding that respondent failed to preserve his constitutional argument.

II. Analysis

¶ 6 Respondent contends that his constitutional argument is automatically preserved under N.C. R. App. P. 10(a)(1) by our holding in *Petersen v. Rogers*, 337 N.C. 397, 445 S.E.2d 901 (1994). There, this Court stated that "the law presumes parents will perform their obligations to their children, [and] presumes their prior right to custody." *Id.* at 403, 445 S.E.2d at 904 (quoting *In re Hughes*, 254 N.C. 434, 436–37, 119 S.E.2d 189, 191 (1961)). "[A]bsent a finding that parents (i) are unfit or (ii) have neglected the welfare of their children, the constitutionally-protected paramount right of parents to custody, care, and control of their children must prevail." *Id.* at 403–04, 445 S.E.2d at 905.

¶ 7 But the existence of a constitutional protection does not obviate the requirement that arguments rooted in the Constitution be preserved for appellate review. Our appellate courts have consistently found that unpreserved constitutional arguments are waived on appeal. *See State v. Lloyd*, 354 N.C. 76, 86–87, 552 S.E.2d 596, 607 (2001) ("Constitutional issues not raised and passed upon at trial will not be considered for the first time on appeal."); *State v. Fernandez*, 346 N.C. 1, 18, 484 S.E.2d 350, 361 (1997) (holding that defendant waived confrontation and due process arguments by not first raising the issues in the trial court); *Dep't of Transp. v. Haywood Oil Co.*, 195 N.C. App. 668, 677–78, 673 S.E.2d 712, 718 (2009) (holding that arguments pertaining to Fourteenth Amendment to the United States Constitution and law of the land clause of the North Carolina Constitution, although constitutional issues, were not raised before the trial court and therefore not properly preserved for appeal); *State v. Wiley*, 355 N.C. 592, 615, 565 S.E.2d 22, 39 (2002) ("It is well settled that an error, even one of constitutional magnitude, that [is not brought] to the trial court's attention is waived and will not be considered on appeal.").

¶ 8 Nothing in *Petersen* serves to negate our rules on the preservation of constitutional issues. Thus, a parent's argument concerning his or her paramount interest to the custody of his or her child, although afforded constitutional protection, may be waived on review if the issue is not first raised in the trial court.

¶ 9 Here, respondent failed to assert his constitutional argument in the trial court. Respondent was on notice that DSS and the guardian ad litem were recommending that the trial court change the primary permanent

plan in this case from reunification to guardianship. Prior to the hearing, DSS filed a court report in which it stated that reunification was not possible due to the minimal progress respondent had made and because respondent was unable to provide for the safety and well-being of Jimmy and Lola. DSS, therefore, recommended that guardianship be granted to the maternal grandparents. Further, the guardian ad litem also filed a court report recommending that guardianship be granted to the maternal grandparents. Moreover, during closing arguments at the hearing, the guardian ad litem attorney specifically stated, "Your Honor, at this point, we feel and would respectfully request that you allow guardianship to be given to [the maternal grandparents]."

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

III. Conclusion

¶ 11 The Court of Appeals did not err in concluding that respondent waived his constitutional argument by not first raising the issue before the trial court.

AFFIRMED.

Justice EARLS concurring.

¶ 12 I concur with the majority that in the context of an abuse and neglect proceeding in juvenile court, the potential issue that a trial court's order may infringe upon a parent's constitutional right under the substantive Due Process Clause of the Fourteenth Amendment to the custody, care, and control of their child is subject to the general rule that the issue must first be raised by the parent in the trial court. *See*, *e.g.*, *State v. Creason*, 313 N.C. 122, 127 (1985) (explaining that the Court is not required to rule on a constitutional issue that was not raised and determined in the trial court). At the same time, nothing in the Court's decision today in any way compromises or negates the principles established in *Petersen v. Rogers*, 337 N.C. 397, 403–04 (1994), *Price v. Howard*, 346 N.C. 68, 79 (1997), *Adams v. Tessener*, 354 N.C. 57, 62 (2001), and *Owenby v. Young*, 357 N.C. 142, 148 (2003), that (1) a parent has a "constitutionally protected paramount interest in the companionship, custody, care, and control of his or her child," *Price*, 346 N.C. at 79; (2) before awarding

custody of a parent's child to a nonparent, the trial court must first determine, based on clear and convincing evidence, that the natural parent has forfeited their constitutionally-protected status, *Owenby*, 357 N.C. at 148; and (3) a parent forfeits this paramount interest by either being unfit to have custody or when the parent's behavior "viewed cumulatively" has been inconsistent with the parent's constitutionally-protected parental status, *id*. Limited to the narrow facts of this case, we hold today that while a parent's rights are protected by "a constitutionally based presumption," *Routten v. Routten*, 374 N.C. 571, 576 (quoting *Routten v. Routten*, 262 N.C. App. 436, 459 (2018) (Inman, J., concurring in part)), *cert. denied*, 141 S. Ct. 958 (2020), *reh'g denied*, 141 S. Ct. 1456 (2021), when a child is already in the custody of a nonparent by valid court order, as in these juvenile court proceedings, a parent on notice that a court may enter a permanent order of guardianship must raise the objection that the constitutionally-required findings are not present in order to preserve that issue for appeal.[1]

¶ 13 As recent decisions illustrate, several propositions also follow from this conclusion. First, a parent must actually have an opportunity to make the argument in the court below. For example, if the procedural posture of the case is such that the Department of Social Services (DSS) has noticed a hearing to determine visitation and does not present any evidence that the parent is unfit or has acted inconsistently with their parental rights, but after the hearing the parent receives an order in which the trial court has imposed guardianship, the parent has had no chance to raise the constitutional issue before the trial court. *See*, *e.g.*, *In re R.P.*, 252 N.C. App. 301, 305 (2017) (holding that although a parent's right to findings regarding his or her constitutionally-protected status is waived if the parent does not raise the issue before the trial court, no waiver occurred when the parent was not afforded the opportunity to raise an objection at the permanency planning review hearing). In such

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1. While state statutory schemes are distinct, most other states that have addressed whether a parent waives constitutional arguments in these circumstances by not raising them below follow this rule. *See*, *e.g.*, *In re L.M.I.*, 119 S.W.3d 707, 710–11 (Tex. 2003) (holding that in termination of parental rights cases, constitutional due process rights must be raised in the trial court in order to be considered on appeal); *In re Doe*, 454 P.3d 1140, 1146 (Idaho 2019) (same); *In re Zanaya W.*, 291 Neb. 20, 31, 863 N.W.2d 803, 812 (2015) (holding that a trial court cannot be found to have committed error regarding an issue never presented to it for disposition). The states that do appear to allow parents to raise these issues for the first time on appeal hold that an appellate court has a duty to sua sponte consider violations of fundamental constitutional rights. *See*, *e.g.*, *In re S.S.*, 2004 OK CIV APP 33, ¶ 7, 90 P.3d 571, 574–75; *Monica C. v. Ariz. Dep't of Econ. Sec.*, 211 Ariz. 89, ¶ 23, 118 P.3d 37, 42 (2005); *In re B.A.*, 2014 VT 76, 197 Vt. 169, 101 A.3d 168; *In re H.Q.*, 182 Wash. App. 541, 330 P.3d. 195, 200 (2014).

circumstances the parent has not waived their right to findings regarding their constitutional status because there was no opportunity to raise an objection at the hearing.

¶ 14 Second, there are no "magic words" such as "constitutionally-protected status as a parent" that must be uttered by counsel, nor is the parent's counsel required to object to certain evidence or specific findings of fact to preserve the constitutional issue. DSS may present evidence that a parent is unfit or otherwise has acted inconsistently with their constitutionally-protected status. Unless the parent presents no evidence and makes no arguments, the parent has raised the constitutional issue by responding to DSS's arguments. S*ee In re B.R.W.*, 2021-NCCOA-343, ¶ 40, *aff'd*, No. 310A21 (N.C. May 6, 2022).

¶ 15 Third, when a parent is on notice that the trial court is considering awarding guardianship to a nonparent and DSS has not offered evidence that the parent is unfit or has acted inconsistently with their constitutionally-protected status, the parent still must raise the constitutional issue in the trial court, and failure to do so constitutes a waiver. *See*, *e.g.*, *In re C.P.*, 258 N.C. App. 241, 246 (2018). The trial court must be on notice that the parent is contesting the loss of their constitutional rights and their arguments for why the evidence does not overcome that presumption. The trial court must then make the factual findings necessary to support its legal determination of whether the parent is unfit or has acted inconsistently with his or her constitutionally-protected parental status, with the burden of proof remaining with the petitioner. *See Price*, 346 N.C. at 84.

¶ 16 It remains the law in North Carolina that a trial court cannot proceed to evaluate the best interests of the child "[u]ntil, and unless, the [petitioner] establishes by clear and convincing evidence that a natural parent's behavior, viewed cumulatively, has been inconsistent with his or her protected status." *Owenby*, 357 N.C. at 148. Moreover, the "clear and convincing standard requires evidence that should fully convince." *In re I.K.*, 377 N.C. 417, 2021-NCSC-60, ¶ 19 (quoting *Scarborough v. Dillard's, Inc.*, 363 N.C. 715, 721 (2009)). "This burden is more exacting than the preponderance of the evidence standard[.]" *Id.* (quoting *Scarborough*, 363 N.C. at 721).

¶ 17 Finally, as a matter of issue preservation, it remains true that while "a constitutional question which is not raised and passed upon in the trial court will not ordinarily be considered on appeal[,]" *State v. Benson*, 323 N.C. 318, 322 (1988) (quoting *State v. Hunter*, 305 N.C. 106, 112 (1982)), this does not mean that constitutional issues may never be raised in the

first instance on appeal. As our rules explicitly recognize, some issues are deemed preserved by rule or law. *See* N.C. R. App. P. 10(a); N.C.G.S. § 15A-1446(d) (2021). Moreover, "[t]his Court may exercise its supervisory power to consider constitutional questions not properly raised in the trial court, but only in exceptional circumstances." *Anderson v. Assimos*, 356 N.C. 415, 416 (2002). Such exceptional circumstances are not present in this case. Therefore, I concur that the constitutional issues were not properly preserved for appeal.

IN THE MATTER OF K.Q.

No. 191A21

Filed 6 May 2022

Termination of Parental Rights—grounds for termination—neglect—likelihood of future neglect—pattern of domestic violence

In an order terminating respondent-father's parental rights to his four-year-old son on the ground of neglect (N.C.G.S. § 7B-1111(a)(1)), the trial court's determination that there was a likelihood of repetition of neglect if the child were returned to respondent's care was supported by unchallenged findings regarding the long history of domestic violence between respondent and the child's mother, respondent's violation of domestic violence protective orders, and respondent's aggression toward a social worker and display of a knife at a supervised visit. Although respondent made some progress on his case plan, his repeated denials that domestic violence occurred or that it was the reason for the child's removal gave rise to a justifiable concern about the possibility of future neglect.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from order entered on 3 March 2021 by Judge Cheri Siler Mack in District Court, Cumberland County. This matter was calendared in the Supreme Court on 18 March 2022 but determined on the record and briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

Patrick A. Kuchyt for petitioner-appellee Cumberland County Department of Social Services.

IN RE K.Q.

[381 N.C. 137, 2022-NCSC-53]

Matthew D. Wunsche for Guardian ad Litem.

Mary McCullers Reece for respondent-appellant father.

HUDSON, Justice.

¶ 1 Respondent-father appeals from the trial court's order terminating his parental rights to his minor child K.Q. (Kenny).[1] Upon review, we affirm the trial court's order.[2]

I. Background

¶ 2 On 8 June 2018, Cumberland County Department of Social Services (DSS) filed a juvenile petition alleging four-year-old Kenny was neglected and dependent. The petition provided that DSS received a Child Protective Services (CPS) referral on 5 April 2018 concerning Kenny's safety after law enforcement was called to the parents' residence on 23 March 2018 in response to a physical altercation between the parents in Kenny's presence. The mother told law enforcement that respondent-father came at her with a knife and cut her, swung a baseball bat at her, threw her on the floor, and held her so she could not leave. Respondent-father was charged with assault on a female as a result of the incident.

¶ 3 DSS further alleged, and the record shows, that the mother filed a complaint and request for a domestic violence protective order (DVPO) based on the 23 March 2018 incident on 26 March 2018; respondent-father was arrested on 31 March 2018 for violating the DVPO; but the action was dismissed and the DVPO was dissolved on 13 April 2018 because the mother failed to appear in court and prosecute. Since that time, social workers had attempted home visits, left notices at the residence, and sent a certified letter to the parents informing them of the CPS report and requesting the parents contact the social workers. However, the social workers' efforts to confirm Kenny's wellbeing were unsuccessful. DSS reported that when a social worker went to the residence with law enforcement on 7 June 2018, respondent-father was present and "became belligerent and yelled and cursed at the social worker." Respondent-father told the social worker that the mother had

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

2. The order also terminated the parental rights of Kenny's mother. The mother noticed an appeal from the termination order and a prior order ceasing reunification efforts, but her appeal was dismissed by order of this Court on 14 September 2021. Accordingly, this opinion concerns only respondent-father's appeal.

left and was in Charlotte, but he would not provide an address or phone number for the mother. DSS ultimately alleged in the petition that it believed the parents were living together; the mother had not contacted DSS; the social worker had not been able to see Kenny to determine his safety; Kenny was at risk of irreparable harm in the parents' custody; and DSS could not ensure his safety.

¶ 4 On the same day the petition was filed, the trial court entered an order granting DSS nonsecure custody of Kenny. However, Kenny was not immediately turned over to DSS because his and his mother's whereabouts were unknown. Kenny had still not been turned over to DSS when the matter came on for hearing on the need for continued nonsecure custody on 13 June 2018. Respondent-father appeared at the hearing and testified about the parents' CPS history and previous DVPOs in Mecklenburg County; but he denied the allegations in the instant petition, testified he did not want to turn Kenny over to DSS, and refused to provide the location of Kenny and the mother. The court continued the hearing until the following afternoon and ordered respondent-father to either produce Kenny by that time or reveal Kenny's exact location so DSS could take custody by that time. Kenny was turned over to DSS on 14 June 2018.

¶ 5 Respondent-father was initially allowed weekly supervised visitation with Kenny while DSS's nonsecure custody of Kenny continued. However, on 16 July 2018, DSS filed a "Motion for Review" seeking to cease respondent-father's visitation and contact with Kenny based on allegations that respondent-father had brought a knife to visitation; he became belligerent with the supervising social worker when the social worker ceased the visit due to his insistence on discussing the case in front of Kenny; he grabbed Kenny's arm after the visit had ceased; and he had to be escorted from the building by security. DSS also reported in the motion that respondent-father had left threatening messages for the mother and threatened to abscond with Kenny if the opportunity arose. The trial court immediately suspended respondent-father's visitation pending a full review hearing and prohibited contact with Kenny. Following a hearing on 20 August 2018, the trial court granted DSS's motion and ordered that respondent-father's visitation remain suspended until Kenny's therapist recommended that visitation resume. The court also ordered respondent-father to complete parenting and anger management classes.

¶ 6 Following an adjudication hearing on the juvenile petition on 29 and 30 November 2018, the trial court adjudicated Kenny neglected

and dependent.[3] In support of the adjudication, the trial court made findings about the long history of domestic violence between the parents, including findings about the 23 March 2018 domestic violence incident and DSS's ensuing intervention that were consistent with the allegations in the petition. The court also found that respondent-father had blamed Kenny for the mother's injuries from the 23 March 2018 incident and had told the mother to tell the court the same.

¶ 7 The matter came back before the trial court for the dispositional portion of the hearing on 12 February 2019. In a disposition order entered on 11 April 2019, the court found that respondent-father was attending counseling and anger management classes and had reported completing a psychological evaluation. The court also found that it had informed respondent-father of the need for continued compliance with his case plan. The court further found and concluded that Kenny's return to respondent-father custody at that time would be contrary to Kenny's health and safety, and that respondent-father was not a fit or proper person for the care, custody, and control of Kenny or for visitation until a therapeutic recommendation. Accordingly, the court ordered DSS to retain custody of Kenny. Respondent-father was ordered to complete age-appropriate parenting classes, participate in individual counseling, complete the Resolve Program to address domestic violence issues, complete a psychological evaluation, and maintain stable housing and employment. Respondent-father was not allowed visitation until it was recommended by Kenny's therapist.

¶ 8 At the initial permanency planning hearing on 11 April 2019, the trial court established a primary plan of reunification with the parents with a secondary plan of custody with a suitable person concurrent with adoption. However, following a permanency planning on 1 August 2019, the court changed the permanent plan for Kenny to adoption with secondary plans of custody with a suitable person and reunification with respondent-father. Then, following a permanency planning hearing on 12 December 2019, the court entered an order finding that despite respondent-father's participation in services, he continued to desire a relationship with the mother; DSS and the guardian ad litem were concerned that domestic violence remained an issue despite his participation in services; the mother had obtained a new DVPO against respondent-father on 29 October 2019; and respondent-father had new

3. The trial court entered an "Adjudication and Temporary Disposition Order" on 7 January 2019. A "Corrected Adjudication and Temporary Disposition Order" was later entered on 17 April 2019. This opinion relies on the corrected order.

criminal charges related to the mother. The court ordered DSS to proceed with filing a termination of parental rights action in pursuit of Kenny's primary permanent plan.

¶ 9 On 2 June 2020, DSS filed a motion to terminate respondent-father's parental rights on grounds of neglect pursuant to N.C.G.S. § 7B-1111(a)(1) (2021), willful failure to make reasonable progress pursuant to N.C.G.S. § 7B-1111(a)(2) (2021), and willful abandonment pursuant to N.C.G.S. § 7B-1111(a)(7) (2021). The termination motion was heard on 25 September and 6 October 2020. On 3 March 2021, the trial court entered an order terminating respondent-father's parental rights. The court concluded that grounds existed to terminate respondent-father's parental rights for neglect and willful failure to make reasonable progress, *see* N.C.G.S. § 7B-1111(a)(1)–(2), and that termination of his parental rights was in Kenny's best interests. Respondent-father appealed.

II. Analysis

¶ 10 Respondent-father challenges the trial court's adjudication of the existence of grounds to terminate his parental rights.

> When reviewing the trial court's adjudication of grounds for termination, we examine whether the court's findings of fact are supported by clear, cogent and convincing evidence and whether the findings support the conclusions of law. Any unchallenged findings are deemed supported by competent evidence and are binding on appeal. The trial court's conclusions of law are reviewed de novo.

In re Z.G.J., 378 N.C. 500, 2021-NCSC-102, ¶ 24 (cleaned up). "[A]n adjudication of any single ground in N.C.G.S. § 7B-1111(a) is sufficient to support a termination of parental rights." *In re E.H.P.*, 372 N.C. 388, 395 (2019).

¶ 11 A trial court may terminate parental rights for neglect pursuant to N.C.G.S. § 7B-1111(a)(1) if it determines the parent has neglected the juvenile within the meaning of N.C.G.S. § 7B-101. N.C.G.S. § 7B-1111(a)(1). A neglected juvenile is defined, in relevant part, as "[a]ny juvenile less than 18 years of age . . . whose parent, guardian, custodian, or caretaker . . . does not provide proper care, supervision, or discipline" or "[c]reates or allows to be created a living environment that is injurious to the juvenile's welfare." N.C.G.S. § 7B-101(15)(a), (e) (2021).

> Termination of parental rights based upon this statutory ground requires a showing of neglect at the time

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

In re R.L.D., 375 N.C. 838, 841 (2020) (cleaned up). "[E]vidence of changed conditions must be considered in light of the history of neglect by the parents and the probability of a repetition of neglect." *In re O.W.D.A.*, 375 N.C. 645, 648 (2020). "The determinative factors must be the best interests of the child and the fitness of the parent to care for the child *at the time of the termination proceeding*." *In re Z.G.J.*, 378 N.C. 500, 2021-NCSC-102, ¶ 26 (quoting *In re Ballard*, 311 N.C. 708, 715 (1984)).

¶ 12 Here the trial court found that Kenny was previously adjudicated neglected due to domestic violence between the parents and determined there was a likelihood of a repetition of neglect if Kenny was returned to respondent-father's care.

¶ 13 On appeal, respondent-father asserts he substantially completed the services required by his case plan and contends the trial court erred in determining that there was a likelihood of repetition of neglect. He asserts the trial court's determination of a likelihood of repetition of neglect "hinged" on unsupported findings that he failed to remediate the domestic violence that led to Kenny's removal. Respondent-father specifically contests only seven of the trial court's findings of fact. He first challenges finding of fact 63 to the extent the trial court found he "was not truthful with his therapists about what brought the juvenile into care or his role in the domestic violence" and his therapist "was unable to provide the proper therapy and tools for him due to him not being truthful or forthcoming." He contends the finding did not accurately reflect his therapist's testimony. Respondent-father also challenges portions findings of fact 40, 62, 64, 71, 72, and 75 to the extent the trial court found he had not demonstrated that he learned from the services in which he participated because he continued to engage in domestic violence. He asserts the only evidentiary basis for findings that he continued to engage in domestic violence were pending criminal domestic violence charges, which he contends did not amount to clear and convincing evidence because the charges had not been adjudicated. Respondent-father argues that absent the findings that he continued to engage in acts of domestic violence, the evidence and findings show that he "exceeded the services

required by his case plan" and do not support the determination that neglect was likely to recur if Kenny was returned to his care.

¶ 14 While neither DSS nor the guardian ad litem concede the challenged findings are unsupported by the evidence, both argue the trial court's unchallenged findings fully support its adjudication of neglect as grounds for termination. We agree the unchallenged findings, which "are deemed supported by competent evidence and are binding on appeal[,]" *In re T.N.H.*, 372 N.C. 403, 407 (2019), sufficiently support the trial court's conclusion that there was a likelihood of repetition of neglect without regard to the challenged findings. Therefore, we need not address or consider the challenged findings. *See id.* ("[W]e review only those findings necessary to support the trial court's determination that grounds existed to terminate respondent's parental rights."); *see also In re A.R.A.*, 373 N.C. 190, 195 (2019) (limiting review to findings necessary to support the adjudication of grounds to terminate parental rights).

¶ 15 In the termination order, the trial court found Kenny had previously been adjudicated neglected due to domestic violence in the home and made unchallenged findings about the "long history of domestic violence which spans across different states" and "created a toxic, dangerous, and injurious environment for [Kenny]." Unchallenged findings describe the domestic violence as "chronic" and document respondent-father's role in the violence. Consistent with the allegations in the underlying juvenile petition and the findings in the prior adjudication order, the court made unchallenged findings about the domestic violence incident in March 2018 that resulted in respondent-father being charged with assault on a female and led to DSS's involvement, including that respondent-father "instructed the [mother] to tell law enforcement that the marks on her body came from [Kenny], who was only four (4) years old at that time"; and about respondent-father's violation of a DVPO and resistance to DSS's efforts to confirm Kenny's wellbeing. The court also found that during a supervised visit with Kenny in July 2018, respondent-father "had to be removed from [DSS]" after he "became irate with the [s]ocial [w]orker[,]" "was verbally aggressive[,]" and "and displayed a knife during [the] altercation." Furthermore, while respondent-father challenges the trial court's reliance on pending criminal charges as evidence of continued domestic violence, the court made unchallenged findings about the mother's numerous applications for DVPOs against respondent-father due to his threats to do her bodily harm, the most recent of which was filed in October 2019.

¶ 16 We note that it is clear from the evidence and findings that respondent-father did engage in his case plan. The trial court detailed

respondent-father's case plan requirements in the termination order and found that he "followed through with the majority of services ordered by the [c]ourt and recommended by [DSS]," including that he "had received counseling services with at least three (3) different therapists since the inception of this case." However, the court additionally found in unchallenged finding of fact 47 that "[w]hile the [parents] have engaged in, as well as continue to engage in, services to address these issues, they have failed to be able to demonstrate an ability to exhibit the methods taught through practical application. As a result, those issues have persisted throughout the duration of both this matter, as well as the underlying matter."

¶ 17 Additional unchallenged findings support the trial court's continued concern about domestic violence. The court specifically found in finding of fact 55 that in therapy sessions with one therapist, "[r]espondent[-f]ather has consistently denied initiating domestic violence with the [mother], as well as he has denied knowing why the juvenile was placed in the custody of [DSS]"; and the court found in finding of fact 56 that another therapist "was not aware that [respondent-father] was the aggressor based on what [he] reported to her" and therefore "was not providing the necessary course of treatment during their sessions." The trial court also specifically found in findings of fact 59 and 60 that respondent-father diminished developmental concerns displayed by Kenny and

> denie[d] that the domestic violence in his relationship with the [mother] had any affect [sic] on [Kenny] because [Kenny] was in the "toy room" while the [he and the mother] were fighting. . . . Respondent [-f]ather blames the domestic violence on the [mother's] personality defects. . . . There is a deflection of blame on all accounts and a failure by the [r]espondents to take responsibility for the causes that brought the juvenile into care. . . . Domestic [v]iolence has persisted between [them] since at least 2006, yet the [r]espondents insist that they can work together to co-parent.

¶ 18 The trial court specifically related respondent-father's continued denial of the domestic violence, minimization of its impact on Kenny, and refusal to accept any responsibility to the likelihood of repetition of neglect as follows:

> 60. Based on . . . ardent denials of [Kenny's] developmental delays and failure to take responsibility

> hereto, the [c]ourt finds that the neglect will more than likely repeat itself.
>
> 61. The [r]espondent[-f]ather continues to deny having any issues relating to domestic violence. The [r]espondent[-f]ather's denial is reason to believe that this issue will continue into the foreseeable future. The issue of domestic violence creates an injurious environment for the juvenile. Thus, it is highly likely that neglect would be repeated if [Kenny] was to be returned to either the [mother] or the [r]espondent [-f]ather's care.
>
> . . . .
>
> 65. The [parents'] continued minimization and denial of the domestic violence incidents is of concern with respect to the health and safety of [Kenny] if he was to be returned to either of the [parents]. The failure of the [parents] to acknowledge the severity of their actions, as well as the [mother's] continued failure to follow through with criminal charges against the [r]espondent[-f]ather is significant evidence to this [c]ourt that neither the [mother] nor the [r]espondent[-f]ather have alleviated the conditions that brought [Kenny] into the care of [DSS], and that this pattern would continue if [Kenny] was returned to either of them.

Ultimately, the trial court determined respondent-father had not adequately addressed the domestic violence that led to Kenny's removal and concluded there was a high probability of repetition of neglect if Kenny was returned to respondent-father's care.

¶ 19 Although respondent-father did engage in service of his case plan, "a parent's compliance with his or her case plan does not preclude a finding of neglect." *In re J.J.H.*, 376 N.C. 161, 185 (2020) (citing *In re D.W.P.*, 373 N.C. 327, 339–40 (2020) (noting the respondent's progress in satisfying the requirements of her case plan while upholding the trial court's determination that there was a likelihood that the neglect would be repeated in the future)); *see also In re Y.Y.E.T.*, 205 N.C. App. 120, 131 (explaining that a "case plan is not just a check list" and that "parents must demonstrate acknowledgment and understanding of why the juvenile entered DSS custody as well as changed behaviors"), *disc. review denied*, 364

N.C. 434 (2010).[4] In *J.J.H.*, this Court upheld the trial court's determination that a repetition of neglect was likely if the children were returned to the respondent's care despite her substantial case plan compliance because the concerns that resulted in the removal of the children continued to exist. *In re J.J.H.*, 376 N.C. at 185–86.

¶ 20 Here, the trial court's unchallenged findings show that while domestic violence was clearly identified as the reason for Kenny's removal and respondent-father engaged in services required by his case plan to address the issue, respondent-father continued to deny his role in the domestic violence, failed to acknowledge the effects the domestic violence had on Kenny, and refused to accept any responsibility for Kenny's removal. The unchallenged findings provide support for the trial court's continued concern that the issue of domestic violence had not been alleviated and support its conclusion that there was a likelihood of repetition of neglect if Kenny was returned to respondent-father's care. *See In re M.A.*, 374 N.C. 865, 874 (2020) (considering a parent's failure to comprehend and accept responsibility for their role in the domestic violence that plagued the family as supporting the court's determinations that there was a lack of reasonable progress and a likelihood of repetition of neglect); *see also In re L.N.G.*, 377 N.C. 81, 2021-NCSC-29, ¶ 23 (upholding the trial court's determination that there had not been meaningful progress to correct the causes of domestic violence where the parent failed to understand or adequately address the traumatic impact of domestic violence on her children); *In re A.R.A.*, 373 N.C. at 198 (upholding the trial court's determination that there had not been reasonable progress in addressing domestic violence where the parent continued to deny the effects of abuse on children, shifted blame to others, and refused to accept responsibility for the removal of the children).[5]

¶ 21 Accordingly, we hold that the trial court did not err by concluding that there was a likelihood of repetition of neglect and affirm the trial court's determination that respondent-father's parental rights were subject to termination for neglect pursuant to N.C.G.S. § 7B-1111(a)(1).

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4. The respondent in *In re Y.Y.E.T.* raised his compliance with his case plan as an argument challenging disposition. 205 N.C. App. at 130–31. The trial court addressed the argument but noted "compliance with the case plan is not one of the factors the trial court is to consider in making the best interest determination." *Id.* at 131.

5. Although *L.N.G.* and *A.R.A.* considered the lack of reasonable progress for purposes of termination pursuant to N.C.G.S. § 7B-1111(a)(2), a parent's failure to make progress is also relevant the determination that there is a likelihood of repetition of neglect for termination pursuant to N.C.G.S. § 7B-1111(a)(1). *See In re M.A.*, 374 N.C. at 870; *see also In re R.L.D.*, 375 N.C. at 841 (the court must consider evidence of changed circumstances).

III. Conclusion

¶ 22 Having determined the trial court did not err in adjudicating the existence of grounds to terminate parental rights, and because respondent-father does not challenge the trial court's best interests determination, we affirm the trial court's termination order.

AFFIRMED.

IN THE MATTER OF L.A.J. AND J.T.J.

No. 217A21

Filed 6 May 2022

Termination of Parental Rights—motion to continue—beyond ninety days after initial petition—extraordinary circumstances—notice of hearing

In a private termination of parental rights action, the trial court did not abuse its discretion in denying a mother's motion for a continuance beyond the statutory ninety-day period where there were no extraordinary circumstances to justify a continuance. While the mother claimed that it was difficult for her to travel from Ohio on such short notice (she claimed she received notice of the hearing date only five days in advance), she knew more than sixty days in advance which week the hearing would occur.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from an order entered on 2 March 2021 by Judge John K. Greenlee in District Court, Gaston County. This matter was calendared for argument in the Supreme Court on 18 February 2022 but determined on the record and briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

No brief for petitioner-appellees.

No brief for Guardian ad Litem.

Leslie Rawls for respondent-appellant mother.

IN RE L.A.J.

[381 N.C. 147, 2022-NCSC-54]

BERGER, Justice.

¶ 1 Respondent-mother[1] appeals from the trial court's order terminating her parental rights to her children, L.A.J. (Lucy) and J.T.J. (Joseph).[2] Upon review of this private termination action, we affirm the trial court.

I. Background

¶ 2 Lucy and Joseph were born in Gaston County, North Carolina in 2015 and 2016, respectively. Both children currently reside in Gaston County. Petitioners are also residents of Gaston County and have been court-appointed custodians of the two juveniles since April 2018.

¶ 3 On May 14, 2020, petitioners filed a verified petition in District Court, Gaston County to terminate the parents' parental rights on the grounds of willful abandonment pursuant to N.C.G.S. § 7B-1111(a)(7) (2019). The petition alleged that the parents, whose last known addresses were in Ohio, had not visited with the children since 2017; had not had contact with the children since March 2019; had not sent any gifts, cards, or written correspondence to the children; had failed to provide financial support to the children; and had failed to provide love, affection, or support to the children or make any effort to foster a relationship with them.

¶ 4 Respondent-mother was assigned counsel and served with the petition and summons in Ohio on June 9, 2020. She did not file an answer. The termination petition was calendared for hearing but continued three times at calendar call in 2020—the first time in July 2020 based on the needs of all parties; the second time in October 2020 upon a request by respondent-mother's newly appointed counsel; and the third time in December 2020 due to purported coronavirus issues.

¶ 5 On January 29, 2021, petitioners served a notice of hearing for February 10, 2021. When the case came on for hearing, respondent-mother was not present, and counsel for respondent-mother moved for a continuance. The trial court denied the motion to continue and proceeded with the hearing.

¶ 6 On March 2, 2021, the trial court entered an order terminating respondent-mother's parental rights to Lucy and Joseph. The court concluded that respondent-mother had willfully abandoned the children and termination of parental rights was in the children's best interests.

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1. The trial court's order also terminated the parental rights of the children's father who is not a party to this appeal.

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

Respondent-mother appeals, arguing that the trial court erred in denying counsel's motion to continue. Specifically, respondent-mother asserts that the trial court abused its discretion in denying the motion to continue because she had difficulty attending the hearing on short notice, traveling from her residence in Ohio to North Carolina was burdensome, and extraordinary circumstances existed due to coronavirus restrictions.[3] We disagree.

II. Analysis

¶ 7 This court has previously held:

> [A] motion to continue is addressed to the discretion of the trial court, and absent a gross abuse of that discretion, the trial court's ruling is not subject to review. If, however, the motion is based on a right guaranteed by the Federal and State Constitutions, the motion presents a question of law and the order of the court is reviewable. Moreover, regardless of whether the motion raises a constitutional issue or not, a denial of a motion to continue is only grounds for a new trial when defendant shows both that the denial was erroneous, and that he suffered prejudice as a result of the error.

In re M.J.R.B., 377 N.C. 453, 2021-NCSC-62, ¶ 11 (cleaned up).

¶ 8 Because counsel did not assert a constitutional basis for the requested continuance, we review denial of the motion to continue for abuse of discretion. *Id.*; *see also In re A.L.S.*, 374 N.C. 515, 517 (2020) ("Respondent-mother did not assert in the trial court that a continuance was necessary to protect a constitutional right. We therefore review the trial court's denial of her motion to continue only for abuse of discretion.").

¶ 9 "An 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 re T.L.H.*, 368 N.C. 101, 107 (2015) (cleaned up). "In reviewing for an abuse of discretion, we are guided by the Juvenile Code, which provides that '[c]ontinuances that extend

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3. Respondent-mother acknowledges in her brief that counsel did not cite coronavirus concerns as grounds for the motion to continue. Respondent-mother has thus waived that argument, and we do not consider it on appeal. *See* N.C. R. App. P. 10(a)(1); *In re J.E.*, 377 N.C. 285, 2021-NCSC-47, ¶ 14.

beyond 90 days after the initial petition shall be granted only in extraordinary circumstances when necessary for the proper administration of justice.' " *In re J.E.*, 377 N.C. 285, 2021-NCSC-47, ¶ 15 (alteration in original) (quoting N.C.G.S. § 7B-1109(d) (2019)). "Furthermore, continuances are not favored and the party seeking a continuance has the burden of showing sufficient grounds for it. The chief consideration is whether granting or denying a continuance will further substantial justice." *Id.* (cleaned up).

¶ 10 Petitioners filed their termination petition on May 14, 2020. Almost nine months passed before the case was finally called for hearing on February 10, 2021, due in part to the continuances discussed above. Respondent-mother was not present when the matter was called for hearing and counsel moved to continue the matter for a fourth time.

¶ 11 Although respondent-mother had not filed an answer to the petition, *see* N.C.G.S. § 7B-1107 (2019), counsel informed the trial court that she denied the allegations set forth in the petition and wished to be present to contest the proceeding. Counsel further asserted that: respondent-mother lives in Ohio; counsel sent her notice of the hearing on January 29, 2021, just as he had done on prior occasions to notify her of court dates and calendar calls; after "basically play[ing] phone tag" with respondent-mother all week, he was able to speak with her the morning of the hearing; and respondent-mother told counsel that she had only recently received the notice of hearing on February 5, 2021, and it was "difficult for her to get down here on short notice."

¶ 12 The record shows counsel was served with a notice of the February 10 hearing date on January 29, 2021. Counsel forwarded the notice of hearing by mail to respondent-mother that same day.

¶ 13 Respondent-mother claimed she did not receive the notice until February 5, 2021, five days before the hearing; however, even if respondent-mother was not aware of the specific date of the hearing until February 5, 2021, she was notified in December 2020 that the matter was rescheduled for the week of February 8, 2021. Counsel advised the trial court that he mailed a letter to respondent-mother on December 3, 2020, and respondent-mother concedes in her brief that counsel "apparently had notified her of the trial week after the case was continued at the 2 December 2020 calendar call." Thus, respondent-mother was notified as early as December 2020 that her case would be heard during the week of February 8, 2021. Consistent with this prior notification from counsel, respondent-mother thereafter received notice stating the specific date and time the termination hearing would be held.

¶ 14 Counsel further failed to provide any specific reasons why respondent-mother was unable to attend the hearing. Counsel merely asserted that it was "difficult for her to get down here on short notice." Even on appeal, when respondent-mother notes that the drive from Ohio takes eight hours and would have required a three-day trip to attend the hearing, she does not provide specific reasons for her absence. She instead suggests that "[m]ost people would require some advance notice to make a three-day trip[.]" Nonetheless, as noted above, respondent-mother received more than sixty-days' notice that the hearing would occur during the week of February 8, 2021.

¶ 15 "[C]ontinuances are not favored, [and] motions to continue ought not to be granted unless the reasons therefor are fully established." *In re D.J.*, 378 N.C. 565, 2021-NCSC-105, ¶ 14 (cleaned up). Respondent-mother received notice months in advance of the week the termination petition would be heard. She failed to provide any reason to justify the requested continuance. Having offered no legitimate reason for being unable to attend the hearing, respondent-mother failed to establish extraordinary circumstances requiring another continuance far beyond the ninety-day deadline. *See* N.C.G.S. § 7B-1109(d). Respondent-mother has failed to demonstrate that the trial court's denial of her motion to continue "is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *In re T.L.H.*, 368 N.C. at 107 (cleaned up). As such, the trial court did not abuse its discretion in denying counsel's motion to continue.

III. Conclusion

¶ 16 The trial court's denial of respondent-mother's motion to continue is affirmed.

AFFIRMED.

IN RE S.D.C.

[381 N.C. 152, 2022-NCSC-55]

IN THE MATTER OF S.D.C.

No. 274A21

Filed 6 May 2022

Termination of Parental Rights—best interests of the child—support for written findings—variation from oral findings

The trial court did not abuse its discretion by determining that it was in the child's best interests to terminate his mother's parental rights, where the court's findings of fact (with one exception) were supported by competent evidence and where those findings demonstrated a proper analysis of the dispositional factors set forth in N.C.G.S. § 7B-1110(a). The court was not bound by its oral statements at the dispositional hearing—regarding the parent-child bond and the mother's efforts toward reunification—when entering its final order, and therefore there was no error where the court's oral findings varied from its written findings. Further, the court was not required to enter any findings regarding dispositional alternatives to termination, such as guardianship.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from order entered on 3 May 2021 by Judge Clifton H. Smith in District Court, Catawba County. This matter was calendared in the Supreme Court on March 18, 2022 but determined on the record and briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

Marcus P. Almond for petitioner-appellee Catawba County Department of Social Services.

Michelle FormyDuval Lynch for appellee Guardian ad litem.

Garron T. Michael for respondent-appellant mother.

BERGER, Justice.

¶ 1 Respondent-mother appeals from an order terminating her parental rights to S.D.C. (Scott),[1] born in September 2012.

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

I. Background

¶ 2 Scott was born in September 2012. In December 2012, Mecklenburg County Department of Social Services obtained nonsecure custody of Scott and filed a petition alleging Scott to be an abused and neglected juvenile. On March 27, 2013, Scott was adjudicated an abused and neglected juvenile based upon findings that he had suffered nonaccidental trauma while in the care of his father, including multiple rib fractures and brain injuries.[2] Scott remained in foster care from December 2012 until June 2014, when the court returned legal and physical custody to respondent.

¶ 3 On May 30, 2019, Catawba County Department of Social Services (DSS) filed a petition alleging Scott was a neglected and dependent juvenile.[3] The petition alleged that on February 9, 2018, respondent shot herself in the foot while preparing to go to a shooting range with Scott present in the home, sleeping in another room. Respondent took Scott with her to the emergency room, where tests confirmed that she had been consuming alcohol. Further, on October 27, 2018, respondent was involved in an automobile accident after drinking two small bottles of vodka. Scott was a passenger in the vehicle at the time of the accident. Both respondent and Scott suffered injuries. After discharge from the hospital, respondent went to reside with the maternal grandparents and participated in substance abuse treatment.

¶ 4 DSS further alleged that on March 28, 2019, respondent was under the influence of alcohol while caring for Scott. An altercation occurred after respondent was confronted by the maternal grandparents about her alcohol abuse. Respondent attempted to remove Scott from their home, and she was subsequently arrested.

¶ 5 The trial court adjudicated Scott a neglected and dependent juvenile on September 19, 2019. The trial court awarded custody of Scott to DSS and approved placement with the maternal grandparents. The trial court identified a host of requirements for respondent to complete to achieve reunification. On November 27, 2019, the trial court found that, although respondent had been granted weekly supervised visitation with Scott for two hours, she missed three visits. Further, while respondent and Scott

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2. The father relinquished his parental rights to Scott on October 2, 2020, and is not a party to this appeal.

3. Jurisdiction over Scott and venue were transferred from Mecklenburg to Catawba County by orders entered in Mecklenburg County on August 2, 2019 and in Catawba County on August 5, 2019.

appeared to share a connection, additional observation was needed to better assess their bond. The trial court set the primary permanent plan as reunification, with a secondary plan of adoption. The trial court also established a visitation schedule that included supervised and unsupervised visits for the next three months.

¶ 6 After a subsequent permanency planning hearing held on January 22, 2020, the trial court entered another order on February 18, 2020. The trial court found that over a span of three months, respondent missed more than five visits, and she only rescheduled two. The trial court found that because respondent was observed as being "frustrated" during visits, continued observation was needed, and "healthier and more positive interactions" were necessary.

¶ 7 On September 16, 2020, the trial court entered an order finding that respondent had incurred two new alcohol-related criminal charges. She was also arrested on March 10, 2020, for public intoxication, March 11, 2020, for misuse of emergency communication systems, and on July 28, 2020, for obtaining property by false pretenses. The trial court changed the primary permanent plan to adoption, with a secondary plan of reunification.

¶ 8 DSS filed a motion to terminate respondent's parental rights to Scott on the grounds of neglect, willfully leaving Scott in foster care or placement outside the home for more than twelve months without making reasonable progress to correct the conditions that led to his removal, and willfully failing to pay a reasonable portion of the cost of care for Scott although physically and financially able to do so. On May 3, 2021, the trial court terminated respondent's parental rights to Scott. The court adjudicated that grounds to terminate respondent's parental rights existed under N.C.G.S. § 7B-1111(a)(1) and (2) and concluded that termination of respondent's parental rights was in Scott's best interests.

¶ 9 In the order, the trial court made the following findings of fact:

> 1. [Scott] is 8 years old.
>
> 2. It is almost certain that [Scott] would be adopted by his maternal grandmother and grandfather once he is legally clear. They are his current placement providers and would like to adopt him once he is legally clear for adoption.
>
> 3. Termination of Parental Rights will legally clear the child for adoption and will enable [DSS] to engage in the adoption process for [Scott].

> Adoption is the primary permanent plan for the minor child.
>
> 4. It is clear that [Scott] loves [respondent], but the two struggle to bond. Due to [respondent's] prolonged absences, [Scott] does not see her as a parental figure and feels as if he can make the decisions and be the "boss" of [respondent]. He does not listen to her well and continues to test to see how far or how long he can do something before she tells him "no."
>
> 5. [Scott] and his maternal grandparents have a strong bond. [Scott] feels safe and comfortable in the home with his grandparents and respects and honors them as his parents.
>
> 6. If [respondent] works on becoming substance-free, she will have no greater cheerleaders than the maternal grandparents, . . . who will be more than happy to allow her to be around her son if she is safe and sober. Hopefully the day is coming when she will leave her current damaging lifestyle behind. In the meantime, the minor child is in need of a safe permanent home and his grandparents are willing to provide that for him.

¶ 10 Respondent appeals. On appeal, respondent challenges some of the trial court's dispositional findings as not being supported by competent evidence and contends that the trial court abused its discretion in determining that it was in Scott's best interests that her parental rights be terminated.

II. Analysis

¶ 11 In a termination proceeding, when a trial court "determines that one or more grounds listed in section 7B-1111 are present, the court proceeds to the dispositional stage, at which the court must consider whether it is in the best interests of the juvenile to terminate parental rights." *In re D.L.W.*, 368 N.C. 835, 842, 788 S.E.2d 162, 167 (2016) (first citing *In re Young*, 346 N.C. 244, 247, 485 S.E.2d 612, 614–15 (1997); and then citing N.C.G.S. § 7B-1110). "The trial court's dispositional findings of fact are binding on appeal if supported by the evidence received during the termination hearing or not specifically challenged on appeal." *In*

re K.N.L.P., 2022-NCSC-39, ¶ 11. A trial court's best interests determination "is reviewed solely for abuse of discretion." *In re A.U.D.*, 373 N.C. 3, 6, 832 S.E.2d 698, 700 (2019). "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 re T.L.H.*, 368 N.C. 101, 107, 772 S.E.2d 451, 455 (2015) (cleaned up).

¶ 12 Respondent first challenges the portion of finding of fact 4 which provides that Scott and respondent "struggle to bond." She contends that this portion of the finding is directly refuted by the trial court's oral statements made during the dispositional hearing and is not supported by the evidence.

¶ 13 Pursuant to Rule 58 of the North Carolina Rules of Civil Procedure, "a judgment is entered when it is reduced to writing, signed by the judge, and filed with the clerk of court[.]" N.C.G.S. § 1A-1, Rule 58 (2021). This Court has held that "a trial court's oral findings are subject to change before the final written order is entered." *In re A.U.D.*, 373 N.C. at 9–10, 832 S.E.2d at 702. Therefore, respondent is unable to demonstrate error based merely on the fact that there were differences between the trial court's orally rendered findings of fact at the dispositional hearing and those set forth in the written order. *See, e.g.*, *In re A.U.D.*, 373 N.C. at 9–10, 832 S.E.2d at 702.

¶ 14 Moreover, finding of fact 4 is supported by the testimony of DSS social workers Kaitlyn Stutts and Kali Jacomine. Ms. Stutts testified that during visitations, Scott was "resistant and . . . trying to test" respondent. Ms. Jacomine further testified that respondent struggled to keep Scott's attention during visits, and Scott would "beg[i]n lashing out and really testing the limits with her." In contrast, when Ms. Jacomine visited with the maternal grandparents alone, she described Scott as "constantly wanting to come in there and see and sit with his grandparents and talk to them and engage with them." Thus, there is evidence in the record that supports the trial court's finding.

¶ 15 Respondent also challenges the portion of finding of fact 4 referencing her "prolonged absences." She argues that this finding is contrary to Ms. Jacomine's testimony and that the "only cause for gaps in her contact with Scott were the direct result of the limited supervised visitation schedule." While it is true that Ms. Jacomine testified that respondent only missed one visit with Scott, respondent overlooks the DSS court report which was admitted into evidence at the termination of parental rights dispositional hearing. This report highlights multiple gaps in her contact with Scott:

> Between the initial court hearing on 8/19/2019, and the court hearing on 10/28/2019, [respondent] had missed three of her supervised visits due to either issues with her car or illness. Between the court date on 10/28/2019 and 1/22/2020, [respondent] missed a total of six visits. [Respondent] stated those visits were missed either due to car issues, injuries from a fall at work, miscommunication due to the holidays, or illness. From 1/22/20 through 3/30/20, [respondent] missed 9 out of 21 possible visits. [Respondent] did not show up for the visit on 1/23/20, so no visits were held from 1/26/20 [through] 2/1/20. [Respondent] did not show up for the visit on 2/23/20 or 2/27/20, so no visits were held from 3/1[/2020 through 3/]7/2020. [Respondent] did not confirm her visit on 3/6/20, so no visits were held from 3/8[/2020 through 3/]14/2020.

¶ 16 The trial court could reasonably infer from this evidence that respondent's "prolonged absences" resulted in Scott not viewing her "as a parental figure." *See In re D.L.W.*, 368 N.C. at 843, 788 S.E.2d at 167–68 (stating that it is the trial court's duty to consider all the evidence, pass upon the credibility of the witnesses, and determine the reasonable inferences to be drawn therefrom).

¶ 17 In addition, respondent contests the portion of finding of fact 6 regarding the maternal grandparents' intentions of allowing respondent to be a part of Scott's life after her parental rights are terminated. The trial court found that the maternal grandparents "will be more than happy to allow [respondent] to be around [Scott] if she is safe and sober." While this appears to be an aspirational statement to encourage respondent, we agree with her that there is no evidence of record to support this challenged portion of finding of fact 6, and thus, we disregard it. *See*, *e.g.*, *In re S.M.*, 375 N.C. 673, 691, 850 S.E.2d 292, 306 (2020) (disregarding a finding of fact based on a guardian ad litem report not included in the record on appeal).

¶ 18 Next, respondent argues the trial court abused its discretion by concluding that it was in Scott's best interests to terminate her parental rights. Specifically, respondent argues that the trial court disregarded the alternative of guardianship and that the trial court's oral statements praising respondent's case plan efforts cut against the necessity of terminating her parental rights.

¶ 19 In determining whether termination of parental rights is in the best interests of a juvenile, a court shall consider

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

N.C.G.S. § 7B-1110(a) (2021). This Court has previously observed that

> [t]he purpose of termination of parental rights proceedings is to address circumstances where parental care fails to "promote the healthy and orderly physical and emotional well-being of the juvenile," while also recognizing "the necessity for any juvenile to have a permanent plan of care at the earliest possible age." N.C.G.S. § 7B-1100. In North Carolina, the best interests of the child are the paramount consideration in termination of parental rights cases. *See In re Montgomery*, 311 N.C. 101, 109, 316 S.E.2d 246, 252 (1984). Thus, when there is a conflict between the interests of the child and the parents, courts should consider actions that are within the child's best interests over those of the parents. N.C.G.S. § 7B-1100(3).

In re F.S.T.Y., 374 N.C. 532, 540, 843 S.E.2d 160, 165–66 (2020).

¶ 20 The trial court is not precluded from determining that termination of respondent's parental rights is in Scott's best interests merely because it made statements during the dispositional hearing acknowledging respondent's efforts at reunification. *In re A.U.D.*, 373 N.C. at 9–10, 832 S.E.2d at 702 (stating that "[a] trial court's oral findings are subject to change before the final written order is entered"). Furthermore, N.C.G.S. § 7B-1110(a) "does not require the trial court to make written findings regarding any dispositional alternatives it considered." *In re M.S.E.*, 378

N.C. 40, 2021-NCSC-76 ¶ 51. Here, the trial court's findings demonstrate that it considered the dispositional factors set forth in N.C.G.S. § 7B-1110(a) and "performed a reasoned analysis weighing those factors." *In re Z.A.M.*, 374 N.C. 88, 101, 839 S.E.2d 792, 801 (2020). Thus, the trial court did not abuse its discretion when it determined that termination of respondent's parental rights was in Scott's best interests.

III. Conclusion

¶ 21 The trial court did not err in terminating respondent's parental rights. The trial court's findings of fact were supported by the evidence presented to the trial court at the dispositional hearing. In addition, the trial court was not bound by its oral statements made regarding Scott's best interests, and the written findings support the trial court's conclusion that termination of respondent's parental rights was in Scott's best interests. As such, we affirm the trial court's order terminating parental rights.

AFFIRMED.

STATE v. WOODS

[381 N.C. 160, 2022-NCSC-56]

STATE OF NORTH CAROLINA
v.
CIERA YVETTE WOODS

No. 535A20

Filed 6 May 2022

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 275 N.C. App. 364, 853 S.E.2d 177 (2020), finding no error in a judgment entered on 10 May 2019 by Judge Karen Eady-Williams in Superior Court, Mecklenburg County. On 10 August 2021, the Supreme Court allowed defendant's petition for discretionary review as to additional issues. Heard in the Supreme Court on 21 March 2022.

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

Glenn Gerding, Appellate Defender, by Aaron Thomas Johnson, Assistant Appellate Defender, for defendant-appellant.

PER CURIAM.

AFFIRMED.

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

STATE v. COBB

[381 N.C. 161, 2022-NCSC-57]

STATE OF NORTH CAROLINA
v.
DESHANDRA VACHELLE COBB

No. 28A21

Filed 6 May 2022

Search and Seizure—vehicle checkpoint—reasonableness—Brown factors

A police checkpoint was lawful under the Fourth Amendment pursuant to *Brown v. Texas*, 443 U.S. 47 (1979), where the checkpoint's purpose—ensuring that each driver had a valid driver's license and was not intoxicated—operated to advance public safety and was reasonable; the checkpoint was conducted on a major thoroughfare during early morning hours conducive to catching intoxicated drivers; and the checkpoint caused only a small amount of traffic backup, it was visible to approaching drivers, and it was conducted in accordance with a plan under a supervising officer with specific restraints on time, location, and officer conduct.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 275 N.C. App. 740, 853 S.E.2d 803 (2020), vacating an order entered on 3 April 2019 by Judge Claire V. Hill in Superior Court, Harnett County, and remanding the case for further proceedings. Heard in the Supreme Court on 15 February 2022.

Joshua H. Stein, *Attorney General*, *by Kindelle McCullen*, *Assistant Attorney General*, *for the State-appellant.*

Glenn Gerding, *Appellate Defender*, *by Wyatt Orsbon*, *Assistant Appellate Defender*, *for defendant-appellee.*

BERGER, Justice.

¶ 1 Defendant pleaded guilty to impaired driving after the trial court denied her motion to suppress evidence obtained at a Harnett County checking station. The Court of Appeals vacated the trial court's order denying defendant's motion to suppress, and the State appeals based upon a dissent. For the reasons stated below, we reverse the decision of the Court of Appeals and reinstate the order of the trial court.

I. Factual Background

¶ 2 At approximately 12:15 a.m. on August 28, 2016, defendant was driving her vehicle in Harnett County when she approached a checking station operated by the North Carolina State Highway Patrol. When defendant rolled down her window, Trooper BJ Holder detected a strong odor of alcohol emanating from the vehicle. Trooper Holder asked defendant if she had been drinking, and defendant responded that she had two shots of Grey Goose vodka at a bar. Trooper Holder asked defendant to step out of the vehicle.

¶ 3 Upon exiting, defendant was unsteady on her feet and Trooper Holder requested that defendant perform standard field sobriety tests, including a horizontal gaze nystagmus (HGN) test. Six of six clues of impairment were present when the HGN test was administered. A breath sample provided by defendant at the Harnett County Detention Center registered a blood alcohol level of 0.11 on the Intox EC/IR II device. Defendant was charged with one count of driving while impaired and one count of reckless driving.[1]

¶ 4 A Checking Station Authorization form (HP-14 form) was completed for the checking station by Sergeant John Bobbitt of the NCSHP. The form indicated that the primary purpose of the checking station was "Chapter 20 enforcement" which included "at a minimum, checking each driver stopped for a valid driver's license and evidence of impairment." Further, pursuant to the information set forth on the HP-14 form, the checking station was to operate between the hours of 12:15 a.m. and 2:00 a.m. on August 28, 2016, and Sergeant Bobbitt was noted as the supervising member in charge.

¶ 5 On February 6, 2019, defendant filed a motion to suppress evidence of her blood alcohol level contending that the checking station was unconstitutional and violated N.C.G.S. § 20-16.3A.[2] Thus, defendant argued, "any evidence obtained [wa]s in violation of [d]efendant's rights and must be suppressed and any charges arising therefrom must be dismissed."

¶ 6 From the testimony presented at the hearing on the motion to suppress, the trial court found as fact that Sergeant Bobbitt had been employed with the NCSHP for approximately twenty-five years. In addition,

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1. The State later dismissed the charge of reckless driving.

2. Defendant did not argue on appeal that the checking station violated N.C.G.S. § 20-16.3A. Defendant has, therefore, abandoned the argument. *See* N.C. R. App. P. 28(a) ("Issues not presented and discussed in a party's brief are deemed abandoned.").

the trial court found that Sergeant Bobbitt completed and signed the HP-14 form, and the form "complied with the statutory and other regulatory requirements regarding checking stations." The findings of fact detailed that the checking station was located "a short distance to [NC] Highway 87 and three county lines making it a major thoroughfare into and out of the county." "The public concern addressed[,]" the trial court went on to find, "was the public safety in confirming motorists were in compliance and not violating any Chapter 20 Motor Vehicle Violation."

¶ 7 Additionally, the trial court included findings of fact related to the execution of the checking station by the NCSHP. Specifically, the trial court found that "[t]he seizure was short in time for most drivers . . . since most drivers were stopped for less than one minute" if they "had their driver's license and registration." Further, the trial court's findings indicate that "[a]t least two [NCSHP] vehicles with blue lights were on at all times[,]" and "[t]he participating members were wearing their [NCSHP] uniforms with reflective vests and utility flashlights." This allowed for the checking station to be "observed from any direction of approach from one-tenth up to one-half a mile [away,]" giving drivers "adequate time to observe the checking station and come to a stop." The trial court also found that although "[t]raffic did back up some" because "every vehicle that approached this checking station was checked[,]" the negative effect on the flow of traffic was "not extreme."

¶ 8 Based on these findings of fact, the trial court then concluded as a matter of law that:

> 1. The plan was reasonable and the checking station did not violate the Defendant's U.S. or N.C. constitutional rights.
>
> 2. The checking station as it was operated advanced the public concern and was reasonable.
>
> 3. Enforcement of the motor vehicle laws is a legitimate public purpose and promotes public safety.
>
> 4. The short amount of time that the checking station potentially interfered with an individual's liberty was not significant.

Accordingly, the trial court denied defendant's motion to suppress.

¶ 9 Following the denial of the motion to suppress, defendant pleaded guilty to the charge of driving while impaired, expressly reserving her right to appeal the denial of the motion to suppress. Defendant's

sentence of sixty days imprisonment was suspended, and she was placed on unsupervised probation. Defendant timely appealed.

¶ 10 In a split decision, the Court of Appeals vacated the trial court's order denying defendant's motion to suppress and remanded the case for further proceedings. *State v. Cobb*, 275 N.C. App. 740, 752, 853 S.E.2d 803, 811 (2020). The majority reasoned that because the trial court "did not adequately weigh the three *Brown* factors" required in such an analysis, the trial court "could not assess whether the public interest in this [checking station] outweighed its infringement on [d]efendant's Fourth Amendment privacy interests." *Id.* at 749, 853 S.E.2d at 809. The Court of Appeals determined, and defendant now argues, that the trial court erred in concluding that the checking station was reasonable without adequately engaging in the analysis required by the United States Supreme Court in *Brown v. Texas*, 443 U.S. 47, 50, 99 S. Ct. 2637, 2640, 61 L. Ed. 2d 357, 361 (1979).

¶ 11 Based on a dissenting opinion, the State timely appealed to this Court, arguing that the majority below erred in concluding that the trial court's order denying defendant's motion to suppress was insufficient to evaluate the constitutionality of the checking station.

II. Standard of Review

¶ 12 "[A] trial court's ruling on a motion to suppress is afforded great deference upon appellate review as it has the duty to hear testimony and weigh the evidence." *State v. McClendon*, 130 N.C. App. 368, 377, 502 S.E.2d 902, 908 (1998), *aff'd*, 350 N.C. 630, 517 S.E.2d 128 (1999); *see also State v. Smith*, 278 N.C. 36, 41, 178 S.E.2d 597, 601 (1971). An appellate court's review of a trial court's denial of a motion to suppress "is strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law." *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982). Findings of fact not challenged on appeal are "deemed to be supported by competent evidence and are binding on appeal." *State v. Biber*, 365 N.C. 162, 168, 712 S.E.2d 874, 878 (2011). Conclusions of law, however, are reviewed de novo and are subject to full review by this Court. *Id.*

¶ 13 Defendant did not challenge any of the trial court's findings of fact as unsupported by the evidence in the record. Thus, the trial court's findings of fact are binding on appeal.

III. Analysis

¶ 14 The Fourth Amendment protects "[t]he right of the people to be secure . . . against unreasonable searches and seizures." U.S. Const. amend. IV. Because law enforcement officers effectuate a seizure when they stop a vehicle at a checking station, such stops must conform to Fourth Amendment requirements. *City of Indianapolis v. Edmond*, 531 U.S. 32, 40, 121 S. Ct. 447, 453, 148 L. Ed. 2d 333, 342 (2000); *see also United States v. Martinez-Fuerte*, 428 U.S. 543, 556, 96 S. Ct. 3074, 3082, 49 L. Ed. 2d 1116, 1127 (1976) ("[C]heck[ing station] stops are 'seizures' within the meaning of the Fourth Amendment."). The ultimate question in challenges to the validity of a checking station is "whether such seizures are 'reasonable' under the Fourth Amendment." *Michigan Dep't of State Police v. Sitz*, 496 U.S. 444, 450, 110 S. Ct. 2481, 2485, 110 L. Ed. 2d 412, 420 (1990).

¶ 15 As an initial matter, the Supreme Court has instructed that reviewing courts must consider the primary programmatic purpose of a challenged checking station. *Edmond*, 531 U.S. at 40–42, 121 S. Ct. at 453–54, 148 L. Ed. 2d at 342–44. Checking stations established primarily to "uncover evidence of ordinary criminal wrongdoing" run afoul of the Fourth Amendment. *Edmond*, 531 U.S. at 42, 121 S. Ct. at 454, 148 L. Ed. 2d at 343. However, checking stations "designed primarily to serve purposes closely related to . . . the necessity of ensuring roadway safety" have been held to serve a legitimate primary purpose. *Id.* at 41, 121 S. Ct. at 454, 148 L. Ed. 2d at 333; *see also Sitz*, 496 U.S. at 451, 110 S. Ct. at 2485, 110 L. Ed. 2d 412. In addition, the Supreme Court has upheld checking stations designed to address problems related to policing the border and to assist law enforcement officers in obtaining information to apprehend "other individuals" involved in criminal activity. *See Martinez-Fuerte*, 428 U.S. at 545, 96 S. Ct. at 3077, 49 L. Ed. 2d at 1116; *Illinois v. Lidster*, 540 U.S. 419, 427, 124 S. Ct. 885, 891, 157 L. Ed. 2d 843, 852 (2004).

¶ 16 Here, the primary programmatic purpose of the checking station was uncontested. At the hearing on the motion to suppress, defense counsel acknowledged the primary purpose of the checking station was "to check licenses. We don't disagree . . . they got to the primary purpose[.]" Defendant's concession is reflected in the trial court's unchallenged finding that "[t]here was no argument by the defendant that the purpose of the checking station was . . . not a permitted primary [programmatic] purpose." The trial court's finding is therefore binding on appeal, and we must next determine the reasonableness of the checking station under the Fourth Amendment. *Edmond*, 531 U.S. at 47, 121 S. Ct. at 457, 148 L. Ed. 2d at 347.

¶ 17 This Court has held that "check[ing stations] are constitutional if vehicles are stopped according to a neutral, articulable standard (e.g., every vehicle) and if the government interest in conducting the check[ing station] outweighs the degree of the intrusion." *State v. Foreman*, 351 N.C. 627, 631, 527 S.E.2d 921, 924 (2000). "The reasonableness of seizures that are less intrusive than a traditional arrest depends on a balance between the public interest and the individual's right to personal security free from arbitrary interference by law officers." *Brown*, 443 U.S. at 50, 99 S. Ct. at 2640, 61 L. Ed. 2d at 361 (cleaned up). "[W]e must judge [the] reasonableness [of a checking station], hence, its constitutionality, on the basis of individual circumstances." *State v. Mitchell*, 358 N.C. 63, 66, 592 S.E.2d 543, 545 (2004) (first and second alterations in original) (quoting *Lidster*, 540 U.S. at 426, 124 S. Ct. at 890, 157 L. Ed. 2d at 852 (2004)).

¶ 18 In determining whether a seizure that results from a checking station survives constitutional scrutiny, we "weigh[ ] . . . the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty." *Brown*, 443 U.S. at 50–51, 99 S. Ct. at 2640, 61 L. Ed. 2d at 362. Upon a balancing of these factors, a checking station is deemed reasonable, and therefore constitutional, if the factors weigh in favor of the public interest. *Lidster*, 540 U.S. at 427, 124 S. Ct. at 890, 157 L. Ed. 2d at 852.

¶ 19 Our nation's highest court has held that driver's license checking stations typically satisfy the first *Brown* prong because "the public concerns served by the seizure" outweigh the Fourth Amendment interest of individuals. *Id.* (quoting *Brown*, 443 U.S. at 50–51, 99 S. Ct. at 2640, 61 L. Ed. 2d at 362); *see also State v. Rose*, 170 N.C. App. 284, 294, 612 S.E.2d 336, 342, *disc. review denied*, 359 N.C. 641, 617 S.E.2d 656 (2005) (holding that license and registration checking stations advance an "important purpose"). The public interest in ensuring compliance with motor vehicle laws is a well-established and important public concern. *See Rose*, 170 N.C. App. at 294, 612 S.E.2d at 342. "States have a vital interest in ensuring that only those qualified to [drive] are permitted to operate motor vehicles . . . ." *Delaware v. Prouse*, 440 U.S. 648, 658, 99 S. Ct. 1391, 1398, 59 L. Ed. 2d 660, 670 (1979). Moreover, the Supreme Court has recognized that "[n]o one can seriously dispute the magnitude of the drunken driving problem or the States' interest in eradicating it. . . . For decades, this Court has repeatedly lamented the tragedy [of deaths resulting from impaired drivers]." *Sitz*, 496 U.S. at 451, 110 S. Ct. at 2485–86, 110 L. Ed. 2d at 420–21 (cleaned up).

¶ 20 Consistent with the requirement of *Brown*, the trial court found that "[t]he public concern addressed with this particular checking station was the public safety in confirming motorists were in compliance and not violating any Chapter 20" provision and that this purpose was clearly set forth in establishing the checking station. The trial court determined the purpose of ensuring each driver had a valid driver's license and was not driving while impaired "operated [to] advance[ ] the public concern and was reasonable."

¶ 21 Under the second prong of the *Brown* analysis, the trial court examined "the degree to which the seizure advance[d] the public interest." *Brown*, 443 U.S. at 51, 99 S. Ct. at 2640, 61 L. Ed. 2d at 362. A consideration at this step is whether "[t]he police appropriately tailored their check[ing station] stops" to fit the primary purpose. *Lidster*, 540 U.S. at 427, 124 S. Ct. at 891, 157 L. Ed. 2d at 852. Alongside other factors, the use of time and location limitations in establishing and operating the checking station provides evidence that the vehicle stop was appropriately tailored. *See id.* (finding that the police's selection of a specific time and location was sufficiently tailored as "[t]he stops took place about one week after [a] hit-and-run accident, on the same highway near the location of the accident, and at about the same time of night").

¶ 22 Based on the evidence presented, the trial court found that the checking station was planned and operated pursuant to a HP-14 form completed by Sergeant Bobbitt. The checking station was established a short distance from NC Highway 87, on a heavily travelled thoroughfare in an area where three county lines converge. Additionally, the trial court found the checking station was in effect during a previously agreed upon timeframe and date, between 12:15 a.m. and 2:00 a.m. on August 28, 2016, and extended no longer than that time. These findings demonstrate that the checking station was conducted in a location where there was increased motor vehicle traffic and during a timeframe conducive to apprehending impaired drivers.

¶ 23 With respect to the final factor of the *Brown* analysis, the severity of the interference with individual liberty, the focus shifts to how the checking station was conducted. *Brown*, 443 U.S. at 51, 99 S. Ct. at 2640, 61 L. Ed. 2d at 362. Specifically, the third factor requires a checking station to "be carried out pursuant to a plan embodying explicit, neutral limitations on the conduct of individual officers." *Id.* This ensures that officers are not able to exercise "unfettered discretion" that results in the invasion of motorists' liberties. *Id.*

¶ 24 The Supreme Court has designated a number of nonexclusive factors as relevant considerations, including the checking station's interference with regular traffic, whether notice of the checking station was given to approaching drivers, and whether there was a supervising official overseeing the checking station. *See Martinez-Fuerte*, 428 U.S. at 559, 96 S. Ct. at 3083–84, 49 L. Ed. 2d at 1129.

¶ 25 Here, as discussed above, the trial court's unchallenged findings of fact show that the checking station was conducted pursuant to the plan established and documented by Sergeant Bobbitt. The plan included explicit limitations regarding the location and timeframe of the checking station. Further, the trial court found that all vehicles were stopped pursuant to the established plan. While the trial court found that "[t]raffic did back up some" because all vehicles were stopped, the backup was "not extreme."

¶ 26 Moreover, the trial court found that drivers were put on notice of the checking station as "[a]t least two [NCSHP] vehicles with blue lights were on at all times" during the checking station. Additionally, the trial court found that "participating members were wearing their [NCSHP] uniforms with reflective vests and utility flashlights." Finally, based on evidence showing that the checking station was approved and executed by Sergeant Bobbitt, the trial court made various findings indicating that the checking station was operated under a supervising officer from start to finish.

¶ 27 In focusing on the specific conduct of the officers during the vehicle stops, the trial court found that officer conduct was sufficiently limited, stating:

> 19. The seizure was short in time for most drivers . . . since most drivers were stopped for less than one minute.
>
> . . . .
>
> 28. If drivers had their driver's license and registration the stop lasted one minute or less.

These findings indicate that the checking station was not operated with "unfettered discretion" but rather with specific restraints on time, location, and officer conduct. It follows that the trial court properly concluded that the "short amount of time that the checking station potentially interfered with an individual's liberty was not significant." Thus, the checking station was appropriately tailored to address the stated purpose.

¶ 28 In balancing the factors set forth in *Brown*, the trial court concluded that the public interest served by the checking station outweighed the intrusion on defendant's liberty interests. The unchallenged findings of fact support this conclusion, and the checking station was reasonable under the Fourth Amendment.

IV. Conclusion

¶ 29 Based on our review of the trial court's unchallenged findings of fact, the public interest in conducting the checking station outweighed any intrusion on defendant's liberty interests, and the checking station was, therefore, reasonable under the Fourth Amendment. Accordingly, we reverse the decision of the Court of Appeals and reinstate the order of the trial court denying defendant's motion to suppress.

REVERSED.

STATE OF NORTH CAROLINA
v.
ISIAH BOYD

No. 126PA20

Filed 6 May 2022

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, No. COA19-543, 2020 WL 774113 (N.C. Ct. App. Feb. 18, 2020), finding no error in a judgment entered on 19 July 2018 by Judge Hugh B. Lewis in Superior Court, Mecklenburg County. Heard in the Supreme Court on 21 March 2022.

Joshua H. Stein, Attorney General, by Keith T. Clayton, Special Deputy Attorney General, for the State-appellee.

Jason Christopher Yoder for defendant-appellant.

PER CURIAM.

DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

STATE v. FAROOK

[381 N.C. 170, 2022-NCSC-59]

STATE OF NORTH CAROLINA
v.
KHALIL ABDUL FAROOK

No. 457PA20

Filed 6 May 2022

1. Evidence—attorney-client privilege—speedy trial claim—defense attorney testified for State regarding trial strategy—plain error

In a prosecution for charges stemming from a fatal car accident, where more than six years passed before defendant's case was brought to trial, during which he was represented by four different attorneys, the trial court committed plain error by allowing one of defendant's attorneys to testify for the State regarding trial strategy to counter defendant's claim that his right to a speedy trial was violated. The attorney's testimony regarding delay tactics divulged privileged communications in the absence of any waiver by defendant of the attorney-client privilege; defendant's pro se claim for ineffective assistance of counsel regarding his attorney's delays was invalid for having been filed when defendant was represented by counsel and therefore could not constitute a waiver or justification. The matter was remanded for the trial court to reweigh any admissible evidence submitted by the State to justify the delay as part of the balancing test set forth in *Barker v. Wingo*, 407 U.S. 514 (1972).

2. Constitutional Law—right to speedy trial—Barker factors—evaluation of prejudice to defendant—misapplication of correct standard

In a prosecution for charges stemming from a fatal car accident, where more than six years passed before defendant's case was brought to trial, the trial court misapplied the proper standard for determining whether the delay prejudiced defendant pursuant to *Barker v. Wingo*, 407 U.S. 514 (1972), by first finding that the State had been prejudiced by the delay, and by determining that the prejudice factor weighed against defendant because he did not demonstrate actual prejudice. The constitutional right to a speedy trial is granted to defendants to protect against prosecutorial delay, and prejudice may be shown by presumptive rather than actual prejudice.

Justice BERGER dissenting.

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

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 274 N.C. App. 65 (2020), reversing an order denying defendant's motion to dismiss for a violation of his Sixth Amendment right to a speedy trial entered on 8 October 2018 by Judge Anna Mills Wagoner in Superior Court, Rowan County, and vacating judgments entered on 10 October 2018 by Judge Anna Mills Wagoner in Superior Court, Rowan County. Heard in the Supreme Court on 8 November 2021.

Joshua H. Stein, Attorney General, by John W. Congleton, Assistant Attorney General, for the State-appellant.

Sarah Holladay for defendant-appellee.

EARLS, Justice.

¶ 1 Over six years elapsed between the initial indictment of defendant Khalil Abdul Farook on 19 June 2012 for multiple charges arising out of an incident where Mr. Farook, driving impaired, hit and killed two people riding a motorcycle and his trial that began on 8 October 2018. The trial court denied his pretrial motion to dismiss on speedy trial grounds and he was convicted by a jury of felony hit and run resulting in serious injury or death, two counts of second-degree murder, and attaining violent habitual felon status. He was sentenced to two terms of life imprisonment without the possibility of parole, plus twenty-nine to forty-four months. Mr. Farook appealed to the Court of Appeals asserting that the trial court erred in denying his motion to dismiss.

¶ 2 On appeal, the Court of Appeals reversed the trial court's order and vacated defendant's convictions on the grounds that the delay in his case was unjustified and violated his Sixth Amendment right to a speedy trial, applying the balancing framework set forth in *Barker v. Wingo*, 407 U.S. 514 (1972). *State v. Farook*, 274 N.C. App. 65, 88 (2020). Before the trial court, the State's explanation for its delay in bringing Mr. Farook to trial centered on the testimony of one of Mr. Farook's attorneys, who testified that it was his strategy to delay the case in the hope of obtaining a better outcome for his client. The Court of Appeals held that eliciting this information from Mr. Farook's attorney, while the attorney was testifying for the State, violated Mr. Farook's attorney-client privilege by

revealing strategic decisions the attorney made on behalf of his client. *Id.* at 84. Because this testimony should not have been admitted, and because the State could not carry its burden of attempting to explain the trial delay without the testimony when considering the weight of the evidence under the *Barker* test, the Court of Appeals concluded that Mr. Farook's motion to dismiss should have been granted. *Id.*

¶ 3 We affirm the Court of Appeals' holding on the evidentiary question and conclude that the trial court improperly admitted the testimony of Mr. Farook's prior attorney where there was no waiver of the attorney-client privilege. Because the trial court plainly erred in admitting the testimony of Mr. Farook's former attorney as evidence against him without justification or waiver, the trial court's order must be reversed. However, the State may have had alternative ways to put into evidence the same facts the attorney testified to if the improperly admitted testimony had not been admitted in the first place. The State may also have decided to rely on entirely different facts not elicited before the trial court if it had not been allowed to introduce the improperly admitted testimony. While the delay in this case is extraordinary and the facts in the record relied on by the Court of Appeals in concluding that Mr. Farook's Sixth Amendment rights were violated appear largely uncontested, we nevertheless remand this case for a rehearing on Mr. Farook's speedy trial claim rather than evaluate the evidence at this stage. Accordingly, we reverse the holding of the Court of Appeals to the extent that it allowed Mr. Farook's motion to dismiss. *Cf. State v. Salinas*, 366 N.C. 119, 124 (2012) (remanding for further factual findings where the trial court improperly relied upon the allegations presented in defendant's affidavit when making its findings of fact).

I. Background

¶ 4 In 2012, Mr. Farook was involved in a fatal automobile crash when his vehicle crossed the centerline of the road and collided with a motorcycle being ridden by Tommy and Suzette Jones. Mr. and Mrs. Jones died following the collision. Another driver, Miguel Palacios, witnessed the collision. Mr. Palacios observed Mr. Farook approach the bodies of the victims and then leave the scene of the accident.

¶ 5 Armed with a description of the suspect, police officers traveled to the address of a residence located near the scene of the collision. The apparent owner of the home led officers into a room where one of the officers observed the name "Khalil Farook" on a prescription bottle atop a coffee table. The property owner then explained that "Donald Miller" had changed his name and that "Donald Miller" and "Khalil Farook"

were the same person. Mr. Farook turned himself in to the authorities on 19 June 2012 after warrants had been issued for his arrest on various charges stemming from the collision. Later that month, Mr. Farook was indicted for reckless driving to endanger, driving left of center, driving while license revoked, felony hit and run resulting in serious injury or death, driving while impaired, resisting a public officer, and two counts of felony death by vehicle.

¶ 6 Mr. Farook was represented by four different attorneys during the pendency of his case. In early July 2012, following his arrest, Mr. James Randolph was appointed to represent Mr. Farook. Thereafter, after his case had been pending for a year, Mr. Farook wrote to the trial court on 12 July 2013 stating that he had been incarcerated for a year and was concerned about the status of his case, particularly because he had not yet received discovery. Subsequently, Mr. James Davis was appointed as Mr. Farook's second attorney in the case. Mr. Davis replaced Mr. Randolph in early December 2014.[1] Mr. Davis represented Mr. Farook for nearly three years, during which time the case remained pending, and Mr. Farook remained incarcerated.

¶ 7 Ultimately, Mr. Davis withdrew from Mr. Farook's case because of the demands of his other work. He was replaced as counsel in July 2017 by Mr. David Bingham, Mr. Farook's third attorney. On 17 July 2017, over five years after the collision, Mr. Farook was indicted for the following new, more serious charges: two counts of second-degree murder and one count of attaining violent habitual felon status. In September 2017, Mr. Bingham withdrew from the case due to a conflict of interest. Mr.

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1. There is some evidence in the record tending to suggest that Mr. Davis began representing Mr. Farook in 2012. Specifically, the trial court announced at a hearing on 6 August 2012 that it would appoint Mr. Davis to replace Mr. Randolph as counsel for Mr. Farook; in a 2018 order on a motion to dismiss, the trial court found Mr. Davis's appointment date to be 6 August 2012; in Mr. Davis's motion to withdraw as counsel he attests that he began representing Mr. Farook on or about 27 August 2012; and Mr. Farook asserted in a pro se motion to dismiss for ineffective assistance of counsel that Mr. Davis was appointed as his attorney in August 2012. Notwithstanding this evidence, the trial court's order of assignment specifies that Mr. Davis was ordered to serve as Mr. Farook's attorney on 10 December 2014. Similarly, although the Court of Appeals' opinion also acknowledges discrepancies in the record regarding Mr. Davis's date of appointment as counsel, the court nonetheless observed that on 10 December 2014 Mr. Davis was explicitly appointed to replace Mr. Randolph as Mr. Farook's counsel. *State v. Farook*, 274 N.C. App. 65, 66 (2020). Likewise, in its brief filed in this Court, the State cites the 10 December 2014 order when referencing Mr. Davis's appointment as Mr. Farook's attorney. Any discrepancy in the record on this point has no bearing on our ultimate conclusion that at the hearing on Mr. Farook's speedy trial motion, Mr. Davis divulged privileged, inadmissible information concerning his representation of Mr. Farook—testimony that was improper irrespective of whether Mr. Davis began representing Mr. Farook in 2012 or 2014.

Chris Sease, Mr. Farook's fourth attorney, was appointed to represent him in late September 2017. He represented Mr. Farook through the trial in October 2018.

¶ 8 In March 2018, Mr. Farook wrote to the clerk of court asking for "information (motions) concerning my t[rial] delay for the years of 2013, 2014, 2015, 2016, 2017 that the district attorney['s] office file[d] to delay my trial." The clerk responded, "There are no written motions in any of your files." Mr. Farook filed a pro se motion to dismiss the charges against him on the grounds of a speedy trial violation and ineffective assistance of counsel (IAC) in early September 2018. In the pro se motion, Mr. Farook alleged that his previous attorney, Mr. Davis, did not speak to him until fifty-seven months after Mr. Davis was appointed, that Mr. Farook never agreed to any delays in his trial, and that Mr. Farook had been prejudiced both by the deficient representation that he had received from Mr. Davis and the delay in his case.

¶ 9 Later that same month, Mr. Sease filed a motion to dismiss for a speedy trial violation alleging that Mr. Farook was not charged or served with indictments for second-degree murder and attaining violent habitual felon status until July 2017 even though the collision occurred five years earlier in June 2012. The motion alleged that Mr. Farook believed the State delayed the case "in an attempt to oppress, harass and punish him further"; that due to the extensive delay he was "prejudiced by an inability to adequately assist his defense attorney" in preparing for trial; and that "it is arguable" that he never would have been charged with second-degree murder had the case been resolved between 2012 and 2017 rather than long after the date of the offense. The State opposed the motion.

¶ 10 Notably, in his motion to dismiss, Mr. Farook chronicled the prolonged delay that evolved over the life of his case from the date of his arrest in June 2012 to his eventual prosecution in October 2018. After Mr. Farook rejected plea offers from the State in August 2012, the case was not calendared again until the week of 18 February 2013, almost six months later. The case was first calendared for the week of 6 August 2012, the date on which Mr. Randolph withdrew as Mr. Farook's attorney. Between 2013 and 2018, Mr. Farook's case was calendared but not reached *nine* times. After the case had been calendared but not reached five times, Mr. Farook was indicted on more serious charges. No motion to continue the case was ever filed by the State or Mr. Farook. *Cf. State v. Farmer*, 376 N.C. 407, 409 (2020) (emphasizing that the defendant filed his motion for a speedy trial approximately two months after he acquiesced to the State's request to continue his case from the January 2017 calendar to the next trial session).

¶ 11 As illustrated below, Mr. Farook's case was repeatedly delayed as it continued to be calendared but not reached while Mr. Farook remained imprisoned for 2,302 days.

11 July 2012	Mr. Randolph is appointed by court order to represent Mr. Farook.
18 February 2013	Mr. Farook's case was calendared but not reached.
19 March 2013	Mr. Farook's case was calendared but not reached.
16 April 2013	Mr. Farook's case was calendared but not reached.
12 July 2013	Mr. Farook wrote a letter to Judge Wagoner stating that he had been incarcerated for a year and had not received his discovery.
10 December 2014	Mr.Davis is appointed by court order to represent Mr. Farook.
15 July 2015	Mr. Farook's case was calendared but not reached.
13 February 2017	Mr. Farook's case was calendared but not reached.
5 July 2017	Mr. Farook's case was calendared but not reached. Mr. Farook was indicted on more serious charges: two counts of second-degree murder and one count of attaining violent habitual felon status. Mr. David Bingham is appointed by court order to represent Mr. Farook.
29 August 2017	Mr. Farook's case was calendared but not reached.
25 September 2017	Mr. Sease was appointed by court order to represent Mr. Farook.
26 September 2017	Mr. Farook's case was calendared but not reached.
8 January 2018	Mr. Farook's case was calendared but not reached.

17 March 2018	Mr. Farook wrote to the clerk of court asking for "information (motions) concerning my t[rial] delay for the years of 2013, 2014, 2015, 2016, 2017 that the district attorney['s] office file[d] to delay my trial."
10 September 2018	Mr. Farook filed a pro se motion to dismiss alleging a Sixth Amendment violation.
13 September 2018	Mr. Sease filed a motion to dismiss alleging a Sixth Amendment violation.

¶ 12 A hearing on Mr. Farook's motion to dismiss was held on 24 September 2018. Mr. Farook's former attorney, Mr. Davis, testified against him as the State's sole witness. Importantly, Mr. Davis testified that it was his desire to delay the case once it became clear that Mr. Farook would possibly face a violent habitual felon indictment because in his experience delay would work to Mr. Farook's advantage. He also testified generally to the backlog of cases that beset the Rowan County courts at the time and explained that he told Mr. Farook sometime during his representation that it was unlikely he would be available to represent him at a trial because of his other professional obligations.

¶ 13 On the dismissal motion, the trial court acknowledged the over six-year delay in Mr. Farook's case, and that Mr. Farook remained in jail awaiting trial since the date he was arrested on 19 June 2012. However, in weighing the evidence offered by the State and Mr. Farook and considering it in light of the *Barker* factors, the trial court ultimately determined that Mr. Farook's Sixth Amendment right to a speedy trial was not violated, and the court denied his motion to dismiss on 8 October 2018. That same day, Mr. Farook's trial began. Two days later, a jury found him guilty of one count of hit and run resulting in serious injury or death and two counts of second-degree murder. Mr. Farook entered into plea agreements for the remaining charges. The trial court sentenced Mr. Farook to two terms of life imprisonment without the possibility of parole, plus twenty-nine to forty-four months. He appealed his convictions.

II. Court of Appeals Decision

¶ 14 Mr. Farook argued before the Court of Appeals that the trial court erred in denying his motion to dismiss and in finding that his constitutional right to a speedy trial had not been violated under the four-factor balancing test described in *Barker*, 407 U.S. at 530. The four factors include the "[l]ength of delay, the reason for the delay, the defendant's

assertion of his right, and prejudice to the defendant." *Id.* Mr. Farook asserted that the trial court erred in admitting as evidence against him privileged and confidential testimony from his former counsel, Mr. Davis, and that absent this evidence, the State could not carry its burden in explaining or excusing the over six-year delay in his case. According to Mr. Farook, the weight of the evidence as applied to each of the *Barker* factors tipped the scales in his favor and entitled him to relief from his convictions. *Farook*, 274 N.C. App. at 85.

¶ 15 A unanimous Court of Appeals held that Mr. Farook had been deprived of his right to a speedy trial, reversed the trial court's denial of his motion to dismiss, and vacated his convictions. *Id.* at 88. The court undertook an analysis of each *Barker* factor in reasoning that he was entitled to relief. First, the court concluded that the six-year delay in the case was sufficient to create a presumption of prejudice to Mr. Farook to "trigger the *Barker* inquiry," thereby shifting the burden to the State to rebut the presumption and assign reasons for the delay. *Id.* at 76–77.

¶ 16 Second, the court concluded that the State failed to meet its burden in explaining the inordinate delay in the case. *Id.* at 87. It held that the trial court erred in allowing Mr. Davis to testify against Mr. Farook as the State's sole rebuttal witness concerning the reason for the delay. *Id.* at 84. In the court's view, Mr. Davis divulged privileged information, and Mr. Farook neither tacitly nor expressly waived the attorney-client privilege. *Id.* The court further reasoned that even if Mr. Davis's mental impressions, conclusions, opinions, and legal theories in connection with his defense of Mr. Farook were work product, those would nevertheless be similarly privileged and inadmissible as evidence. *Id.* The panel also acknowledged that neither the State nor the trial court made any attempt to limit Mr. Davis's testimony concerning the delay to public information such as court calendars or Mr. Davis's caseload and explained that even if Mr. Davis adopted a trial strategy of delay as the State alleged, Mr. Farook could not have acquiesced to such a strategy if it had not been communicated to him. *Id.* Having discounted all of Mr. Davis's testimony in evaluating the factual allegations raised at the hearing on defendant's motion to dismiss, the Court of Appeals concluded that under the totality of circumstances, the trial court committed plain error when it admitted privileged testimony as competent rebuttal evidence and improperly relied on the testimony to support its ruling on the motion to dismiss. *Id.* at 84–85.

¶ 17 Third, the court addressed whether Mr. Farook sufficiently asserted his right to a speedy trial. It diverged from the trial court's finding that Mr. Farook did not appropriately assert his right to a speedy trial on

the grounds that the trial court's analysis of this factor was improperly influenced by Mr. Davis's testimony. *Id.* at 87. In addition, the Court of Appeals noted that Mr. Farook otherwise requested information about his case and filed a pro se motion to dismiss during its pendency. *Id.* Finally, the Court of Appeals held that Mr. Farook was prejudiced by the undue delay in the case which impacted his ability to adequately prepare a defense to the charges against him. *Id.* at 87–88.

¶ 18 On 10 March 2021, we allowed the State's petition for discretionary review to consider whether the Court of Appeals correctly held that the trial court plainly erred in admitting privileged and confidential testimony from Mr. Davis and whether the Court of Appeals properly applied the *Barker* test in evaluating Mr. Farook's speedy trial claim.

III. Standard of Review

¶ 19 This Court reviews decisions of the Court of Appeals for errors of law. N.C. R. App. P. 16(a); *State v. Melton*, 371 N.C. 750, 756 (2018). The denial of a motion to dismiss on speedy trial grounds presents a constitutional question of law subject to de novo review. *State v. Williams*, 362 N.C. 628, 632–33 (2008).

IV. Analysis

A. The trial court plainly erred when it admitted privileged testimony from Mr. Davis as evidence against Mr. Farook at the hearing on defendant's motion to dismiss.

¶ 20 **[1]** To prove a speedy trial violation, a criminal defendant must first show that the length of the delay in his case is so presumptively prejudicial that it warrants a full constitutional review of his claim under *Barker*. *State v. Farmer*, 376 N.C. 407, 415 (2020). The length of the delay is considered a triggering mechanism that either instigates or obviates the need to conduct the full *Barker* analysis. *See Barker*, 407 U.S. at 530 ("Until there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other factors that go into the balance."). If the rest of the inquiry is triggered, the length of delay functions independently as a factor to be weighed alongside the remaining three factors. *Id.*; *see also State v. Spivey*, 357 N.C. 114, 119 (2003).

¶ 21 The length of delay is not per se determinative of whether a defendant has been deprived of his right to a speedy trial. *See State v. Webster*, 337 N.C. 674, 678 (1994). Although there is no specific duration that constitutes a delay of constitutional dimension, delays that exceed one year have been considered "presumptively prejudicial," signaling the point at which courts deem the delay unreasonable enough to

trigger the *Barker* calculus. *See Doggett v. United States*, 505 U.S. 647, 652 n.1 (1992) (recognizing that post-accusation delay is presumptively prejudicial at least as it approaches one year); *Webster*, 337 N.C. at 679 (delay of sixteen months triggered examination of other factors); *State v. Pippin*, 72 N.C. App. 387, 392 (1985) (delay of fourteen months prompted consideration of *Barker* factors); *State v. McCoy*, 303 N.C. 1, 12 (1981) (delay of eleven months was not presumptively prejudicial for a murder case). When the accused makes this showing, the burden of proof "to rebut and offer explanations for the delay" shifts to the State. *See State v. Wilkerson*, 257 N.C. App. 927, 930 (2018).

¶ 22 Here, the trial court failed to recognize the presumption of prejudice to Mr. Farook created by the over six-year delay in his case before undertaking its review of the other *Barker* factors. Mr. Farook was incarcerated for 2,302 days — six years and three months — without a trial. As we have routinely held, and as the Court of Appeals correctly noted, as a delay approaches one year, it is generally recognized as long enough to create a "prima facie showing that the delay was caused by the negligence of the prosecutor." *Wilkerson*, 257 N.C. App. at 930 (quoting *State v. Strickland*, 153 N.C. App. 581, 586 (2002)). Indeed, a delay of over six years is "extraordinarily long," "striking," and "clearly [sufficient to] raise[ ] a presumption that defendant's constitutional right to a speedy trial may have been breached." *Farmer*, 376 N.C. at 414.

¶ 23 Our decision in *McCoy*, in which we held that an eleven-month delay was not presumptively prejudicial for *Barker* purposes, casts no shadow on our conclusion in this case. *See McCoy*, 303 N.C. at 12. The delay in this case far surpasses the eleven-month delay at issue in *McCoy*. Indeed, "the presumption that pretrial delay has prejudiced the accused intensifies over time." *Doggett*, 505 U.S. at 652. The over six-year delay in this case must therefore be considered unreasonable and presumptively prejudicial within the meaning of the Sixth Amendment and is clearly sufficient to shift the burden of proof to the State "to rebut and offer explanations for the delay." *See Wilkerson*, 257 N.C. App. at 930.

¶ 24 The only evidence presented by the State to rebut the presumption of the unreasonableness of the delay in this case was the challenged testimony offered by Mr. Farook's former attorney, Mr. Davis. The *Barker* Court explained that different weights should be assigned to various reasons for delay:

> A deliberate attempt to delay the trial in order to hamper the defense should be weighted heavily against the government. A more neutral reason such

> as negligence or overcrowded courts should be weighted less heavily but nevertheless should be considered . . . . Finally, a valid reason, such as a missing witness, should serve to justify appropriate delay.

Barker, 407 U.S. at 531 (footnote omitted).

¶ 25 Consistent with that explanation, *Barker* recognizes four categories of reasons for delay: (1) deliberate delay on the part of the State, (2) negligent delay, (3) valid delay, and (4) delay attributable to the defendant. 407 U.S. at 531. Although establishing a violation of the speedy trial right does not require proof of an improper prosecutorial motive, because the Sixth Amendment speedy trial guarantee is itself indicative that delay is often detrimental to the criminal defendant, deliberate delay is "weighted heavily" against the State. *Id.* Deliberate delay includes an "attempt to delay the trial in order to hamper the defense[,]" *id.* at 531, or "to gain some tactical advantage over [a defendant] or to harass them[,]" *id.* at 531 n.32 (quoting *United States v. Marion*, 404 U.S. 307, 325 (1971)); *see also Pollard v. United States*, 352 U.S. 354, 361 (1957).

¶ 26 A more neutral reason such as negligent delay or a valid administrative reason such as the complexity of the case or a congested court docket is weighted less heavily against the State than is a deliberate delay. *Barker*, 407 U.S. at 531. However, the fact that the State did not act maliciously in delaying the case does not absolve the State of its responsibility to bring a criminal defendant to trial within a reasonable period. *Id.* Appropriately, such neutral circumstances do not necessarily excuse delay and speedy trial claims nevertheless should be considered when there is a neutral reason for the delay, "since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant." *Id.*; *see also State v. Smith*, 289 N.C. 143, 148–49 (1976) (holding that an eleven-month delay caused by overcrowded court dockets and difficulty in locating witnesses was acceptable); *State v. Hughes*, 54 N.C. App. 117, 119 (1981) (holding that no speedy trial violation occurred when reason for delay was congested dockets and a policy of giving priority to jail cases).

¶ 27 A valid reason for delay, such as delay caused by difficulty in locating witnesses, serves to justify appropriate delay. *Barker*, 407 U.S. at 531. Finally, delays occasioned by acts of the defendant or on his or her behalf are heavily counted against the defendant and will generally defeat his or her speedy trial claim. *See Vermont v. Brillon*, 556 U.S. 81, 89, 94 (2009) (holding that delay caused by defendant's counsel is not attributable to the State and defendant's "deliberate attempt to disrupt

proceedings" was weighted heavily against him); *see also State v. Groves*, 324 N.C. 360, 366 (1989) (holding that no speedy trial violation occurred when defendant repeatedly requested continuances); *State v. Tindall*, 294 N.C. 689, 695–96 (1978) (holding that no speedy trial violation occurred when the delay was caused largely by the defendant absconding from the jurisdiction and living under an assumed name); *Pippin*, 72 N.C. App. at 394 (holding that a speedy trial claim does not arise from delay attributable to defense counsel's requested plea negotiations).

¶ 28 The State asserted below, as it does before this Court, that the overlong delay in this case was caused by Mr. Farook's repeated requests for changes in representation and his acquiescence to Mr. Davis's strategy of delay, both of which it argued must weigh against Mr. Farook in the balance. At the hearing on Mr. Farook's motion to dismiss, Mr. Davis testified that Mr. Farook faced new criminal charges after plea negotiations with the State had failed. The State asked Mr. Davis if he strategized to delay the case once it became clear Mr. Farook would possibly face a violent habitual felon indictment. Mr. Davis answered in the affirmative, avowing that in his experience, delay would work to Mr. Farook's advantage. Mr. Davis testified as follows:

> Q. Now, would you — would you — would it be fair to say that that was a strategic decision in delaying the case from that point based on the discussions of the violent habitual felon?
>
> A. Of course. It's sort of the nature of trial practice, and again, I teach trial practice. Early on, victims are angry, prosecutors are sometimes motivated. Cases almost always get worse for the State over time.
>
> Witnesses leave. Evidence gets lost. Officers retire. I've had — I've done a tremendous number of jury trials. Probably well in excess of a hundred.
>
> Many of them very serious trials, and one of the recurrent themes of jurors is, "Where were these witnesses? Why did the State wait so long?" It greatly diminishes the — the power of the State's case. So, yes, because there were no labs, because people were angry, because the prosecutor was very interested in going after Mr. Farook with the violent habitual felon, all of those dynamics were part of my trial strategy and letting things cool down.

¶ 29 Mr. Davis also attempted to rationalize the delay in Mr. Farook's case through his general testimony about the burdened Rowan County court dockets. During cross-examination, he noted that while he was Mr. Farook's counsel, "at no time" had the case been on a trial calendar, only administrative calendars. Furthermore, Mr. Davis explained that he was under pressure to meet strict deadlines in one case, was "under the gun" with his normal caseload, and had "at least two pending pressing murders." Mr. Davis also emphasized that he told Mr. Farook to request new counsel owing to the prospect that he would be unavailable to represent Mr. Farook at trial "for a year or longer" because he "couldn't even consider [representing Mr. Farook at trial] for a long time." Indeed, Mr. Davis testified about his representation of Mr. Farook, his trial strategy, and the administrative difficulties that plagued the Rowan County courts. Each of these buckets of testimony is significant in analyzing whether Mr. Davis's testimony was improperly admitted. The testimony should have been excluded if it revealed information protected by the attorney-client privilege. *See Sims v. Charlotte Liberty Mut. Ins. Co.*, 257 N.C. 32, 36 (1962) (explaining that if evidence is held to be privileged it is therefore inadmissible).

¶ 30 "The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law." *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). The privilege functions for the public benefit by encouraging clients to communicate with their attorneys freely and fully, fostering the provision of competent legal advice, facilitating the ends of justice, and outweighing the harm that may result from the loss of relevant information. Jack B. Weinstein & Margaret A. Berger, *Weinstein's Evidence Manual* § 18.03[1] (Joseph M. McLaughlin ed., Matthew Bender 2014). For the privilege to apply and thus require the exclusion of relevant evidence, "the relation of attorney and client [must have] existed at the time the [particular] communication was made." *In re Miller*, 357 N.C. 316, 335 (2003) (quoting *State v. McIntosh*, 336 N.C. 517, 523 (1994)).

¶ 31 However, the mere fact that an attorney-client relationship exists does not automatically trigger the attorney-client privilege: the communication sought to be shielded from publication must be confidential. *See Dobias v. White*, 240 N.C. 680, 684 (1954) (noting that simply because "the evidence relates to communications between attorney and client alone does not require its exclusion" because such communications must also be confidential); *see also McIntosh*, 336 N.C. at 523; *State v. McNeill*, 371 N.C. 198, 240 (2018). At common law, "confidential communications made to an attorney in his professional capacity by his

client are privileged, and the attorney cannot be compelled to testify to them unless his client consents." *Dobias*, 240 N.C. at 684.

> A privilege exists if (1) the relation of attorney and client existed at the time the communication was made, (2) the communication was made in confidence, (3) the communication relates to a matter about which the attorney is being professionally consulted, (4) the communication was made in the course of giving or seeking legal advice for a proper purpose although litigation need not be contemplated[,] and (5) the client has not waived the privilege.

State v. Murvin, 304 N.C. 523, 531 (1981). The party asserting the privilege has the burden of establishing each of the essential elements of the privileged communication. *Id.* at 532.

1. Standard of review for unpreserved evidentiary errors

¶ 32 Mr. Davis did not assert the attorney-client privilege or work-product privilege at the hearing on his speedy trial motion. And despite being represented by Mr. Sease at the hearing, there was no objection made on Mr. Farook's behalf to any of Mr. Davis's testimony. Unpreserved evidentiary errors are reviewed by this Court for plain error. *See State v. Lawrence*, 365 N.C. 506, 516 (2012) ("[T]he North Carolina plain error standard of review applies only when the alleged error is unpreserved, and it requires the defendant to bear the heavier burden of showing that the error rises to the level of plain error."). To demonstrate plain error, Mr. Farook must also "establish . . . that, after examination of the entire record," the error had a probable impact on the trial court's decision to deny Mr. Farook's motion to dismiss. *Lawrence*, 365 N.C. at 518 (holding that plain error requires defendant to show the error had a probable impact on the jury's finding that defendant was guilty).

2. The testimonial evidence contained information that was protected by the attorney-client privilege.

¶ 33 We hold that under *Murvin*, the Court of Appeals correctly decided that the attorney-client privilege attached to Mr. Davis's testimony concerning his representation of Mr. Farook, which included both the testimony about his decision to engage in delay and any communications Mr. Davis had with Mr. Farook regarding his decision that flowed therefrom.

¶ 34 First, the attorney-client relationship existed between Mr. Davis and Mr. Farook. Second, all such communications between Mr. Davis and Mr. Farook were made in confidence. Nowhere in the transcript of

Mr. Davis's testimony did Mr. Davis indicate that he communicated his delay strategy in the presence of anyone other than Mr. Farook either directly or indirectly through other attorneys from his office who, acting as Mr. Davis's agents, met with Mr. Farook when Mr. Davis was busy. Specifically, Mr. Davis testified that he sent these attorneys "to routinely make contact with [Mr. Farook]" when he was preoccupied with his other duties as an attorney. It is beyond dispute that the attorney-client privilege also extends to an attorney's agents. *See Murvin*, 304 N.C. at 531 ("Communications between attorney and client generally are not privileged when made in the presence of a third person who is not an agent of either party."). Necessarily, then, the communications at issue related to a matter about which Mr. Davis was professionally consulted and were made in the course of giving Mr. Farook legal advice for a proper purpose.

¶ 35 The State emphasizes the last element under the *Murvin* test, namely, that the attorney-client privilege was waived. According to the State, assuming its existence, Mr. Farook waived the attorney-client privilege by filing his speedy trial motion. However, as the Court of Appeals explained, to demonstrate that Mr. Farook went along with Mr. Davis's trial strategy, and thus that Mr. Farook was the cause of the delay, the State relied upon privileged communications between Mr. Farook and his attorney. The State has failed to demonstrate any exception that would allow the admission of testimony containing such privileged information absent a waiver.

¶ 36 The dissent insists that Mr. Farook waived the protections afforded by the attorney-client privilege concerning Mr. Davis's trial strategy testimony when, in Mr. Farook's pro se motion alleging that Mr. Davis rendered IAC, Mr. Farook asserted that he never agreed to a strategic delay of his trial. In the dissent's view, this declaration in Mr. Farook's IAC motion waived any privilege that may have otherwise applied to Mr. Davis's trial strategy testimony because (1) the declaration constituted a third-party disclosure which was relevant to Mr. Davis's representation of Mr. Farook and (2) it was a declaration Mr. Davis had the authority to respond to under Rule 1.6(b) of the North Carolina Rules of Professional Conduct. The dissent further contends that pursuant to N.C.G.S. § 15A-1415(e), such a waiver of the attorney-client privilege was automatic upon the filing of Mr. Farook's IAC motion, and that being so, the trial court was not required to acknowledge the waiver of attorney-client privilege nor preclude Mr. Davis from testifying to information that was no longer protected by the privilege. This argument ignores long-standing precedent of this Court which establishes that it

is proper, as happened here, for a trial court to disregard motions filed pro se by represented defendants. *See, e.g.*, *State v. Williams*, 363 N.C. 689, 700 (2009) ("Having elected for representation by appointed defense counsel, defendant cannot also file motions on his own behalf. … Defendant was not entitled to file pro se motions while represented by counsel.") (quoting *State v. Grooms*, 353 N.C. 50, 61 (2000) (citations omitted), *cert. denied*, 534 U.S. 838, 122 S. Ct. 93, 151 L. Ed. 2d 54 (2001). Moreover, the argument also rests on a misinterpretation and misapplication of the statute governing IAC claims.

¶ 37 At the outset, it should be noted that the State did not make this argument before the trial court, the Court of Appeals, or this Court. It has been the rule in this Court, at least since 1934, that "[a] party has no right to appear both by himself and by counsel. Nor should he be permitted ex gratia to do so." *Abernethy v. Burns*, 206 N.C. 370, 370-71 (1934). As we said in *State v. Parton*, "[i]t has long been established in this jurisdiction that a party has the right to appear in propria persona or, in the alternative, by counsel. There is no right to appear both in propria persona and by counsel." *State v. Parton*, 303 N.C. 55, 61 (1981). In *State v. Williams*, this principle was the basis for our holding that it was impermissible for the defendant in that case, who was represented by court-appointed counsel, to file a pro se motion to dismiss on speedy trial grounds. *State v. Williams*, 363 N.C. at 700 ("Defendant was represented by appointed counsel and was not allowed to file pro se motions on his behalf.") In this case, Mr. Farook was represented by counsel and was not allowed to file pro se motions. Therefore, such a legal nullity cannot be the basis of any sort of waiver of the attorney-client privilege in these circumstances.

¶ 38 Indeed, the notion that Mr. Farook waived his privilege here is contrary to the statute governing IAC claims.

¶ 39 Subsection 15A-1415(e) provides that the filing of a motion for IAC

> waive[s] the attorney-client privilege with respect to both oral and written communications between such counsel and the defendant to the extent the defendant's prior counsel reasonably believes such communications are necessary to defend against the allegations of ineffectiveness. This waiver of the attorney-client privilege shall be automatic upon the filing of the motion for appropriate relief alleging ineffective assistance of prior counsel, and the superior court need not enter an order waiving the privilege.

N.C.G.S. § 15A-1415(e) (2021). As with all statutes, in interpreting N.C.G.S. § 15A-1415(e) we must look to the intent of the legislature, *State v. Tew*, 326 N.C. 732, 738 (1990), and give meaning to all its provisions. *State v. Bates*, 348 N.C. 29, 35 (1998). "Individual expressions must be construed as a part of the composite whole and be accorded only that meaning which other modifying provisions and the clear intent and purpose of the act will permit." *Tew*, 326 N.C. at 739.

¶ 40 While under N.C.G.S. § 15A-1415(e) the waiver of the attorney-client privilege is automatic upon the filing of a motion alleging IAC with respect to certain information, the statute also provides that the automatically waived communications between a defendant and his attorney are only waived "*to the extent the defendant's prior counsel reasonably believes such communications are necessary to defend against the allegations of ineffectiveness*." N.C.G.S. § 15A-1415(e) (emphasis added). Thus, the italicized clause is a limitation on the context within which the automatic waiver relating to IAC filings is operative. The waiver of certain information has force only to the extent that the information is disclosed when a defendant's attorney "reasonably believes" such disclosure is "necessary to defend against the allegations of ineffectiveness." *See* N.C.G.S. § 15A-1415(e).

¶ 41 The fact that by statute the waiver is deemed automatic upon the filing of a motion alleging an IAC claim does not mean that the scope of the waiver knows no bounds. On the contrary, the statute's use of the "to the extent" expression places a statutory limit on the contexts in which the waived information is available for disclosure. Moreover, the statute contains no express provision for expanding the scope of the waiver beyond the context of the IAC claim. *See also*, *State v. Buckner*, 351 N.C. 401 (2000) (holding that N.C.G.S. § 15A-1415(e) permitted only the discovery of privileged information relevant to the specific IAC claim being litigated).

¶ 42 In this case, Mr. Farook's pro se IAC filing was a legal nullity and never litigated. Consistent with the limiting language in N.C.G.S. § 15A-1415(e), such information, even if waived, was only admissible *to defend against* Mr. Farook's claim of ineffective representation, which necessarily requires that the IAC claim be properly before the trial court. However, it was not.

¶ 43 While the objective and subjective mental processes of Mr. Davis and his communications with Mr. Farook regarding a strategic decision to delay his case may be relevant to the effectiveness of Mr. Davis's representation, pursuant to N.C.G.S. § 15A-1415(e) such information

must also be reasonably *necessary in defending* against an IAC claim. Privileged materials are not subject to the automatic waiver if: (1) they do not concern any matter contested in the IAC proceeding or (2) there is no IAC claim being litigated. Furthermore, N.C.G.S. § 15A-1415(e) cannot be read to imply a waiver of the attorney-client privilege upon the filing of a speedy trial motion, nor can a defendant be required to forfeit one constitutional right as a condition of asserting another. *State v. White*, 340 N.C. 264, 274 (1995) ("A defendant cannot be required to surrender one constitutional right in order to assert another." (citing *Simmons v. United States*, 390 U.S. 377, 394 (1968))); *see also State v. Diaz*, 372 N.C. 493, 500 (2019).

¶ 44 In addition, while Mr. Davis's testimony concerning trial strategy was inadmissible as evidence, the testimony regarding his professional obligations and the backlog of cases that plagued the Rowan County courts was admissible, non-privileged testimony about which Mr. Davis had personal knowledge. Nevertheless, the trial court's order indicates that Mr. Farook's motion to dismiss was denied based in part on the court's reliance on *all* of Mr. Davis's testimony. We therefore leave it to the trial court on remand to reweigh this admissible evidence independently.

¶ 45 The State alternatively contends that Mr. Farook acquiesced to the delay because of his requests for changes in representation. However, even if changes to Mr. Farook's counsel prolonged the pendency of this case, it may be of no constitutional significance if those changes were warranted and necessary. For example, if Mr. Bingham — Mr. Farook's third attorney in the case — withdrew from his role as Mr. Farook's counsel because he had a conflict of interest, any delay that resulted from his withdrawal was warranted and should not be attributable to, nor held against, Mr. Farook. Additionally, any delay that could be imputed to Mr. Farook because of his requests for changes in counsel would only explain part of the delay in a case that spanned over six years — a case that remained pending because the State did not call the case for trial when it had the opportunity to do so on at least *nine* separate occasions over the years. The trial court acknowledged that Mr. Bingham "was almost immediately appointed" when Mr. Farook sought substitute counsel in 2017, but the court did not explain whether the change in counsel in 2017 weighed against Mr. Farook when it decided the State did not intentionally delay the case. On remand, the trial court can evaluate what weight, if any, should be given to this fact in assigning responsibility for the delay in this case.

¶ 46 Lastly, the State argues that the Court of Appeals improperly expanded the scope of the attorney-client privilege. However, the Court

of Appeals acknowledged that if Mr. Davis's testimony regarding court calendars in Rowan County and his other obligations as an attorney was not privileged, the trial court could have limited his testimony to this non-privileged information. *Farook*, 274 N.C. App. at 84. Additionally, the State could have presented testimony from the clerk of court or a prosecutor regarding the court's docket and its explanation for the failure to call Mr. Farook's case for trial. *Id.* at 78. For whatever reason, the trial court and the State did neither.

¶ 47 Applying the *Murvin* test to the facts of this case, Mr. Farook has established that the trial court's erroneous admission of privileged testimony was plain error. The trial court relied on Mr. Davis's testimony in weighing the reason-for-delay factor against Mr. Farook and in favor of the State.[2] The court summed up the reasons for the delay as administrative encumbrances such as "the extensive backlog in Superior Court cases." Further, the court found that the State had taken no actions to deliberately delay the trial, had not been negligent in bringing the case to trial, and that Mr. Farook contributed to the delay through acquiescence. Because Mr. Davis was the State's only witness from which this evidence was drawn out, then necessarily, these conclusions can only be based on his testimony. Thus, the erroneous admission of this evidence, and the trial court's reliance thereon, "seriously affect[ed] the fairness [and] integrity" of the judicial proceeding and had a probable impact on its decision to deny the motion to dismiss. *Lawrence*, 365 N.C at 515 (first alteration in original) (quoting *United States v. Atkinson*, 297 U.S. 157, 160 (1936)).

¶ 48 The trial court's conclusion, in conjunction with the weight it accorded to the other factors, resulted in the denial of Mr. Farook's speedy trial claim. We therefore hold that the trial court plainly erred in allowing Mr. Davis to testify to privileged communications and confidential trial strategy. On remand, the court is free to consider any other competent evidence the State may offer relevant to the reasons for the delay of the trial in this case. And having found that sufficient time elapsed between Mr. Farook's arrest and his trial, and thus that the *Barker* test

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2. To the extent that the dissent is contending that privileged information concerning conversations between Mr. Farook and his attorney is discoverable and admissible because otherwise, the State would have difficulties proving that defense counsel had an impermissible strategy of delay, that argument would virtually eliminate the privilege. It simply cannot be correct that because the attorney-client privilege makes it difficult to show delay, the privilege can be abandoned. Such a rule would allow the State to call defense counsel to testify about what the defendant said about the underlying facts of the case, any time such testimony would make the State's case easier to prove.

is implicated, on remand the trial court must also independently weigh the length of the delay among the other factors. The longer the delay, the more heavily this factor weighs against the State. *See Farmer*, 376 N.C. at 414, 416 (holding that a delay of five years, two months, and twenty-four days was extraordinarily long and weighed against the State); *Doggett*, 505 U.S. at 657–58 (holding that a delay of more than eight years required relief).

B. Under the *Barker* test, the trial court misapplied the proper standard for evaluating prejudice to defendant resulting from the delay.

¶ 49 **[2]** To assess whether the defendant has suffered prejudice from the delay in bringing his case to trial, courts should analyze three interests identified by the *Barker* Court that are affected by an unreasonable delay: (1) oppressive pretrial incarceration; (2) the social, financial, and emotional strain and anxiety to the accused of living under a cloud of suspicion; and (3) impairment of the ability to mount a defense to the charges pending against the defendant. *Barker*, 407 U.S. at 532; *see also Webster*, 337 N.C. at 680–81; *Farmer*, 376 N.C. at 418 (stating that the possibility that the defense will be impaired is the most serious component of *Barker* prejudice). The United States Supreme Court warned in *Barker* that none of the four factors in the balancing scheme are "either a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial," and further, that because these factors "have no talismanic qualities," they must be considered together with the relevant circumstances set forth in each case. *Barker*, 407 U.S. at 533.

¶ 50 Later, vacating a decision concluding that a showing of actual prejudice is essential, the United States Supreme Court held that this language from *Barker* "expressly rejected the notion that an affirmative demonstration of prejudice was necessary to prove a denial of the constitutional right to a speedy trial." *Moore v. Arizona*, 414 U.S. 25, 26 (1973) (per curiam). In a similar fashion, the Court recognized in *Doggett* that when the delay is inordinate and undue it may be impossible for the defendant to produce evidence of demonstrable prejudice "since excessive delay can compromise a trial's reliability in unidentifiable ways." *Doggett*, 505 U.S. at 648. As a result, the Court recognized in *Doggett* that a lengthy delay coupled with the absence of any rebuttal to the presumption of prejudice created by that delay should result in a finding of prejudice. *Id.* at 658. In *Doggett*, the government protested that the defendant failed to make an affirmative showing that the delay in the case impaired his ability to defend against the charges against him. *Id.* at 655. Though the Court agreed that the defendant did not make such

a showing, it recognized that this argument did not settle the issue. *Id.* at 655–56. Instead, the Court emphasized that actual and particularized prejudice to the defendant is not essential to every speedy trial claim. *Id.* at 655.

¶ 51 *Barker* and its progeny make clear that one of the purposes of the speedy trial guarantee is to protect against those forms of prejudice that are so axiomatic as to require no affirmative proof. *Doggett*, 505 U.S. at 655. The failure to show actual prejudice to the defense is not fatal per se to a speedy trial claim. Thus, "presumptive prejudice" along with the fact that the other factors are found to tip the scales in a defendant's favor may be enough to require dismissal of the charges, especially when there is no justification presented by the government. *See id.* (declaring the defendant had done enough to secure dismissal on speedy trial grounds, recognizing that "excessive delay presumptively compromises the reliability of a trial in ways that neither party can prove or, for that matter, identify"). And as the Court clarifies in *Doggett*, a criminal defendant may establish prejudice for purposes of his speedy trial claim through proof of either actual prejudice or presumptive prejudice. *Id.*

¶ 52 In this case, the trial court misapplied the standard for assessing prejudice in two ways. The trial court first erred in finding that "the State has been significantly prejudiced by the length of the delay." So finding, the trial court misapprehended the *Barker* requirement and improperly identified the State, rather than Mr. Farook, as the prejudiced party. That requirement was, in the trial court's view, met by the prejudice suffered by the State from the six-year delay in bringing the case to trial. In fact, the State has the calendaring authority to set a case for trial. *See Farmer*, 376 N.C. at 412 (demonstrating that the State retains the authority and ability to calendar a case for trial through an acknowledgement that within four months of the *Farmer* defendant's assertion of his right to a speedy trial, his case was calendared and tried); N.C.G.S. § 7A-49.4(a) (2021) (stating that criminal cases in superior court shall be calendared by the district attorney). Furthermore, the Sixth Amendment right to a speedy trial is a right granted to the defendant. *See* U.S. Const. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . ."). The speedy trial guarantee is a constitutionally granted shield against unreasonably sluggish prosecutorial conduct that is oppressive to the defendant and hostile to the fair administration of justice.

¶ 53 Second, the trial court erred in concluding that the prejudice factor weighed decisively against Mr. Farook because he did not prove actual prejudice. As we have emphasized, the trial court may not find

that a criminal defendant's speedy trial claim is doomed merely because he does not demonstrate actual prejudice. On remand, the trial court should assess the extent to which Mr. Farook was prejudiced by the delay in this case under the proper standard articulated herein.

V. Conclusion

¶ 54 In *Beavers v. Haubert*, the United States Supreme Court emphasized that a reviewing court's scrutiny of a speedy trial claim depends not on a bright-line rule but is governed by the context and factual circumstances particular to each individual defendant's case. 198 U.S. 77, 87 (1905); *see also Barker*, 407 U.S. at 522. The ad hoc considerations prescribed in *Beavers* reflected the Court's sensitivity to balancing the competing interests of the government and the criminal defendant. No single *Barker* factor is, in itself, either necessary or sufficient to find a violation of the speedy trial right; instead, "they are related factors and must be considered together with such other circumstances as may be relevant." *Barker*, 407 U.S. at 533; *see also Spivey*, 357 N.C. at 118. The *Beavers* Court explained: "The right of a speedy trial is necessarily relative. It is consistent with delays and depends upon circumstances. It secures rights to a defendant. It does not preclude the rights of public justice." *Beavers*, 198 U.S. at 87; *see also State v. Neas*, 278 N.C. 506 (1971). In reviewing speedy trial claims, trial courts must be sensitive to the interests of the State and the defendant, with an eye toward fairness as the *Barker* test compels.

¶ 55 For the reasons set forth above, we remand this case to the Court of Appeals for further remand to the trial court. On remand, the trial court should consider any competent, non-privileged evidence of the reason for the delay in this case. It also must assess the extent to which Mr. Farook asserted his speedy trial right and the extent to which he was prejudiced by the delay in light of the proper standard by which such prejudice is to be determined. Finally, the trial court may receive additional evidence by both parties to establish the necessary quantum of proof on each *Barker* factor to be weighed to determine whether Mr. Farook's Sixth Amendment speedy trial right was abridged such that his motion to dismiss should be granted and his convictions vacated.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

Justice BERGER dissenting.

¶ 56 By improperly removing the burden of proof from defendant and placing it squarely on the shoulders of the State, the majority effectively

holds that the mere passage of time entitles a defendant to relief on a motion to dismiss for a purported speedy trial violation. In addition, the majority eliminates the requirement under *Barker* that a defendant demonstrate prejudice caused by the delay. Finally, the majority offers the shelter of privilege to defense counsel's testimony despite the waiver of such privilege by defendant himself. Because defendant waived the attorney-client privilege, failed to prove that delay was attributable to the State, and failed to show prejudice, I respectfully dissent.

¶ 57 On June 17, 2012, defendant killed Tommy and Suzette Jones when defendant crossed the centerline of the road in his vehicle and collided with the couple's motorcycle. A witness to the collision testified that defendant stepped out of his vehicle following the crash, observed the bodies of Mr. and Mrs. Jones, and fled the scene on foot. Defendant was later charged with two counts of felony death by vehicle, felony hit and run resulting in death, driving while impaired, reckless driving to endanger, driving left of center, driving with a revoked license, and resisting a public officer.[1]

¶ 58 Defendant was represented by four different attorneys prior to filing his motion to dismiss for an alleged speedy trial violation in September 2018. Defendant's first attorney, James Randolph, was appointed in July 2012 following defendant's arrest. Soon after, however, on August 6, 2012, Mr. Randolph withdrew as defendant's counsel upon realizing that other members of his law firm were working with the family of the victims.

¶ 59 James Davis, defendant's second attorney, was appointed on or about August 27, 2012. While the majority notes that Mr. Davis was not appointed until December 2014 in its analysis, this date merely reflects when an administrative order of assignment was entered, and use of this date by the majority is contrary to the information in the record. Defendant stated in a pro se motion to dismiss for ineffective assistance of counsel that Mr. Davis was appointed on August 28, 2012. Mr. Davis testified that he was appointed "on or about August 27, 2012" and included this date in his written motion to withdraw. Further, evidence in the record indicates that Mr. Davis received discovery for defendant's case in December 2012 and engaged in discussions with the State regarding defendant's pending violent habitual felon indictment as early as March 2013. An honest review of the record leads to use of the August 27, 2012 date as the date Mr. Davis was appointed as defense counsel.

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1. Defendant was subsequently indicted on two counts of second-degree murder and attaining violent habitual felon status.

This obviously impacts the majority's characterization of the delay attributable to counsel for defendant. While the majority acknowledges in a footnote that there is "some evidence in the record tending to suggest that Mr. Davis began representing Mr. Farook in 2012," the majority nonetheless characterizes the delay attributable to defendant as three years. In reality, delay attributable to Mr. Davis alone was closer to five years.

¶ 60 Mr. Davis entered into plea negotiations with the State; however, he filed a motion to withdraw as defendant's counsel on June 30, 2017, after defendant rejected a plea offer from the State. In other words, when Mr. Davis understood that defendant's case would proceed to trial instead of being resolved through a plea, he sought to withdraw from representation.

¶ 61 In acknowledging this was "a very important case" given it involved a violent habitual felon indictment, Mr. Davis testified that his workload would not allow him to adequately prepare for defendant's trial. Mr. Davis indicated that he could not be prepared for trial until summer 2018, even though the State wanted to calendar the case for trial in 2017. Mr. Davis was permitted to withdraw, and David Bingham was appointed as defendant's third attorney on July 5, 2017. The case was placed on an administrative calendar for August 7, 2017.

¶ 62 On September 11, 2017, defendant filed a pro se "Motion to Dismiss Appointed Attorney" requesting Mr. Bingham be dismissed as defendant's counsel.[2] According to defendant, Mr. Bingham was not looking after defendant's best interests and had informed defendant that he would "be found guilty of all charges."

¶ 63 On September 14, 2017, Mr. Bingham filed a motion requesting that the trial court appoint a private investigator to interview witnesses and to "help [defendant] locate and establish alibi witnesses." There is no indication in the record that any other attorney appointed to represent defendant on these charges had applied for assistance in investigating defendant's case. On September 13, 2017, Mr. Bingham filed a motion to withdraw as counsel for defendant. The trial court entered an order granting Mr. Bingham's motion on September 25, 2017.

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2. There is also a letter in the record from defendant to Mr. Bingham dated August 2, 2017. It is unclear if this letter was sent to the clerk's office or directly to Mr. Bingham. In the letter, defendant informs Mr. Bingham that he wants Mr. Bingham to withdraw from the case and provides Mr. Bingham with a list of three attorneys he would prefer to have appointed to represent him.

¶ 64 On that same day, Chris Sease was assigned as the fourth appointed attorney to represent defendant in this case. Between August 2012 and the time Mr. Sease was appointed, defendant's case was calendared but not reached at least eight times. In further examining this time period, the trial court found that from the time defendant killed Mr. and Mrs. Jones until June 2016, there was "an extensive backlog in Superior Court cases" in Rowan County and "the State [had] tried mostly cases older than [d]efendant's."[3]

¶ 65 Despite representation by Mr. Sease, defendant filed a pro se motion on September 4, 2018, alleging ineffective assistance of counsel and seeking dismissal of the charges against him. The motion stated that Mr. Davis did not speak with or visit defendant in jail for more than four-and-a-half years, from August 2012 until March 2017. Defendant further alleged that the delay by Mr. Davis resulted in prejudice to defendant, and defendant claimed to have "never agreed to the delay of his trial."

¶ 66 On September 13, 2018, defendant filed another pro se motion to dismiss, this time alleging a speedy trial violation and ineffective assistance of counsel. Defendant again alleged Mr. Davis did not speak with him about his case for more than four-and-a-half years and that Mr. Bingham informed defendant that he would be found guilty.

¶ 67 Mr. Sease filed a motion to dismiss for a speedy trial violation on September 18, 2018, and alleged the following:

> 8. That the [d]efendant entered a plea of [n]ot [g]uilty . . . in Superior Court on August 13, 2012.
>
> 9. That the [d]efendant's case was not calendared again until the week of February 18, 2013, almost six months later. Said case was not reached. . . .
>
> 10. That the [d]efendant's case was not calendared for trial again until the week of March 19, 2013. Said case was not reached. . . .
>
> 11. That the [d]efendant's case was not calendared for trial again until the week of April 16, 2013. . . .

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3. This Court recently found that there was no speedy trial violation in another case from Rowan County during this same time period. In *State v. Farmer*, 376 N.C. 407, 412, 852 S.E.2d 334, 339 (2020), Justice Morgan, writing for the majority, weighed the *Barker* factors, including "crowded criminal case dockets," and determined that a delay of five years from 2012 to 2017 of the trial of the defendant's sexual abuse charges did not violate the defendant's constitutional right to a speedy trial.

> 12. That the [d]efendant's case was not calendared again until July 15, 2015, almost 27 months later. Said case was not reached. . . .
>
> 13. That the [d]efendant's case was not calendared again until July 27, 2015. Said case was not reached. . . .
>
> 14. That the [d]efendant's case was not calendared again until February 13, 2017, almost 19 months later. Said case was not reached. . . .
>
> . . . .
>
> 16. That [d]efendant's case was calendared for the week of July 5, 2017. Said case was not reached. . . .
>
> 17. That the [d]efendant's case was not calendared again until August 29, 2017. Said case was not reached. . . .
>
> 18. That the [d]efendant's case was not calendared again until September 26, 2017. Said case was not reached. . . .
>
> 18. [sic] That the case was not calendared until January 8, 2018. Said case was not reached for trial.

¶ 68 Defendant offered no further evidence in support of his contention that his right to a speedy trial had been violated by the State. While defendant's motion does not state the reason defendant's case was not reached on each date, his case was "calendared for trial" at least twice during Mr. Davis's representation. In a section of the order denying defendant's motion to dismiss entitled "Timeline," the trial court stated that "[Mr.] Davis tried approximately 18 jury trials in Rowan County criminal superior [court] between 2013 and 2017 along with countless criminal and civil district court trials. Additionally, during the time [Mr.] Davis represented [d]efendant[,] he represented 7 other defendant[s] charged with first degree murder, some of which are still pending."

¶ 69 Defendant argues, and the majority agrees with the Court of Appeals, that the testimony provided by Mr. Davis, a very experienced trial attorney, disclosed information protected by attorney-client privilege. Additionally, the majority holds that the trial court erred in its application of the *Barker* factors. Both determinations are contrary to existing law.

I. Attorney-Client Privilege

¶ 70 "It is well settled that communications between an attorney and a client are privileged under proper circumstances." *State v. Bronson*, 333 N.C. 67, 76, 423 S.E.2d 772, 777 (1992). In accordance with this privilege, the protection is extended "not only [to] the giving of professional advice to those who can act on it but also the giving of information to the lawyer to enable him to give sound and informed advice." *Upjohn Co. v. United States*, 449 U.S. 383, 390, 101 S. Ct. 677, 683, 66 L. Ed. 2d 584, 592 (1981). Nevertheless, "the mere fact the evidence relates to communications between attorney and client alone does not require its exclusion." *Dobias v. White*, 240 N.C. 680, 684, 83 S.E.2d 785, 788 (1954). Courts are obligated to strictly construe the attorney-client privilege and limit it to the purpose for which it exists. *State v. Smith*, 138 N.C. 700, 703, 50 S.E. 859, 860 (1905).

¶ 71 Because the privilege is a protection belonging to the defendant, it may be waived by him at any time. *See State v. Tate*, 294 N.C. 189, 193, 239 S.E.2d 821, 825 (1978). For example, a defendant's decision to disclose the substance of communications that would otherwise be privileged to a third party waives confidentiality. *See State v. Fair*, 354 N.C. 131, 168, 557 S.E.2d 500, 525–26 (2001) (finding waiver of attorney-client privilege where defendant presented the substance of the communication to the jury as part of his defense). The rationale behind this type of waiver is indeed a logical one: once a party makes a third-party disclosure, thereby sharing privileged information with someone other than their attorney, the purpose of keeping such information confidential is no longer implicated.

¶ 72 In addition, waiver of the privilege may occur in the context of claims involving the quality of an attorney's representation of a criminal defendant. N.C.G.S. § 15A-1415(e) (2021); *see also* N.C. R. Prof'l Conduct r. 1.6(b) (N.C. State Bar 2017) (authorizing attorneys "to respond to allegations in *any* proceeding concerning the lawyer's representation of the client[.]" (emphasis added)). Subsection 15A-1415(e) provides that the filing of a motion for ineffective assistance of counsel

> waive[s] the attorney-client privilege with respect to both oral and written communications between such counsel and the defendant to the extent the defendant's prior counsel reasonably believes such communications are necessary to defend against the allegations of ineffectiveness. This *waiver of the attorney-client privilege shall be automatic upon the filing* of the motion for appropriate relief

> alleging ineffective assistance of prior counsel, and the superior court need not enter an order waiving the privilege.

N.C.G.S. § 15A-1415(e) (2021) (emphasis added); *see also State v. Buckner*, 351 N.C. 401, 406, 527 S.E.2d 307, 310 (2000) ("[W]aiver of the attorney/client privilege [is] automatic upon the filing of the allegations of ineffective assistance of counsel . . . ."). However, the waiver is limited "to matters relevant to his allegations of ineffective assistance of counsel." *State v. Taylor*, 327 N.C. 147, 152, 393 S.E.2d 801, 805 (1990).

¶ 73 In addressing the State's argument that defendant waived any privilege that might have applied to defense counsel's testimony, the majority here notes that in order to demonstrate defendant "went along with Mr. Davis's trial strategy" of delay, "the State relied upon privileged communications between [defendant] and his attorney." The majority goes on to say that because "[t]he State has failed to demonstrate any exception that would allow admission" of such testimony, the testimony of Mr. Davis is protected. In using this circular reasoning, however, the majority discounts the ineffective assistance of counsel claim filed by defendant and the contents thereof. Moreover, the majority declines to address the fact that defendant failed to object to Mr. Davis's testimony. To the contrary, defendant cross-examined Mr. Davis regarding information which defendant now claims is subject to the attorney-client privilege.

¶ 74 It is uncontested that defendant was in custody for an extended period of time while awaiting trial for killing Mr. and Mrs. Jones. Defendant filed an ineffective assistance of counsel claim alleging the existence of a dilatory strategy that, according to defendant, was unilaterally developed by Mr. Davis. In filing this claim against his previous attorney, defendant launched serious allegations concerning Mr. Davis and the quality of his representation that, based on the majority opinion, may have violated the Rules of Professional Conduct. Defendant's ineffective assistance of counsel claim contained specific allegations of ineffective representation and a voluntary disclosure of privileged information, both of which result in a waiver of the attorney-client privilege.

¶ 75 Defendant's September 4, 2018, ineffective assistance of counsel claim specifically addressed Mr. Davis's strategy in delaying trial to receive a more favorable outcome for defendant. Defendant alleged that his defense counsel "never instructed on speedy trial, or delay o[f] . . . defendant['s] trial[,]" and thus defendant "never agreed to the delay of his trial." The mere filing of this document waived the attorney-client

privilege. N.C.G.S. § 15A-1415(e); *see also Buckner*, 351 N.C. at 406, 527 S.E.2d at 310. To be clear, and as the majority correctly notes, waiver is necessarily limited "to matters relevant to his allegations of ineffective assistance of counsel." *Taylor*, 327 N.C. at 152, 393 S.E.2d at 805. Defendant thus forfeited confidentiality with respect to the apparent five-year delay strategy employed by Mr. Davis. Mr. Davis's testimony during the hearing was directly related to this allegation. Defendant did not object to this testimony, and the trial court was not otherwise required to acknowledge or address the waiver of the attorney-client privilege. *See* N.C.G.S. § 15A-1415(e) (a trial court "need not enter an order waiving the privilege.").

¶ 76 In addition, N.C.G.S. § 15A-1415(e) does not expressly limit the context in which an attorney may address allegations of ineffectiveness, only that "prior counsel reasonably believes [disclosure is] necessary to defend against the allegations of ineffectiveness." N.C.G.S. § 15A-1415(e).

¶ 77 The speedy trial issue is directly related to defendant's claim of ineffective assistance of counsel. Filed only days before the speedy trial hearing, defendant's own pro se motion to dismiss based on a "lack of speedy trial" focused on the alleged inaction by Mr. Davis. Similarly, the motion to dismiss based on a speedy trial violation filed by defendant's counsel discussed the appointment of defendant's various attorneys and the lapse of time leading up to trial. Mr. Davis merely provided an explanation countering the allegations against him and his representation when he testified at the hearing. Mr. Davis obviously believed disclosure was necessary to defend against defendant's assertions of gross violations of the Rules of Professional Conduct, and the nexus between the limited testimony of Mr. Davis and the speedy trial motions is far from the majority's characterization of a "waiver [that] knows no bounds."

¶ 78 The majority holds that the State may be in violation of defendant's right to a speedy trial, not because of any action (or inaction) shown on the part of the State, but rather because the State cannot access evidence relating to defense counsel's strategy of delay. Delay in criminal cases is a common strategy. As Mr. Davis testified, delaying disposition of criminal cases is the "nature of trial practice," and it is in no way unique to this defendant. *See Vermont v. Brillon*, 556 U.S. 81, 90, 129 S. Ct. 1283, 1290, 173 L. Ed. 2d 231, 240 (2009) (acknowledging "the reality that defendants may have incentives to employ a delay as a 'defense tactic,' " as such a delay may " 'work to the accused's advantage' because 'witnesses may become unavailable or their memories may fade' over time." (quoting *Barker v. Wingo*, 407 U.S. 514, 521, 92 S. Ct. 2182, 2187,

33 L. Ed. 2d 101, 111 (1972)). Under the majority's theory, a defendant could initially consent to a delay for strategic purposes, subsequently file a motion to dismiss for a speedy trial violation, and later preclude counsel's testimony concerning the delay strategy on the basis of the attorney-client privilege. We should be particularly concerned with determining whether such an approach was employed by defendant or defense counsel, especially in light of the fact that "[d]ilatory practices bring the administration of justice into disrepute." N.C. R. Prof'l Conduct r. 3.2, cmt. 1.

¶ 79 In addition to waiver under N.C.G.S. § 15A-1415(e), the privilege between attorney and client evaporates the moment such privileged communications are shared beyond that relationship. Based on the record here, defendant voluntarily disclosed to the world that a strategy of delay had been utilized by his attorney without his consent. The content of defendant's motion waived the attorney-client privilege. Even though defendant was represented by counsel, he voluntarily disclosed information related to representation by Mr. Davis.[4] Defendant now invites this Court to reimpose these protections, despite having waived his privilege and having failed to object or otherwise argue the same in the trial court. This is not only an improper application of privilege, but, as discussed below, it directly impacts the *Barker* analysis on defendant's speedy trial claim.

¶ 80 Because there was no error in the admission of Mr. Davis's testimony in the trial court, there can be no plain error.

II. *Barker* Factors

¶ 81 Our nation's highest court has identified four factors that "courts should assess in determining whether a particular defendant has been deprived of his right" to a speedy trial. *Barker v. Wingo*, 407 U.S. 514, 530, 92 S. Ct. 2182, 2192, 33 L. Ed. 2d 101, 117 (1972). These factors include: (1) the length of delay, (2) the reason for delay, (3) the defendant's assertion of his right to a speedy trial, and (4) whether the defendant was prejudiced as a result. *Id.*; *see also State v. Flowers*, 347 N.C. 1, 27, 489 S.E.2d 391, 406 (1997), *cert. denied*, 522 U.S. 1135, 118 S. Ct. 1094, 140 L. Ed. 2d 150 (1998). In adopting *Barker*'s "permeating principles," this Court has recognized that no one factor is sufficient to show a deprivation of the right, and courts must "engage in a difficult and sensitive

4. The majority's reliance on *State v. Williams*, 363 N.C. 689, 686 S.E.2d 493 (2009), is misplaced. *Williams* simply stands for the proposition that once a criminal defendant is appointed counsel, he or she has no right to a ruling by the court on any pro se motions. *Id.* at 700, 686 S.E.2d at 501. *Williams* does not state or imply that information contained in pro se filings has no legal consequence.

balancing process" that requires analysis of any "circumstances [that] may be relevant." *State v. Farmer*, 376 N.C. 407, 419, 852 S.E.2d 334, 343–44 (2020) (quoting *Barker*, 407 U.S. at 533, 92 S. Ct. at 2193, 33 L. Ed. 2d at 118–19). Ultimately, this allows courts to assess "whether the government or the criminal defendant is more to blame for th[e] delay." *Brillon*, 556 U.S. at 90, 129 S. Ct. at 1290, 173 L. Ed. 2d at 240 (alteration in original) (quoting *Doggett v. United States*, 505 U.S. 647, 651, 112 S. Ct. 2686, 2691, 120 L. Ed. 2d 520, 528 (1992)).

¶ 82 In accordance with this approach, this Court has cautioned that the first factor—the length of delay—is not determinative of whether a defendant has been denied a speedy trial. *State v. Webster*, 337 N.C. 674, 678, 447 S.E.2d 349, 351 (1994). While "lower courts have generally found postaccusation delay 'presumptively prejudicial' at least as it approaches one year," such a finding only instructs that further analysis into the remaining *Barker* factors is appropriate. *Doggett*, 505 U.S. at 652 n.1, 112 S. Ct. at 2691 n.1, 120 L. Ed. 2d at 528 n.1. In other words, a proper *Barker* inquiry merely proceeds to analysis of the remaining factors following a post-accusation delay of more than one year.

¶ 83 As to the second factor—the reason for delay—this Court has consistently held that a "defendant has the burden of showing that the delay was caused by the *neglect or willfulness* of the prosecution." *Farmer*, 376 N.C. at 415, 852 S.E.2d at 341 (quoting *State v. Spivey*, 357 N.C. 114, 119, 579 S.E.2d 251, 255 (2003)); *see also Webster*, 337 N.C. at 679, 447 S.E.2d at 351; *State v. McKoy*, 294 N.C. 134, 141, 240 S.E.2d 383, 388 (1978) ("Thus the circumstances of each particular case must determine whether a speedy trial has been afforded or denied, and the *burden is on an accused who asserts denial of a speedy trial to show that the delay was due to the neglect or wilfulness of the prosecution*." (emphasis added)). This ensures that "[a] defendant who has himself caused the delay, or acquiesced in it, will not be allowed to convert the guarantee [of a speedy trial], designed for his protection, into a vehicle to escape justice." *State v. Johnson*, 275 N.C. 264, 269, 167 S.E.2d 274, 278 (1969).

¶ 84 "Only *after* the defendant has carried his burden of proof by offering *prima facie* evidence showing that the delay was caused by the neglect or willfulness of the prosecution must the State offer evidence fully explaining the reasons for the delay and sufficient to rebut the *prima facie* evidence." *Spivey*, 357 N.C. at 119, 579 S.E.2d at 255 (emphasis added). The analysis into whether a defendant was deprived of a speedy trial is concerned with "purposeful or oppressive" delays on the part of the State, not those that happen in good faith or in the normal course. *Id.* (quoting *Johnson*, 275 N.C. at 273, 167 S.E.2d at 280).

Indeed, neither "a defendant nor the State can be protected from prejudice which is an incident of ordinary or reasonably necessary delay." *Id.* (quoting *Johnson*, 275 N.C. at 273, 167 S.E.2d at 280).[5]

¶ 85 The trial court denied defendant's motion to dismiss, concluding that his right to a speedy trial had not been violated. The trial court correctly found that the length of delay in defendant's case was not determinative but that delay merely triggered further examination of the *Barker* factors. The trial court went on to find specifically that

> the State had an extensive backlog in Superior Court cases. From the week of July 2nd, 2012 through June 27th, 2016 the State tried mostly cases older than [d]efendant's case . . . . In the instant case, law enforcement found blood on the driver's side airbag of the Saturn Sedan involved in the crash. The airbag, along with a cheek swab of [d]efendant's DNA was sent to the State Crime Lab for analysis. The State even filed a rush request in attempts to have the State Crime Lab conduct the DNA analysis more quickly. The DNA report was returned approximately three years after the date of offense. This delay is all consistent with a good-faith delay allowing the State to gather evidence "which [was] reasonably necessary to prepare and present its case." *Johnson*, 27[5] N.C. at 273, 167 S.E.2d at 280.

¶ 86 Once DNA testing had been completed, prosecutors and Mr. Davis began discussing disposition of the case and scheduling. Calendaring the case was difficult due to the backlog in Rowan County. This backlog led to a request by the State to secure the assistance of the North Carolina Conference of District Attorneys. Defendant refused to accept a plea offered by the State, and subsequently, defendant was indicted on additional charges. Upon defendant's rejection of the plea, Mr. Davis chose to withdraw due to his workload.

¶ 87 Mr. Bingham was then appointed. He withdrew as counsel for defendant "within three months" of being appointed after defendant requested the change in counsel. It was defendant's actions here that the trial court determined "delay[ed] the case further."

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5. This is contrary to the majority's suggestion that only a defendant can be prejudiced and that it was error under *Barker* for the trial court to conclude that "the State has been significantly prejudiced by the length of the delay." As our caselaw instructs, a finding of prejudice to the State is not a "misapprehen[sion] [of] the *Barker* requirement[s]" nor an "improper[ ] identifi[cation]" by a trial court as the majority contends.

¶ 88 After Mr. Sease, defendant's fourth attorney, was appointed in September 2017, scheduling orders were entered. The trial court found that "[d]efendant never objected or even asked for a sooner trial date[,]" and, in fact, he "consented to his trial date."

¶ 89 The trial court ultimately concluded that the second *Barker* factor weighed against defendant, finding that the delays in defendant's case were reasonable and that defendant failed to prove that "the State acted negligently or willfully in delaying [d]efendant's trial."

¶ 90 Regarding the third factor, the trial court determined that defendant had failed to file a demand for a speedy trial and that his motion to dismiss for an alleged speedy trial violation was filed only one week before the actual trial of his case. Thus, the trial court determined that the third factor—assertion of the right by defendant—"weighs heavily against [d]efendant's claim."

¶ 91 Fourth and finally, as to the prejudice factor, the trial court found that

> [d]efendant does not allege that he has suffered from increased anxiety or concern. In addition, there has been no evidence as to how his incarceration has resulted in loss of witnesses or his ability to prepare a defense for his case.[6] *In actuality, the State has been significantly prejudiced by the length of the delay.* Many of the State's witnesses have retired from law enforcement and civilian witnesses have moved and changed phone numbers. Two witnesses that would have significantly helped the State are unable to be located. . . . Even though [d]efendant has been incarcerated, [d]efendant has actually benefitted from the time elapsed in regards to the State's evidence against him at trial.

(Emphasis added.)

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6. The failure of defendant's four attorneys to secure an investigator for more than five years certainly must be a circumstance overlooked by the majority. *See Vermont v. Brillon*, 556 U.S. 81, 91, 129 S. Ct. 1283, 1291, 173 L. Ed. 2d 231, 241 (2009) (noting that it was error to "attribut[e] to the State delays caused by the failure of several assigned counsel to move [his] case forward" (cleaned up)). Thus, it is improper to attribute to the State delays caused by the failure of defendant's counsel to investigate and locate any other potential witnesses to move defendant's case forward. It is worth noting that the witnesses defendant intended to call at trial were family members who were readily available.

¶ 92 Based on the trial court's findings, defendant's motion to dismiss for a speedy trial violation was denied. In citing to this Court's decision in *State v. Grooms*, 353 N.C. 50, 62, 540 S.E.2d 713, 724 (2000), the trial court here correctly identified that the "burden is on an accused" to demonstrate that the State was the reason for the delay. While the trial court did not directly acknowledge the lack of evidence provided by defendant, the trial court nonetheless correctly concluded that "[t]here has been no showing how the State acted negligently or willfully in delaying [d]efendant's trial" based on a comprehensive analysis of the record. The majority makes the same error as the Court of Appeals and assumes the role of factfinder, summarily rejecting any possibility that the delay resulted from defendant.

¶ 93 Despite clear precedent instructing that "we do not determine the right to a speedy trial by the calendar alone," *State v. Wright*, 290 N.C. 45, 51, 224 S.E.2d 624, 628 (1976), the majority here does just that. The majority effectively concludes that the length of time between defendant's arrest and his motion to dismiss is all the evidence necessary to suggest that the delay was a result of the State's willful or negligent acts. To be clear, defendant presented no evidence to demonstrate willfulness or negligence by the State despite the burden of proof at that juncture resting solely with him. *See Spivey*, 357 N.C. at 119, 579 S.E.2d at 255.

¶ 94 In *Spivey*, this Court examined an alleged speedy trial violation where the defendant had been held in custody pretrial for approximately four-and-a-half years. The defendant argued only that "because over four and one-half years elapsed between his arrest and trial, he was denied his constitutional right to a speedy trial." 357 N.C. at 118, 579 S.E.2d at 254. This Court, in looking at the first prong of the *Barker* analysis, noted that a delay exceeding one year "does not necessarily indicate a statistical probability of prejudice; it simply marks the point at which courts deem the delay unreasonable enough to trigger the *Barker* inquiry." *Id.* at 119, 579 S.E.2d at 255 (quoting *Doggett*, 505 U.S. at 652 n.1, 112 S. Ct. at 2691 n.1, 120 L. Ed. 2d at 528 n.1). This Court clearly stated that the length of delay was enough only to "trigger examination of the other factors." *Id.* Put differently, the length of delay simply moved the inquiry to step two. *Id.* This Court ultimately concluded that despite this delay, defendant had not shown that his constitutional right had been violated. *Id.* at 123, 579 S.E.2d at 257.

¶ 95 More recently, this Court in *Farmer* found that a delay of more than five years was not a violation of the defendant's constitutional right to a speedy trial. *Farmer*, 376 N.C. at 419–20, 852 S.E.2d at 343–44. In looking at the individual factors of the *Barker* analysis, this Court correctly

noted that the first factor merely operated as a "triggering mechanism" compelling further analysis of the remaining *Barker* factors. *Id.* at 414–15, 852 S.E.2d at 341. In writing for the majority, Justice Morgan pointed out that until a notable delay occurs, "there is no necessity for inquiry into the other factors that go into the balance." *Id.* at 415, 852 S.E.2d at 341 (quoting *Barker*, 407 U.S. at 530, 92 S. Ct. at 2192, 33 L. Ed. 2d at 117).

¶ 96 The majority here, however, relies on nonbinding caselaw from the Court of Appeals to conclude that the delay here shifts "the burden of proof [to the State] 'to rebut and offer explanations for the delay.' " Curiously, despite stating that this holding is one that this Court "ha[s] routinely held," the only citation found in the majority opinion supporting their burden shifting scheme is *State v. Wilkerson*, 257 N.C. App. 927, 810 S.E.2d 389 (2018). This is telling in and of itself. In relying on *Wilkerson*, the majority ignores this Court's precedent in *Spivey* and *Farmer*. Neither *Spivey* nor *Farmer* mention the burden shifting scheme announced by the majority today. "The only possible conclusion from the majority's silence on [*Spivey* and *Farmer*] is that these cases remain good law." *State v. Crompton*, 380 N.C. 220, 868 S.E.2d 48, 2022-NCSC-14, ¶ 26 (Earls, J., dissenting).

¶ 97 In *Wilkerson*, the defendant was incarcerated for over three years following his arrest on charges of first-degree murder, robbery with a dangerous weapon, and conspiracy to commit robbery with a dangerous weapon. *Wilkerson*, 257 N.C. App. at 927, 930, 810 S.E.2d at 391, 392. In noting that the length of delay surpassed the one-year mark, the Court of Appeals concluded that this factor "trigger[ed] the need for analysis of the remaining three *Barker* factors." *Id.* at 930, 810 S.E.2d at 392. The Court of Appeals, however, then went on to state that this length of delay can also "create[ ] a prima facie showing that the delay was caused by the negligence of the prosecutor." *Id.* (quoting *State v. Strickland*, 153 N.C. App. 581, 586, 570 S.E.2d 898, 902 (2002)). Pulling this proposition from *Strickland*, which in turn regurgitates this rule from another case from that court,[7] the Court of Appeals announced that once this prima facie case, predicated on the passage of time alone, is made, "the burden shifts to the State to rebut and offer explanations for the delay." *Wilkerson*, 257 N.C. App. at 930, 810 S.E.2d at 392–93.

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7. Both *Wilkerson* and *Strickland* appear to take this line of thinking from yet another Court of Appeals case, *State v. Chaplin*, 122 N.C. App. 659, 471 S.E.2d 653 (1996). Notably, however, the *Chaplin* panel cited no cases to support this proposition.

¶ 98 The idea that the mere passage of time entitles a defendant to relief has been routinely rejected by this Court. Instead of heeding the instruction that an excessive pretrial incarceration period only triggers the need for analysis into the remaining *Barker* factors, this line of cases from the Court of Appeals (and most concerning, the majority here) reconfigures *Barker* such that a delay no longer merely advances the analysis to the second factor, but rather shifts the burden of proof to the State. However, this shift is illusory because, in the majority's view, the burden would always rest with the State. The majority does not explain why it shifts the burden prior to analysis of the second prong in this case, or why it is appropriate to deviate from clear precedent that the "defendant has the burden of showing that the delay was caused by the *neglect* or *willfulness* of the prosecution." *Farmer*, 376 N.C. at 415, 852 S.E.2d at 341 (quoting *Spivey*, 357 N.C. at 119, 579 S.E.2d at 255). Moreover, the majority does not provide any instruction as to whether the burden should return to defendant. This Court simply ignores well-established precedent to reach a desired outcome.

¶ 99 The majority further diverges from the requirements of *Barker* in its approach to the final prong of the analysis, prejudice to the defendant. The assessment of whether prejudice exists involves a look into "the interests of defendants" that the right to a speedy trial was designed to safeguard. *Barker*, 407 U.S. at 532, 92 S. Ct. at 2193, 33 L. Ed. 2d at 118. The Supreme Court of the United States "has identified three such interests: (i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired." *Id*. The final factor—an impairment of the defendant's defense—is the most serious, as it affects a defendant's ability to prepare his case for trial. *Id*.

¶ 100 Here, the majority cites *Doggett* for the proposition that it "may be impossible for the defendant to produce evidence of demonstrable prejudice" in the context of a *Barker* challenge. The majority then states that what is termed as "presumptive prejudice" may now be sufficient to tip the scales and "require dismissal of the charges" against a defendant. Notably, however, *Doggett* concerned a defendant who was neither in custody before his trial nor informed of the charges pending against him. 505 U.S. at 648–51, 112 S. Ct. at 2689–90, 120 L. Ed. 2d at 526–28. For this reason, it was difficult for the defendant to show prejudice simply because many of the speedy trial interests were not applicable. *Id*. at 654–56, 112 S. Ct. at 2692–93, 120 L. Ed. 2d at 529. This alone makes the majority's heavy reliance on *Doggett* misplaced. Nonetheless, in looking past obvious factual discrepancies, while *Doggett* purports to suggest that prejudice may sometimes be inferred, this inference can only be

made when prejudice is "neither extenuated, as by the defendant's acquiescence, nor persuasively rebutted." *Id.* at 658, 112 S. Ct. at 2694, 120 L. Ed. 2d at 532 (cleaned up). Here, the majority suggests that no justification was given by the State to rebut such "prejudice," while simultaneously barring the State from presenting such a justification through the testimony of Mr. Davis.

¶ 101 Further, defendant here makes no claim that any prejudice that occurred was "impossible" to demonstrate or "unidentifiable" to him; the majority does so on his behalf. Defendant's speedy trial motion specifically alleged that he had been "prejudiced by an inability to adequately assist his defense attorney" and by additional charges being brought by the State. While defendant failed to point to any defense he was unable to develop or witness he was unable to secure, Mr. Davis testified that the majority of the witnesses that defendant would call were family members who were readily available. In addition, Mr. Davis testified that defendant had been informed by the State at an early stage that additional charges were possible if he did not plead guilty to lesser charges. Although these additional charges carried the possibility for increased punishment, the underlying allegations against defendant arose from the same set of facts and his criminal record. As such, the reason the trial court found that defendant did not suffer prejudice was not because such was impossible to demonstrate but rather because none had occurred.

¶ 102 Even so, a mere "*possibility* of prejudice is not sufficient to support [a defendant's] position that their speedy trial rights were violated." *United States v. Loud Hawk*, 474 U.S. 302, 315, 106 S. Ct. 648, 656, 88 L. Ed. 2d 640, 654 (1986) (emphasis added). As this Court has expressly held, "a demonstration of *actual* prejudice experienced by defendant" is required to prove defendant suffered prejudice stemming from the delay of his trial. *Farmer*, 376 N.C. at 419, 852 S.E.2d at 343 (emphasis added).

¶ 103 Defendant has failed to carry his burden under *Barker*. Nonetheless, contrary to the overwhelming weight of authority from this Court and the Supreme Court of the United States, the majority effectively holds that the mere passage of time entitles defendant to relief on a motion to dismiss for a purported speedy trial violation. Moreover, the majority eliminates the requirement under *Barker* that defendant demonstrate actual prejudice resulting from the delay.

¶ 104 For the reasons stated herein, I would uphold the decision of the trial court and reverse the decision of the Court of Appeals.

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

STATE v. ROBINSON

[381 N.C. 207, 2022-NCSC-60]

STATE OF NORTH CAROLINA
v.
LEWIE P. ROBINSON

No. 533A20

Filed 6 May 2022

1. Appeal and Error—standard of review—conclusion that factual basis exists to support guilty plea—de novo

A trial court's conclusion regarding the sufficiency of a factual basis to support a defendant's guilty plea requires an independent judicial determination and, as such, is subject to de novo review on appeal.

2. Assault—guilty plea—multiple charges—factual basis—no evidence of distinct interruption in assault

The factual basis for defendant's guilty plea to multiple assaults was insufficient to support the trial court's decision to accept the plea and sentence defendant to three separate and consecutive assault sentences based on an assaultive episode in which defendant grabbed the victim's neck, punched her multiple times, and strangled her. Although the victim stated that defendant had held her captive for three days, the evidence as presented to the trial court did not describe any distinct interruptions between the assaults—whether a lapse in time, a change in location, or other intervening event—but instead indicated a confined and continuous attack.

3. Criminal Law—guilty plea—multiple assault charges—insufficient factual basis—remedy—entire plea vacated

Where there was an insufficient factual basis to support defendant's plea of guilty to multiple assaults—because defendant committed one continuous assault—the appropriate remedy was to vacate the entire plea and remand to the trial court for further proceedings.

Chief Justice NEWBY dissenting.

Justice BARRINGER joins in this dissenting opinion.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 275 N.C. App. 330 (2020), affirming in part a judgment entered 5 December 2018 by Judge Marvin P. Pope, Jr.,

in Superior Court, Buncombe County, and remanding for resentencing. Heard in the Supreme Court on 21 March 2022.

Joshua Stein, *Attorney General*, *by Jessica Macari*, *Assistant Attorney General for the State.*

Dylan J.C. Buffum, *for defendant.*

HUDSON, Justice.

¶ 1 In *State v. Dew*, this Court determined that "the State may charge a defendant with multiple counts of assault only when there is substantial evidence that a distinct interruption occurred between assaults." 379 N.C. 64, 2021-NCSC-124, ¶ 27. Here, we must apply that principle to the context of a guilty plea, in which the trial court sentenced defendant to separate and consecutive sentences based on several assault charges arising from one assaultive episode. Because the facts presented at the plea hearing did not establish that a distinct interruption occurred between assaults, we affirm the decision of the Court of Appeals that the trial court lacked a sufficient factual basis to accept defendant's guilty plea. Because we see no basis for rejecting defendant's guilty plea in part, however, we modify the holding of the Court of Appeals by vacating the entire plea arrangement and remanding to the trial court for further proceedings.

I. Factual and Procedural Background

A. Charges and Guilty Plea

¶ 2 In May 2018, defendant and Leslie Wilson were in a dating relationship in which Wilson became the victim of defendant's domestic violence. On or around the evening of 27 to 28 May 2018, Wilson and defendant were at Wilson's home together when defendant attacked her. Specifically, defendant grabbed Wilson around the neck, punched her several times in the face and chest, and strangled her while holding her down on a bed. When law enforcement arrived, Wilson stated that defendant had held her captive for three days. Wilson sustained severe injuries to her jaw, neck, and chest from the attack, requiring extensive medical treatment. On 4 December 2018, defendant was formally charged with four offenses: assault on a female, violation of a domestic violence protective order (DVPO), assault inflicting serious bodily injury, and assault by strangulation.

¶ 3 On 5 December 2018, defendant's case came on for hearing in Buncombe County Superior Court. Through his appointed counsel, defendant agreed to plead guilty to each of the four charged offenses. Under the terms of this original plea agreement, the State agreed to consolidate the four offenses into one Class F Felony judgment, with defendant receiving a single active prison sentence of 23–37 months. In establishing the factual basis for defendant's plea, the State described the facts surrounding the charges as follows:

> Your Honor, this occurred on May the 28th, 2018. Officers responded just after midnight that morning . . . to [Wilson's house]. The caller was Ms. Leslie Wilson who is present today, Your Honor. She stated that she'd been held captive by the defendant for three days and there was an active [DVPO] in place.
>
> When officers arrived, Ms. Wilson was present and stated that. . . defendant[ ] had grabbed her around the neck and that while he was choking her she had a taken a box cutter from him. During the assault that occurred over that night, Your Honor, Ms. Wilson was punched a number of times causing a broken jaw and a dislodged breast implant. She also had small cuts on her hands that were consistent with the altercation, as well as bruising around her neck. Ms. Wilson describes that during the strangulation she was unable to breathe and felt like she was going to pass out. She had tenderness about her neck for a few days after. Additionally, she was unable to eat food properly for about six weeks after the assault due to the condition of her jaw, Your Honor.

¶ 4 After defendant's counsel agreed with this factual presentation by the State, the trial court requested to hear directly from Wilson, who was present at the hearing. In response to the trial court asking her to describe the incident, Wilson stated as follows:

> We were both drinking and he was getting ill, so I dumped all the beer out. Dumped out everything I could find. And then I locked myself in the bathroom. And he broke two doors trying to get to me and he kept telling me to tell him where I had hid the beer. I didn't want to tell him then that I'd poured it out because I was so afraid. But I poured it out, trying

> to keep him from getting to this point. And then he got after me and I had a box cutter, which I was trying to defend myself at that point, and he held me down on the bed. I actually blacked out twice. And when he was strangling me and told me I needed to learn where the pressure points was, with his elbow on my jawbone and my throat. And then when I got back up I did—I had the box cutter but I was trying—I was scared to death. I thought he was going to kill me. I couldn't even hardly talk.

When the trial court subsequently asked Wilson whether she understood the terms of defendant's plea and why the court should accept the plea, Wilson responded affirmatively and stated she "just want[ed] to close this chapter of [her] life and move on."

¶ 5 Ultimately, addressing defendant's counsel, the trial court stated the following:

> So I'm telling you this, [defense counsel], I'm rejecting the plea the way it is now. I will sentence [defendant] to four consecutive sentences for active time, if you want to renegotiate your plea arrangement. Otherwise, I'll sign off on it, won't take it, and you can take it in front of another judge and see if you can sell this bill of goods to some other person. I'm not going to take it.

The court then took a brief recess to allow the parties to reconvene.

¶ 6 Twenty-four minutes later, the parties returned with a new plea arrangement. Under the new plea arrangement, defendant pleaded guilty to the same four charges as in the original plea arrangement: one count of assault on a female, one count of DVPO violation, one count of assault inflicting serious bodily injury, and one count of assault by strangulation. However, where the original plea agreement consolidated the four offenses into one sentence, the new plea arrangement offered four separate sentences: one Class F felony judgment with an active sentence of 23–37 months; one Class H felony judgment with a consecutive active sentence of 15–27 months; and two consecutive A1 misdemeanor judgments of two 150-day suspended sentences with supervised probation. Notably, the trial court did not solicit further factual statements to support the new plea arrangement; instead, it relied solely on the previous statements from the prosecutor and Wilson. After defendant duly agreed to the plea arrangement, the trial court accepted it and entered judgment accordingly.

B. Court of Appeals

¶ 7 On 5 August 2019, defendant filed a petition for writ of certiorari with the North Carolina Court of Appeals pursuant to N.C.G.S. § 15A-1444. Although defendant's petition requested appellate review of four issues, the Court of Appeals, in its discretion, allowed defendant's petition on only one of these issues: whether the trial court had a sufficient factual basis to accept the new plea arrangement and enter separate and consecutive judgments accordingly. Specifically, defendant argued that the trial court erred when it accepted the new plea arrangement and entered judgment on three assault charges because the factual summary provided by the State and Wilson did not establish more than one assault.

¶ 8 On 15 December 2020, the Court of Appeals filed a divided opinion in which the majority concluded that "there was an insufficient factual basis for [d]efendant's guilty plea." *Robinson*, 275 N.C. App. at 331.

¶ 9 First, the majority noted that by statute, a "judge may not accept a plea of guilty . . . without first determining that there is a factual basis for the plea." N.C.G.S. § 15A-1022(c) (2021). The court observed that such a factual basis may be provided by a statement of facts by the prosecutor, and that a "trial court may also 'consider any information properly brought to its attention in determining whether there is a factual basis for a plea of guilty.' " *Id.* at 334 (quoting *State v. Dickens*, 299 N.C. 76, 79 (1980) (cleaned up)). Further, relying on its own precedent in *State v. Williams*,[1] the majority noted that "in order for a defendant to be charged with multiple counts of assault, there must be multiple assaults. This requires evidence of a distinct interruption in the original assault followed by a second assault." *Robinson*, 275 N.C. App. at 335 (quoting *State v. Williams*, 201 N.C. App. 161, 182 (2009)).

¶ 10 Here, the Court of Appeals majority noted, "the State's summary of the factual basis for the plea was brief" and "indicated that this was a singular assault, without distinct interruption, during which Wilson was strangled, beaten, and cut." *Robinson*, 275 N.C. App. at 334–35. The majority observed that "nothing in the State's factual summary suggests that there was a distinct interruption that would support multiple assault convictions." *Id.* at 335. Instead, "the prosecutor's language shows that she only referenced a singular assault during her summary of the factual basis for the plea arrangement," using singular language such as "the assault" or "the altercation." *Id.* "Moreover," the majority noted,

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1. The Court of Appeals opinion was published before this Court's ruling in *State v. Dew*, 379 N.C. 64, 2021-NCSC-124. In *Dew*, the Court clarified the requirements for being charged with multiple counts of assault.

"Wilson's statement to the trial court at the hearing provided no evidence of a distinct interruption in the assault." *Id.* Finally, the majority stated that "[t]he fact that [d]efendant held Wilson captive for three days does not, alone, compel the conclusion that he committed multiple assaults against Wilson during that period." *Id.* at 336. Given this lack of substantial evidence of a distinct interruption in the assault, the Court of Appeals majority concluded "that [d]efendant has shown that the State did not provide a sufficient factual basis for the trial court to accept his guilty plea and enter judgments on multiple assault charges." *Id.*

¶ 11 Second, because the offense of assault inflicting serious bodily injury (Class F felony) is classified as more severe than the offenses of assault by strangulation (Class H felony) and assault on a female (Class A1 misdemeanor), the Court of Appeals majority concluded that "[d]efendant could only be punished for the offense of assault inflicting serious bodily injury, and not for the other two assault offenses as well." *Id.* at 338. Specifically, the majority reasoned that "[b]ecause the factual basis for [d]efendant's guilty plea . . . supported just one assault conviction, the trial court was only authorized to enter judgment and sentence [d]efendant for one assault—that which provided for the greatest punishment of the three assault offenses to which [d]efendant pleaded guilty." *Id.*

¶ 12 Finally, relying on this Court's ruling in *State v. Fields*, the Court of Appeals majority concluded that "the appropriate course of action is to arrest judgment on [d]efendant's convictions for assault on a female. . . and assault by strangulation[,]" while affirming defendant's conviction for assault inflicting serious bodily injury. *Robinson*, 275 N.C. App. at 338 (citing *State v. Fields*, 374 N.C. 629, 636–37 (2020)). The majority subsequently remanded the case to the trial court with instructions to arrest these two lesser judgments and to resentence defendant on the remaining charges. *Id.*

¶ 13 Judge Berger dissented. *See id.* at 339 (Berger, J., dissenting). The dissent would have denied defendant's petition for writ of certiorari because, in its view, defendant failed to make the required showing of merit or that error was probably committed below. Specifically, the dissent relied upon this Court's ruling in *State v. Rambert*, 341 N.C. 173 (1995), to conclude that "[d]efendant's separate and distinct actions [during the assaultive episode] are not the same conduct," and therefore that the trial court did not err in sentencing defendant for separate assaults. *Id.* at 339–40 (Berger, J., dissenting).

¶ 14 In *Rambert*, the defendant was charged and convicted of three separate counts of discharging a firearm into occupied property after firing

three shots from a handgun into an occupied car. 341 N.C. at 174–176. In rejecting defendant's claim that this evidence supported only a single conviction, not three, this Court "noted that (1) the defendant employed his thought process each time he fired the weapon, (2) each act was distinct in time, and (3) each bullet hit the vehicle in a different place." *Dew*, 379 N.C. 64, 2021-NCSC-124, ¶ 25 (citing *Rambert*, 341 N.C. at 177).

¶ 15 Applying these *Rambert* factors to the case at bar, the dissent here reasoned that defendant's actions of (1) grabbing Wilson by the neck, (2) punching Wilson in the face and chest, and (3) placing his forearm on Wilson's neck constituted "at least three separate and distinct acts" for which the trial court could properly sentence defendant separately. *Robinson*, 275 N.C. App. at 342–43 (Berger, J., dissenting). Specifically, the dissent noted that defendant's actions during the assaultive episode each required a different thought process, were distinct in time, and resulted in injuries to different body parts. *Id.* at 343 (Berger, J., dissenting). Accordingly, the dissent would have held that the factual showing made at the hearing reasonably supported the trial court's decision to sentence defendant based on three separate assault offenses. *Id.* (Berger, J., dissenting).

C. Present Appeal

¶ 16 On 19 January 2021, the State filed a notice of appeal with this Court based on the Court of Appeals dissent. In its appeal, the State argues that the trial court properly determined that there was a factual basis for defendant's guilty plea, and therefore that the Court of Appeals majority erred in reversing the trial court's judgment and sentences.

¶ 17 First, the State argues that this Court has not yet identified the applicable standard of review, but that it has made clear that the question before the trial court is limited and the scope of review is narrow. The State contends that the Court of Appeals majority erred in reviewing the factual basis for defendant's guilty plea de novo based on a "statutory interpretation" standard of review. Even if the correct standard of review is de novo, the State contends, "review is limited to a narrower question than what the Court of Appeals majority addressed . . . [because] [t]he test applied by the trial court is merely whether there is some substantive material independent of the plea itself which tends to show guilt. Because the trial court's determination below was "distinctly fact-bound[,]" the State contends, appellate courts must consider it "with respect for [the] trial court['s] discretion."

¶ 18 Second, the State argues that the facts presented to the trial court during defendant's hearing adequately support defendant's guilty

plea to three distinct assaults. The State notes that under N.C.G.S. § 15A-1022(c), a trial court "may not accept a plea of guilty . . . without first determining that there is a factual basis for the plea." The State notes that this determination requires that "some substantive material independent of the guilty plea itself appear of record which tends to show that defendant is, in fact, guilty." *State v. Sinclair*, 301 N.C. 193, 199 (1980).

¶ 19 Here, the State argues, the facts presented at the hearing by the prosecutor and Wilson adequately support the trial court's sentencing under each distinct charge of assault. As reasoned by the Court of Appeals dissent, the State contends that defendant's actions constitute three distinct assaults: (1) grabbing Wilson's neck (assault on a female); (2) punching Wilson in the face and chest (assault inflicting serious bodily injury); and (3) pushing his forearm against Wilson's neck (assault by strangulation). The State argues that these facts "easily clear [*Sinclair*'s] threshold of 'some substantive material independent of the plea itself . . . which tends to show' that the defendant committed the crimes charged against him." As such, the State argues that the Court of Appeals majority erred in ruling otherwise.

¶ 20 Third, the State argues that the Court of Appeals majority followed the wrong analytical framework when it determined that only one assault had occurred. Specifically, the State asserts that the majority gave improper weight to the "distinct interruption" standard instead of following this Court's precedent from *State v. Rambert*, 341 N.C. 173, (1995).[2] Under *Rambert*, the State contends that the relevant factors in determining whether a defendant committed one or multiple criminal acts include: (1) whether each action required defendant to employ a separate thought process; (2) whether each act was distinct in time; and (3) whether each act resulted in a different outcome. Under this analysis, the State argues, no "distinct interruption" is required between assaults because defendant attacked Wilson in "at least three different ways," rendering the three assault charges and sentences proper.

¶ 21 Finally, at oral arguments, which took place *after* this Court's ruling in *Dew*, the State argued that even under *Dew*'s distinct interruption requirement, sufficient facts were summarized during the hearing to support the defendant's separate sentences. For instance, counsel for the State proffered that Wilson pouring the beer down the sink, locking

2. The briefs from both the State and defendant here were filed before the publication of this Court's ruling in *State v. Dew*, 379 N.C. 64, 2021-NCSC-124. *Dew* was published between the filing of the briefs and oral arguments.

herself in the bathroom, blacking out twice, or defendant "getting ill" could each reasonably constitute a distinct interruption in the assaultive episode. Further, the State emphasized that Wilson told law enforcement that defendant had held her captive in the home for three days, and that over this extended period of time "there had to have been ebbs and flows in the momentum of the attack—there had to be lapses of time to calm down, to eat, to go to the bathroom." As such, the State argued, the trial court had a sufficient factual foundation for defendant's three separate judgments and sentences.

¶ 22 In response, defendant argues that the Court of Appeals majority did not err. Regarding the proper standard of review, defendant asserts that the trial court's ruling on the sufficiency of a factual basis is subject to de novo appellate review because "whether the record shows that there was a sufficient factual basis for the plea is a quintessential question of law[.]" Because the only question following a guilty plea is whether the uncontested facts support each of the elements of each of the charged offenses, defendant argues that "[t]his is no different than appellate review of a motion to dismiss after the close of evidence[,]" which is conducted de novo.

¶ 23 Next, defendant argues that the Court of Appeals ruling was correct on the merits because the facts presented to the trial court did not support entry of judgment on three distinct assaults. Rather, defendant argues that the factual basis provided by the State would have supported any one of the assault charges, but not all three. Defendant particularly notes that the prosecutor's description of the assault repeatedly referred to "the assault" as a singular event, not multiple or distinct attacks, and that Wilson's description of the attack corroborated this singularity. As such, defendant contends, "nothing in the State's recitation would support an inference that three separate assaults occurred[.]"

¶ 24 In alignment with the majority opinion below, defendant argues that to support multiple assault convictions stemming from a single transaction, evidence must establish a distinct interruption in the transaction followed by a separate and distinct assault. "While the *Rambert* Court determined each distinct act of discharging a gun constituted a separate unit of prosecution and supported a separate conviction[,]" defendant asserts, "nothing in *Rambert* suggested assault is defined the same way."

¶ 25 Finally, at oral arguments, defense counsel argued that *Dew*'s distinct interruption requirement is controlling and dispositive in this case because the factual summary provided by the State and Wilson at the hearing described the assault as one continuous episode, without any

distinct interruptions. Although Wilson reported that defendant had held her captive for three days, defense counsel noted that the hearing statements and the record only described one distinct assaultive episode, not an ongoing attack over the course of three days. Accordingly, defendant contends, the Court of Appeals majority correctly determined that the trial court lacked a sufficient factual basis to sentence defendant on three separate assault convictions.

II. Analysis

¶ 26 Now, we must determine whether the trial court had a sufficient factual basis to sentence defendant to three separate and consecutive assault sentences. Under the distinct interruption requirement established by *Dew*, 379 N.C. 64, 2021-NCSC-124, we hold that it did not, and therefore partially affirm the ruling of the Court of Appeals majority. 2021-NCSC-124. However, because defendant's guilty plea must be accepted or rejected as a whole, rather than piecemeal, we modify the holding of the Court of Appeals by vacating the entire plea arrangement and remanding to the trial court for further proceedings.

A. Standard of Review

¶ 27 **[1]** First, we must address the appropriate standard of review. Below, the Court of Appeals majority determined that "[d]efendant raises an issue of statutory construction[,]" and thus applied de novo review. *Robinson*, 275 N.C. App. at 333. On appeal, the State contends that in light of the trial court's limited test in these circumstances, appellate review should be narrow and deferential. Defendant, contrastingly, asserts that "[w]hether the record shows that there was a sufficient factual basis for the plea is a quintessential question of law, which is properly subject to de novo review."

¶ 28 As an initial matter, we disagree with the reasoning of the Court of Appeals majority that "[d]efendant raises an issue of statutory construction." The core dispute between the parties here does not revolve around competing interpretations of a statute, but around competing applications of certain legal requirements to these facts.

¶ 29 Nevertheless, we agree with the ultimate determination of the Court of Appeals majority and with defendant that this appeal is properly reviewed de novo. Under N.C.G.S. § 15A-1022(c), a "judge may not accept a plea of guilty . . . without first determining that there is a factual basis for the plea." In *State v. Agnew*, this Court observed that this statutory condition "requires an *independent judicial determination* that a sufficient factual basis exists before a trial court accepts a guilty plea."

361 N.C. 333, 333–34 (2007) (emphasis added).[3] At its core, such an "independent judicial determination" requires the trial court to exercise judgment and apply legal principles by considering whether the stipulated facts fulfill the various elements of the offense or offenses to which the defendant is pleading guilty. Although a defendant who pleads guilty can and does stipulate to the *factual* summary presented by the State, this stipulation cannot and does not relieve the trial court of its subsequent duty to conduct an "independent judicial determination that a sufficient factual basis exists" to support the *legal* requirements of the charged offenses. *Id*. Accordingly, we hold that a trial court's determination as to whether a sufficient factual basis exists to support a defendant's guilty plea is a conclusion of law reviewable de novo on appeal. *Cf. Plott v. Plott*, 313 N.C. 63, 73 (1985) (noting that a trial court's determination is "properly denominated a conclusion of law [when] it states the legal basis upon which [a] defendant's liability may be predicated under the applicable statute(s)"); *Woodard v. Mordecai*, 234 N.C. 463, 472 (1951) (observing that conclusions of law are "reached by . . . an application of fixed rules of law").

B. "Distinct Interruption" Analysis

¶ 30 **[2]** Second, we must consider whether the trial court erred in determining that it had a sufficient factual basis to sentence defendant to three separate and consecutive assault sentences. As noted by both parties during oral arguments, this determination is governed by this Court's recent ruling in *State v. Dew*, 379 N.C. 64, 2021-NCSC-124.

¶ 31 Before *Dew*, different Court of Appeals decisions applied somewhat differing methods of analysis to determine whether the facts of one assaultive episode supported multiple assault charges. While these cases were unified in requiring "a distinct interruption in the original assault followed by a second assault" in order to support multiple assault charges, *State v. Brooks*, 138 N.C. App. 185, 189 (2000), they were divided as to what factors illustrated such a "distinct interruption." In some cases, the Court of Appeals generally looked for evidence of a clear and significant break or demarcation within the assaultive episode. *See*, *e.g.*, *Robinson*, 275 N.C. App. at 335–36 (finding "no evidence of a distinct interruption in the assault"); *State v. McPhaul*, 256 N.C. App. 303, 317–18 (2017) (same). In others, the Court of Appeals more specifically

3. Although this Court in *Agnew* did not formally state that it was reviewing the trial court's determination de novo, it functionally engaged in de novo review by considering anew the factual information before the trial court when the defendant's guilty plea was accepted. *See Agnew*, 361 N.C. at 337 (considering the facts and record presented to the trial court before its guilty plea determination).

applied this Court's analysis in *State v. Rambert* to consider whether the defendant's actions employed different thought processes, were distinct in time, and caused different injuries. *See*, *e.g.*, *State v. Dew*, 270 N.C. App. 458, 462–63 (applying the three *Rambert* factors to determine whether there was a distinct interruption between assaults); *State v. Littlejohn*, 158 N.C. App. 628, 636 (2003) (same). The use of these differing analytical frameworks created tension between various Court of Appeals opinions considering the issue. *See*, *e.g.*, *Robinson*, 275 N.C. App. at 340 (Berger, J., dissenting) (opining that the majority opinion "ignores binding precedent and fails to conduct an analysis under *State v. Rambert*"); *compare State v. Dew*, 270 N.C. App. 458, 462–63 (applying *Rambert* factors) *with Robinson*, 275 N.C. App. at 335–36 (not applying *Rambert* factors).

¶ 32 In *Dew*, this Court resolved this tension in favor of the more general "distinct interruption" approach. 379 N.C. 64, 2021-NCSC-124. Because "[m]ultiple contacts can still be considered a single assault[ ] even though each punch or kick would require a different thought process, would not occur simultaneously, and would land in different places on the victim's body[,]" this Court "conclude[d] that the *Rambert* factors are not the ideal analogy for an assault analysis." Accordingly, we "decline[d] to extend *Rambert* to assault cases generally." *Id.* at ¶ 26. Instead, this Court provided examples—though not an exclusive list—of what can qualify as a distinct interruption: "an intervening event, a lapse of time in which a reasonable person may calm down, an interruption in the momentum of the attack, a change in location, or some other clear break delineating the end of one assault and the beginning of another." *Id.* at ¶ 27. Likewise, the Court clarified "what does *not* constitute a distinct interruption." For instance,

> the fact that a victim has multiple, distinct injuries alone is not sufficient evidence of a distinct interruption such that a defendant can be charged with multiple counts of assault. The magnitude of the harm done to the victim can be taken into account during sentencing but does not automatically permit the State to stack charges against a defendant without evidence of a distinct interruption.

Id. at ¶ 28. Further, a defendant's "different methods of attack standing alone are insufficient evidence of a distinct interruption." *Id.* at ¶ 35.

¶ 33 Here, the parties agreed at oral argument that *Dew*'s "distinct interruption" analysis governed this case but argued for different results.

The State argued that any number of events noted in the factual summaries provided by the prosecutor and Wilson at the hearing could indicate a distinct interruption in the attack, including Wilson pouring out the beer, Wilson locking herself in the bathroom, Wilson blacking out, or defendant "getting ill." Further, the State emphasized that Wilson reported that defendant held her captive in the home for three days, and that over this extended period of time "there had to have been ebbs and flows in the momentum of the attack" constituting a distinct interruption. Contrastingly, defense counsel asserted that the factual summary provided by the State and Wilson at the hearing clearly and repeatedly described the assault as one continuous episode, without any evidence of distinct interruptions.

¶ 34 We agree with the Court of Appeals majority and defendant that the facts provided at the hearing fail to establish evidence of a distinct interruption in the assault to support multiple assault convictions and sentences. Neither the prosecutor's factual summary nor Wilson's statement note "an intervening event, a lapse of time in which a reasonable person may calm down, an interruption in the momentum of the attack, a change in location, or some other clear break delineating the end of one assault and the beginning of another." *Id.* at ¶ 27. Instead, the factual statements as given describe a confined and continuous attack in which defendant choked and punched Wilson in rapid succession and without pause or interruption.

¶ 35 We acknowledge that one can *imagine* a distinct interruption being described here with additional facts. For instance, if the facts indicated that the attack began in the bathroom but then moved to the bedroom, such a change in location may constitute a distinct interruption. Likewise, if there was evidence presented of multiple different attacks occurring over the course of Wilson's three-day captivity, such a lapse of time and interruption in momentum could clearly constitute a distinct interruption. However, like the trial court, this Court must consider the factual summary not as it *could have been*, but as it was presented. As it was presented, the factual summary provided by the State and Wilson at the hearing describe no such discernible sequence of events indicating a distinct interruption in the assault.

¶ 36 Without evidence of a distinct interruption in the assault, the trial court did not have a sufficient factual basis upon which to sentence defendant to separate and consecutive assault sentences. Accordingly, we affirm the ruling of the Court of Appeals majority that the trial court erred when it accepted the plea and entered judgment on the three different assault charges. *Robinson*, 275 N.C. App. at 333–34.

C. Remedy

¶ 37 **[3]** Finally, we must consider an appropriate remedy. Below, the Court of Appeals majority relied on this Court's ruling in *State v. Fields* to determine that "the appropriate course of action is to arrest judgment on [d]efendant's convictions for assault on a female . . . and assault by strangulation[,]" and thus remanded the case to the trial court to resentence defendant only on the remaining two charges (assault inflicting serious bodily injury and violation of a DVPO). *Robinson*, 275 N.C. App. at 338 (citing *Fields*, 374 N.C. at 636–37).

¶ 38 We cannot agree. Although this Court in *Fields* held that "the Court of Appeals should have arrested the trial court's judgment for [a lesser included offense] rather than vacating the judgment[,]" 374 N.C. at 637, a key procedural difference between the cases renders that remedy improper here: whereas the defendant in *Fields* was convicted via jury trial, defendant here was convicted via guilty plea. *Id.* at 631. Because a guilty plea, like a contract, is the result of nuanced negotiations between a defendant and the State, it is not the role of an appellate court to accept certain portions of the plea deal while rejecting others. *See State v. Collins*, 300 N.C. 142, 149 (1980) (viewing a guilty plea "in light of the analogous law of contracts" in which "the consideration given for the prosecutor's promise . . . is defendant's actual performance by [pleading guilty]"). Rather, defendant's plea arrangement constitutes a finished product which must be accepted or rejected in its entirety, not piecemeal. *See* N.C.G.S. § 15A-1023 (describing a judge's authority to either accept or reject a plea arrangement). Accordingly, we modify the ruling of the Court of Appeals on this issue by arresting each of the trial court's judgments and remanding to the trial court for any further proceedings.

III. Conclusion

¶ 39 According to our decision in *Dew*, "the State may charge a defendant with multiple counts of assault only when there is substantial evidence that a distinct interruption occurred between assaults." 379 N.C. 64, 2021-NCSC-124, ¶ 27. Because the facts presented at defendant's plea hearing did not establish that a distinct interruption occurred between assaults, we affirm the ruling of the Court of Appeals that the trial court lacked a sufficient factual basis to accept defendant's guilty plea. However, because defendant's guilty plea must be accepted or rejected as a whole, we modify the holding of the Court of Appeals by vacating the entire plea arrangement and remanding to that court for further remand to the trial court for further proceedings.

MODIFIED AND AFFIRMED.

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

Chief Justice NEWBY dissenting.

¶ 40 This case requires us to determine whether the trial court properly determined that there was a factual basis for defendant's guilty plea. A guilty plea must be substantiated in fact by some substantive material independent of the plea itself which tends to show that the defendant is guilty. Moreover, for sentences to be entered against a defendant for multiple assaults arising from closely connected conduct, the evidence must show a distinct interruption occurred between the assaults. Here the prosecutor's factual summary and the testimony of the victim tended to show that there was a distinct interruption between each assault. Accordingly, there was a factual basis for defendant's plea to each assault and the trial court properly entered each judgment and sentence against defendant. I respectfully dissent.

¶ 41 A defendant's appeal following a guilty plea is limited by statute. *State v. Ledbetter*, 371 N.C. 192, 195, 814 S.E.2d 39, 42 (2018). N.C.G.S. § 15A-1444(e) provides that a "defendant is not entitled to appellate review as a matter of right when he has entered a plea of guilty . . . to a criminal charge in the superior court, but he may petition the appellate division for review by writ of certiorari." N.C.G.S. § 15A-1444(e) (2021). "Certiorari is a discretionary writ, to be issued only for good and sufficient cause shown." *State v. Grundler*, 251 N.C. 177, 189, 111 S.E.2d 1, 9 (1959) (emphasis omitted). The Court of Appeals may issue a writ of certiorari when the petition "show[s] 'merit or that error was probably committed below.' " *State v. Ricks*, 378 N.C. 737, 2021-NCSC-116, ¶ 6 (quoting *Grundler*, 251 N.C. at 189, 111 S.E.2d at 9). This Court "review[s] the Court of Appeals' decision to allow a petition for writ of certiorari . . . for an abuse of discretion." *Ricks*, ¶ 5.

¶ 42 "[A] plea arrangement or bargain is '[a] negotiated agreement between a prosecutor and a criminal defendant whereby the defendant pleads guilty to a lesser offense or to one of multiple charges in exchange for some concession by the prosecutor . . . .' " *State v. Alexander*, 359 N.C. 824, 830, 616 S.E.2d 914, 919 (2005) (second alteration in original) (quoting *Plea Bargain*, *Black's Law Dictionary* (7th ed. 1999)). Because "[a] plea of guilty . . . involves the waiver of various fundamental rights," *State v. Sinclair*, 301 N.C. 193, 197, 270 S.E.2d 418, 421

(1980), the General Assembly has enacted legislation to protect criminal defendants, *see State v. Agnew*, 361 N.C. 333, 335, 643 S.E.2d 581, 583 (2007) ("[O]ur legislature has enacted laws to ensure guilty pleas are informed and voluntary.").

¶ 43 One such protection is that "guilty pleas must be substantiated in fact as prescribed by [N.C.G.S. § 15A-1022(c)]." *Id.* N.C.G.S. § 15A-1022(c) provides that

> [t]he judge may not accept a plea of guilty or no contest without first determining that there is a factual basis for the plea. This determination may be based upon information including but not limited to:
>
> (1) A statement of the facts by the prosecutor.
>
> (2) A written statement of the defendant.
>
> (3) An examination of the presentence report.
>
> (4) Sworn testimony, which may include reliable hearsay.
>
> (5) A statement of facts by the defense counsel.

N.C.G.S. § 15A-1022(c) (2021). Moreover,

> [t]he five sources listed in the statute are not exclusive, and therefore '[t]he trial judge may consider any information properly brought to his attention.' *State v. Dickens*, 299 N.C. 76, 79, 261 S.E.2d 183, 185–86 (1980). Nonetheless, such information 'must appear in the record, so that an appellate court can determine whether the plea has been properly accepted.' *Sinclair*, 301 N.C. at 198, 270 S.E.2d at 421. Further, in enumerating these five sources, the statute 'contemplate[s] that some substantive material independent of the plea itself appear of record which tends to show that defendant is, in fact, guilty.' *Id.* at 199, 270 S.E.2d at 421–22.

Agnew, 361 N.C. at 336, 643 S.E.2d at 583 (second and third alterations in original).

¶ 44 Here defendant was charged with, *inter alia*, misdemeanor assault on a female, *see* N.C.G.S. § 14-33(c)(2) (2021); felony assault inflicting serious bodily injury, *see* N.C.G.S. § 14-32.4(a) (2021); and felony assault by strangulation, *see* N.C.G.S. § 14-32.4(b) (2021). Our case law defines

"assault" as "an overt act or an attempt, or the unequivocal appearance of an attempt, with force and violence, to do some immediate physical injury to the person of another, which show of force . . . must be sufficient to put a person of reasonable firmness in fear of immediate bodily harm." *State v. Dew*, 379 N.C. 64, 2021-NCSC-124, ¶ 23 (quoting *State v. Roberts*, 270 N.C. 655, 658, 155 S.E.2d 303, 305 (1967)). Moreover, for defendant to be sentenced for multiple assaults, it must appear that "a distinct interruption occurred between assaults." *Id.* ¶ 27.

¶ 45 Here there was significant substantive material independent from the plea itself that tended to show a distinct interruption occurred between the assaults. First, the prosecutor offered a factual summary at the plea hearing:

> Your Honor, this occurred on May the 28th, 2018. Officers responded just after midnight that morning, Your Honor, to 37 Amirite Drive, A-m-i-r-i-t-e, Drive in Candler, North Carolina. The caller was Ms. Leslie Wilson who is present today, Your Honor. She stated that she'd been held captive by the defendant for three days and there was an active [domestic violence protective order] in place.
>
> When officers arrived, Ms. Wilson was present and stated that Lewie Robinson, the defendant, had grabbed her around the neck and that while he was choking her she had taken a box cutter from him. During the assault that occurred over that night, Your Honor, Ms. Wilson was punched a number of times causing a broken jaw and a dislodged breast implant. She also had small cuts on her hands that were consistent with the altercation, as well as bruising around her neck. Ms. Wilson describes that during the strangulation she was unable to breathe and felt like she was going to pass out. She had tenderness about her neck for a few days after. Additionally, she was unable to eat food properly for about six weeks after the assault due to the condition of her jaw, Your Honor. Thankfully, thanks to health insurance, she was not out-of-pocket any money for restitution which is why we're not seeking restitution in this case.

Then, when the trial court asked defendant's attorney if she "agree[d] with the factual presentation," defendant's attorney responded, "Yes."

¶ 46 At the trial court's request, Ms. Wilson testified regarding the events underlying the assault charges:

> We were both drinking and he was getting ill, so I dumped all the beer out. Dumped out everything I could find. And then I locked myself in the bathroom. And he broke two doors trying to get to me and he kept telling me to tell him where I had hid the beer. I didn't want to tell him then that I'd poured it out because I was so afraid. But I poured it out, trying to keep him from getting to this point. And when he got after me and I had a box cutter, which I was trying to defend myself at that point, and he held me down on the bed. I actually blacked out twice. And then he was strangling me and told me I needed to learn where the pressure points was, with his elbow on my jawbone and my throat. And then when I got back up I did—I had the box cutter but I was trying—I was scared to death. I thought he was going to kill me. I couldn't even hardly talk.

¶ 47 This evidence tends to show that distinct interruptions occurred between the assaults. One assault began when defendant "broke two doors trying to get to" the bathroom, where Ms. Wilson had locked herself in, and then "grabbed [Ms. Wilson] around the neck and . . . was choking her" before she took a box cutter from him. At some point, defendant "got after [Ms. Wilson]" and chased her from the bathroom to the bedroom. This change in location constituted a distinct interruption. After this interruption, defendant "held [Ms. Wilson] down on the bed." Defendant "strang[led] [Ms. Wilson] and told [her that she] needed to learn where the pressure points w[ere], with his elbow on [Ms. Wilson's] jawbone and [her] throat." Defendant thus caused Ms. Wilson to black out, creating another distinct interruption. When she awoke, Ms. Wilson still "had the box cutter" and tried to defend herself, but defendant nonetheless committed another assault by "punch[ing] [Ms. Wilson] a number of times causing a broken jaw and a dislodged breast implant." Thus, the substantive material independent of the plea tends to show that a distinct interruption occurred between the assaults. Accordingly, the trial court did not lack authority to sentence defendant for each assault.

¶ 48 In holding otherwise, the majority errs by wrongly applying a de novo standard of review to the trial court's determination that a factual basis existed for defendant's plea. In so doing, the majority expands the role of the trial court beyond that envisioned by the statute, into one

similar to the role performed when reviewing a motion to dismiss. After a defendant moves to dismiss the charges during a trial, the trial court must determine "whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense." *State v. Scott*, 356 N.C. 591, 595, 573 S.E.2d 866, 868 (2002) (quoting *State v. Powell*, 299 N.C. 95, 98, 261 S.E.2d 114, 117 (1980)). Similarly, the majority states that in determining whether a factual basis exists for a guilty plea, the trial court must "consider[ ] whether the stipulated facts *fulfill* the various elements of the offense or offenses to which the defendant is pleading guilty." When, however, "a defendant pleads guilty, no trial occurs," *State v. Alexander*, 2022-NCSC-26, ¶ 66 (Newby, C.J., concurring in the result), and there is no motion to dismiss; therefore, the substantial evidence standard does not apply.

¶ 49 Moreover, "[i]n a jury trial the judge instructs jurors on the law, and the jury finds the facts and applies the law." *State v. Arrington*, 371 N.C. 518, 521, 819 S.E.2d 329, 331 (2018). When a defendant pleads guilty, however, he admits his conduct constitutes the offense and waives the right to have a jury make that determination. *See Sinclair*, 301 N.C. at 197, 270 S.E.2d at 421 ("A plea of guilty . . . involves the waiver of . . . the right to trial by jury."). Specifically, in a "transcript of plea," which the trial court may properly consider under N.C.G.S. § 15A-1022(c)(2), the defendant and his attorney represent to the trial court that a factual basis exists for the guilty plea. *See Dickens*, 299 N.C. at 79, 261 S.E.2d at 186 (" '[A] written statement of the defendant' ordinarily consists of defendant's written answers to the questions contained in a document entitled 'Transcript of Plea.' " (quoting N.C.G.S. § 15A-1022(c)). Accordingly, given the defendant's representations and the nature of a plea hearing, the parties do not fully develop the factual record before the trial court. Thus, when accepting a guilty plea, the trial court's role is properly limited to determining whether the plea is "substantiated in fact," *Agnew*, 361 N.C. at 335, 643 S.E.2d at 583, by "some substantive material independent of the plea itself . . . which tends to show that defendant is, in fact, guilty," *id.* at 336, 643 S.E.2d at 583. Therefore, "[i]f the evidence considered in the light most favorable to the State" supports the guilty plea, then the trial court may accept the plea. *Sinclair*, 301 N.C. at 197, 270 S.E.2d at 421.

¶ 50 Using a de novo review of this limited factual record, however, the majority then holds that "the facts provided at the hearing fail to establish evidence of a distinct interruption in the assault." One need not "imagine," as the majority does, that a distinct interruption "such [as]

a change in location" occurred in this case. Rather, the evidence demonstrates exactly the hypothetical situation posited by the majority—one assault occurred in the bathroom, and then defendant chased Ms. Wilson into the bedroom and assaulted her again. Moreover, after defendant strangled Ms. Wilson, causing her to black out, the "lapse of time and interruption in momentum" imagined by the majority occurred until Ms. Wilson awoke. Defendant then assaulted Ms. Wilson a third time. Thus, the evidence tends to show two distinct interruptions occurred.[1]

¶ 51 The trial court did not err by determining that a sufficient factual basis existed for defendant's guilty plea. The Court of Appeals therefore abused its discretion by allowing defendant's petition for writ of certiorari. The decision of the Court of Appeals should be reversed and the trial court's entry of judgment and sentences against defendant should be affirmed. I respectfully dissent.

Justice BARRINGER joins in this dissenting opinion.

STATE OF NORTH CAROLINA
v.
ROBERT WAYNE DELAU

No. 30A21

Filed 6 May 2022

1. Appeal and Error—preservation of issues—timely objection—grounds for objection—clear from context

In his trial for driving while impaired, defendant properly preserved the issue of whether a police officer gave improper lay opinion testimony—his opinion that defendant was the driver of a crashed moped—by timely objecting to the testimony. Defense counsel was not required to clarify the grounds for the objection because it was reasonably clear from the context.

2. Evidence—lay opinion—assumed error—prejudice analysis

Even assuming that admission of an officer's allegedly improper lay opinion testimony—his belief that a crashed moped was driven by defendant—was error, defendant could not prove prejudice

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1. Further, it should be noted that at the time the trial court accepted the plea, it did not have the benefit of this Court's decision in *State v. Dew*, 379 N.C. 64, 2021-NCSC-124, ¶ 27.

where other evidence admitted at his trial for driving while impaired included substantially similar information. Specifically, the warrant application (to draw defendant's blood) and defense counsel's cross-examination of the officer put essentially the same information before the jury.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, No. COA19-1030, 2020 WL 7974281 (N.C. Ct. App. Dec. 31, 2020), vacating a judgment entered on 28 November 2018 by Judge Marvin P. Pope, Jr., in Superior Court, Buncombe County, and remanding for a new trial. Heard in the Supreme Court on 15 February 2022.

Joshua H. Stein, Attorney General, by Zachary K. Dunn, Assistant Attorney General, for the State-appellant.

Joseph P. Lattimore for defendant-appellee.

HUDSON, Justice.

¶ 1 Here we consider whether defendant was prejudiced by the trial court's admission of certain testimony by a police officer that we assume without deciding violated Rule 701 of the North Carolina Rules of Evidence. Because we conclude that even assuming error, defendant was not prejudiced, we reverse the decision of the Court of Appeals.

I. Factual and Procedural Background

A. Accident and Trial

¶ 2 In the early morning hours of 15 June 2017, defendant Robert Wayne Delau was involved in a moped accident in Asheville, North Carolina. Paramedics were called to the scene and found defendant lying in the road, severely injured. Two officers from the Asheville Police Department, Henry Carssow (Officer Carssow) and Tyler Barnes (Office Barnes), also responded to the accident. The officers observed defendant lying in the road being treated by paramedics, a moped lying on its side a few feet away from defendant, and a "trail of debris" leading to a nearby stone wall that had "a deep impact . . . that was about the size of what a moped would produce." No other people or vehicles were in the immediate vicinity of the accident, and none of the pedestrians interviewed on the scene reported witnessing the wreck.

¶ 3 When Officer Carssow approached defendant and the paramedics, Officer Carssow smelled a strong odor of alcohol. The smell, in addition to his professional experience responding to late-night single-vehicle accidents, led Officer Carssow to initiate a Driving While Intoxicated (DWI) investigation. However, because of defendant's severe injuries, the officers were not able to conduct standard field sobriety tests at the scene. Instead, Officer Carssow applied for a search warrant to obtain a sample of defendant's blood to check his blood alcohol concentration. Officer Carssow signed the Application for Search Warrant for Bodily Fluids (warrant application) and checked a box that read, "I ascertained that the above-named individual was operating the described vehicle at the time and place stated from the following facts[.]" The subsequent space for further explanation, however, was left blank. Officer Carssow additionally checked the boxes indicating that defendant had previously been convicted of an offense involving impaired driving and that he had detected a strong odor of alcohol coming from defendant's breath at the scene.

¶ 4 Officer Carssow's warrant application was executed and signed by a magistrate. In accordance with the warrant, defendant's blood was drawn by a nurse at the hospital and placed into evidence at the police department. The State Crime Laboratory tested the blood sample and determined that defendant's blood alcohol concentration was 0.13. Defendant was subsequently cited for "unlawfully and willfully operating a (motor) vehicle . . . [w]hile subject to an impairing substance" under N.C.G.S. § 20-138.1.

¶ 5 Defendant's trial was held before a jury on 27 and 28 November 2018 in Superior Court, Buncombe County. As an initial matter, defendant filed a motion to suppress the blood sample evidence obtained as a result of the warrant. Defendant argued that the magistrate "erred in finding probable cause to issue the search warrant" because the information presented in Officer Carssow's affidavit "fails to reveal any information implicating the [d]efendant as the driver of the moped." The trial court denied the motion.

¶ 6 Officer Carssow testified for the State at trial. During Officer Carssow's testimony, the following exchange took place:

> [Prosecutor]: So in a situation like this, you didn't see [defendant] driving, What circumstantial evidence did you believe you had at that time that he was, in fact, the driver of that moped?

> [Officer Carssow]: Correct. Pretty much starting from [defendant] wearing a helmet and having the jacket on—the riding jacket for safety—you know, safety equipment for riding a moped or motorcycle. His position next to the . . . moped. The fact that the moped was owned by him. The . . . extent of his injuries told me that I didn't believe anybody else could have been on scene. The speed at which both EMS and officers arrived on this scene which I believe prohibited—
>
> [Defense counsel]: Objection, your Honor.
>
> [The court]: Overruled.
>
> [Officer Carssow]: Prohibited, you know, too much time passing where other individuals are coming in and out where somebody else riding could have left the scene.

Following this testimony, the State moved to admit the warrant application completed by Officer Carssow into evidence. Defendant did not object. The trial court admitted the warrant application into evidence, and copies were distributed to the jury.

¶ 7 During Officer Carssow's subsequent cross-examination by defense counsel, the following exchange took place:

> [Defense counsel]: So at the point that you went to go get this warrant, you really didn't know if he had driven; correct?
>
> [Officer Carssow]: I had not actually seen him driving. I had done it based upon circumstances.
>
> . . . .
>
> [Defense counsel]: And so when you were filling this out, . . . since you didn't see an individual operating the vehicle, you didn't check [Section] 2A right there? You see what I'm talking about?[1]
>
> [Officer Carssow]: Correct.

1. Section 2A of the warrant application indicates that the officer "*observed* the above-named individual operating the above-described vehicle." (Emphasis added).

> [Defense counsel]: Instead, you checked this section on B; right?[2]
>
> [Officer Carssow]: Mm-hmm. Yes, Ma'am.
>
> [Defense counsel]: And this—what this says right here is that on or about this date, 1:32 AM . . . I responded to a . . . report of a vehicle crash. After arriving at the scene I ascertained that the above-named individual was operating the described vehicle at the time and place stated from the following facts, colon. You see that?
>
> [Officer Carssow]: Yes, Ma'am.

¶ 8 After the State's presentation of evidence, defendant called two witnesses who both testified to being with defendant during the time leading up to the moped accident and that defendant had not been the driver. One witness, Damon Mobley, testified that *he* was driving the moped during the crash and that defendant was a passenger.

¶ 9 On 28 November 2018, the jury found defendant guilty of driving while impaired under N.C.G.S. § 20-138.1. The trial court subsequently sentenced defendant to thirty-six months in the Misdemeanant Confinement Program. Defendant timely appealed.

B. Court of Appeals

¶ 10 Before the North Carolina Court of Appeals, defendant raised two issues. First, defendant argued that the trial court plainly erred by denying his motion to suppress because the warrant application failed to establish probable cause for the search warrant. Second, defendant argued that the trial court erred by admitting Officer Carssow's lay witness opinion that defendant was driving the moped at the time of the accident.

¶ 11 On 31 December 2020, the Court of Appeals issued an unpublished, divided opinion in which it concluded that: (1) defendant waived his right to appellate review concerning the admission of the evidence obtained as a result of the search warrant, but (2) the trial court committed prejudicial error by admitting Officer Carssow's testimony that defendant was driving the moped at the time of the accident. Accordingly, the Court of Appeals vacated defendant's conviction and

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2. Section 2B of the warrant application indicates that the officer "*ascertained* that the above-named individual was operating the described vehicle." (Emphasis added).

remanded the case to the trial court for a new trial. *State v. Delau*, No. COA19-1030, 2020 WL 7974281, at *6 (N.C. Ct. App. Dec. 31, 2020).

¶ 12 First, the Court of Appeals majority held that defendant waived his right to appellate review concerning the admission of the evidence obtained from the search warrant. *Delau*, 2020 WL 7974281, at *3. At trial, defendant "freely entered into a written stipulation with the State that directly referenced the evidence of his blood alcohol concentration obtained from the search warrant" and accordingly consented to the language of the stipulation. *Id.* Further, the Court of Appeals noted, defendant "made no objection to the inclusion of his blood alcohol concentration obtained as a result of the search warrant" in evidence. *Id.* Through his consent, "[d]efendant waived his right to appellate review of any error that may have resulted from the admission and stipulation of the blood alcohol concentration resulting from the search warrant." *Id.*

¶ 13 Second, the Court of Appeals majority held that the trial court committed prejudicial error by admitting Officer Carssow's testimony that defendant was driving the moped at the time of the accident. *Delau*, 2020 WL 7974281, at *5. As an initial matter, the majority determined that defendant sufficiently preserved this issue for appellate review under Rule 10(a)(1) of the North Carolina Rules of Appellate Procedure by timely objecting to Officer Carssow's testimony regarding the factual basis as to why he believed defendant was driving. *Delau*, 2020 WL 7974281, at *3–4.

¶ 14 Next, the majority held that the trial court's admission of Officer Carssow's testimony concluding that defendant was the driver of the moped constituted error under Rule 701 of the North Carolina Rules of Evidence, which limits lay witness testimony "to those opinions or inferences which are . . . rationally based on the perception of the witness." *Delau*, 2020 WL 7974281, at *4 (quoting N.C.G.S. § 8C01, Rule 701 (2019)). Specifically, the majority determined that "it was an abuse of discretion for Officer Carssow to testify [that] [d]efendant was the driver of the moped based on his examination of the scene because he did not personally witness the accident and was not qualified as an expert." *Delau*, 2020 WL 7974281, at *5.

¶ 15 Finally, the majority held that this error was prejudicial. *Id.* at 5. On this point, the majority reasoned that because of the "significant weight" that the jury is likely to give to the testimony of a police officer, the lack of direct evidence from the State that defendant was driving, and the contrary evidence presented by defendant, "there is a reasonable possibility

. . . a different result would have been reached at the trial[.]" *Id.* (alterations in original) (quoting N.C.G.S. § 15A-1443(a) (2019)). Accordingly, the Court of Appeals majority vacated defendant's conviction and remanded the case back to the trial court for a new trial because "[d]efendant was prejudiced when the trial court abused its discretion by admitting Officer Carssow's lay opinion testimony." *Delau*, 2020 WL 7974281, at *6.

¶ 16 Judge Dillon dissented. Although the dissent came to the same conclusion as the majority on the first issue—that defendant waived his right to appellate review concerning the admission of the blood sample evidence—it would have held that the trial court's admission of Officer Carssow's testimony did not constitute reversible error. *Id.* (Dillon, J., dissenting). Specifically, the dissent reasoned that Officer Carssow "was not expressly asked to give a formal opinion as to who was driving the moped. Rather, he was merely asked what circumstantial evidence led him to form his belief that [d]efendant was driving, *at the time* he sought the warrant." *Delau*, 2020 WL 7974281, at *7. Even assuming that Officer Carssow's testimony was improper, though, the dissent would have held that the issue was not preserved for appellate review because "[d]efendant failed to state the grounds of his objection when the testimony was offered . . . [a]nd the grounds are not otherwise obvious in the context of the objection." *Id.* Finally, even assuming that the error was properly preserved for appellate review, the dissent reasoned that any such error was not prejudicial because defendant did not object to the introduction of the warrant, which contained Officer Carssow's "opinion" that defendant was the driver. *Id.*

¶ 17 On 4 February 2021, the State filed its notice of appeal to this Court based on the dissenting opinion below.

C. Present Appeal

¶ 18 Here, the State argues that the Court of Appeals majority erred in its determination that the trial court committed prejudicial error by admitting Officer Carssow's lay opinion testimony and that the Court of Appeals decision should thus be reversed. First, the State argues that the majority erred in concluding that defendant properly preserved his argument regarding the alleged lay opinion testimony of Officer Carssow. The State asserts that defendant failed to provide the basis for his objection to Officer Carssow's testimony and, therefore, the issue was not preserved under Rule 10(a)(1) of the North Carolina Rules of Appellate Procedure, which requires a party to state "the specific grounds for the" desired ruling. The State asserts that defendant provided "only a belated

general objection to Officer Carssow's testimony" during the final portion of questioning about the scene of the moped accident.

¶ 19 Second, the State argues that even if defendant properly preserved this issue for appellate review, the Court of Appeals majority erred in concluding that Officer Carssow's testimony constituted improper lay opinion testimony. The State asserts that Officer Carssow was not giving his opinion on whether or not defendant was driving the moped but rather explaining what circumstantial evidence he relied upon in obtaining the warrant for the defendant's blood.

¶ 20 Third, the State argues that even assuming that the trial court erred in admitting Officer Carssow's testimony, the Court of Appeals majority erred in concluding that the alleged lay opinion testimony was prejudicial and that a new trial was required. The State asserts that other evidence presented at trial prevented defendant from carrying his burden to show that, in the absence of Officer Carssow's testimony, there was "a reasonable possibility that…a different result would have been reached at the trial," quoting N.C.G.S. § 15A-1443(a) (2021). Specifically, the State notes that the warrant application contained functionally the same information as Officer Carssow's testimony regarding his conclusion that defendant was the driver of the moped. And because defendant did not object to the admission of the warrant application at trial, the State contends, any error in admitting Officer Carssow's testimony could not be prejudicial. *See State v. Campbell*, 296 N.C. 394, 399 (1979) ("It is well established that the admission of evidence without objection waives prior or subsequent objection to the admission of evidence of a similar character."). Further, the State points to defendant's own cross-examination of Officer Carssow, which elicited much of the same information. The State concludes that because this other evidence and testimony presented at trial included much of the same information that is at issue in Officer Carssow's testimony, defendant cannot show that a different result would have been reached had Carssow's testimony been excluded, as required by N.C.G.S. § 15A-1443(a).

¶ 21 In response, defendant argues that the decision of the Court of Appeals majority should be affirmed. First, defendant argues that the issue of improper lay opinion testimony was properly preserved by defense counsel's timely objection at trial. Defendant asserts that the reason underlying defense counsel's objection to Officer Carssow's testimony is clear from its context under Rule 10(a)(1). Defendant contends that his objection at trial was prompted by Officer Carssow's repeated use of the word "believe" when testifying as to his reasons for concluding that defendant was the driver of the moped. Accordingly, defendant

argues, it was "apparent from the context" that defense counsel's objection was in direct response to Officer Carssow's improper lay opinion regarding who was driving the moped. *See* N.C. R. App. P. 10(a)(1).

¶ 22 Further, defendant argues that Officer Carssow's testimony was not admissible for any purpose because it was irrelevant and ultimately invaded the province of the jury. Defendant states that even an overruled "general objection" to evidence that could not have been admissible is preserved, citing *State v. Ward*, 301 N.C. 469, 477 (1980). Defendant contends that Officer Carssow's testimony about his belief that defendant was the moped driver faced an admissibility problem, which even the State acknowledges could have been subject to a "proper" objection.

¶ 23 Second, defendant argues that the Court of Appeals majority correctly determined that the trial court erred in admitting Officer Carssow's testimony because a non-expert officer investigating the aftermath of an accident cannot provide the jury with the conclusions he has drawn from his observations of the scene. Defendant notes that "[o]rdinarily, opinion evidence of a non-expert witness is inadmissible because it tends to invade the province of the jury," quoting *State v. Fulton*, 299 N.C. 491, 494, (1980). Although defendant notes that it is appropriate "for an investigating officer to testify as to the condition and position of the vehicles and other physical facts observed by him at the scene of an accident, his testimony as to his *conclusions* from those facts is incompetent," quoting *State v. Wells*, 52 N.C. App. 311, 314 (1981) (emphasis added). Defendant notes that in *McGinnis v. Robinson*, 258 N.C. 264 (1962), this Court held that an investigating officer's testimony about who drove a vehicle in an accident that he did not witness was merely a guess or opinion and therefore not competent evidence, *id.* at 268. Here, defendant contends, Officer Carssow's testimony inappropriately drew inferences from his observations at the scene of the accident, as the jury was just as qualified as Officer Carssow to draw such inferences. Therefore, defendant concludes that the Court of Appeals majority correctly determined that the trial court erred in admitting Officer Carssow's non-expert testimony.

¶ 24 Third, defendant argues that the Court of Appeals majority correctly determined that the admission of this improper lay opinion testimony was prejudicial because it impacted the jury's analysis of the live issue in the case. Defendant asserts that the jury probably gave Officer Carssow's testimony "significant weight." Defendant further contends that the State's argument that Officer Carssow's testimony was essentially the same as the information included in the warrant application is without merit because the warrant application did not include Officer

Carssow's thought process, explanation, or detailed observations. Accordingly, defendant asserts that the Court of Appeals correctly concluded that there is a reasonable possibility of a different result in the absence of the improper evidence under N.C.G.S. § 15A-1443(a).

II. Analysis

¶ 25 Now, this Court must determine: (1) whether defendant properly preserved this issue for appellate review; if so, (2) whether the trial court erred by admitting the testimony in question; and, if so, (3) whether such error was prejudicial. "This Court reviews the decision of the Court of Appeals to determine whether it contains any errors of law." *State v. Melton*, 371 N.C. 750, 756 (2018). As an initial matter, we agree with the Court of Appeals majority and defendant that this issue was properly preserved for appellate review. However, we agree with the Court of Appeals dissent and the State that, assuming that the trial court's admission of the testimony in question was erroneous, it was not prejudicial. Accordingly, we reverse the Court of Appeals decision below.

A. Preservation

¶ 26 **[1]** First, we must consider whether this issue was properly preserved for appeal. Rule 10 of the North Carolina Rules of Appellate Procedure establishes that "[i]n 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). This specificity requirement "prevents unnecessary retrials by calling possible error to the attention of the trial court so that the presiding judge may take corrective action if it is required. *State v. Bursell*, 372 N.C. 196, 199 (2019). Further, it "contextualizes the objection for review on appeal, thereby enabling the appellate court to identify and thoroughly consider the specific legal question raised by the objecting party." *Id.*

¶ 27 Here, we agree with the Court of Appeals majority below and defendant on appeal that the admissibility of Officer Carssow's testimony was properly preserved for appeal through defense counsel's timely objection at trial. During Officer Carssow's testimony, the parties and the trial court engaged in the following exchange:

> [Prosecutor:] So in a situation like this, you didn't see [defendant] driving. What circumstantial evidence did you believe you had at that time that he was, in fact, the driver of that moped?

> [Officer Carssow:] Correct. Pretty much starting from [defendant] wearing a helmet and having the jacket on—the riding jacket for safety—you know, safety equipment for riding a moped or motorcycle. His position next to the . . . moped. The fact that the moped was owned by him. The . . . extent of his injuries told me that *I didn't believe* anybody else could have been on scene. The speed at which both EMS and officers arrived on the scene which *I believe* prohibited—
>
> [Defense counsel]: Objection, your Honor.
>
> The court: Overruled.
>
> [Officer Carssow]: Prohibited, you know, too much time passing where other individuals are coming in and out where somebody else riding could have left the scene.

¶ 28 As determined by the Court of Appeals majority below, it is reasonably clear from the context of this exchange that defense counsel's objection was raised in immediate response to "Officer Carssow's testimony regarding the factual basis as to why he believed [d]efendant was driving." *Delau*, 2020 WL 7974281, at *4. While defense counsel certainly *could* have clarified the specific grounds for the objection, such specificity is not *required* where, as here, the purpose of the objection is apparent from the context. Further, defense counsel both "call[ed the] possible error to the attention of the trial court" and "contextualize[d] the objection for review on appeal," *Bursell*, 372 N.C. at 199, by objecting as soon as the witness veered from answering the question about circumstantial evidence into the realm of opinion and belief, thus fulfilling the fundamental purposes of the Rule 10(a)(1) requirements. Accordingly, we hold that the grounds of defendant's timely objection were apparent from the context, and thus that defendant properly preserved the underlying issue for appeal.

B. Legal Error

¶ 29 Second, we must consider whether the trial court's admission of Officer Carssow's testimony that defendant was the driver of the moped constituted improper lay witness testimony. "We review the trial court's decision to admit [lay opinion testimony] evidence for abuse of discretion, looking to whether the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result

of a reasoned decision." *State v. Williams*, 363 N.C. 689, 701–02 (2009) (cleaned up).

¶ 30 Rule 701 of the North Carolina Rules of Evidence establishes that

> [i]f [a] witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue.

N.C.G.S. § 8C-1, Rule 701 (2021). In accordance with this Rule, this Court has held that the testimony of an investigating officer was properly admitted at trial where it was "based on his personal observations" and "helpful to a clear understanding of his testimony" concerning the facts in question. *See, e.g.*, *State v. Dickens*, 346 N.C. 26, 46 (1997); *State v. Lloyd*, 354 N.C. 76, 109 (2001).

¶ 31 Here, we assume without deciding that Officer Carssow's testimony noted above constituted an improper lay opinion under Rule 701 and therefore that the trial court erred in admitting the testimony. Because such assumed error would only require correction if prejudicial, we now proceed directly to the prejudice analysis.

C. Prejudice

¶ 32 **[2]** Third, we must consider whether this assumed error was prejudicial to defendant. Even assuming error, "evidentiary error does not necessitate a new trial unless the erroneous admission was prejudicial." *State v. Wilkerson*, 363 N.C. 382, 415 (2009). "A defendant is prejudiced by evidentiary error when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at . . . trial . . . ." *Id.* (cleaned up); *see* N.C.G.S. § 15A-1443(a) (2021) (establishing this standard). "The burden of showing . . . prejudice under [N.C.G.S. § 15A-1443(a)] is upon the defendant." N.C.G.S. § 15A-1443(a) (2021). Further, if certain evidence is admitted without objection, the admission of subsequent evidence of similar a character cannot be objectionable. *See Campbell*, 296 N.C. at 399.

¶ 33 Here, assuming *arguendo* that the admission of Officer Carssow's testimony was erroneous, we determine that defendant has not met his burden of showing prejudice because other admitted evidence included substantially similar information. First, defendant did not object to the introduction of the warrant application, which was admitted into evidence and published to the jury. The warrant application, signed by Officer

Carssow, definitely stated Carssow's conclusion that the defendant was "operating the" moped. Next, defendant's own cross-examination of Officer Carssow brought out much of the same information because defendant quoted from the warrant application where defendant was identified as the driver of the moped. Specifically, defense counsel's exchange with Officer Carssow during cross-examination noted that Officer Carssow's conclusion regarding who was driving the moped was "based upon circumstances," and that Officer Carssow "ascertained that [defendant] was operating the described vehicle at the time and place stated."

¶ 34 To be sure, it is reasonable to assume that the testimony of a police officer at trial will be afforded significant credibility and weight by the jury. Here, however, even if Officer Carssow's testimony was given significant weight by the jury, very similar evidence—to the effect that defendant was the moped driver was admitted without objection through the warrant application and the defendant's own cross-examination. Defendant did not meet his burden in showing that had Officer Carssow's testimony not been admitted, a different result would have been reached as required by N.C.G.S. § 15A-1443(a). Accordingly, we hold that even assuming that the trial court erred in admitting the testimony in question, such error was not prejudicial.

III. Conclusion

¶ 35 We agree with the Court of Appeals majority below and defendant on appeal that Officer Carssow's testimony was properly preserved for appeal. However, assuming *arguendo* that the admission of Officer Carssow's testimony was erroneous under Rule 701, we hold that defendant has not met his burden of showing that such assumed error was prejudicial where other evidence properly admitted at trial established substantially the same thing. Accordingly, we reverse the decision of the Court of Appeals.

REVERSED.

THE CHERRY COMMUNITY ORGANIZATION,
A NORTH CAROLINA NON-PROFIT CORPORATION, AND STONEHUNT, LLC
v.
STONEY D. SELLARS, MIDTOWN AREA PARTNERS HOLDINGS, LLC,
AND MIDTOWN AREA PARTNERS II, LLC

No. 141PA20

Filed 6 May 2022

Real Property—good faith purchaser for value—fraudulent intention—imputation of knowledge—agency principles

In plaintiff's action pursuant to the Uniform Voidable Transactions Act—in which plaintiff, a nonprofit community organization, challenged a real estate transfer of land which it had previously owned and to which it had a potential claim under a separate lawsuit—defendants were not entitled to the protections afforded good faith purchasers for value where they purchased the land in a private sale from another developer with which defendants had formed a joint real estate development venture. Pursuant to principal-agent law and the doctrine of imputed knowledge, defendants were charged with the knowledge of their co-principal's fraudulent intent to shield the land from plaintiff as a creditor, which was accomplished by transferring title of the subject property—the co-principal's last substantial asset—to defendants without public notice, appraisal, or negotiation during the pendency of plaintiff's appeal from the related lawsuit.

Justice BARRINGER concurring in part and dissenting in part.

Chief Justice NEWBY joins in this concurring in part and dissenting in part opinion.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous, unpublished opinion of the Court of Appeals, No. COA19-695, 2020 WL 774020 (N.C. Ct. App. Feb. 18, 2020), affirming a judgment entered on 31 December 2018 by Judge Eric L. Levinson in Superior Court, Mecklenburg County. Heard in the Supreme Court on 4 October 2021.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, L.L.P., by Scott A. Miskimon, Kerry A. Shad, and J. Mitchell Armbruster, for plaintiff-appellant Cherry Community Organization.

Alexander Ricks PLLC, by Roy H. Michaux Jr. and Matthew T. Houston, for defendant-appellees Midtown Area Partners Holdings, LLC and Midtown Area Partners II, LLC.

MORGAN, Justice.

¶ 1 This Court allowed plaintiff's Petition for Discretionary Review in order to examine a unanimous opinion of the Court of Appeals which affirmed a trial court's judgment dismissing plaintiff's lawsuit which lodged claims against defendants under North Carolina's Uniform Voidable Transactions Act (UVTA). The trial court concluded, and the Court of Appeals agreed, that defendants were good faith purchasers for value and thus possessed a legitimate defense against plaintiff's claims under the UVTA. However, the trial court's unchallenged findings of fact require the application of common law agency principles which operate to remove the protection of the good faith purchaser defense from defendants. Therefore, the decision of the Court of Appeals is reversed in part, and the judgment of the Superior Court, Mecklenburg County, entered on 31 December 2018 in which it dismissed plaintiff's UVTA claims against defendants is vacated and this case remanded for further proceedings in accordance with this opinion.

I. Factual and Procedural Background

¶ 2 Plaintiff The Cherry Community Organization is a North Carolina nonprofit entity dedicated to the preservation and enhancement of an area of Charlotte known as Cherry, a historic Black, working-class neighborhood near the city's uptown district. Plaintiff organization is comprised of occupants of properties within the Cherry community and leases affordable housing units which plaintiff owns to low-income, disabled, and senior residents, some of whom have lived there for generations. In furtherance of this mission, plaintiff began contracting with an individual named Stoney Sellars and his real estate development company StoneHunt, LLC in 2004 in order to develop affordable housing units on several acres of land which plaintiff owned in the Cherry neighborhood. Under the ensuing contracts, StoneHunt obtained title to eight acres of prime real estate owned by plaintiff near the center of Charlotte at below-market rates in exchange for a promise that StoneHunt would develop certain parcels of the land into housing units for low-income, disabled, and senior occupants. However, StoneHunt failed to build all of the affordable housing units which it pledged, instead maneuvering to sell most of the land conveyed to StoneHunt by plaintiff under the contract to market-rate residential builders in May 2014 for an enormous

profit. Of the land conveyed to StoneHunt by plaintiff under the original contract, StoneHunt retained only a half-acre parcel. Adjacent to this half-acre parcel was another quarter-acre parcel which StoneHunt also owned but that was otherwise unrelated to StoneHunt's unfulfilled contractual obligations to plaintiff. Together, these two parcels are identified in this matter as the "subject property."

¶ 3 Defendants Midtown Area Partners Holdings, LLC and Midtown Area Partners II, LLC (MAP) are real estate development businesses which share identical ownership. Defendants' principals are sophisticated, informed real property and financial investment professionals who have heightened knowledge about the marketplace and land values.[1] One of defendants' principals approached Sellars twice during the 2012–2013 time period in order to probe StoneHunt's willingness to sell the subject property to MAP. Defendants' representative explained that MAP owned adjacent parcels to the subject property and remarked that it did not appear that StoneHunt was in the process of developing the land at issue despite a sign from 2008 which was situated on the property stating, "Town Homes Coming." Sellars denied the occurrence of such overtures. Defendants' agent then proposed that StoneHunt and MAP work together in developing the subject property which StoneHunt controlled and the adjacent parcels that defendants owned. The two entities, through their respective actors, entered into an operating agreement to develop these contiguous properties into a $50 million mixed-use project in March 2014. Extending from the creation of this arrangement until its termination, defendants and StoneHunt were the principals of a general partnership engaged in a joint venture for the development of the mixed-use project, with defendants enjoying an insider status to StoneHunt's dealings with the subject property.

¶ 4 Having discovered StoneHunt's breach of its contract with plaintiff to construct the affordable housing units in a collaborative approach on the acreage conveyed by plaintiff to StoneHunt in the 2004 conveyance, plaintiff filed suit against StoneHunt and its principal Sellars on 10 September 2015 for breach of contract and violations of the North Carolina Unfair and Deceptive Trade Practices Act (the first lawsuit). The first lawsuit sought monetary damages and the recovery of title to the portion of the subject property which plaintiff had deeded to StoneHunt under the 2004 contract and was accompanied by a Notice of Lis Pendens that was filed in the county clerk's office the same day

1. In addressing this case in a manner to promote clarity, the term "defendants" collectively refers to the two MAP entities which are named parties in this action as well as their respective principals who are identical, yet unnamed in the underlying lawsuit.

concerning this part of the subject property. Plaintiff delivered copies of the complaint and Notice of Lis Pendens simultaneously to defendants' attorney. Defendants contemplated the potential effects which the first lawsuit could have on the viability of the joint project of defendants and StoneHunt, leading to communications with Sellars and StoneHunt about the authority of plaintiff's board members to prosecute the first lawsuit, StoneHunt's legal strategy in countering plaintiff's claims, and the financial impact on defendants' and StoneHunt's joint venture as a result of the Notice of Lis Pendens. Defendants were not involved otherwise with StoneHunt's defense of the first lawsuit. The first lawsuit was dismissed in February 2016 by order of the trial court pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure and the Notice of Lis Pendens was cancelled by another order of the trial court in May 2016. Plaintiff timely appealed the trial court's orders which, taken together, effectively halted the first lawsuit.

¶ 5 During the pendency of plaintiff's appeal to the Court of Appeals and at the behest of StoneHunt, one of defendants' principals submitted to the lower appellate court an affidavit in opposition to plaintiff's appeal, lamenting that the development of the subject property would "be delayed and thus damaged by a cloud on the title to two of the StoneHunt parcels" due to the Notice of Lis Pendens filed by plaintiff. On 17 June 2016—approximately one week after the affidavit—plaintiff's counsel sent a letter to defendants' counsel which expressed confidence that the Court of Appeals would reverse the trial court's dismissal of the first lawsuit and the trial court's cancellation of the Notice of Lis Pendens, and reminded defendants that litigation against StoneHunt was still pending, thus putting title to the subject property "at issue." The letter concluded with an admonition from plaintiff's counsel that if StoneHunt and defendants continued with plans to develop or convey the subject property, they did so "strictly at their own risk and peril." A few months later, in September 2016, although StoneHunt had represented the subject property to be worth $2.5 million, nevertheless the real estate development company offered to sell the subject property to defendants outright for $1.1 million. Sellars explained that this sudden shift in his company StoneHunt's involvement with the subject property and the accompanying mixed-use project was inspired by Sellars's desire to spend more time looking after his family and growing information technology business, even though Sellars's continued involvement with the multi-use development would have yielded far greater monies than a direct sale to defendants without any substantial work on Sellars's part. The following week, notwithstanding defendants' belief that the

value of the subject property rested somewhere between $600,000 and $800,000, defendants orally agreed to purchase the subject property for StoneHunt's offering price of $1.1 million but on different terms than those offered by StoneHunt.

¶ 6 In late October 2016, plaintiff's counsel sent defendants' counsel a calculation of damages totaling $1,694,000 which plaintiff reasonably expected to obtain in an eventual judgment against StoneHunt—not including interest, attorney's fees, and potential treble damages—in the event that plaintiff prevailed in its lawsuit. The oral arguments in plaintiff's appeal were presented in the Court of Appeals on 28 November 2016. On the following day, in recognizing that the Court of Appeals would possibly issue an opinion in favor of plaintiff and potentially reinstate the first lawsuit, StoneHunt's counsel sent an electronic mail to defendants explaining that they should expect the Court of Appeals decision "fairly quickly" and advising "everyone to try to get this done as soon as possible," referring to the completion of the sale of the subject property which had yet to be reduced to writing.

¶ 7 Based upon a mutual trust established through the parties' relationship as business partners, StoneHunt and defendants agreed to fully conceal their pending land transaction until it was too late for plaintiff to attempt to prevent the sale. Instead of placing the subject property on the open market, StoneHunt and defendants agreed to an insider sale, wherein the availability of the subject property to be purchased from StoneHunt would not be publicized and defendants' knowledge of the land's availability for purchase was due to their special relationship with StoneHunt. There was no appraisal of the land's value which was performed, and the parties did not negotiate about the transaction price. On 8 December 2016—nine days after the electronic mail correspondence which StoneHunt's counsel sent to defendants which advised that the subject property transfer needed to be "done as soon as possible" lest an unfavorable ruling from the Court of Appeals on plaintiff's appeal of the first lawsuit erect a formidable barrier to the ability to consummate the land transaction involving the subject property—StoneHunt and defendants signed a contract for the sale of the subject property (the purchase contract) through their respective agents, with Sellars executing the contract on StoneHunt's behalf. The purchase contract included a provision that, because of certain circumstances, defendants were "not willing to pay full market value" for the subject property. After multiple amendments, the final terms of the purchase contract provided that StoneHunt would disclose to defendants any filings which it already had, or would receive, from plaintiff in the continuing first lawsuit, and

that the joint venture between StoneHunt and defendants would be dissolved contemporaneous with the delivery of a deed to the subject property by StoneHunt to defendants. The purchase contract further provided that, in light of the first lawsuit, and in order to encourage the resolution of the "differences" between plaintiff and StoneHunt, defendants would pay $200,000 of the purchase price at closing and issue a promissory note for the remaining $900,000 which would be payable one year later. There was also a "gentlemen's agreement" between defendants and StoneHunt that there would be a "principal pay down" of $200,000 against the $900,000 promissory note upon a dismissal of plaintiff's *lis pendens* appeal. This term was excluded from the written purchase contract because defendants' counsel feared that it would be discoverable and defendants "didn't want to get caught up in the litigation."

¶ 8 On 30 December 2016, the Court of Appeals issued an opinion reversing the trial court's dismissal of plaintiff's first lawsuit for StoneHunt's alleged breach of contract and alleged violation of the Unfair or Deceptive Trade Practices Act (UDTPA). Having reinstated plaintiff's first lawsuit, the Court of Appeals dismissed plaintiff's appeal of the trial court's cancellation of the Notice of Lis Pendens as interlocutory. Therefore, as of January 2017, defendants knew that plaintiff's first lawsuit had been revived, defendants and StoneHunt had not yet consummated the proposed conveyance of the subject property, and the Notice of Lis Pendens clouding a portion of the subject property had not been reinstated. Irrespective of these circumstances, on 2 February 2017, StoneHunt and defendants formally closed their real estate transaction, with StoneHunt signing and delivering a deed to defendants which transferred ownership of the subject property to defendants in exchange for the $200,000 down payment and the $900,000 promissory note. On the same day the transaction closed, StoneHunt and defendants signed an agreement which dissolved the joint venture between them. StoneHunt then divided the $200,000 which it received at closing between StoneHunt's counsel for outstanding legal fees and Sellars for an amount owed by StoneHunt to him, leaving the $900,000 promissory note and a small amount of funds as StoneHunt's sole remaining assets.

¶ 9 Upon learning of the insider sale of the subject property from StoneHunt to defendants, plaintiff initiated legal action against defendants on 30 August 2017 seeking, among other things, avoidance of the transfer of the subject property and the accompanying sale proceeds, as well as a judgment against defendants in the amount of the value of the subject property at the time of its transfer by StoneHunt for defendants'

alleged violation of the UVTA[2] (the second lawsuit). *See* N.C.G.S. §§ 39-23.1 to 39-23.12 (2021). While taking the position that StoneHunt had transferred title to the subject property to defendants in an effort to defraud plaintiff of an opportunity to reach this asset as a creditor, plaintiff asserted in its complaint that defendants were not good faith purchasers for value of the subject property, and therefore defendants could not claim the protection of the UVTA which is afforded to good faith transferees. Following a lengthy jury trial in the first lawsuit which resulted in a verdict for plaintiff, StoneHunt and plaintiff entered into a consent judgment by which plaintiff would be entitled to recover from StoneHunt's bankruptcy estate over $7 million in damages, interest, and attorney's fees.[3]

¶ 10 On 21 May 2018, almost nine months after the filing of the original complaint, plaintiff filed a motion to amend its complaint against defendant Midtown Area Partners Holdings, LLC in order to add a claim under the UDTPA found in Chapter 75 of the North Carolina General Statutes. Concurrently, plaintiff amended its complaint against defendant Midtown Area Partners II, LLC as a matter of right to include a claim under the UDTPA. The trial court denied plaintiff's motion to amend its complaint against Midtown Area Partners Holdings, LLC on 19 July 2018, concluding that there had "been undue delay with respect to pursuing this claim." A nine-day bench trial in plaintiff's second lawsuit concluded on 30 July 2018.

¶ 11 The trial court entered a judgment dismissing plaintiff's second lawsuit, including plaintiff's UVTA claims against both defendant's and plaintiff's singular UDTPA claim against Midtown Area Partners II, LLC, on 31 December 2018. In its judgment, the trial court included extensive, expansive findings of fact and conclusions of law which detailed a calculated scheme by Sellars and StoneHunt to fraudulently liquidate the subject property and to hide the monetary proceeds from legitimate creditors. Despite its express recognition of the width and depth of StoneHunt's fraud, the trial court nonetheless concluded that defendants "acted in a commercially reasonable manner" in their acquisition of the property and "did not engage in fraudulent activities." The trial court further concluded that defendants had "established and met

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2. Prior to 1 October 2015, the UVTA was known as the Uniform Fraudulent Transfer Act and is mentioned as the Uniform Fraudulent Transfer Act in plaintiff's verified complaint despite the complaint being filed subsequent to the law's name change. *See* N.C.G.S. § 39-23.12 (2021).

3. StoneHunt filed for Chapter 11 bankruptcy in the Western District of North Carolina on 29 August 2018.

its burden of proof to show that it was a good faith purchaser of the Subject Property,"[4] and lamented that its decision and its designation of defendants as good faith purchasers would likely leave plaintiff with little recourse in collecting the $7 million owed by StoneHunt to plaintiff for StoneHunt's breach of their 2004 contract. The trial court dismissed plaintiff's second lawsuit with prejudice and declared that the Notice of Lis Pendens was ineffectual. Plaintiff timely filed its notice of appeal from the trial court's judgment of 31 December 2018.

¶ 12 The Court of Appeals issued a unanimous, unpublished opinion affirming the trial court's dismissal of plaintiff's second lawsuit against defendants on 18 February 2020. *Cherry Cmty. Org. v. Sellars*, No. COA19-695, 2020 WL 774020, at *1 (N.C. Ct. App. Feb. 18, 2020). Plaintiff petitioned this Court for discretionary review of the Court of Appeals decision. We allowed plaintiff's petition for discretionary review on 15 December 2020.

II. Analysis

¶ 13 Plaintiff's request for this Court's exercise of discretionary review asks us to determine whether the trial court and the Court of Appeals committed an error of law in concluding that defendants were good faith purchasers for value where defendants were co-principals in a joint real estate development venture with a party which intended to defraud creditors by way of the party's insider conveyance to defendants of the real estate property at issue. We conclude that defendants were imputed with the knowledge of their co-principal's fraudulent intent by virtue of the principal-agent relationship which existed between the parties pursuant to common law. Therefore, the Court of Appeals erred in affirming the trial court's determination that defendants were good faith purchasers of the subject property.

A. Standard of Review

¶ 14 "A trial court's unchallenged findings of fact are presumed to be supported by competent evidence and are binding on appeal." *Cape Fear River Watch v. N.C. Env't Mgmt. Comm'n*, 368 N.C. 92, 99 (2015) (extraneity omitted). Otherwise, a trial court's findings of fact are conclusive on appeal if supported by any competent evidence.

4. As noted in the opinion of the Court of Appeals in this case, and as further discussed below, the trial court's conclusion to the effect that defendants were good faith purchasers of the subject property would typically be treated as a finding of fact instead of a conclusion of law, which would in turn alter the standard of review which is normally applicable to such a determination. *Bledsole v. Johnson*, 357 N.C. 133, 138 (2003). However, the legal standard by which the trial court reaches this finding remains a question of law. *Id.*

E. Carolina Reg'l Hous. Auth. v. Loftin, 369 N.C. 8, 11 (2016). "Whether a party has acted in good faith is a question of fact for the trier of fact, but the standard by which the party's conduct is to be measured is one of law." *Bledsole v. Johnson*, 357 N.C. 133, 138 (2003) (citation omitted). Questions of law are reviewed de novo, and "[w]hen considering a case on discretionary review from the Court of Appeals, we review the decision for errors of law." *Irving v. Charlotte-Mecklenburg Bd. of Educ.*, 368 N.C. 609, 611 (2016).

B. The Uniform Voidable Transactions Act, the Good Faith Defense, and Imputation of Knowledge Under Agency Principles

¶ 15 The UVTA "was not designed to permit those dealing in the commercial world to obtain rights by an absence of inquiry under circumstances amounting to an intentional closing of the eyes and mind to defects in or defenses to the transaction." *Branch Banking & Tr. Co. v. Gill*, 293 N.C. 164, 189 (1977). Instead, the UVTA renders "voidable as to a creditor" any "transfer made or obligation incurred" when that transfer—in this case, the conveyance of the subject property—is consummated by a debtor with the "intent to . . . defraud any creditor of the debtor." N.C.G.S. § 39-23.4(a) (2021). In the present case, it is worthy of note that a creditor who is successful in a UVTA claim may obtain avoidance of the transfer of the real property to the extent necessary to satisfy the creditor's claim and may recover judgment for the value of the asset transferred against "[t]he first transferee of the asset" or "[a]n immediate or mediate transferee of the first transferee." N.C.G.S. §§ 39-23.7(a)(1), 39-23.8(b)(2) (2021). However, N.C.G.S. § 39-23.8(a) establishes that a transfer—such as one made by the debtor with the intent to defraud any creditor of the debtor—is not voidable against a transferee "that took in good faith and for a reasonably equivalent value given the debtor." N.C.G.S. § 39-23.8(a). Parties such as defendants in the instant case which rely upon this statutory protection afforded to qualifying transferees have the burden of proving the applicability of N.C.G.S. § 39-23.8(a) by a preponderance of the evidence. N.C.G.S. § 39-23.8(g)(1), (h).

¶ 16 Here, defendants were charged with the burden to prove in plaintiff's second lawsuit against them that defendants both (1) took title to the subject property in good faith from StoneHunt, which was defendants' co-principal in the joint real estate development venture, *and* (2) bought the subject property for a reasonably equivalent value which it gave to the debtor StoneHunt. While the trial court made some findings of fact which were unchallenged on appeal and hence are binding on this Court, and made still other findings of fact that are deemed

conclusive for our review because they are supported by competent evidence, nonetheless the trial court was remiss in failing in its conclusions of law to consider the imputation of knowledge to defendants of StoneHunt's fraudulent conduct in StoneHunt's cunning tactic, as plaintiff's debtor, in manipulatively conveying title to the acres of the subject property which were owned by plaintiff to defendants in an effort to prevent StoneHunt's creditors from satisfying a potential judgment through acquisition of the subject property themselves. In applying the statutory law and the pertinent case law to the current matter, we determine that the facts and circumstances here, when viewed as a whole, lead to the imputation of knowledge on the part of defendants that their business partner StoneHunt had engaged in fraudulent activity by obfuscating plaintiff's access to the subject property which StoneHunt had finagled from the sole ownership of plaintiff years ago. Consequently, defendants did not meet their burden of proof to show that they were a good faith purchaser of the subject property and that they paid a reasonably equivalent value for the land. In deciding as a conclusion of law that defendants met this statutory burden of proof, the trial court erred; subsequently, the Court of Appeals erred in affirming the trial court's judgment. We now reverse this outcome.

¶ 17 Fundamentally, the doctrine of imputed knowledge establishes the rule that "a principal is deemed to know facts known to his or her agent if they are within the scope of the agent's duties to the principal, unless the agent has acted adversely to the principal." *Doctrine of Imputed Knowledge*, Black's Law Dictionary (11th ed. 2019). Under this common law doctrine, a party is charged with knowledge attributed to a given person, especially because of the person's legal responsibility for another's conduct. *Imputed Knowledge*, Black's Law Dictionary (11th ed. 2019). As the Supreme Court of the United States stated in *Curtis*, *Collins & Holbrook Co. v. United States*, 262 U.S. 215, 222–23 (1923), "[t]he general rule is that a principal is charged with the knowledge of the agent acquired by the agent in the course of the principal's business." In North Carolina, "[e]very partner is an agent of the partnership for the purpose of its business." N.C.G.S. § 59-39(a) (2021). The creation of a business partnership "constitut[es] each member an agent of the others in matters appertaining to the partnership and within the scope of its business." *Rothrock v. Naylor*, 223 N.C. 782, 786 (1944).

¶ 18 In the case before us, defendants and StoneHunt were business partners engaged in a joint venture to develop the subject property by erecting a mixed-use project. As co-principals in this capitalistic endeavor, both parties in this real estate development were recognized as agents

for one another—in the statutory law under N.C.G.S. § 59-39(a) and the case law under *Rothrock*—in matters which involved the purpose and scope of the business partnership. A representative of defendants expressly proposed to StoneHunt's Sellars that StoneHunt and defendants combine their respective resources to build the mixed-use project on the adjoining lands of the subject property—in which StoneHunt held control—and neighboring parcels—in which defendants held control. StoneHunt's subsequent relinquishment of the subject property was in furtherance of the purpose and scope of its business partnership with defendants. Pursuant to the principles of this state's statutory law regarding elements of partnership and of the doctrine of imputed knowledge, fortified by the aforementioned declaration of the nation's highest court in *Curtis*, *Collins & Holbrook Co.*, defendants are charged with the knowledge of StoneHunt's fraudulent relinquishment of title to the subject property, as defendants are deemed to know the facts which are known by StoneHunt regarding StoneHunt's desire to convey the subject property prior to the subject property being reached by plaintiff, in its capacity as StoneHunt's creditor, to satisfy plaintiff's $7 million judgment against StoneHunt. While the doctrine of imputed knowledge does not apply in the event that an agent acts adversely to the principal's interests, which the Supreme Court of the United States amplified in a circumstance known as the "adverse interest" exception when the highest forum opined in *Curtis*, *Collins & Holbrook Co.* that the doctrine does not apply "when the agent's attitude is one adverse in interest to that of the principal, because of which it cannot be inferred that the agent would communicate the facts against his own interest to his principal," *Curtis*, *Collins & Holbrook Co.*, 262 U.S. at 223, there is no evidence in the record, nor any legal argument advanced by defendants, that an adverse interest between StoneHunt and defendants existed regarding their business partnership to develop the subject property in general, or StoneHunt's dishonest acquisition of the title to the subject property and StoneHunt's later fraudulent conveyance of the subject property to defendants in particular. Therefore, the application of the doctrine of imputed knowledge, in conjunction with the applicable statutory law and case law, remains intact to apply to defendants' awareness of StoneHunt's fraudulent actions in obtaining title to the subject property which was originally owned by plaintiff.

¶ 19 In the federal case of *Chrysler Credit Corporation v. Burton*, 599 F. Supp. 1313 (M.D.N.C. 1984), a creditor filed a complaint against its debtor and others in an effort to have the trial court to set aside two conveyances of real estate used as business property because the title transfers were fraudulently made by the debtor. The debtor "retained

substantially no assets" at the time that the property was conveyed because "the piece of land was his principal asset." *Chrysler Credit Corp.*, 599 F. Supp. at 1316. The federal district court, in exercising jurisdiction in this matter, applied North Carolina's fraudulent conveyance law in reaching its determination. *See id.* at 1317. The trial court began its analysis by noting: "In a diversity case the Court enforcing state enacted rights must apply the law of North Carolina as declared by its legislature in a statute or by the North Carolina Supreme Court in a decision." *Id.* at 1316.

¶ 20 In recognizing that "North Carolina fraudulent conveyance law has as its cornerstone the venerable case of *Aman v. Walker*, 165 N.C. 224, 81 S.E. 162 (1914)," the federal district court stated that "[a]ccording to *Aman* when a conveyance is made by a debtor for valuable consideration, it is fraudulent and may be set aside only when the conveyance was (1) made with the intent to defraud creditors and (2) the grantee either participated in the intent or *had notice of it*." *Id.* at 1317 (emphasis added) (quoting *Edwards v. Nw. Bank*, 39 N.C. App. 261, 269 (1979)). After citing this Court's decision in *Arrington v. Arrington*, 114 N.C. 151 (1894), as the source for the pronouncement that "[e]ither actual or constructive notice of the grantor's fraud is sufficient to deny protected status to a grantee[,]" *id.*, the trial court went on to determine the "conveyance to be a fraudulent conveyance and therefore invalid as to creditors." *Id.* at 1321. In "[c]laiming protection under North Carolina registration law," a third-party banking institution's deed of trust was deemed by the trial court to be "protected from avoidance under fraudulent conveyance law." *Id.* at 1319.

¶ 21 While not dispositive of the outcome of the instant case's presentation of the fundamentally identical issues raised in *Chrysler Credit Corporation*, nonetheless the federal district court's discussion and application of our case law decisions regarding their impact upon a debtor's fraudulent acts regarding title to real property, the debtor's significant reduction in assets after the fraudulent acts which occasioned the conveyance, the state trial court's ability to set aside a real property conveyance which was marked by fraud, and the status of the grantee of the real property as a protected good faith purchaser is highly instructive and persuasive in our analysis of this matter. The federal district court's observation in *Chrysler Credit Corporation* that the "[p]laintiff retained . . . considerably less [assets] than the requirement that sufficient assets be retained" in leading to the tribunal's view that "no lender would extend credit for the amount of the existing debt with such security as the assets the defendant . . . retained[,]" *id.* at 1320, is germane to our evaluation of the factor in the present case wherein StoneHunt

had divested itself of its chief financial asset in the form of the subject property in the event that plaintiff, as StoneHunt's creditor, was successful in plaintiff's lawsuit against StoneHunt. Likewise, the federal district court's conclusion that the grantee of the land conveyance had notice of the grantor's fraud so as to negate the grantee's protected status and to invalidate the conveyance as to creditors is pertinent to our assessment of the situation in the present case wherein defendants claim to possess protected status as the grantee of their joint venture business partner StoneHunt's conveyance of the subject property in the face of the pending claims against StoneHunt by plaintiff as StoneHunt's creditor.

C. Consideration of Subsection 39-23.4(b) of the General Statutes of North Carolina

¶ 22 Our determination that the trial court erred in its conclusions of law, and subsequently that the Court of Appeals erred in affirming the trial court's judgment which resulted from these conclusions of law, is buttressed by this Court's examination of the factors which are delineated in N.C.G.S. § 39-23.4(b). While referenced earlier, N.C.G.S. § 39-23.4(a)(1) reads in its entirety as follows:

> (a) A transfer made or obligation incurred by a debtor is voidable as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation:
>
> (1) With intent to hinder, delay, or defraud any creditor of the debtor . . . .

N.C.G.S. § 39-23.4(a) (2021).

¶ 23 As a preface to identifying thirteen factors to which, "[i]n determining intent under subdivision (a)(1) of this section, consideration may be given, among other factors[,]" N.C.G.S. § 39-23.4(b) lists these circumstances to be utilizable as potentially helpful guidelines. The words employed in this statutory introduction to the factors indicate that they are not intended to be mandatory nor exclusive. In examining these factors, this Court recognizes that it must refrain, as previously stated, from disturbing any of the trial court's findings of fact which are unchallenged as well as those which are supported by any competent evidence. This Court is also aware of the standard espoused in *Shepard v. Bonita Vista Properties, L.P.*, 191 N.C. App. 614 (2008), *aff'd per curiam*, 363 N.C. 252 (2009), with which we reiterate our agreement that "[w]hen the trial court sits without a jury, as it did in this case, 'the standard of review

on appeal 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.' " 191 N.C. App. at 616.

¶ 24 While honoring these limitations upon appellate review, we still identify the existence of six of the thirteen factors[5] upon our de novo review of the Court of Appeals decision for errors of law which it committed upon affirming the trial court's judgment, which included the trial court's failure to address in its conclusions of law the matter of the imputation of knowledge to defendants of StoneHunt's fraudulent conduct regarding the conveyance of the subject property to defendants which had belonged to plaintiff. We conclude that the imputation of knowledge to defendants of those facts which were known to StoneHunt at the time of the conveyance operates to defeat defendants' claim that it was a good faith purchaser for value of the land at issue.

¶ 25 Upon our review, this Court considers the following statutory factors expressly mentioned in N.C.G.S. § 39-23.4(b) to be invoked with regard to StoneHunt's intent to defraud plaintiff, in plaintiff's capacity as a creditor of its debtor StoneHunt, so as to render voidable, as to the creditor plaintiff, its debtor StoneHunt's transfer of title to the subject property to defendants because defendants are deemed to be imputed with the knowledge of their business partner StoneHunt that StoneHunt's transfer of title to defendants was made with the intent to defraud plaintiff.

1. Subsection (b)(1): The transfer or obligation was to an insider.

¶ 26 Collectively, defendants, as the grantee of the subject property, were insiders of StoneHunt when the transfer of title was made to defendants.

2. Subsection (b)(3): The transfer or obligation was disclosed or concealed.

¶ 27 StoneHunt concealed its sale of the subject property to defendants. StoneHunt did not disclose to plaintiff the sale of the subject property

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5. Of the thirteen statutory factors, only eleven of them were in position to be actively considered. Firstly, the factor contained in N.C.G.S. § 39-23.4(b)(11), "The debtor transferred the essential assets of the business to a lienor that transferred the assets to an insider of the debtor" is preempted by the utilization of N.C.G.S. § 39-23.4(b)(1) because the conveyance at issue was directly from StoneHunt to defendants, rather than from StoneHunt to another party which, in turn, transferred the land to defendants. Secondly, the factor addressed in N.C.G.S. § 39-23.4(b)(13), "The debtor transferred the assets in the course of legitimate estate or tax planning" is not relevant, with the subject matter of real estate constituting the focus here.

until after defendants took title to the land. The concealment was instituted by StoneHunt at a time when plaintiff's claims against StoneHunt in the first lawsuit were reinstated by the Court of Appeals. StoneHunt's eventual disclosure to plaintiff of the transfer was performed in order for StoneHunt to gain an advantage in the reactivated litigation.

3. Subsection (b)(4): Before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit.

¶ 28 Plaintiff filed the first lawsuit against StoneHunt on 10 September 2015. The transfer of title to the subject property was made by StoneHunt to defendants on 2 February 2017. Plaintiff's appeal of the dismissal of the first lawsuit was pending at the time of the negotiation, and the Court of Appeals opinion which reversed the dismissal of plaintiff's lawsuit against StoneHunt and reinstated the action was issued on 30 December 2016, more than a month prior to the transaction's consummation.

4. Subsection (b)(5): The transfer was of substantially all the debtor's assets.

¶ 29 The subject property which StoneHunt transferred to defendants was the real estate development company's sole remaining real estate asset at the time, and StoneHunt only had a small amount of cash on hand. With the exception of the cash and the $900,000 promissory note which defendants issued to StoneHunt which became due one year from its creation, StoneHunt had a weak financial condition and no remaining assets. The subject property was StoneHunt's last substantial asset before plaintiff's claims were reinstated.

5. Subsection (b)(8): The value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred.

¶ 30 StoneHunt's agent, Sellars, proposed that defendants purchase the subject property for $1.1 million, which was significantly less than half of the $2.5 million value of the land that agent Sellars represented as the land's worth.

6. Subsection (b)(9): The debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred.

¶ 31 Subsequent to the debtor StoneHunt's transfer of the title to the subject property to defendants on 2 February 2017 which left StoneHunt

with only a small amount of cash money and a $900,000 promissory note as StoneHunt's remaining assets, StoneHunt filed for bankruptcy on 29 August 2018. StoneHunt had not been able to pay its bills as they became due, and very soon after StoneHunt transferred the subject property, a fair evaluation of StoneHunt's debts exceeded the value of its assets. In coupling our assessment of the presence and persuasiveness of these statutory factors enumerated in N.C.G.S. § 39-23.4(b) with additional non-statutory factors which we find existent and enlightening in the present case concerning the determination of StoneHunt's intent to defraud its creditor—here, plaintiff—under N.C.G.S. § 39-23.4(a)(1) and the imputation of knowledge of the facts as StoneHunt knew them at the time of StoneHunt's implementation of the debtor's intent, such as (1) the lack of the obtainment of a formal appraisal prior to defendants' purchase of the subject property from StoneHunt, (2) defendants' ready agreement to StoneHunt's proposed sales price of the subject property without any material negotiation, (3) defendants' willingness to accommodate StoneHunt's desire for an expeditious transfer of the land's title in light of the prospect of a Court of Appeals decision reinstating plaintiff's claims against StoneHunt after StoneHunt's unequivocal e-mails to defendants' agents that the Court of Appeals "may have a decision fairly quickly" on plaintiff's appeal and therefore it was advisable "to try to get this [subject property sale] done as soon as possible[,]" (4) the fact that StoneHunt and defendants dissolved their joint venture to develop the subject property on the same day—2 February 2017—that defendants obtained title to the subject property from StoneHunt, (5) StoneHunt's favoritism of defendants to the detriment of plaintiff, and (6) StoneHunt's preference to sell the subject property to defendants outright rather than to contribute the land to their joint venture so that the subject property would not have been an ownership asset of StoneHunt that would be available to creditors such as plaintiff and to prevent plaintiff from collecting anything on a judgment, we determine that these non-statutory factors are consistent with the emblematic statutory factors found in N.C.G.S. § 39-23.4(b) to establish that the transfer of land by StoneHunt to defendants which was fraudulently performed is voidable as to plaintiff in plaintiff's capacity as StoneHunt's creditor, because as a debtor—and as expressly determined by the trial court—StoneHunt made the transfer with the intent to defraud plaintiff in plaintiff's role as StoneHunt's creditor. In recognizing the binding nature of these extensive and comprehensive findings of fact by the trial court upon this Court because they are either unchallenged on appeal or because they are supported by any competent evidence, the trial court erred as a matter of law in its failure to indicate its consideration of the imputation of knowledge of StoneHunt's fraudulent actions

to defendants in defendants' capacity as a co-principal of StoneHunt in their joint real estate development venture and the resulting common law recognition of their principal-agent relationship wherein defendants are charged with the knowledge of StoneHunt which was acquired by StoneHunt in the course of defendants' business pursuits with StoneHunt. The facts, as found by the trial court, compel the imputation of knowledge to defendants of StoneHunt's fraudulent activities as StoneHunt knew these activities to be fraudulent at the time of their commission, consequently rendering the transfer of the subject property to defendants by StoneHunt to be voidable as to plaintiff and thus denying defendants' ability, under these facts and circumstances, to be a good faith purchaser for value of the subject property.

D. Plaintiff's UDTPA Argument

¶ 32 As a related issue, plaintiff argues that if the trial court is deemed to have erred, as we have concluded was the case here, in determining defendants' status as good faith purchasers for value, then the trial court must also be instructed on remand to enter judgment in favor of plaintiff as to its UDTPA claim against Midtown Area Partners II, LLC, because the trial court's dismissal of this claim was predicated on its erroneous good faith purchaser determination. Plaintiff offers the bare assertion, without citation to controlling statutory or case law, that defendants' violation of the UVTA alone "constitutes a violation of the UDTPA as a matter of law." Plaintiff invokes several cases from this Court and the Court of Appeals which have tended to hold that violations of other fraud-related statutes also constitute violations of the UDTPA. *See*, *e.g.*, *Stanley v. Martin*, 339 N.C. 717, 723–25 (1995); *Winston Realty Co. v. G.H.G., Inc.*, 314 N.C. 90, 97–99 (1985).

¶ 33 Plaintiff's argument regarding this issue was not argued before, nor considered by, the Court of Appeals, and there is no decision from the lower appellate forum concerning the trial court's dismissal of plaintiff's UDTPA claim which was lodged against defendant Midtown Area Partners II, LLC when plaintiff amended its complaint against that party as a matter of right.[6] The argument was not referenced in plaintiff's petition for discretionary review, and thus was not considered in this Court's

6. The Court of Appeals did, however, hold that the trial court did not abuse its discretion in denying plaintiff's motion to amend its complaint against defendant Midtown Area Partners Holdings, LLC because that issue was properly briefed and argued before the Court of Appeals. Plaintiff expressly waived any argument concerning this issue on discretionary review before this Court, and the Court of Appeals opinion on the issue of the trial court's denial of plaintiff's motion to amend is therefore left undisturbed by this opinion.

allowance of plaintiff's request for this Court to afford discretionary review of the Court of Appeals decision. Rule 16(a) of the North Carolina Rules of Appellate Procedure states that, when reviewing a decision of the Court of Appeals "whether by appeal of right or by discretionary review," our task is limited to determining "whether there is error of law *in the decision of the Court of Appeals*." N.C. R. App. P. 16(a) (emphasis added). Unless a party asserts the right to appeal by virtue of the presence of a dissenting opinion within the Court of Appeals' decision in a case, our review "is limited to consideration of the issues stated in . . . the petition for discretionary review and the response thereto . . . and properly presented in the new briefs." *Id.* We have held that "[i]n the absence of error so fundamental that we would invoke our Rule 2 [of the North Carolina Rules of Appellate Procedure] power to suspend the rules and consider defendant's assignment of error, we, too, are bound by the Rules of Appellate Procedure, and will not review matters not properly before us." *State v. Fennell*, 307 N.C. 258, 263 (1982). We hold that whether defendants' violation of the UVTA constitutes a per se violation of the UDTPA is not an issue that is properly before the Court, and plaintiff asserts no argument which requests our invocation of Rule 2. Furthermore, we decline to invoke the general supervisory powers of the Court in order to implement such a definitive determination as urged by plaintiff. We therefore do not address the merits of plaintiff's argument concerning this issue.

III. Conclusion

¶ 34 In light of the foregoing observations, the decision reached by the Court of Appeals in this case is reversed in part and remanded to the Court of Appeals for further remand to the trial court for additional proceedings not inconsistent with this Court's opinion.

REVERSED IN PART AND REMANDED.

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

Justice BARRINGER concurring in part and dissenting in part.

¶ 35 This matter concerns a claim of invalid transfer of real property (Subject Property) between StoneHunt, LLC and Midtown Area Partners Holdings, LLC and Midtown Area Partners II, LLC (collectively MAP), alleged by The Cherry Community Organization (CCO). The Court of Appeals correctly held that the trial court's determination that MAP was

a good faith purchaser of the Subject Property was a finding of fact that was supported by competent evidence. Therefore, this Court should affirm the decision of the Court of Appeals.

¶ 36 In reaching a contrary conclusion, the majority fails to consider the unique nature of the asset in dispute—real property—and neglects to contemplate the effect at the time of purchase of the trial court's previous cancellation of CCO's notice of lis pendens. A full consideration of the evidence before the trial court—including the trial court's consistent denial of CCO's claims to the title of the Subject Property, MAP's independent efforts to ensure that the Subject Property's title was unencumbered, and the fact that MAP paid a reasonably equivalent value for the Subject Property—dictates that this Court should affirm the decision of the Court of Appeals that upheld the trial court's judgment. Therefore, I respectfully dissent in part. I concur with the majority's holding that CCO's argument concerning its claim against MAP under the Unfair or Deceptive Trade Practices Act is not properly before us and the majority's decision to decline to invoke the Court's general supervisory powers to reach the merits on this issue.

I. Background

¶ 37 In 2004, StoneHunt and CCO entered into a contract under which StoneHunt would purchase real property from CCO and provide some affordable housing on the real property conveyed. Thereafter, in 2005, StoneHunt purchased the real property, which included part of the Subject Property, from CCO. StoneHunt constructed a multi-story residential structure on one of the parcels purchased from CCO. In 2013, MAP approached StoneHunt to purchase the Subject Property, with the intention to add the land to a mixed-use development project. MAP and StoneHunt subsequently agreed to enter into a venture in which they would jointly pursue rezoning the Subject Property and another parcel owned by MAP. Accordingly, MAP and StoneHunt executed a zoning application in August 2014 for a mixed-use development covering the Subject Property. StoneHunt had already sold the remaining undeveloped real property purchased from CCO, except for the Subject Property, to another company. At the public hearing in April 2015 before the Charlotte City Council, two individuals spoke on behalf of CCO to voice their objections to the rezoning application. Ultimately, the rezoning was approved on 28 September 2015.

¶ 38 On 10 September 2015, CCO filed a complaint against StoneHunt alleging breach of contract and violation of the Unfair or Deceptive Trade Practices Act (UDTPA) and seeking money damages, partial rescission

of the contract and deed, and reconveyance of the Subject Property to CCO (Case No. 1). CCO also filed a notice of lis pendens with respect to the Subject Property.

¶ 39 On 26 May 2016, the trial court cancelled the notice of lis pendens after determining that pursuant to N.C.G.S. § 1-116(a)(1), CCO's allegations in the complaint for Case No. 1 did not affect title to the Subject Property (Cancellation Order). CCO appealed the Cancellation Order. While initially, the Court of Appeals temporarily stayed the Cancellation Order, the Court of Appeals later dissolved the stay on 16 June 2016. On 17 June 2016, CCO's counsel sent a letter to MAP's counsel informing MAP that although the notice of lis pendens had been cancelled by the trial court, CCO expected its claim to recover title to the Subject Property would be reinstated. Yet, on 4 April 2017, the Court of Appeals dismissed the appeal from the Cancellation Order, finding that the appeal was interlocutory and that CCO had not argued that the appeal affected a substantial right. *Cherry Cmty. Org. v. StoneHunt, LLC*, No. COA16-905, 2017 WL 1276077, at *3–4 (N.C. Ct. App. April 4, 2017).

¶ 40 MAP purchased the Subject Property from StoneHunt on 2 February 2017. Before the purchase, MAP had confirmed that the trial court had ruled that CCO's Case No. 1 had not affected the title to the Subject Property, that the trial court had cancelled the notice of lis pendens, and that there was currently no lis pendens filed with respect to the Subject Property. MAP paid StoneHunt $200,000 in cash and executed a promissory note in the amount of $900,000 due and payable on 2 February 2018.

¶ 41 On 30 August 2017, CCO filed a complaint against StoneHunt and MAP, asserting claims under the North Carolina Uniform Voidable Transactions Act (UVTA) pursuant to N.C.G.S. § 39-23.5, alleging that StoneHunt had engaged in a fraudulent transfer and that MAP was not a good faith purchaser and did not pay a reasonably equivalent value for the Subject Property (Case No. 2). CCO further moved for a preliminary injunction either enjoining MAP from paying $900,000 to StoneHunt on 2 February 2018 or enjoining StoneHunt and its principal from disposing of any payments related to the transfer of the Subject Property or other assets, or both. CCO also filed a notice of lis pendens relating to Case No. 2. On 9 February 2018, the trial court denied plaintiff's motion for a preliminary injunction.

¶ 42 In Case No. 1, the jury returned a verdict in July 2018 in favor of CCO, finding that StoneHunt breached the 2004 contract and finding facts supporting CCO's UDTPA claim. StoneHunt subsequently filed for bankruptcy under Chapter 11 of the United States Bankruptcy Code,

and CCO and StoneHunt consented to a judgment in the amounts of $4,934,247, $591,929, $25,000, and $1,488,682, which respectively reflect the trebling of actual damages found by the jury, interest, costs, and attorneys' fees.

¶ 43 Beginning 18 July 2018, a bench trial was conducted on Case No. 2 by the same judge who had presided over Case No. 1 since 2017. On 31 December 2018, the trial court entered a judgment in Case No. 2. The trial court found that CCO had met its burden of proof to show that StoneHunt intended to hinder, delay, or defraud CCO when it conveyed the Subject Property to MAP. *See* N.C.G.S. § 39-23.4(a)(1) (2021) ("A transfer made or obligation incurred by a debtor is voidable as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation . . .[w]ith intent to hinder, delay, or defraud any creditor of the debtor . . . ."). However, the trial court found that MAP met its burden of proof to show that it was a good faith purchaser of the Subject Property and paid a reasonably equivalent value for the property. The trial court noted that "[m]ere knowledge of a claim by a creditor that does not affect title does not preclude MAP from being a good faith purchaser." As a result, the trial court found that the transfer of the Subject Property was not voidable pursuant to N.C.G.S. § 39-23.8(a). *See* N.C.G.S. § 39-23.8(a) (2021) ("A transfer or obligation is not voidable under [N.C.]G.S. [§] 39-23.4(a)(1) against a person that took in good faith and for a reasonably equivalent value given the debtor or against any subsequent transferee or obligee."). Therefore, the trial court adjudged that CCO should recover nothing against MAP, dismissed CCO's claim against MAP with prejudice, and decreed the notice of lis pendens void.

¶ 44 Plaintiff appealed. On appeal, CCO argued that the trial court erred when it concluded MAP was a good faith purchaser of the Subject Property. The Court of Appeals disagreed and affirmed the trial court's judgment in Case No. 2.

¶ 45 After appealing Case No. 2, CCO also filed an appeal from the Cancellation Order entered in Case No. 1. However, CCO withdrew its appeal from the Cancellation Order on 28 January 2020.

II. Standard of Review

¶ 46 In a bench trial in which the trial court sits without a jury, the standard of review is whether competent evidence supported the trial court's findings of fact and whether those findings support its conclusions of law. *Lumbee River Elec. Membership Corp. v. City of Fayetteville*, 309 N.C. 726, 741–42 (1983). In reviewing the trial court's findings of fact,

"[t]he findings of fact made by the trial judge are conclusive on appeal if supported by competent evidence, even if . . . there is evidence to the contrary." *Id.* at 741. A trial court's judgment "must be granted the same deference as a jury verdict." *Id.*

III. Analysis

¶ 47 Under the UVTA, "[a] transfer [of property] is not voidable under [N.C.]G.S. [§] 39-23.4(a)(1) against a person that took in good faith and for a reasonably equivalent value." N.C.G.S. § 39-23.8(a). The transferee has the burden of proving that it took the property in good faith and that it paid reasonably equivalent value for the property by a preponderance of the evidence. N.C.G.S. § 39-23.8(g)(1), (h).

¶ 48 As previously noted, the trial court determined that "MAP ha[d] established and met its burden of proof to show that it was a good faith purchaser of the Subject Property and that it paid reasonably equivalent value for the Subject Property." Since "[w]hether a party has acted in good faith is a question of fact for the trier of fact," *Bledsole v. Johnson*, 357 N.C. 133, 138 (2003), the Court of Appeals properly treated this determination as a finding of fact. *Cherry Cmty. Org. v. Sellars*, No. COA19-695, 2020 WL 774020, at *4 (N.C. Ct. App. Feb. 18, 2020) (unpublished opinion); *see also Embree Constr. Grp., Inc. v. Rafcor, Inc.*, 330 N.C. 487, 499 (1992) ("The question of 'good faith' is one of fact to be resolved by the jury . . . ."). Therefore, this Court's task is to determine whether the finding of MAP's good faith is supported by competent evidence.

¶ 49 While good faith is not defined in N.C.G.S. § 39-23.8, this Court has recognized in other contexts that good faith "is an equitable concept premised on honest belief and fair dealing with another." *Bledsole*, 357 N.C. at 140. Determining a party's good faith requires consideration of "the circumstances and context in which the party acted." *Id.* at 138.

¶ 50 Regarding the circumstances and context of this case, it is noteworthy that it involves a real property transaction. In real property transactions, our law has consistently recognized that "a sale or mortgage for a valuable consideration may be upheld as valid, though the seller or mortgagor intended by the transaction to delay or defraud his creditors, where it is not shown that the purchaser or mortgagee participated in the fraudulent purpose." *Henry W. Wolfe & Co. v. Arthur*, 118 N.C. 890, 899 (1896).[1] Nonetheless, a showing of actual knowledge and

1. Wolfe is spelled "Wolfe" in the text of the North Carolina Reports but is listed as "*Wolf*" on Westlaw and in the "Cases Reported" portion of Volume 118 of the North Carolina

involvement is not required when the transferee had "notice of such facts as would induce any prudent man to institute and prosecute inquiries that *would have led to the discovery by them of the covinous purpose* of [the transferor]." *Id.* at 898–99 (emphasis added).

¶ 51 Further, because this is a real estate transaction, the doctrine of lis pendens applies. Under "[t]he firmly-established doctrine of lis pendens[,] . . . '[w]hen a person buys property pending an action of which he has notice, actual or presumed, *in which the title to it is in issue*, from one of the parties to the action, he is bound by the judgment in the action, just as the party from whom he bought would have been.' " *Hill v. Pinelawn Mem'l Park, Inc.*, 304 N.C. 159, 163–64 (1981) (original emphasis omitted and emphasis added) (quoting *Rollins v. Henry*, 78 N.C. 342, 351 (1878)). Likewise, "[t]he lis pendens statutes enable a purchaser for a valuable consideration who has no actual notice of the pendency of litigation affecting the title to the land to proceed with assurance when the lis pendens docket does not disclose a cross-indexed notice disclosing the pendency of such an action." *Lawing v. Jaynes*, 285 N.C. 418, 432 (1974) (original emphasis omitted); *see also Lis Pendens*, Black's Law Dictionary (11th ed. 2019) (stating the purpose of a notice of lis pendens as "to warn all persons that certain property is the subject matter of litigation, and that any interests acquired during the pendency of the suit are subject to its outcome"). Thus, a lis pendens provides "record notice[ ] upon the absence of which a prospective innocent purchaser may rely." *Whitehurst v. Abbott*, 225 N.C. 1, 5 (1945).

¶ 52 In this matter, the trial court found that prior to purchase, MAP had confirmed that the trial court had ruled that CCO's Case No. 1 had not affected the title of the Subject Property and had cancelled the lis pendens, that there was currently no lis pendens, that MAP's attorneys conducted a title search, and that MAP obtained a commitment from a title insurance company to insure the Subject Property's title as free and clear without any exception for any notice of lis pendens. MAP had also sought to purchase the property since 2013, long before any litigation by CCO. These facts are not in dispute, and on this basis, MAP argues it could not have acted in bad faith. These findings, which are supported by competent evidence, do support the finding of good faith. While the letter sent to MAP by CCO's attorney gave MAP actual notice of CCO's pending contract action against StoneHunt, the notice of lis pendens had already been cancelled by the trial court, indicating CCO had *no valid*

Reports. The page numbers in the Supreme Court reporter are misnumbered. The page numbering skips from 891 directly to 898.

claim to the Subject Property's title. Further, the property had been recently re-zoned by the Charlotte City Council. Had there been a cloud on the title, the rezoning would not have occurred. As found by the trial court, "[m]ere knowledge of a claim by a creditor that does not affect title does not preclude MAP from being a good faith purchaser." *See Hill*, 304 N.C. at 165 ("While actual notice of another unrecorded conveyance does not preclude the status of innocent purchaser for value, actual notice of pending litigation *affecting title to the property* does preclude such status." (emphasis added)).

¶ 53 Moreover, no reinstatement of the lis pendens ever occurred. The Court of Appeals dissolved the temporary stay of the Cancellation Order. CCO's subsequent appeal to the Court of Appeals with respect to the Cancellation Order was then dismissed as interlocutory, because CCO failed to "address in its brief any substantial right which would be jeopardized." *StoneHunt*, 2017 WL 1276077, at *3 (cleaned up). After entry of final judgment in Case No. 1, CCO appealed the trial court's Cancellation Order again. However, CCO moved to withdraw this appeal on 17 January 2020, and the Court of Appeals allowed the withdrawal on 28 January 2020. Thus, CCO abandoned its right to contend that Case No. 1 affected the Subject Property's title.

¶ 54 Further, MAP's payment of more than a reasonably equivalent value for the Subject Property is additional competent evidence of MAP's good faith. After hearing testimony and considering appraisals by multiple witnesses, the trial court accepted the estimated value of the Subject Property as approximately $664,000. MAP, however, paid $1,100,000 for the Subject Property.

¶ 55 Therefore, the evidence put forth at trial was competent to support the trial court's finding that MAP was a good faith purchaser. Most notably: MAP was on notice that CCO had no valid claims to the title of the Subject Property since the notice of lis pendens was cancelled, and that remains the law of this case. Furthermore, MAP conducted an independent investigation to ensure that the Subject Property's title was unencumbered, and MAP paid more than a reasonably equivalent value for the Subject Property. While ultimately CCO was left without a solvent entity from which to collect its judgment against StoneHunt in Case No. 1, subsection 39-23.8(a) provides MAP a complete defense to avoidance of StoneHunt's fraudulent transfer and such defense is assessed at the time of transfer. N.C.G.S. § 39-23.8, official cmt. (2014). Both precedent and the statutory enactments of our legislature compel that we leave this determination to the fact-finder. Accordingly, we should adhere today to our role as an appellate court and decline to usurp the

authority of the trial court by reweighing the evidence in this matter, even if our sympathies would encourage us to do otherwise. We should also recognize that to do otherwise would render real property purchasers subject to the will of an appellate court to determine issues better suited for a fact-finder and would undermine the certainty and predictability necessary to protect good faith purchasers of real property, lenders, and insurers of real property title.

Chief Justice NEWBY joins in this concurring in part and dissenting in part opinion.

HOKE COUNTY BOARD OF EDUCATION, ET AL., PLAINTIFFS	)	
AND	)	
CHARLOTTE-MECKLENBURG BOARD OF EDUCATION, PLAINTIFF-INTERVENOR	)	
AND	)	
RAFAEL PENN, ET AL., PLAINTIFF-INTERVENORS	)	
v.	)	Wake County
STATE OF NORTH CAROLINA AND THE STATE BOARD OF EDUCATION	)	
AND	)	
CHARLOTTE-MECKLENBURG BOARD OF EDUCATION, REALIGNED DEFENDANT	)	
AND	)	
PHILIP E. BERGER, IN HIS OFFICIAL CAPACITY AS PRESIDENT *PRO TEMPORE* OF THE NORTH CAROLINA SENATE, AND TIMOTHY K. MOORE, IN HIS OFFICIAL CAPACITY AS SPEAKER OF THE NORTH CAROLINA HOUSE OF REPRESENTATIVES, INTERVENOR-DEFENDANTS	)	

No. 425A21-1

ORDER

Plaintiffs' Notice of Appeal Based Upon a Dissent, Plaintiffs' Notice of Appeal Based Upon a Constitutional Question, Plaintiffs' Petition for Discretionary Review Under N.C.G.S. § 7A-31, Plaintiffs' Petition in the Alternative for Writ of Certiorari to Review Order of N.C. Court of Appeals, Plaintiff-Intervenors' (Rafael Penn, et al.) Notice of Appeal Based Upon a Dissent, Plaintiff-Intervenors' (Rafael Penn, et al.) Notice of Appeal Based Upon a Constitutional Question, Plaintiff-Intervenors' (Rafael Penn, et al.) Petition for Discretionary Review Under N.C.G.S. § 7A-31, Plaintiff-Intervenors' (Rafael Penn, et al.) Petition for Writ of Certiorari to Review Order of N.C. Court of Appeals, Controller's Motion to Dismiss Appeals, Controller's Conditional Petition for Writ of Supersedeas, and Legislative-Intervenors' Motion to Dismiss Appeals

are held in abeyance, with no other action, including the filing of briefs, to be taken until further order of the Court.

By order of the Court in conference, this the 18th day of March 2022.

s/Berger, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 21st day of March 2022.

GRANT E. BUCKNER
Clerk, Supreme Court of
North Carolina

s/Grant E. Buckner

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

HOKE COUNTY BOARD OF EDUCATION, ET AL., PLAINTIFFS	)	
AND	)	
CHARLOTTE-MECKLENBURG BOARD OF EDUCATION, PLAINTIFF-INTERVENOR	)	
AND	)	
RAFAEL PENN, ET AL., PLAINTIFF-INTERVENORS	)	
v.	)	Wake County
STATE OF NORTH CAROLINA AND THE STATE BOARD OF EDUCATION, DEFENDANT	)	
AND	)	
CHARLOTTE-MECKLENBURG BOARD OF EDUCATION, REALIGNED DEFENDANT	)	
AND	)	
PHILIP E. BERGER, IN HIS OFFICIAL CAPACITY AS PRESIDENT *PRO TEMPORE* OF THE NORTH CAROLINA SENATE, AND TIMOTHY K. MOORE, IN HIS OFFICIAL CAPACITY AS SPEAKER OF THE NORTH CAROLINA HOUSE OF REPRESENTATIVES, INTERVENOR-DEFENDANTS	)	

No. 425A21-2

ORDER

Defendant State of North Carolina's Petition for Discretionary Review Prior to Determination by the Court of Appeals and Plaintiff's Petition for Discretionary Review Prior to Determination by the Court of Appeals are allowed. Defendant State of North Carolina's Motion to Set an Expedited Schedule is determined as followed: This case is remanded to Superior Court, Wake County, for a period of no more than thirty days for the purpose of allowing the trial court to determine what effect, if any, the enactment of the State Budget has upon the nature and extent of the relief that the trial court granted in its 11 November 2021 order. The trial court is instructed to make any necessary findings of fact and conclusions of law and to certify any amended order that it chooses to enter with this Court on or before the thirtieth day following the entry

of this order. As soon as the trial court has certified to this Court any amended order that it chooses to enter, this Court will enter any such other and further orders governing the procedures to be followed in this case as it deems necessary. In the meantime, the otherwise-applicable schedule for filing briefs in this case is held in abeyance pending further order of the Court.

By order of the Court in conference, this the 18th day of March 2022.

s/Berger, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 21st day of March 2022.

GRANT E. BUCKNER
Clerk, Supreme Court of
North Carolina

s/Grant E. Buckner

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

MICHAEL MOLE´	)	
	)	
v.	)	Durham County
	)	
CITY OF DURHAM, A MUNICIPALITY	)	

No. 394PA21

ORDER

Defendant-Appellee's Motion to Designate Parties and Plaintiff Appellant's Motion to Extend Time to File His Brief are decided as follows: The Court's allowance of plaintiff's petition for discretionary review also encompasses, in this case, the allowance of the issue identified in defendant's response to plaintiff's petition for discretionary review. In addition, Defendant-Appellee's Motion to Designate Parties and Plaintiff Appellant's Motion to Extend Time to File his Brief are allowed, with Plaintiff being classified as the appellant, defendant being classified as the appellee, and plaintiff's appellant's brief being due on or before 10 May 2022.

By order of the Court in conference, this the 29th day of March 2022.

s/Berger, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 29th day of March 2022.

GRANT E. BUCKNER
Clerk, Supreme Court of
North Carolina

s/Grant E. Buckner

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

STATE v. McNEILL

[381 N.C. 269 (2022)]

STATE OF NORTH CAROLINA	)	From Cumberland
	)	09CRS65760 09CRS66040
v.	)	09CRS66041
	)	
MARIO ANDRETTE McNEILL	)	

No. 446A13-2

ORDER

Defendant's Petition for Writ of Certiorari to Review Order of Superior Court, Cumberland County is dismissed without prejudice to defendant's right to later raise any potential issues encompassed therein.

By order of the Court in Conference, this the 4th day of May 2022.

s/Berger, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 6th day of May 2022.

s/Grant E. Buckner

Grant E. Buckner
Clerk of the Supreme Court

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

6 MAY 2022

8P22	State of North Carolina v. Carlos DeMarcuis Burch	Def's PDR Under N.C.G.S. § 7A-31 (COA20-753)	Denied
10P22	Kevin Nesbeth v. Shannon Flynn	1. Plt's Notice of Appeal Based Upon a Constitutional Question (COA20-404) 2. Plt's PDR Under N.C.G.S. § 7A-31	1. Dismissed *ex mero motu* 2. Denied
12P22-2	State v. Rose Williams	Def's Pro Se Motion for Clarification of Motion Being Dismissed	Dismissed
16P22	Lawyers Andrew Locke Clifford and Daniel Allen Harris, Third Parties Applicable from Guilford County v. Iman Fadulalla Khidr	Def's Pro Se Motion for PDR	Dismissed
20PA19-2	State v. Utaris Mandrell Reid	Def's Motion to Direct that the Mandate Issue Immediately	Allowed **03/15/2022** **Berger, J., recused**
22P22	Carrie C. Taylor v. Carolyn Trice Walker, Harold Trice, Carl Trice	1. Petitioner's Pro Se Motion for Notice of Petition for Writ of Certiorari (COAP21-563) 2. Petitioner's Pro Se Petition for Writ of Certiorari to Review Order of the COA	1. Denied 2. Denied
23P22	State v. Eric Pierre Stewart	1. State's Motion for Temporary Stay (COA21-101) 2. State's Petition for Writ of Supersedeas 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **01/21/2022** 2. Allowed 3. Allowed
28P22	State v. Michael Isaac Russ	Def's PDR Under N.C.G.S. § 7A-31 (COA20-742)	Denied
31P22	American Southwest Mortgage Corp. and American Southwest Mortgage Funding Corp. v. Terrance J. Arnold; Nancy E. Arnold; First Mortgage Company, LLC, d/b/a Cunningham & Company; and JP Morgan Chase Bank, N.A.	Plts' PDR Under N.C.G.S. § 7A-31 (COA21-315)	Denied

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

6 MAY 2022

32P22	American Southwest Mortgage Corp. and American Southwest Mortgage Funding Corp. v. Mary Ellen O'Meara; First Mortgage Company, LLC; and Wells Fargo Bank, N.A.	Plts' PDR Under N.C.G.S. § 7A-31 (COA21-311)	Denied
35PA21	In the Matter of A.J.L.H., C.A.L.W., M.J.L.H.	1. Petitioner's PDR Under N.C.G.S. § 7A-31 (COA20-267) 2. Petitioner's Motion for Temporary Stay 3. Petitioner's Petition for Writ of Supersedeas 4. Respondent-Father's Emergency Motion to Dissolve the Temporary Stay 5. Respondent-Father's Motion for Sanctions 6. Respondent-Mother's Motion for Sanctions 7. Guardian ad Litem's Motion to Withdraw and Substitute Counsel 8. Respondent-Father's Motion to Dissolve the Temporary Stay	1. Allowed **04/08/2022** 2. Allowed **01/21/2021** 3. Allowed **04/08/2022** 4. Denied **02/01/2021** 5. Denied **03/09/2022** 6. Denied **03/09/2022** 7. Allowed **02/17/2021** 8. Denied **02/17/2021**
38P22	State v. William Joseph Barber	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA20-268) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. --- 2. Denied 3. Allowed
39A22	State v. Robin Applewhite	1. Def's Notice of Appeal Based Upon a Dissent (COA20-610) 2. Def's PDR as to Additional Issues 3. State's Motion for Permission to Deliver Original Sealed Exhibit	1. --- 2. Allowed 3. Allowed **02/11/2022**
41A22	State v. Mark Brichikov	1. State's Motion for Temporary Stay (COA20-660) 2. State's Petition for Writ of Supersedeas 3. State's Notice of Appeal Based Upon a Dissent	1. Allowed **02/04/2022** 2. Allowed 3. ---
45PA18-2	State v. Pierre Alexander Amerson	Def's PDR Under N.C.G.S. § 7A-31 (COA20-836)	Denied

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

6 MAY 2022

47P22	In the Matter of Precious McNeil	Plt's Pro Se Motion for Examination	Dismissed
51P21	State v. William P. Sherrill	Def's Pro Se Motion for a Bond	Dismissed **04/08/2022**
62P22	Thomasina Gean v. National General Insurance Company/Integon Insurance	Plt's Pro Se Motion to Review the Case	Dismissed
63P22	Travis Baxter v. Hames Wojcik	1. Plt's Pro Se Motion for Notice of Appeal of Right Constitutional Question 2. Plt's Pro Se Motion for Stay of Judgment 3. Plt's Pro Se Motion for Stay of Proceedings	1. Dismissed *ex mero motu* 2. Dismissed 3. Dismissed
66P22	State v. Noah Junior Toler	Def's Pro Se Motion to Get Back into Advanced Supervised Release Program	Dismissed
69A22	Miller v. LG Chem Ltd., et al.	1. Plt's Motion to Admit Deepak Gupta Pro Hac Vice 2. Plt's Amended Motion to Admit Deepak Gupta Pro Hac Vice 3. Plt's Motion to Admit Robert D. Friedman Pro Hac Vice 4. Defs' (LG Chem, Ltd. and LG Chem America, Inc.) Motion to Admit Wendy S. Dowse Pro Hac Vice	1. Denied **03/28/2022** 2. Allowed **03/29/2022** 3. Allowed **04/28/2022** 4. Allowed **04/28/2022**
70P22	Edward L. Cobbler and Patricia D. Lowe v. Anthony Q. Knotts	Def's Pro Se Motion for First Appearance and to Set Bond	Denied **03/15/2022**
71P21	Angela Annette Palmer v. Elaine Brown, et al.	1. Plt's (Angela Annette Palmer) Motion for Appeal 2. Def's (Lawrence Larabee Jr., M.D.) Motion to Dismiss Appeal 3. Def's (Dee Dee Morris) Motion to Dismiss Appeal 4. Defs' (Elaine McNeil Brown, Nicole Patrick, and John Costello) Motion to Dismiss Plaintiff's Appeal	1. Dismissed **04/08/2022** 2. Allowed **04/08/2022** 3. Allowed **04/08/2022** 4. Allowed **04/08/2022**
77P22	In re Anthony Aikens	Petitioner's Pro Se Petition for Writ of Habeas Corpus	Denied **03/10/2022**

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

6 MAY 2022

78P22	State v. Eric Antron Ingram	Def's Pro Se Motion for Assistance in Review of Case	Dismissed **03/16/2022**
79P22	State v. Clarence Melvin Battle	1. Def's Pro Se Petition for Writ of Mandamus 2. Def's Pro Se Petition for Writ of Habeas Corpus	1. Denied **03/17/2022** 2. Denied **03/17/2022**
80P22	State v. Bobby Thomas Liles, Jr.	Def's Pro Se Motion for Review	Dismissed **04/01/2022**
83P22	State v. Joseph Adams Hales, III	1. Def's Pro Se Motion for Temporary Stay (COA21-121) 2. Def's Pro Se Petition for Writ of Supersedeas 3. Def's Pro Se Notice of Appeal Based Upon a Constitutional Question	1. Denied **03/22/2022** 2. Denied **03/22/2022** 3. Dismissed *ex mero motu* **03/22/2022**
88P22	Johnathan Glenn Henry v. State of North Carolina	Petitioner's Pro Se Motion for Violation of Policy	Dismissed **03/30/2022**
89P22	Eric Steven Fearrington, Craig D. Malmrose v. City of Greenville, Pitt County Board of Education	1. Defs' Motion for Temporary Stay (COA20-877) 2. Defs' Petition for Writ of Supersedeas	1. Allowed **03/30/2022** 2.
93P22	State v. Ryan Keith Moore	Def's PDR Under N.C.G.S. § 7A-31 (COA20-733)	Denied
97A20-2	State v. Antiwuan Tyrez Campbell	1. Def's Notice of Appeal Based Upon a Dissent (COA18-998-2) 2. Petition for Discretionary Review as to Additional Issues 3. Def's Motion for Extension of Time to File Brief 4. Def's Motion for Extension of Time to File Brief 5. Def's Motion for Extension of Time to File Brief 6. Def's Motion for Extension of Time to File Brief 7. Roderick and Solange MacArthur Justice Center and American Civil Liberties Union's Motion for Leave to File Amicus Brief	1. — 2. Allowed **12/15/2020** 3. Allowed **01/14/2021** 4. Allowed **02/16/2021** 5. Allowed **04/13/2021** 6. Allowed **05/03/2021** 7. Allowed **06/18/2021**

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

6 MAY 2022

		8. Roderick and Solange MacArthur Justice Center and American Civil Liberties Union's Motion to Admit Easha Anand Pro Hac Vice	8. Dismissed as moot **05/02/2022**
		9. Roderick and Solange MacArthur Justice Center and American Civil Liberties Union's Motion to Admit Elizabeth R. Cruikshank Pro Hac Vice	9. Dismissed as moot **05/02/2022**
		10. Roderick and Solange MacArthur Justice Center and American Civil Liberties Union's Motion to Admit Daniel A. Rubens Pro Hac Vice	10. Dismissed as moot **05/02/2022**
		11. Roderick and Solange MacArthur Justice Center and American Civil Liberties Union's Motion to Admit Sarah H. Sloan Pro Hac Vice	11. Dismissed as moot **05/02/2022**
		12. Black Lives Matter Activists' (Zachary Boyce, Kerwin Pittman, Kristie Puckett-Williams, and Ronda Taylor Bullock) Motion for Leave to File Amicus Brief	12. Allowed **06/18/2021**
		13. Black Lives Matter Activists' (Zachary Boyce, Kerwin Pittman, Kristie Puckett-Williams, and Ronda Taylor Bullock) Motion to Admit Tiffany R. Wright Pro Hac Vice	13. Allowed **05/02/2022**
		14. Roderick and Solange MacArthur Justice Center and American Civil Liberties Union's Amended Motion to Admit Easha Anand Pro Hac Vice	14. Allowed **05/02/2022**
		15. Roderick and Solange MacArthur Justice Center and American Civil Liberties Union's Amended Motion to Admit Elizabeth R. Cruikshank Pro Hac Vice	15. Allowed **05/02/2022**
		16. Roderick and Solange MacArthur Justice Center and American Civil Liberties Union's Amended Motion to Admit Daniel A. Rubens Pro Hac Vice	16. Allowed **05/02/2022**
		17. Roderick and Solange MacArthur Justice Center and American Civil Liberties Union's Amended Motion to Admit Sarah H. Sloan Pro Hac Vice	17. Allowed **05/02/2022**
101P22	Solomon Nimrod Butler v. Claire V. Hill	Petitioner's Pro Se Petition for Writ of Certiorari to Review Order of the COA (COAP21-481)	Denied

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

6 MAY 2022

102P19-2	State v. Christopher Lee Neal	1. Def's Pro Se Motion to Dismiss Indictment for Lack of Subject Matter Jurisdiction (COAP17-537) 2. Def's Pro Se Motion for Notice of Appeal 3. Def's Pro Se Petition for Writ of Certiorari to Review Order of Superior Court, Alamance County	1. Dismissed 2. Dismissed 3. Dismissed
102A20-2	Taylor, et al. v. Bank of America, N.A.	Plts' Motion to Admit Justin Witkin, Daniel Thornburgh, Chelsie Warner, and Caitlyn Miller Pro Hac Vice	Denied **03/28/2022** **Berger, J., recused**
102P22	State v. Marcus A. Satterfield	1. Def's Pro Se Petition for Writ of Habeas Corpus 2. Def's Pro Se Motion for Dismissal	1. Denied **04/08/2022** 2. Dismissed **04/08/2022**
104P22	State v. Travis Wayne Baxter	1. Def's Pro Se Motion for Petition and Order of Expunction 2. Def's Pro Se Motion to Certify Defendant as Attorney in the State of North Carolina	1. Dismissed 2. Dismissed
106P22	G. Marshall Johnson v. North Carolina Bar	Plt's Pro Se Motion for Complaint Against North Carolina Bar	Dismissed **04/27/2022**
110P22	State v. Oscar Martin Cook, III	1. Def's Pro Se Motion for Copies of Documents 2. Def's Pro Se Motion for Preparation of Stenographic Transcript	1. Dismissed 2. Dismissed
112P22	State v. Grant P. Dalton	Def's Pro Se Petition for Writ of Habeas Corpus	Denied **04/14/2022**
114P22	Stephens v. Stephens	Petitioner's Pro Se Motion to Review the Case	Dismissed **04/19/2022**
115P22	State v. Eduardo Vidal Mercado	Def's Pro Se Petition for Writ of Mandamus	Denied **04/19/2022**
116P22	State v. Sherman Gerrard Holley	1. Def's Pro Se Motion to Remove Counsel 2. Def's Pro Se Motion for Speedy Trial	1. Dismissed **04/18/2022** 2. Dismissed **04/18/2022**

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

6 MAY 2022

118P22	Timothy Shane Hoffman v. Marissa Curry	1. Def's Pro Se Motion for Temporary Stay 2. Def's Pro Se Petition for Writ of Supersedeas	1. Denied **04/19/2022** 2.
119P22	State v. Tiran C. Farris	Def's Pro Se Motion for Speedy Trial or Speedy Disposition of Warrants, Information, Detainers, Indictments	Dismissed **04/20/2022**
123P22	The Society for the Historical Preservation of the Twenty-Sixth North Carolina Troops, Inc. v. City of Asheville, North Carolina and Buncombe County, North Carolina	1. Plt's Motion for Temporary Stay (COA21-429) 2. Plt's Petition for Writ of Supersedeas 3. Plt's Petition for Discretionary Review Under N.C.G.S. § 7A-31	1. Allowed **04/22/2022** 2. 3.
124P22	State v. Richard Henry Jordan, Jr.	1. State's Motion for Temporary Stay (COA21-91) 2. State's Petition for Writ of Supersedeas 3. State's Petition for Discretionary Review Under N.C.G.S. § 7A-31	1. Allowed **04/21/2022** 2. 3.
125P22	State v. Jaime Suzanne Bowen	1. Def's Motion for Temporary Stay 2. Def's Petition for Writ of Supersedeas	1. Allowed **04/22/2022** 2.
128P22	Leilei Zhang v. Preston K. Sutton, III	1. Plt's Pro Se Expedited Petition for Writ of Certiorari to Review Order of the COA (COA22-79) 2. Plt's Pro Se Motion for Temporary Stay 3. Plt's Pro Se Motion for Writ of Supersedeas	1. Denied **04/26/2022** 2. Denied **04/29/2022** 3. Denied **04/29/2022**
130P22-1	State v. Travis Wayne Baxter	Def's Pro Se Motion to be Freed from Jail and Property Returned	Denied **04/28/2022**
130P22-2	Baxter v. Cooper, et al.	Plt's Pro Se Motion for Criminal Negligence, Aiding and Abetting, Burglary, Kidnapping, False Arrest, Unlawful Imprisonment, Cruel and Unusual Punishment, Trespass to Property, Trespass to Person, Insurance Law Contract Violation	Denied **05/03/2022**

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134P22	Kimarlo Ragland v. Francene Gregory	1. Def's Pro Se Petition for Writ of Certiorari to Review Order of District Court, Vance County 2. Def's Pro Se Petition for Writ of Supersedeas 3. Def's Pro Se Motion for Relief	1. Dismissed **05/04/2022** 2. Dismissed **05/04/2022** 3. Dismissed **05/04/2022**
140P21	State v. John Shadrick Matthews, III	1. Def's Pro Se Petition for Writ of Certiorari to Review Order of Superior Court, Guilford County 2. Def's Pro Se Motion to Proceed *In Forma Pauperis* 3. Def's Pro Se Motion to Appoint Counsel	1. Dismissed 2. Allowed 3. Dismissed as moot
143A95-8	State v. Charles Phillips Bond	1. Def's Petition for Writ of Certiorari to Review Order of Superior Court, Bertie County 2. State's Motion for Extension of Time to File Response	1. Denied 2. Allowed **01/05/2022**
147A21	In the Matter of D.R.J.	Petitioner's Motion to Dispense with Oral Argument	Dismissed as moot
173P21-2	State v. Aaron L. Stephen	1. Def's Pro Se Motion to Waive Counsel 2. Def's Pro Se Motion for Speedy Trial 3. Def's Pro Se Motion for Dismissal	1. Dismissed **03/22/2022** 2. Dismissed **03/22/2022** 3. Dismissed **03/22/2022**
184P21	State v. Lee Jernard Burns	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA20-259) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. --- 2. Denied 3. Allowed
199P18-2	State v. Shenandoah Freeman	Def's Pro Se Motion for Notice of Appeal (COA17-347)	Dismissed
205P21	State v. Ronald Keith Ezzell	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA20-50) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. --- 2. Denied 3. Allowed

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210P20-2	State v. Quamaine Lee Massey	1. Def's Petition for Writ of Certiorari to Review Order of Superior Court, Anson County	1. Dismissed
		2. Def's Pro Se Motion to Proceed *In Forma Pauperis*	2. Allowed
		3. Def's Pro Se Motion to Appoint Counsel	3. Dismissed as moot
		4. Def's Pro Se Motion to Give Time Back/Immediate Release on Parole	4. Dismissed
		5. Def's Pro Se Motion for Immediate Release on Parole	5. Dismissed
		6. Def's Pro Se Motion for Relief	6. Dismissed
		7. Def's Pro Se Motion for Early Parole	7. Dismissed
		8. Def's Pro Se Motion for Deportation Releases and Verification	8. Dismissed
		9. Def's Pro Se Motion for Immediate Release	9. Denied **04/19/2022**
216P10-2	State v. Markese Donnell Rice	Def's Pro Se PDR Under N.C.G.S. § 7A-31 (COA21-154)	Denied
221A21	In the Matter of M.C.B.	1. Petitioner's Motion to Dismiss Appeal	1. Allowed
		2. Guardian ad Litem's Motion to Dismiss Appeal	2. Dismissed as moot
		3. Guardian ad Litem's PDR Prior to a Determination by the COA	3. Special Order **11/02/2021**
		4. Guardian ad Litem's Motion to Suspend the Appellate Rules to Permit Expedited Review	4. Special Order **11/02/2021**
		5. Guardian ad Litem's Motion to Consolidate Appeals	5. Special Order **11/02/2021**

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228A21	C Investments 2, LLC v. Arlene P. Auger, Herbert W. Auger, Eric E. Craig, Gina Craig, Laura Dupuy, Stephen Ezzo, Janice Huff Ezzo, Anne Carr Gilman Wood, as Trustee of the Francis Davidson Gilman, III Trust f/b/o Pets U/W Dated June 20, 2007, Lauren Heaney, Bridget Holdings, LLC, Ginner Hudson, Jack Hudson, Chad Julka, Sabrina Julka, Arthur Maki, Ruth Maki, Jennie Raubacher, Matthew Raubacher, as Co-Trustees of the Raubacher/Cheung Family Trust Dated November 11, 2018, Lawrence Tillman, Linda Tillman, Ashfaq Uraizee, Jabeen Uraizee, Jeffrey Stegall, and Valerie Stegall	1. Defs' (Jennie Raubacher, et al.) Motion in the Alternative to Consider Brief as Amicus Curiae Brief 2. Defs' (Jennie Raubacher, et al.) Petition for Writ of Certiorari to Review Decision of the COA 3. Defs' (Jennie Raubacher, et al.) Motion to Strike 4. Plt's Motion for Substitution of Parties	1. Denied 2. Denied 3. Dismissed as moot 4.
241P21	State v. Donald S. Edwards	Def's Pro Se Petition for Writ of Certiorari to Review Order of Superior Court, Alamance County	Dismissed
253P19-4	State v. Justin Michael Tyson	Def's Pro Se Motion for Relief from Judgment or Order	Dismissed
263P21	In re J.U.	1. State's Motion for Temporary Stay (COA20-812) 2. State's Petition for Writ of Supersedeas 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **08/10/2021** 2. Allowed 3. Allowed
272A14	State v. Jonathan Douglas Richardson	1. Def's Pro Se Motion to Preserve Def's Position 2. State's Motion to Dissolve Stay of Def's Direct Appeal 3. State's Motion to Hold All Other Pending Proceedings in Abeyance	1. 2. Allowed 3. Allowed

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276A21	State v. Michael Steven Elder	State's Motion to Continue Oral Argument (COA20-215)	Allowed **04/12/2022**
280P21-3	Travis Wayne Baxter v. Lincoln County Sheriff Office	Plt's Pro Se Motion for Rehearing and Hearing of Merits of Case (COA21-392)	Dismissed
290P21	State v. Claude Mordecia Stevens	Def's Pro Se PDR Under N.C.G.S. § 7A-31 (COA20-421)	Denied
291P21	State v. Cherelle Renee Hills	Def's Pro Se PDR Under N.C.G.S. § 7A-31 (COA20-9)	Denied
294PA17-2	State v. Nancy Benge Austin	Def's PDR Under N.C.G.S. § 7A-31 (COA20-198)	Denied
294A21	State v. Harold Eugene Swindell	1. State's Motion for Temporary Stay (COA20-263) 2. State's Petition for Writ of Supersedeas 3. State's Notice of Appeal Based Upon a Dissent 4. Def's PDR Under N.C.G.S. § 7A-31	1. Allowed **08/20/2021** 2. Allowed **09/08/2021** 3. --- 4. Denied
297P21	State v. William Matthew Fortney	Def's Pro Se PDR Under N.C.G.S. § 7A-31 (COA20-524)	Denied
300P21	Charles F. Walter, Jr. v. Lawrence Joseph Walter, Sr.; Laurie Walter; Lawrence Joseph Walter, Jr.; Angel Walter; Thomas D. Walter, Individually and as Personal Representative of the Estate of Louise Walter; Judith Walter; The Louise M. Walter Trust u/t/d February 7, 2000 as Amended Through Thomas D. Walter, First Successor Trustee; Melanie Walter Day; Patrick Day; Edwin Boyer as Administrator ad Litem of the Estate of Charles Walter; Barbara Evers as Personal Representative of the Estate of Charles Walter	Plt's Petition for Writ of Certiorari to Review Decision of the COA (COA20-154)	Denied

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304P20-6	State v. Clyde Junior Meris	1. Def's Pro Se Emergency Petition for Writ of Certiorari to Review Order of Superior Court, Guilford County 2. Def's Pro Se Motion to Proceed *In Forma Pauperis*	1. Dismissed 2. Allowed
324P20-2	State v. Joseph Levi Grantham	Def's Pro Se Petition for Writ of Certiorari to Review Order of Superior Court, Randolph County	Denied
331P21	Community Success Initiative, et al. v. Moore, et al.	1. Plts' PDR Prior to a Determination by COA (COAP22-153) 2. Plts' Motion to Suspend Appellate Rules 3. Plts' Motion for Leave to File Reply	1. Allowed 2. Dismissed as moot 3. Dismissed as moot
334A21	State v. Sindy Lina Abbitt ——————— State v. Daniel Albarran	1. Def's (Sindy Lina Abbitt) Notice of Appeal Based Upon a Dissent (COA20-309) 2. Def's (Sindy Lina Abbitt) PDR as to Additional Issues 3. Def's (Daniel Albarran) Notice of Appeal Based Upon a Dissent	1. --- 2. Denied 3. ---

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342PA19-2	Jabari Holmes, Fred Culp, Daniel E. Smith, Brendon Jaden Peay, and Paul Kearney, Sr. v. Timothy K. Moore, in his official capacity as Speaker of the North Carolina House of Representatives; Philip E. Berger, in his official capacity as President Pro Tempore of the North Carolina Senate; David R. Lewis, in his official capacity as Chairman of the House Select Committee on Elections for the 2018 Third Extra Session; Ralph E. Hise, in his official capacity as Chairman of the Senate Select Committee on Elections for the 2018 Third Extra Session; the State of North Carolina; and the North Carolina State Board of Elections	1. Defs' Motion to Admit David H. Thompson Pro Hac Vice (COA19-762 22-16) 2. Defs' Motion to Admit Peter A. Patterson Pro Hac Vice 3. Defs' Motion to Admit Joseph O. Masterman Pro Hac Vice 4. Defs' Motion to Admit Nicholas A. Varone Pro Hac Vice 5. Defs' Motion to Admit John W. Tienken Pro Hac Vice 6. Plts' Motion to Admit Andrew J. Ehrlich, Jane B. O'Brien, and Paul D. Brachman Pro Hac Vice	1. Allowed **03/10/2022** 2. Allowed **03/10/2022** 3. Allowed **03/10/2022** 4. Allowed **03/10/2022** 5. Allowed **03/10/2022** 6. Allowed **03/25/2022**
355P21	Daniel Ross v. N.C. State Bureau of Investigation	1. Plt's PDR Under N.C.G.S. § 7A-31 (COA20-599) 2. Plt's Motion for Rule 34 Sanctions 3. Plt's Second Motion for Rule 34 Sanctions	1. Denied 2. Denied 3. Denied
358P21	Contaminant Control, Inc. v. Allison Holdings, LLC	Def's PDR Under N.C.G.S. § 7A-31 (COA20-531)	Denied
366P21	State v. Sharif Hakim Moore	1. Def's Pro Se Motion for Appeal 2. Def's Pro Se Motion for Appeal	1. Dismissed 2. Dismissed
378P21	State v. Calvin Gene McNeill	Def's PDR Under N.C.G.S. § 7A-31 (COA20-557)	Denied

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380P21	Hortense Pamela Hill v. David Warner Boone, M.D., and Raleigh Orthopaedic Clinic, P.A.	Plt's PDR Under N.C.G.S. § 7A-31 (COA20-488)	Denied **Newby, C.J., recused**
394PA21	Michael Mole' v. City of Durham, North Carolina, a Municipality	1. Plt's PDR Under N.C.G.S. § 7A-31 (COA19-683) 2. North Carolina Fraternal Order of Police's Motion for Leave to File Amicus Brief in Support of PDR 3. Def's Motion to Designate Parties 4. Def's Motion to Reset 30-Day Deadline for Opening Briefs 5. Plt's Motion for Extension of Time to File Brief	1. Allowed **03/09/2022** 2. Denied **03/09/2022** 3. Special Order **03/29/2022** 4. Special Order **03/29/2022** 5. Special Order **03/29/2022**
396P21	State v. Kevin Ray Holliday	Def's PDR Under N.C.G.S. § 7A-31 (COA20-768)	Denied
404P21	State v. Halo Garrett	1. Def's Motion for Temporary Stay (COA19-1171) 2. Def's Petition for Writ of Supersedeas 3. Def's Notice of Appeal Based Upon a Constitutional Question 4. Def's PDR Under N.C.G.S. § 7A-31 5. State's Motion to Dismiss Appeal	1. Allowed **11/19/2021** Dissolved **05/04/2022** 2. Denied 3. --- 4. Denied 5. Allowed
406P21	State v. Jimmy Brown Rodriguez, II	Def's Pro Se PDR Under N.C.G.S. § 7A-31 (COA20-850)	Denied
407A21	Quad Graphics, Inc. v. N.C. Department of Revenue	1. Multistate Tax Commission's Motion for Leave to File Amicus Brief 2. Multistate Tax Commission's Motion to Admit Richard L. Cram Pro Hac Vice 3. District of Columbia, et al.'s Motion to Admit Caroline S. Van Zile Pro Hac Vice 4. Petitioner's Motion to Admit Michael J. Bowen Pro Hac Vice	1. Allowed **01/21/2022** 2. Allowed **03/22/2022** 3. Allowed **03/22/2022** 4. Allowed **03/22/2022**

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414P21	T. Alan Phillips and Robert Warwick, in their capacities as co-Trustees of the Marital Trust created Under Section 2 of Article IV of the Hugh MacRae II Revocable Declaration of Trust; and Robert Warwick, Hugh MacRae III, and Nelson MacRae, in their capacities as co-Trustees of the Family Trust Created Under Section 3 of Article IV of the Hugh MacRae II Revocable Declaration of Trust which Family Trust is the sole remainder Beneficiary of the Marital Trust v. Eunice Taylor MacRae and Marguerite Bellamy MacRae, in her capacity as a beneficiary of the Family Trust	Defs' PDR Under N.C.G.S. § 7A-31 (COA20-903)	Allowed
417P21	State v. Kenneth Lewis Powell, Jr.	Def's Pro Se Motion to Dismiss Charges	Dismissed
425A21-1	Hoke County Board of Education, et al. v. State of North Carolina, et al.	1. Plts' Notice of Appeal Based Upon a Dissent (COAP21-511) 2. Plts' Notice of Appeal Based Upon a Constitutional Question 3. Plts' PDR Under N.C.G.S. § 7A-31 4. Plts' Petition in the Alternative for Writ of Certiorari to Review Order of the COA 5. Plt-Intervenors' (Rafael Penn, et al.) Motion to Admit David Hinojosa Pro Hac Vice	1. Special Order **03/18/2022** 2. Special Order **03/18/2022** 3. Special Order **03/18/2022** 4. Special Order **03/18/2022** 5. Allowed **03/18/2022**

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		6. Plt-Intervenors' (Rafael Penn, et al.) Notice of Appeal Based Upon a Dissent	6. Special Order **03/18/2022**
		7. Plt-Intervenors' (Rafael Penn, et al.) Notice of Appeal Based Upon a Constitutional Question	7. Special Order **03/18/2022**
		8. Plt-Intervenors' (Rafael Penn, et al.) PDR Under N.C.G.S. § 7A-31	8. Special Order **03/18/2022**
		9. Plt-Intervenors' (Rafael Penn, et al.) Petition for Writ of Certiorari to Review Order of the COA	9. Special Order **03/18/2022**
		10. Controller's Motion to Dismiss Appeals	10. Special Order **03/18/2022**
		11. Controller's Conditional Petition for Writ of Supersedeas	11. Special Order **03/18/2022**
		12. Legislative-Intervenors' Motion to Dismiss Appeals	12. Special Order **03/18/2022**
		13. State's Notice of Upcoming Filing	13. Dismissed as moot **03/18/2022**
425A21-2	Hoke County Board of Education, et al. v. State of North Carolina, et al.	1. State's PDR Prior to Determination by COA (COA22-86)	1. Special Order **03/18/2022**
		2. State's Motion to Set an Expedited Schedule	2. Special Order **03/18/2022**
		3. Plts' Conditional PDR Prior to Determination by COA	3. Special Order **03/18/2022**
		4. Trial Court Request for Extension of Time to File Order on Remand	4. Allowed **04/20/2022**
426P21	Daniel A. Young, Sr. v. Ryan Russell Megia	Plt's Pro Se Motion for Appeal	Dismissed
434P21	State v. Jessica Lea Metcalf	Def's PDR Under N.C.G.S. § 7A-31 (COA20-917)	Denied

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436A21	State of North Carolina *ex rel.* Joshua H. Stein, Attorney General v. E. I. Du Pont De Nemours and Company, et al.	1. Defs' Motion to Admit Joshua P. Ackerman Pro Hac Vice 2. State's Motion to Admit Levi Downing Pro Hac Vice 3. State's Motion to Admit Elizabeth Krasnow Pro Hac Vice 4. State's Motion to Admit Julia Schuurman Pro Hac Vice 5. State's Motion to Admit Lauren H. Shah Pro Hac Vice 6. State's Motion to Admit David Zalman Pro Hac Vice 7. Defs' Motion to Admit Katherine L.I. Hacker Pro Hac Vice 8. Defs' Motion to Deem Motion to Admit Katherine L.I. Hacker Pro Hac Vice Timely Filed	1. Allowed **04/04/2022** 2. Allowed **04/22/2022** 3. Allowed **04/22/2022** 4. Allowed **04/22/2022** 5. Allowed **04/22/2022** 6. Allowed **04/22/2022** 7. Allowed **05/03/2022** 8. Allowed **05/03/2022**
446A13-2	State v. Mario Andrette McNeill	1. State's Motion for Extension of Time to File Response to Petition for Writ of Certiorari 2. Def's Petition for Writ of Certiorari to Review Order of Superior Court, Cumberland County 3. Def's Motion for Leave to File Reply in Support of Petition for Writ of Certiorari	1. Allowed **12/08/2021** 2. Special Order 3. Denied
454P20-4	State v. Nafis Abdullah-Malik	Def's Pro Se Motion to Order District Courts Clerks to Find, Locate, File, and Return Any Filings	Dismissed
476P03-3	State v. Sharoid Te-Juan Wright	Def's Pro Se Petition for Writ of Habeas Corpus (COA02-744)	Denied **03/11/2022**
495P20-2	US Bank v. Leland Thompson, et al.	1. Third-Party Claimant's Pro Se Motion for Notice of Appeal 2. Third-Party Claimant's Pro Se Motion for Demand for Jury Trial 3. Third-Party Claimant's Pro Se Motion for Notice of Default: Opportunity to Cure	1. Dismissed 2. Dismissed 3. Dismissed
567P04-4	State v. John Darrell Norman, Sr.	Def's Pro Se Motion for Appropriate Relief	Dismissed
580P05-26	In re David Lee Smith	1. Def's Pro Se Petition for Writ of Mandamus 2. Def's Pro Se Petition for Writ of Mandamus	1. Denied 2. Denied **Ervin, J., recused**

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