CIVIL LAW UPDATE
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2022 Appellate Training: New & Emerging Legal Issues

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A. Negligence

In Asher v. Honeycutt, ___N.C. App. ___, 2022-NCCOA-517, the court of appeals considered whether sufficient evidence existed to forecast that homeowners breached the duty of care owed to guests on their property when they failed to notice and remedy minor code violations.

Homeowners purchased a house to use as a rental property. Id. ¶ 2. The house could be entered through the garage using three wooden steps. Id. Prior to purchasing the house, the homeowners had it inspected to evaluate potential problems. Id. ¶ 3. The inspection revealed that there was "a little play or movement of the handrail" on the garage steps and recommended only that the handrail be tightened or secured. Id. The homeowners secured the handrail without making other alterations to the garage steps. Id.

The homeowners rented the home to a tenant for two years who testified the steps "always felt stable and safe". Id. ¶ 4. The homeowners then rented the home to a second tenant. Id. The second tenant did not observe any problem with the steps during a visual inspection with the homeowners at the time of renting the house or while living there. Id.

The second tenant hosted a party at the house. Id. ¶ 5. While assisting his wife down the steps as they were leaving the party, a guest lost his balance and fell down the steps. Id. His severed his left optic nerve, causing complete loss of vision in that eye. Id.

Subsequent inspection of the garage steps revealed that they did not comply with the applicable provisions of the North Carolina Residential Building Code: the variance among step heights was 1/4-inch greater than the code permitted, the threshold height from the floor was 1/4-inch higher than code allowed, the variance in tread depth was 3/8-inches greater than code permitted, and at least one tread sloped 1.1% more than code allowed. Id. ¶ 7.

The guest filed suit against the homeowners alleging negligence per se and common law negligence. Id. ¶ 8. The trial court granted the homeowners' motion for summary judgment. Id. ¶¶ 9-10.

Reviewing the trial court's decision de novo, the court of appeals affirmed. Id. ¶¶ 1, 19. The court of appeals concluded the guest failed to forecast evidence that the homeowners knew or should have known of the code violation. Id. ¶ 24. Accordingly, no genuine issue of material fact existed as to the negligence per se claim. Id. ¶¶ 21-26.

As to the common law negligence claim, the guest argued the homeowners had a duty to inspect the steps and perform necessary repairs, which they failed to do as evidenced by the code violations. Id. ¶ 27. To prove a homeowner was negligent in a premises liability care case, the invitee must show that the property owner "either (1) negligently created the condition causing the injury, or (2) negligently failed to correct the condition after actual or constructive notice." Id. ¶ 31 (citing Burnham v. S&L Sawmill, Inc., 229 N.C. App. 334, 340, 749 S.E.2d 75, 80 (2013)).

The court of appeals explained that while the homeowners owed the guest a duty of care, the guest could not demonstrate that the homeowners breached that duty by failing to notice and remedy a minor code violation. Id. ¶ 33. The court of appeals concluded the homeowners acted reasonably in relying upon a professional inspection to ascertain the existence of hidden dangers rather than measuring the steps themselves. Id. ¶¶ 34-36. Given the inspection and absence of complaints by two tenants, the homeowners had no reason to suspect the garage steps contained "hidden hazards". Id. ¶ 36. The court of appeals concluded that "accepting [the guest's husband's] position would require landowners to double-check the work of their hired professionals, which would unreasonably mandate that landowners perform important safety tasks without the requisite expertise." Id. ¶ 38.

The court of appeals held there was no evidence that the homeowners breached their duty to make a reasonable inspection of the house. Id. ¶ 39. Accordingly, it affirmed the trial court's entry of judgment in favor of the homeowners. Id. ¶ 40.

In Keith v. Health-Pro Home Care Services, Inc., 381 N.C. 442, 2022-NCSC-72, the supreme court considered whether an employer's failure to vet one of its employees may give rise to a negligent hiring claim for that employee's subsequent criminal conduct.

An elderly couple filed a complaint for negligence against an in-home health care services provider whose employee committed a home invasion and armed robbery of the elderly couple. Id. ¶¶ 3-4. The couple alleged that "despite [the employee's] criminal record, lack of a driver's license, and history of prior incidents of suspected prior thefts from the [couple's] home, [the employer] negligently allowed [the employee] to provide in-home care to [the couple], and [the employer's] conduct in assigning [the employee] to these responsibilities as opposed to some other position in the company, was the proximate cause of the robbery [. . .] and the consequent injuries sustained therein." Id. ¶ 4. At trial, following the conclusion of the elderly couple's evidence, the employer moved for a directed verdict. Id. ¶ 6. The trial court denied the motion. Id. Subsequently, the case progressed and proposed jury instructions were submitted. Id. ¶ 8. The trial court proposed an instruction stating the general common law of negligence. Id. The employer contended that the couple's claim was for negligent hiring, and it proposed an alternative instruction. Id. The trial court refused to give the employer's instruction. Id. The jury ultimately returned a verdict in favor of the couple. Id. ¶ 9. The employer moved for judgment notwithstanding the verdict; the trial court denied this motion. Id. ¶10. On appeal, a divided court of appeals panel reversed the trial court's judgment and remanded for entry of the employer's motion for judgment notwithstanding

the verdict. Id. ¶ 11. The court of appeals found that the couple alleged a claim for negligent hiring and that the trial erred in denying the employer's requested jury instruction. Id. ¶¶ 12-13.

In an opinion by Justice Barringer writing for the majority, the supreme court reversed the court of appeals. Id. ¶ 81. North Carolina recognizes a cause of action against an employer for negligent hiring. Id. ¶ 27. A plaintiff bringing a claim on this ground must prove:

> (1)The specific negligent act on which the action is founded . . . (2) incompetency, by inherent unfitness or specific acts of negligence, from which incompetence may be inferred; and (3) either actual notice to the master of such unfitness or bad habits, or constructive notice, by showing that the master could have known the facts had he used ordinary care in 'oversight and supervision,' . . . and (4) that the injury complained of resulted from the incompetency proved.

Id. (quoting Medlin v. Bass, 327 N.C. 587, 591 (1990)).

The supreme court found that the court of appeals erred, id., holding that to survive a motion for directed verdict or judgment notwithstanding the verdict, the couple had to present evidence supporting the elements addressed in Medlin, id. ¶ 66. Here, the evidence presented at trial showed that when the couple initially sought the in-home health care services, they were told that all employees underwent a criminal background check. Id. ¶ 38. It was the employer's policy that all potential employees went through a criminal background check with the "State Bureau of Investigations or another approved entity" Id. ¶ 40. However, this criminal check was never sufficiently performed by the employer; the criminal check was performed by a third party that specifically stated on its website that "its services cannot be used to conduct background checks for employees or applicants." Id. ¶ 42. The website had no record of any crimes committed by the employee. Id. Had a sufficient criminal check been completed it would have showed that the employee had been charged multiple times for communicating threats along with several other misdemeanors. Id. ¶ 46. Additionally, the employer did not confirm whether the employee had a

valid driver's license, as indicated on her application. Id. ¶ 45. Had the employer confirmed, it would have discovered that the employee did not have a valid driver's license. Id. ¶ 46. Furthermore, at some point prior to this incident, the couple discovered that more than $2,000 had been stolen from their home. Id. ¶ 51. Suspecting it could have been the employee, the couple informed the employer. Id. ¶ 54. The employer, having a strong belief that the employee was responsible, withdrew her from the home. Id. Nevertheless, a few weeks later, the employee was reassigned to the home. Id. ¶ 55. A couple weeks thereafter, the employee perpetrated the crime. Id. ¶ 57. Taking these circumstances into account, the supreme court found that there was evidence to support each element of the couple's cause of action. Id. ¶ 64.

The majority further held that there is a sufficient nexus between the injurious act and the employment relationship to create a duty. Id. ¶ 67. This is demonstrated by the facts that: (1) the employer assigned the employee to the couple's home, (2) the employer participated in the meeting between the employee and the couple, (3) the employer reaped financial benefit from the employee's meeting with the couple, and (4) the employee used the intelligence she received working for the couple to engage in her criminal behavior. Id. Furthermore, the inaccuracies in the employee's employment application, the employer's belief that the employee committed a prior theft at the couple's home, and the employee's criminal background supports the inference that the employer should have known that the employee was incompetent to be the couple's provider. Id. ¶ 69. Since, the nexus requirement and the elements provided by Medlin are met, the court concluded that the jury, not the court, was required to determine the outcome of the case. Id. ¶ 72. Thus, the supreme court reversed the court of appeals' decision.

Chief Justice Newby, concurring in part and dissenting in part, agreed with the majority's analysis of the case that: (1) negligent hiring requires a plaintiff to show evidence of each of the

three elements from Medlin and a nexus connection between the employment and injury, (2) the evidence was sufficient to submit the case to a jury, (3) the pattern instructions were incorrectly given, and (4) the trial court erred in giving an ordinary negligence jury instruction and not a negligent hiring instruction. Id. ¶ 82. However, Justice Newby would have held that the "trial court's failure to give a negligent hiring instruction prejudiced the defendant such that defendant is entitled to a new trial." Id. This state has established that "a party's decision to request the delivery of a particular jury instruction during the jury instruction conference suffices to preserve a challenge to the trial court's refusal to deliver that instruction to the jury." Id. ¶ 83. Here, the health care provider requested a specific instruction during the conference and objected to the trial court's instruction after it was given. Id. ¶ 87. Thus, a new trial should have been awarded. Id. ¶ 88.

Justice Berger, dissenting, concluded that the circumstances at issue in the case did not give rise to a legal duty on behalf of the employer. Id. ¶ 91. He stated that the law provides that "[i]n cases where a plaintiff asserts liability founded on a defendant's relationship to a third party who injured them, the establishment of a legal duty hinges on whether defendant held a special relationship with the third party." Id. (citing Stein v. Asheville City Bd. of Educ., 360 N.C. App. 321, 329 (2006)). He observed that employment alone does not satisfy that relationship, but rather the employer must "[(1)] know or should know of the third person's violent propensities and (2) the [employer must have] the ability and opportunity to control the third person at the time of the third person's criminal acts." Id. (quoting Stein, 360 N.C. App. at 330). Here, the employee's prior convictions were for non-violent offenses and the employer did not have any complaints as to her violent propensity. Id. ¶ 93. Additionally, the employer had no ability to control the employee's

actions in the robbery. Id. Thus, Justice Berger would have found no legal duty was owed to the couple. Id.

(1) Economic Loss Doctrine

In Cummings v. Carroll, 379 N.C. 347, 2021-NCSC-147, the supreme court considered whether the economic loss rule barred negligence, negligent misrepresentation, and fraud claims that two homeowners asserted against the seller of their beach house, the seller's owner, and the seller's real estate agents after the homeowners discovered structural damage to their house.

The homeowners purchased an oceanfront beach house. Id. at ¶ 1. Several months after closing on the house, the homeowners discovered significant structural damage to the house that had been caused by past water intrusion. Id. The homeowners asserted several claims, including (a) negligent misrepresentation and fraud against the seller and the seller's owner and (b) negligence and fraud against the real estate agents who represented the seller in the sale of the house. Id. at ¶¶ 1–2. All defendants moved for summary judgment in their favor. Id. at ¶ 19. The trial court granted the motion, and the court of appeals affirmed in part and reversed in part. Id. at ¶¶ 19–20. The parties appealed several issues to the supreme court. One of the issues that the seller, the seller's owner, and the seller's real estate agents (the "selling parties") appealed was the determination by the court of appeals that the economic loss rule did not bar the homeowners' tort claims against these defendants.

The supreme court ruled that the court of appeals did not err in holding that the economic loss rule did not bar the homeowners' claims against the selling parties for negligence, negligent misrepresentation, and fraud.

"[T]he economic loss rule bars recovery in tort by a plaintiff against a promisor for his simple failure to perform his contract, even though such failure was due to negligence or lack of

skill." Id. at ¶ 23 (quoting Crescent Univ. City Venture, LLC v. Trussway Mfg., Inc., 376 N.C. 54, 58, 852 S.E.2d 98 (2020)). The homeowners' negligence, negligent misrepresentation, and fraud claims against the selling parties were based on these defendants' alleged failure to disclose the house's long history of water intrusion problems and to adequately repair those problems. Id. at ¶ 24. According to these defendants, the residential property disclosure statement "upon which these claims rely constitute[d] a part of the purchase contract, so that claims relating to the disclosure statement implicate[d] contractual duties for purposes of the economic loss rule." Id. at ¶ 25. The supreme court disagreed.

After examining the contents of the disclosure statement and the purchase contract, the supreme court held that the "substance" of the disclosure statement was not incorporated into the purchase contract, and therefore, the disclosure statement could not be used to apply the economic loss rule in this case. Id. at ¶ 26. The supreme court also distinguished its Crescent University City Venture decision, explaining that it applied the economic loss rule in that case "in the context of a large commercial real estate transaction in which the rights and responsibilities of the parties were comprehensively controlled by a series of inter-related contracts and sub-contracts." Cummings, 2021-NCSC-147, at ¶ 27. That decision did "not control in this instance given that the present case arose in the context of a subsequent sale of an existing residence between individuals or privately held entities that the individual participants controlled." Id.

In addition, the supreme court declined to adopt a categorical rule exempting fraud claims from the economic loss rule, like the court of appeals has done in the past, since the disclosure statement did not require the application of the economic loss rule in the first place. Id. at ¶¶ 28–29. Furthermore, the supreme court agreed with the conclusion of the court of appeals that the seller's real estate agents could not avail themselves of the protection of the economic loss rule

because they were not parties to the purchase contract. On this issue, the supreme court distinguished a court of appeals decision, Simmons v. Cherry, 43 N.C. App. 499, 259 S.E.2d 410 (1979), where, unlike in this case, there was evidence that the president of a corporation that contracted with a real estate appraiser had bound himself personally to the contract. Cummings, 2021-NCSC-147, at ¶¶ 30–31. Here, the seller's real estate agents lacked the privity of contract necessary for them to rely on the economic loss rule. Id. at ¶ 31.

For these reasons, the supreme court affirmed the determination by the court of appeals that the economic loss rule did not bar the homeowners' tort claims against the selling parties.

(2) Contributory Negligence

In Lovett v. University Place Owner's Association, Inc., ___ N.C. App. ___, 2022-NCCOA-594, the court of appeals considered whether voluntary intoxication can rise to the level of gross contributory negligence that bars a plaintiff's tort claim.

An administrator of a decedent's estate filed a wrongful death action against the owners of a restaurant. Id. ¶ 2, ¶ 6. The administrator alleged that the owners' negligence and gross negligence directly and proximately caused the decedent's death. Id. ¶ 6. The decedent met his friends at the restaurant on the day of his death. Id. ¶ 2. The decedent was intoxicated when he arrived. Id. The decedent consumed more alcoholic beverages at the restaurant. Id. After leaving the restaurant, the decedent and his friends chose to walk around a lake, which was adjacent to the restaurant. Id. ¶ 3. At some point thereafter, the decedent walked to the edge of the lake and jumped in. Id. He was pulled out of the water and given aid. Id. Shortly after, the decedent jumped into the lake a second time. Id. ¶ 4. He was unable to be pulled out of the water and ultimately disappeared below the water. Id. The next day, divers retrieved the decedent's body from the lake. Id. ¶ 5. A toxicology report showed that the decedent's blood alcohol content at the time of his death was

.37 grams per millimeter. Id. At the wrongful death trial, the owners moved to dismiss the administrator's complaint asserting contributory negligence as a defense. Id. ¶ 6. The trial court granted the owners' motion to dismiss. Id. The administrator appealed. Id.

On appeal, the court of appeals affirmed the trial court's grant of the owners' motion to dismiss. Id. ¶ 19. Under this state's laws, contributory negligence can be used as a bar to recover for a negligence claim, however, only gross contributory negligence precludes recovery from a grossly negligent defendant. Id. ¶ 12. Here, the decedent was voluntarily intoxicated when he jumped into the lake. Id. ¶ 16. Further, the decedent's blood alcohol content was nearly five times the legal threshold. Id. The court concluded these facts sufficient to find the decedent grossly negligent. Id. ¶ 17. Therefore, the decedent's intoxication barred his claim. Id. ¶ 16.

Thus, for the foregoing reasons, the court affirmed the trial court's dismissal of the administrator's complaint.

(3) Gross Negligence

In Estate of Graham v. Lambert, ___ N.C. App. ___, 2022-NCCOA-161, review allowed, ___ N.C. ___, 2022 WL 16707800 (Nov. 2, 2022), the court of appeals considered whether an estate sufficiently established gross negligence by a police officer to overcome governmental and public official immunity. Judge Gore wrote for the majority.

A citizen was struck and killed by a police cruiser while crossing a road in Fayetteville just before midnight on July 24, 2018. Id. at ¶¶ 1–4. The officer driving the police cruiser was responding to a domestic violence incident involving a firearm. Id. at ¶ 2. In June 2019, the citizen's estate filed a complaint against the officer, the police department, and the city alleging negligence, gross negligence, and wrongful death. Id. at ¶ 5. The officer, police department, and

city asserted defenses of sovereign, governmental, and public official immunity. Id. The defendants then filed a motion for summary judgment. Id. at ¶ 6.

The trial court denied the motion for summary judgment. Id. at ¶ 7. The defendants appealed.

The court of appeals considered a number of issues on appeal including whether the gross negligence standard was appropriately applied. The court of appeals reversed, holding that the estate failed to present evidence of gross negligence, entitling the officer and city to summary judgment. Id. at ¶ 8.

The estate argued that the officer was grossly negligent in operation of the police cruiser. Id. at 18. However, by statute, police officers are exempted from speed laws when engaged in the apprehension of a "law violator." Id. at 19 (citing N.C. Gen. Stat. § 20-145). The officer here was responding to a domestic violence incident involving a firearm. Id. In such an instance, courts apply the gross negligence standard. Id. at ¶ 20 (citing Parish v. Hill, 350 N.C. 231, 238, 513 S.E.2d 547, 551 reh'g denied, 350 N.C. 600, 537 S.E.2d 215 (1999)). "North Carolina's standard of gross negligence, with regard to police pursuits, is very high and rarely met." Eckard v. Smith, 166 N.C. App. 312, 323 603 S.E.2d 134, 142 (2004), aff'd, 360 N.C. 51, 619 S.E.2d 503 (2005).

To determine whether an officer's action constitutes gross negligence, a court considers (1) the reason for the pursuit, (2) the probability of injury to the public due to the officer's decision to begin and maintain the pursuit, and (3) the officer's conduct during the pursuit. Est. of Graham, 2022-NCCOA-161 ¶ 21 (citing Greene v. City of Greenville, 225 N.C. App. 24, 27, 736 S.E.2d 833, 836, review denied, 367 N.C. 214, 747 S.E.2d 249 (2013)).

Analyzing each of the prongs in turn, the court first reiterated that the officer was responding to a domestic violence incident involving a firearm, and therefore had a "valid and

lawful" reason to drive above the speed limit. Id. at ¶ 23. The court noted the officer was driving on a seven-lane highway on a night when the road was clear and was traveling as at a speed of 58 miles-per-hour on a road with a 45 mile-per-hour speed limit, indicating a low probability of injury to the public. Id. at ¶ 24. For the final prong, while noting that the officer did not utilize his lights and sirens and video footage indicated the officer looked at his laptop and touched its touchpad while driving, these actions did not rise to the level of gross negligence. Id. at ¶ 25. The court found persuasive an analysis of a series of cases under analogous circumstances. Id. at ¶ 25–26.

With all three prongs satisfied, the court of appeals held there was no genuine issue of material fact whether the officer was grossly negligent. Id. at ¶ 28. As the gross negligence issue was dispositive on the matter as a whole, the court of appeals held that the trial court erred in denying summary judgment to the officer, police department, and city. Id. at ¶ 28.

Judge Jackson offered a dissent in part, arguing that the record presented a genuine question whether the officer was grossly negligent. Id. at ¶ 29 (Jackson, J., dissenting). The dissent argued that use of the laptop while driving could be sufficient to establish gross negligence. Id.

The dissent noted that "[a] person's use of a computer or handheld electronic device while operating an automobile presents unique risks to public safety." Id. at ¶ 33. While agreeing that the officer's use of the laptop, coupled with operating the cruiser without lights and sirens, did not amount to gross negligence as a matter of law, "[the record] certainly shows that a jury could conclude that he was." Id. at ¶ 38.

(4) Negligent Infliction of Emotional Distress

In Cauley v. Bean, 282 N.C. App. 443, 2022-NCCOA-202, review denied, 876 S.E.2d 289 (Aug 17, 2022) the court of appeals considered whether a bicyclist, who observed a minivan hit her father who died from injuries sustained in the accident sufficiently pleaded a claim for

negligent infliction of emotional distress against the minivan's driver. Finding itself bound by precedent, the court of appeals affirmed the trial court's dismissal of the bicyclist's claims.

A bicyclist, her father, and two friends went cycling on a road near Blowing Rock in October 2019. Id. at ¶ 2. A minivan approached the group from the opposite direction. Id. The minivan's driver was "driving erratically," crossed the center lane and continued across toward the cyclists, before veering back onto the road. Id. The minivan struck the bicyclist's father but did not hit the bicyclist. Id. The bicyclist's father was ejected from his bicycle and landed on the road, leading to his death. Id. The minivan driver fled the scene. Id.

In April 2020, the bicyclist filed a complaint against the driver alleging, among other things, negligent infliction of emotional distress ("NIED"). Id. at ¶ 3. The driver filed a Rule 12(b)(6) motion to dismiss the bicyclist's claims. Id. After a hearing, the trial court dismissed each of the bicyclist's claims. Id. The bicyclist appealed the dismissal of her NIED claim. Id. at ¶ 4.

The court of appeals first recognized that a viable NIED claim must allege (1) the defendant negligently engaged in conduct, (2) it was reasonably foreseeable the conduct would cause the plaintiff severe emotion distress, and (3) the conduct did in fact cause the plaintiff severe emotional distress. Id. at ¶ 6 (citing Johnson v. Ruark Obstetrics, 327 N.C. 283, 304, 395 S.E.2d 85, 97 (1990)). As the parties agreed the complaint sufficiently alleged the driver engaged in negligent conduct, the court of appeals focused its analysis on whether it was reasonably foreseeable the negligence would cause severe emotional distress and whether it did in fact cause severe emotional distress. Id. at ¶ 7.

Turning to the issue of reasonable foreseeability, the court of appeals recognized that factors for consideration include the plaintiff's proximity to the negligent act, the relationship

between the plaintiff and the directly injured party, and whether the plaintiff personally observed the negligent act. Id. at ¶ 9 (citing Ruark Obstetrics, 327 N.C. at 305, 395 S.E.2d at 98). The list of factors is non-exhaustive and should be determined on a case-by-case basis. Id. (citing Ruark Obstetrics, 327 N.C. at 305, 395 S.E.2d at 98).

The court of appeals found several factors weighed in favor of foreseeability, including that the directly injured party was the bicyclist's father, the bicyclist was in close proximity to the accident, and she personally observed the accident. Id. at ¶¶ 11–12. "Considering the totality of the facts and circumstances alleged, we conclude [the bicyclist's] allegations are sufficient to establish the reasonable foreseeability of her severe emotional distress." Id. at ¶ 12.

The driver argued that the bicyclist failed to allege reasonable foreseeability because the driver did not have actual knowledge of the relationship between the bicyclist and her father. Id. at ¶ 13. The driver relied on a case where the court of appeals held severe emotional distress was not reasonably foreseeable when a driver hit a car driven by the plaintiff's mother while the plaintiff was in another car. Id. at ¶¶ 13–15 (citing Fields v. Diery, 131 N.C. App. 525, 509 S.E.2d 790 (1998)). The court of appeals found this reasoning unpersuasive because, as here, the bicyclist was riding in close proximity to her father, whereas in Fields the plaintiff and her mother were in two different cars. Id. at ¶ 16. The court held that the bicyclist alleged sufficient facts for a jury to conclude her severe emotional distress was reasonably foreseeable. Id.

The court of appeals next turned to the issue of whether the bicyclist sufficiently pleaded the driver caused her severe emotional distress. Id. at ¶ 17. "Severe emotional distress has been defined as 'any emotional or mental disorder, such as, for example, neurosis, psychosis, chronic depression, phobia, or any other type of severe and disabling emotional or mental condition which

may be generally recognized and diagnosed by professionals trained to do so.'" Id. at ¶ 18 (citing Ruark Obstetrics, 327 N.C. at 304, 395 S.E.2d at 97).

Prior to 2008, North Carolina courts had not required a plaintiff to plead severe emotional distress with detail. Id. at ¶¶ 19–20 (citing McAllister v. Ha, 347 N.C. 638, 496 S.E.2d 577 (1998); Chapman ex rel. Chapman v. Byrd, 124 N.C. App. 13, 475 S.E.2d 736 (1996)). "More recently, however, this Court has required a complaint for NIED to contain some factual allegations to support an allegation of severe emotional distress." Id. at ¶ 21 (citing Holleman v. Aiken, 193 N.C. App. 484, 668 S.E.2d 579 (2008); Horne v. Cumberland Cnty. Hosp. Sys., Inc., 228 N.C. App. 142, 746 S.E.2d 13 (2013)). Finding itself bound by Holleman and Horne, the court found insufficient detail in the bicyclist's complaint on the issue of whether the driver's alleged negligence actually caused severe emotional distress. Id. at ¶ 22.

Accordingly, the court of appeals held that the bicyclist's allegations were sufficient to establish that it was reasonably foreseeable that the minivan driver's negligence would cause severe emotional distress. "However, as [the bicyclist's] complaint is devoid of factual allegations regarding the type, manner, or degree of severe emotional distress she claims to have experienced, [the bicyclist] has not sufficiently pled that Defendant's negligence caused her severe emotional distress." Id. at ¶ 23.

B. Intentional Infliction of Emotional Distress

In companion cases Clark v. Clark, 280 N.C. App. 384, 2021-NCCOA-652, and Clark v. Clark, 280 N.C. App. 403, 2021-NCCOA-653, the court of appeals considered whether a trial court erred in allowing a wife's intentional infliction of emotional distress ("IIED") claim to proceed against her husband and the husband's paramour. (Note: The opinion regarding the husband's appeal is available at 2021-NCCOA-652. The opinion regarding the paramour's appeal is

available at 2021-NCCOA-653. As both appeals arise from the same facts, and both opinions are largely identical, this summary cites to the husband's appeal, 2021-NCCOA-652, unless otherwise noted.)

A couple married in 2010. Clark, 2021-NCCOA-652 at ¶ 2. Despite a rocky start to their relationship, the couple attended marriage retreats and eventually had two children. Id. at ¶¶ 2–3. In 2016, the husband, an Army officer, met another Army officer who stayed in the same barracks and attended the same training. Id. at ¶ 4. The two began a relationship. Id. at ¶¶ 4–5.

When the husband returned home for a long weekend, the wife found the paramour's phone number in the husband's phone. Id. at ¶ 8. A few months later, the wife discovered text messages between the husband and the paramour, including sexually explicit pictures of the husband. Id. at ¶ 9. The wife threatened to call the paramour, leading to a fight between the couple, and the husband left their marital home in September 2016. Id. at ¶ 10.

Despite the husband's departure, he and the wife maintained an "emotionally and sexually intimate relationship." Id. at ¶ 11. In March 2017, the husband and wife executed a separation agreement including monthly support payments by the husband for their children. Id. However, throughout June and July 2017, the husband and wife continued a sexual relationship "and recorded themselves doing so." Id. at ¶ 12.

Also in July 2017, the husband and the paramour conceived a child together via in vitro fertilization. Id. In August 2017, the husband traveled to Boston for training. Id. When the husband ceased responding to the wife's messages, she "sent him a topless photo," which she claimed she did not send to anyone else. Id. The husband and wife ended their sexual relationship in September 2017. Id. at ¶ 13. A month later, the wife sent "a picture of female genitalia" to the

husband in a text message. Id. The same month, she also discovered that the paramour was pregnant with the husband's child. Id.

In January 2018, the wife discovered an online advertisement she believed was about her:

> Liz is super hot! Shows you what plastic surgeons and eating disorders can do for you in 2018. There's a reason she's been divorced twice and can't take care of her kids. She's a plaything, nothing more. Hope you fellas are wearing condoms, she's got herpes.

Id. at ¶ 14. The wife responded to the ad and observed the associated username was linked to the husband's personal email address. Id. at ¶ 15.

In March 2018, the wife began communicating on a social media platform with someone she believed was the husband. Id. ¶ 16. The individual sent the wife the same topless photograph the wife had sent to the husband, claiming the photograph was "all over the place." Id. In May 2018, the wife discovered a social media "weight loss" advertisement featuring a post-pregnancy photograph of her and the same topless photograph. Id. at ¶ 17.

Throughout 2018, the wife's friends and associates contacted her regarding postings on social media platforms and chatrooms soliciting "no strings attached sex." Id. at ¶ 18. Business records from the social media platform indicated the postings could be traced to an IP address matching a residence shared by the husband and paramour. Id.

When the wife messaged the individual on the platform, the individual replied, "We are going to do continue doing everything in our power to make your life miserable." Id. at ¶ 19.

In August 2018, the wife filed claims against the husband and the paramour for IIED, among other things. Id. at ¶ 20. After a jury trial, the trial court entered judgment against the husband, id. at ¶ 23, and the paramour, Clark, 2021-NCCOA-653 at ¶ 22, on the IIED claim. After

the denial of post-trial motions by the husband and paramour, both appealed. Id. at ¶ 23; Clark, 2021-NCCOA-652 at ¶ 23.

On appeal, the husband and paramour argued the claims should not have proceeded because the conduct was "subsumed by other causes of action," and further that there was insufficient evidence to submit the claim to the jury. Id. at ¶ 31. The court of appeals held that the husband and paramour could not argue on appeal that the cause of action was subsumed because they failed to plead an election of remedies defense prior to or during trial, or in post-trial motions. Id. at ¶ 34. (citing N.C. Fed. Sav. & Loan Ass'n v. Ray, 95 N.C. App. 317, 323, 382 S.E.2d 851, 856 (1989) ("Election of remedies is an affirmative defense which must be pleaded by the party relying on it.")).

The next court of appeals considered whether the wife presented sufficient evidence for the IIED claims to be submitted to the jury. Id. at ¶ 37. To state a claim for IIED, a plaintiff must allege (1) extreme and outrageous conduct (2) which is intended to and does cause (3) severe emotional distress. Id. at ¶ 39 (citing Norton v. Scotland Mem'l Hosp., Inc., 250 N.C. App. 392, 397, 793 S.E.2d 703, 708 (2016)).

The court first considered whether the wife presented evidence of severe emotional distress. Id. at ¶ 40. The court of appeals observed that severe emotional distress means any emotional or mental disorder, including neurosis, psychosis, chronic depression, or other severe and disabling condition. Id. (citing Waddle v. Sparks, 331 N.C. 73, 83, 414 S.E.2d 22, 27 (1992)). While these conditions may be recognized by a medical professional, expert testimony is not necessary and testimony from plaintiff's "friends, family and pastors can be sufficient to support a claim." Id. (quoting Williams v. HomEq Serv. Corp., 184 N.C. App. 413, 419, 646 S.E.2d 381, 385 (2007)). The court of appeals held that testimony from the wife herself that she "cried

hysterically, hyperventilated and sought out a counselor" coupled with corroborating testimony from one of the wife's friends was sufficient to support the severe emotional distress element. Id. at ¶ 41.

Next the court considered causation. Id. at ¶ 42. The husband and paramour argued the wife failed to show a causal link because the wife had testified to certain symptoms of distress before the conduct she alleged supported her IIED claim -- primarily the online activity. Id. at 44. While the court of appeals recognized it was undisputed the wife showed some symptoms of distress before the husband and paramour began their online harassment, the trial court did not solely rely on those prior occurrences or prior symptoms in its findings. Id. at ¶ 45. As the wife offered evidence that at least some of the later-occurring symptoms were linked to later actions by the husband and paramour, the court of appeals held the wife provided "more than a scintilla of evidence" necessary to submit the issue to the jury. Id.

Finally, for the IIED claims, the court of appeals considered whether the husband's and paramour's conduct was outrageous. Id. at ¶ 46. The husband argued that his conduct was a "mere trading of insults" and did not give rise to the wife's IIED claim. However, conduct becomes "extreme and outrageous when it is so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." Id. at 47 (quoting Chidnese v. Chidnese, 210 N.C. App. 299, 316, 708 S.E.2d 725, 738 (2011)). Viewing the evidence in a light most favorable to the wife, the court of appeals held that the evidence showed that the husband harassed and stalked the wife, humiliated her, and frightened her – rising beyond the "mere insults" to extreme and outrageous behavior. Id. at ¶ 48.

The paramour argued that the wife had failed to establish any extreme and outrageous conduct by the paramour, by failing to show that she had engaged with the wife at all. Clark, 2021-NCCOA-653 at ¶ 46. Again, viewing the evidence in a light most favorable to the wife, the court of appeals noted the paramour began a sexual relationship with the husband with knowledge he was married and conceived a child with the husband, and that the paramour told the wife in at least one email that she was a "bad mother," "uneducated," and a "bad wife." Id. at ¶ 48. Further, the court recognized that the paramour lived with the husband for the period of the online harassment, and therefore had access to the computer used to communicate with the wife and create the salacious advertisements. Id. The court held this evidence, too, was sufficient to submit the issue to the jury.

Finding no error, the court of appeals affirmed the trial court's findings. Id. at ¶ 74.

C. Alienation of Affection

In companion cases Clark v. Clark, 280 N.C. App. 384, 2021-NCCOA-652, and Clark v. Clark, 280 N.C. App. 403, 2021-NCCOA-653, the court of appeals considered whether a trial court lacked subject matter jurisdiction to consider a wife's claim for alienation of affection where the paramour asserted her Fifth Amendment right to avoid testifying regarding whether she and the husband had sexual relations in North Carolina. (Note: The opinion regarding the husband's appeal is available at 2021-NCCOA-652. The opinion regarding the paramour's appeal is available at 2021-NCCOA-653. As both appeals arise from the same facts, and both opinions are largely identical, this summary cites to the husband's appeal, 2021-NCCOA-652, unless otherwise noted.)

A couple married in 2010. Clark, 2021-NCCOA-652 at ¶ 2. Despite a rocky start to their relationship, the couple attended marriage retreats and eventually had two children. Id. at ¶¶ 2–3.

In 2016, the husband, an Army officer, attended training in Virginia. Id. at ¶ 4. There he met another Army officer who stayed in the same barracks and attended the same training. Id. The two began a relationship over "homework or papers" and would often be "all alone in each other's rooms." Id. at ¶¶ 4–5.

When the husband returned home for a long weekend, the wife found the paramour's phone number in the husband's phone. Id. at ¶ 8. A few months later, the wife discovered text messages between the husband and the paramour, including sexually explicit pictures of the husband. Id. at ¶ 9. The wife threatened to call the paramour, leading to a fight between the couple, and the husband left their marital home in September 2016. Id. at ¶ 10.

Despite the husband's departure, he and the wife maintained an "emotionally and sexually intimate relationship." Id. at ¶ 11. In March 2017, the husband and wife executed a separation agreement including monthly support payments by the husband for their children. Id. However, throughout June and July 2017, the husband and wife continued a sexual relationship "and recorded themselves doing so." Id. at ¶ 12.

Also in July 2017, the husband and the paramour conceived a child together via in vitro fertilization. Id. In August 2017, the husband traveled to Boston for training. Id. When the husband ceased responding to the wife's messages, she "sent him a topless photo," which she claimed she did not send to anyone else. Id. The husband and wife ended their sexual relationship in September 2017. Id. at ¶ 13. A month later, the wife sent "a picture of female genitalia" to the husband in a text message. Id. The same month, she also discovered that the paramour was pregnant with the husband's child. Id.

In January 2018, the wife discovered an online advertisement she believed was about her:

> Liz is super hot! Shows you what plastic surgeons and eating disorders can do for you in 2018. There's a reason she's been divorced twice and can't take care of her kids. She's a plaything, nothing more. Hope you fellas are wearing condoms, she's got herpes.

Id. at ¶ 14. The wife responded to the ad and observed the associated username was linked to the husband's personal email address. Id. at ¶ 15.

In March 2018, the wife began communicating on a social media platform with someone she believed was the husband. Id. ¶ 16. The individual sent the wife the same topless photograph the wife had sent to the husband, claiming the photograph was "all over the place." Id. In May 2018, the wife discovered a social media "weight loss" advertisement featuring a post-pregnancy photograph of her and the same topless photograph. Id. at ¶ 17.

Throughout 2018, the wife's friends and associates contacted her regarding postings on social media platforms and chatrooms soliciting "no strings attached sex." Id. at ¶ 18. Business records from the social media platform indicated the postings could be traced to an IP address matching a residence shared by the husband and paramour. Id.

When the wife messaged the individual on the platform, the individual replied, "We are going to do continue doing everything in our power to make your life miserable." Id. at ¶ 19.

In August 2018, the wife filed a claim against the paramour for alienation of affection, among other things. Id. at ¶ 20. After a jury trial, the trial court entered judgment against the paramour, Clark, 2021-NCCOA-653 at ¶ 22, on the IIED claim. After the denial of post-trial motions, the paramour appealed. Id. at ¶ 23.

On appeal, the paramour asserted that the trial court lacked subject matter jurisdiction because alienation of affection is a "transitory tort," and the wife failed to show injury occurred in North Carolina. Id. at ¶ 50. The court of appeals recognized that for a successful alienation of

affection claim, a plaintiff must establish that the "alienating conduct occurred within a state that still recognizes alienation of affections as a valid cause of action." Id. at ¶ 52 (quoting Jones v. Skelley, 195 N.C. App. 500, 506, 673 S.E.2d 385, 389-90 (2009)). The court of appeals held the wife provided sufficient evidence the alienation of affection occurred in North Carolina: at the time the husband and paramour met, the wife lived in North Carolina; the wife discovered text messages between the husband and paramour in North Carolina; and the wife testified the husband had sent the paramour a sexually explicit photograph from North Carolina. Id. at ¶ 54. Further, while the paramour had invoked her fifth amendment privilege when asked whether she and the husband had engaged in sexual activity in North Carolina, the court of appeals recognized that "the finder of fact in a civil case may use a witness's invocation of [her] fifth amendment privilege against self-incrimination to infer that [her] truthful testimony would have been unfavorable to [her]." Id. (quoting In re Trogdon, 330 N.C. 143, 152, 409 S.E.2d 897, 902 (1991)). Accordingly, the court of appeals held the wife provided sufficient basis to establish alienating conduct occurred in North Carolina, providing subject matter jurisdiction for the trial court. Id.

D. Breach of Implied Warranty of Workmanship

In Dan King Plumbing Heating & Air Conditioning, LLC v. Harrison, 281 N.C. App. 312, 2022-NCCOA-27, the court of appeals considered whether expert testimony was needed for a homeowner to prove his claim against a plumbing and HVAC contractor for breach of the implied warranty of workmanship.

In connection with renovations at his home, the homeowner entered into two separate contracts with the contractor, one for plumbing work and one for HVAC work. Id. at ¶¶ 3–4. The homeowner was dissatisfied with the quality of some of the contractor's work. Id. at ¶¶ 13–14. The homeowner made some payments to the contractor, but he did not pay the remaining balance

that the contractor claimed it was owed. Id. at ¶ 15. As a result, the contractor sued the homeowner in small claims court. Id. at ¶ 16. After the contractor's small claims case was dismissed, the contractor appealed to the district court, and the homeowner then filed several counterclaims against the contractor. Id. at ¶¶ 16–17. At trial, the jury found in favor of the homeowner, and the trial court entered judgment in favor of the homeowner. Id. at ¶¶ 19–22. As relevant here, the contractor appealed the trial court's denial of the contractor's motion for a directed verdict on the homeowner's breach of contract claims, which included a claim for breach of the implied warranty of workmanship. Id. at ¶ 2.

The court of appeals concluded that the trial court erred in failing to grant the contractor's motion for a directed verdict on the homeowner's claim for breach of the implied warranty of workmanship.

The court of appeals addressed the homeowner's workmanship claim, which was based on the homeowner's allegation that the contractor's re-piping and insulation work was substandard. Id. at ¶¶ 68–69. "In actions for breach of building or construction contracts, a plaintiff may bring a claim for 'failure to construct in a workmanlike manner.'" Id. at ¶ 73 (citation omitted). This claim arises from "an implied warranty that the contractor or builder will use the customary standard of skill and care based upon the particular industry, location, and timeframe in which the construction occurs." Id. (internal quotation marks and citation omitted). The contractor argued that the homeowner was required, but failed, to present expert testimony to establish the standard of care relevant to his workmanship claim. Id. at ¶ 74. The homeowner countered that the jury could properly assess the quality of the work at issue here without expert testimony. Id.

The court of appeals held "that at least some expert evidence must be presented to sustain a claim such as this." Id. In reaching this conclusion, the court of appeals examined two of its

prior decisions on workmanship claims, including one in which the court declined to apply the common knowledge exception. Id. at ¶¶ 75–79. Under this exception, "where the common knowledge and experience of the jury is sufficient to evaluate compliance with a standard of care, expert testimony is not needed." Id. at ¶ 78 (quoting Delta Env't Consultants of N. Carolina, Inc. v. Wysong & Miles Co., 132 N.C. App. 160, 168, 510 S.E.2d 690, 695–96 (1999)). The common knowledge exception, however, is "reserved for cases where the complained-of professional conduct 'is so grossly negligent that a layperson's knowledge and experience make obvious the shortcomings of the professional'—such as a medical malpractice case in which 'an open wound was not cleansed or sterilized' before being placed in a cast." Id. (quoting Delta, 132 N.C. App. at 168, 510 S.E.2d at 696).

In this case—which involved "$16,324 worth of extensive plumbing work" that one employee of the contractor described as "massive" in scope—the court of appeals determined that the common knowledge exception did not apply. Id. at ¶ 82. Therefore, the evidence offered by the homeowner, in the form of his own lay testimony and photographs of the allegedly substandard work, was insufficient to show a breach of the implied warranty of workmanship by the contractor. Id. at ¶ 83. Because the homeowner was required, but failed, to present expert testimony to support his workmanship claim, the trial court erred in not granting the contractor's motion for a directed verdict on this claim. Id.

E. Unfair and Deceptive Trade Practices

In Nobel v. Foxmoor Group, LLC, 380 N.C. 116, 2022-NCSC-100, the supreme court considered whether an investor's claim was within the scope of section 75-1.1 of the North Carolina General Statutes where the investor's claim was based on money that the investor loaned

to a company and the company's failure to repay the loan in accordance with the terms of a promissory note.

The investor loaned money to the company after the company's owners, who were personal friends of the investor, encouraged her to invest in the newly formed company. Id. at ¶¶ 2–3. In exchange for the loan, one of the owners executed a promissory note. Id. at ¶ 5. The investor received an initial payment on the loan, but she did not receive any additional payments after that. Id. at ¶ 6. The company was eventually administratively dissolved by the secretary of state, and the investor sued the owners and the company for an alleged violation of section 75-1.1, which prohibits unfair and deceptive trade practices in or affecting commerce. Id. at ¶¶ 6–7, 10. Following a bench trial, the trial court concluded that the owners and the company had violated section 75-1.1 and awarded treble damages to the investor. Id. at ¶ 7. The owners and the company appealed to the court of appeals, which reversed the trial court's judgment, reasoning "that the conduct at issue related to an investment for the purpose of funding [the company] and therefore was not 'in or affecting commerce.'" Id. at ¶ 8 (citation omitted). The investor appealed the decision of the court of appeals to the supreme court.

The supreme court affirmed the decision of the court of appeals with Justice Berger writing the majority opinion.

To recover under section 75-1.1, a plaintiff must prove, among other elements, that "the action in question was in or affecting commerce." Id. at ¶ 11 (quoting Dalton v. Camp, 353 N.C. 647, 656, 548 S.E.2d 704, 711 (2001)). As used in the statute, the term "commerce" generally "includes all business activities, however denominated." Id. (quoting N.C. Gen. Stat. § 75-1.1(b)). In a prior case, the supreme court explained that "business activities," for purposes of section 75-1.1, "connotes the manner in which businesses conduct their regular, day-to-day activities, or

affairs, such as the purchase and sale of goods, or whatever other activities the business regularly engages in and for which it is organized." Id. (quoting HAJMM Co. v. House of Raeford Farms, Inc., 328 N.C. 578, 594, 403 S.E.2d 483, 493 (1991)). In that case, the supreme court established that "utilization of financial mechanisms for capitalization merely enable an entity to organize or continue ongoing business activities in which it is regularly engaged and cannot give rise to a [section 75-1.1] claim." Id. at ¶ 12 (citing HAJMM, 328 N.C. at 594–95, 403 S.E.2d at 493).

Relying on this precedent, the supreme court determined that the conduct at issue here involved a capital-raising device (the promissory note), which placed the conduct outside the scope of section 75-1.1. Id. at ¶¶ 13–14. The supreme court concluded that the investor's claim also failed because the underlying conduct occurred within a single business. Id. at ¶ 16. As the supreme court explained, section 75-1.1 extends to "(1) interactions between businesses, and (2) interactions between businesses and consumers." Id. at ¶ 15 (quoting White v. Thompson, 364 N.C. 47, 52, 691 S.E.2d 676, 679 (2010)). Stated differently, the statute is "not focused on the internal conduct of the individuals within a single market participant, that is, within a single business." Id. (quoting White, 364 N.C. at 53, 691 S.E.2d at 680). According to the supreme court, the investor was not a "consumer" of the company, "nor engaged in any commercial transaction with the company," and the "interaction" giving rising to her claim "occurred entirely within a single market participant, i.e., within a single business." Id. at ¶ 16.

For these reasons, the supreme court held that the court of appeals did not err in reversing the trial court's judgment on the investor's section 75-1.1 claim.

Justice Earls wrote a dissenting opinion with Justice Hudson joining this opinion. Justice Earls disagreed with the majority's application of the precedent that the majority relied on in reaching its conclusion that the investor's claim fell outside the scope of section 75-1.1. Id. at ¶¶

25–29. In her view, when applying this precedent, the supreme court "should do [its] best to respect the General Assembly's decision to enact a broad remedial statute designed to protect the general public." Id. at ¶ 29. According to Justice Earls, the conduct at issue here was "clearly encompassed within the [statute's] plain language." Id.

F. Tortious Interference with Contract

In Button v. Level Four Orthotics & Prosthetics, Inc., 380 N.C. 459, 2022-NCSC-19, the supreme court considered whether the plaintiff's employer was justified in terminating his employment at the suggestion of one of its corporate shareholders.

Plaintiff entered into an agreement to serve as CEO of the defendant employer, a North Carolina corporation with its principal place of business in Winston-Salem, North Carolina. Id. at ¶ 2. This agreement allowed the employer to terminate the CEO's employment with or without cause and defined "cause" to include "any willful misconduct or gross negligence which could reasonably be expected to have a material adverse [e]ffect on the business and affairs of" the employer. Id. at ¶ 5. The CEO had negotiated in his contract that the interest rate on certain debts owed by the employer to one of its corporate shareholders would be lowered to 2.5%. Id.

Once in his position, the CEO sought an additional loan from the shareholder, and the shareholder conditioned the loan on an 8% interest rate, applicable both to the new loan and retroactively to the previous loans. Id. at ¶ 10. The CEO objected that this would violate his employment agreement, but the shareholder nonetheless wired the funds to the employer and presented an associated promissory note at 8% interest. Id. at ¶¶ 10–11. When the CEO refused to sign the note, the shareholder who had loaned the money (represented by one of the individual defendants, who was simultaneously also a director of the employer and a manager at the

employer's parent company), see id. at ¶ 3, informed the CEO that he was being terminated for cause. Id. at ¶ 12.

The CEO filed a complaint seeking (in relevant part) relief for tortious interference with his employment contract by the shareholder, two of its individual representatives, and the employer's parent company. Id. at ¶ 13. The trial court dismissed the CEO's tortious interference claims without prejudice, determining that allegations of malice were insufficiently pleaded. Id. at ¶ 14. The CEO and all defendants cross-appealed these rulings directly to the supreme court. Id. The CEO also filed a petition for writ of certiorari in the alternative. Id. at ¶ 1. The supreme court determined that an interlocutory appeal was premature on the tortious interference claims, since they were dismissed without prejudice. Id. at ¶ 17. However, it addressed the CEO's petition for certiorari and denied it. Id. at ¶ 20.

Justice Berger authored the court's opinion. The court analyzed the tortious interference claim, focusing on the fourth of five elements: namely, whether in terminating the CEO's employment the employer acted without justification. Id. at ¶¶ 27–28. The court first explained that when a corporate defendant allegedly interfering with the claim has "a legitimate business interest of his own in the subject matter," the court applies a presumption that this "non-outsider" defendant acted in the corporation's best interest. Id. at ¶ 29. To overcome this presumption, the CEO would need to show that the non-outsider acted with malice, entailing that the "defendant's actions were not prompted by legitimate business purposes." Id. The court stressed that these allegations must rise above generalized and conclusory assertions of malice but must "allege with specificity how each [defendant] acted in their own personal interest." Id. at ¶¶ 32–34. Holding that the CEO had failed to do so, it affirmed the dismissal of the claims below. Id. at ¶ 34.

Justice Earls (joined by Justices Hudson and Ervin) issued a separate concurrence in part, disagreeing as to the discussion of the CEO's petition for certiorari. Id. at ¶ 50. Justice Earls highlighted that the majority denied certiorari, but that its decision seemed to rule on the merits of the claims nonetheless. Id. at ¶ 51. While Justice Earls acknowledged that the merits of a plaintiff's claim are properly considered at a more basic level in deciding whether or not to grant certiorari, certiorari is intended as a preliminary gate that comes before the full resolution of the case on the merits. Id. at ¶ 54.

Considering only these more basic criteria, Justice Earls would have granted certiorari for reasons of judicial economy. Id. at ¶ 57. Justice Earls stated that she would have affirmed the dismissal of the declaratory judgment claim on the merits but would have allowed the tortious interference claim to proceed. Id. at ¶¶ 58–59. Justice Earls asserted that the need to specifically allege malice conflicted with principles of notice pleading. Id. at ¶ 59. Further, she highlighted several details not mentioned by the majority that provided more detail. Id. at ¶¶ 62–63.

G. Uniform Voidable Transactions Act

In Cherry Community Organization v. Sellars, 381 N.C. 239, 2022-NCSC-62, rehearing denied, 873. S.E.2d 411 (June 27, 2022) the supreme court considered whether the buyers of property subject to a lawsuit were good faith purchasers for value under the North Carolina Uniform Voidable Transactions Act where the buyers and the seller were co-principals in a joint real estate development venture, and the seller intended to defraud its creditors by conveying the property to the purchasers.

The seller, a real estate development company, initially purchased the property at below-market rates from a nonprofit dedicated to the preservation and enhancement of a historically black Charlotte neighborhood in exchange for the seller's promise that it would build affordable housing

units on the property. Id. at ¶ 2. Several years later, the buyers, two real estate development companies with the same owners, entered into an agreement with the seller to develop the property (along with other properties that the buyers owned) into a mixed-use project. Id. at ¶ 3. Under this agreement, the buyers and seller "were the principals of a general partnership engaged in a joint venture for the development of the mixed-use project, with [the buyers] enjoying an insider status to [to the seller's] dealings with the subject property." Id. The seller failed to build all the agreed-upon affordable housing units, so the nonprofit sued the seller for breach of contract and filed a notice of lis pendens on the property. Id. at ¶¶ 2, 4. While that lawsuit was pending, the seller conveyed the property to the buyers through an insider sale—without the nonprofit's knowledge and despite a warning from the nonprofit to the buyers that the title of the property was at issue due to the nonprofit's lawsuit against the seller. Id. at ¶¶ 5–9.

After learning about the insider sale, the nonprofit sued the buyers under the Uniform Voidable Transactions Act, seeking avoidance of the conveyance of the property and damages for the buyers' alleged violation of the statute. Id. at ¶ 9. At a bench trial, the trial court determined that the seller had engaged in "a calculated scheme . . . to fraudulently liquidate the subject property and to hide the monetary proceeds from legitimate creditors," while also concluding that the buyers "did not engage in fraudulent activities." Id. at ¶ 11. The trial court further concluded that the buyers "had 'established and met [their] burden of proof to show that [they were] good faith purchaser[s] of the Subject Property.'" Id. As a result, the trial court dismissed the nonprofit's lawsuit against the buyers and declared that the notice of lis pendens on the property was ineffective.

The nonprofit appealed the trial court's dismissal of its lawsuit against the buyers to the court of appeals, and the court of appeals unanimously affirmed the trial court's judgment. Id. at

¶ 12. The nonprofit then successfully petitioned the supreme court for discretionary review of the decision of the courts of appeals. Id.

The supreme court reversed the decision of the court of appeals regarding the trial court's dismissal of the nonprofit's lawsuit against the buyers with Justice Morgan writing the majority opinion.

The supreme court first explained that the Uniform Voidable Transactions Act "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.'" Id. at ¶ 15 (quoting N.C. Gen. Stat. § 39-23.4(a)). A transfer, however, "is not voidable against a transferee 'that took in good faith and for a reasonably equivalent value given the debtor.'" Id. (quoting N.C. Gen. Stat. § 39-23.8(a)). As the transferees of the property, the buyers had the burden of proving that they were good faith purchasers for value of the property. Id.

The supreme court held that the buyers had not met their burden because the "facts and circumstances" in this case led "to the imputation of knowledge on the part of [the buyers] that their business partner [the seller] had engaged in fraudulent activity by obfuscating [the nonprofit's] access to the subject property which [the seller] had finagled from the sole ownership of [the nonprofit] years ago." Id. at ¶ 15.

As the supreme court explained, under "the doctrine of imputed knowledge[,] . . . '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.'" Id. at ¶ 17 (quoting Doctrine of Imputed Knowledge, Black's Law Dictionary (11th ed. 2019)). In addition, North Carolina statutory and common law establish that "[e]very partner is an agent of the

partnership for the purpose of its business" and that "[t]he 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.'" Id. (quoting N.C. Gen. Stat. § 59-39(a) and Rothrock v. Naylor, 223 N.C. 782, 786, 28 S.E.2d 572 (1944)).

Here, the buyers and seller were business partners who entered into a joint venture to develop the property for a mixed-use project. Id. at ¶ 18. Therefore, as co-principals in this joint venture, the buyers and seller were agents for one another under North Carolina law. Id. Further, the supreme court determined that the buyers' acquisition of the property from the seller was within the scope of their partnership and that the buyers did not argue or present evidence that there was an adverse interest between them and the seller. Id. As a result, the buyers were "charged with the knowledge of [the seller's] fraudulent relinquishment of title to the subject property, as [the buyers were] deemed to know the facts which [were] known by [the seller]" surrounding the seller's scheme to prevent the nonprofit from reaching the property. Id.

Furthermore, the supreme court held that the findings by the trial court, along with the supreme court's application of the factors listed in the Uniform Voidable Transactions Act for determining intent, supported the conclusion that the seller had intended to defraud the nonprofit by transferring the property to the buyers. Id. at ¶¶ 22–31.

For these reasons, the supreme court held that the trial court erred in its conclusion that the buyers were good faith purchasers for value of the property under the Uniform Voidable Transactions Act, and the supreme court accordingly reversed the decision of the court of appeals on this issue.

Justice Barringer wrote a dissenting opinion on the good faith purchaser for value issue with Chief Justice Newby joining this opinion. Justice Barringer would have held that the court of

appeals correctly determined that the trial court's conclusion that the buyers were good faith purchasers for value was supported by competent evidence. Id. at ¶ 35. According to Justice Barringer, "[w]hether a party has acted in good faith is a question of fact for the trier of fact," and therefore, the trial court's determination on the buyers' good faith purchaser for value defense was a finding of fact, which limited the supreme court's review to analyzing whether this finding was supported by competent evidence. Id. at ¶ 38 (citation omitted).

In Justice Barringer's view, the evidence presented to the trial court was competent to support its finding that the buyers were good faith purchasers for value. Id. at ¶¶ 52–55. In particular, Justice Barringer emphasized that the buyers were made aware that the notice of lis pendens on the property had been cancelled by the time that the conveyance of the property took place, that the buyers conducted an independent investigation to ensure that the property's title was unencumbered, and that buyers paid more than a reasonably equivalent value for the property. Id. at ¶ 55.

H. Constitutional Claims

In Kinsley v. ACE Speedway Racing, Ltd., ___ N.C. App. ___, 2022-NCCOA-524, petition for disc. rev. filed (N.C. Sept. 6, 2022), the court of appeals considered whether a business adequately pleaded a constitutional violation of infringement on the right to earn a living as guaranteed by the North Carolina Constitution's fruits of labor clause when the governor issued executive orders prohibiting mass gatherings in response to the COVID-19 pandemic.

ACE Speedway is a racetrack that can host a maximum of 5,000 fans. Id. ¶ 4. To cover overhead costs associated with hosting an event, the speedway needs around 1,000 fans to attend. Id. In May 2020, amidst the COVID-19 pandemic, Governor Cooper issued Executive Order 141, which temporarily prohibited "mass gatherings" (defined as an event bringing together more than

twenty-five people outdoors). Id. ¶ 5. This Order nullified the speedway's ability to hold economically feasible racing events. Id.

Five days before the Executive Order was issued, speedway personnel met with local health officials and agreed to health precautions for the event, including contact tracing, temperature screenings, social distancing, use of plexiglass, and reduced and distanced seating arrangements. Id. After the Order was issued, the speedway hosted three events that drew over 1,000 spectators each. Id.

The day of the second event, the governor's office requested the county sheriff personally ask the speedway to stop holding events that violated the Executive Order. Id. ¶ 8. The sheriff relayed the message, but publicly announced he would not take action to enforce the Executive Order. Id. The governor's office sent a letter advising the speedway that it could face sanctions if it continued operating in violation of the Executive Order. Id. The speedway hosted its third event the following day. Id.

After the third event, the Secretary of the North Carolina Department of Health and Human Services issued an order demanding that the speedway abate further "mass gatherings" in violation of the Executive Order. Id. ¶ 9. The speedway did not comply with the terms of the abatement order. Id. Seeking to enforce the terms of the abatement order, the secretary filed a complaint, motion for temporary restraining order, and motion for preliminary injunction. Id. ¶ 10.

The trial court granted the secretary's motions for temporary restraining order and preliminary injunction, enjoining the speedway from taking action that was prohibited by the abatement order. Id. The speedway subsequently answered the secretary's complaint and filed constitutional counterclaims. Id. ¶ 11.

In September 2020, the governor issued a new Executive Order, loosening the restrictions on "mass gatherings," allowing up to fifty people to congregate at outdoor events. Id. ¶ 12. The secretary voluntarily dismissed its complaint as the terms of the abatement order were mooted by the new Executive Order. Id. The speedway did not dismiss its counterclaims. Id. The secretary moved to dismiss the speedway's counterclaims, arguing sovereign immunity. Id. ¶ 13. The trial court denied the secretary's motion and the secretary appealed. Id.

Reviewing the trial court's decision de novo, the court of appeals concluded the secretary was not entitled to sovereign immunity because the speedway raised claims of infringement of constitutional rights. Id. ¶¶ 20-21. The North Carolina Constitution recognizes the right to earn a living as an inalienable right. Id. ¶ 22 (citing N.C. Const. art. 1, §§ 1, 19). The court of appeals explained, "[t]he right to work and to earn a livelihood is a property right that cannot be taken away except under the police power of the State in the paramount public interest for reasons of health, safety, morals, or public welfare." Id. ¶ 23 (quoting Roller v. Allen, 245 N.C. 516, 518, 96 S.E.2d 851, 854 (1957)).

> To effectively plead government intrusion on a constitutional right, the claimant's pleadings must show: (1) a state actor violated the claimant individual's constitutional rights; (2) the claim alleged substantively presents a "colorable" constitutional claim; and (3) no adequate remedy exists apart from a direct claim under the Constitution.

Id. ¶ 24 (citing Deminski v. State Bd. of Educ., 2021-NCSC-58, ¶¶ 15-18).

The speedway adequately pleaded its claim by alleging the state deprived it of the ability to earn a living and did not have an adequate, alternative remedy. Id. ¶¶ 25-26. The court of appeals recognized that the speedway's claim was novel as claims of government intrusion on the right to earn a living are generally asserted against the legislature for enacting regulation. Id. ¶ 27.

However, the court of appeals explained, "[i]t naturally follows that actions taken by other non-legislative state actors, whether elected officials or unelected bureaucrats, may run afoul of a citizen's right to the fruits of his own labor when they arbitrarily interfere with occupations, professions, or the operation of business." Id.

The court of appeals concluded that the speedway adequately pleaded the secretary deprived it of its constitutional right to earn a living and affirmed the trial court's order denying the secretary's motion to dismiss. Id. ¶ 29.

In Kelly v. State, ___ N.C. App. ___, 2022-NCCOA-675, the court of appeals considered how to evaluate whether a challenge to a statute is facial or as-applied for purposes of applying section 1-267.1 of the North Carolina General Statutes and Rule 42 that require trial court judges to transfer constitutional facial challenges to a three-judge panel.

Plaintiffs brought action against the State of North Carolina and the North Carolina State Educational Assistance Authority ("SEAA") alleging that an educational program operated by the defendants violated several sections of the North Carolina Constitution. Id. ¶¶ 1, 5. This case arises from the general assembly's enactment of a scholarship program that sought to provide a "small number of students in low-income families to receive scholarships from the State to attend private school." Id. ¶ 2. Each year, the SEAA makes available applications for "eligible students" to aid them in attending any "nonpublic school." Id. ¶ 3. A "nonpublic school" is defined under the act as "a school that meets the requirements of Part 1 [private church schools and schools of religious charter] or Part 2 [qualified nonpublic schools] of this Article." Id. Plaintiffs first contended that this program violated their state constitutional rights under Article I, Sections 13 and 19 of the North Carolina Constitution by: (1) funding this program based on an individual's religious faith and sexual orientation, (2) creating a program in which a student's choice in schools are limited

by their religious beliefs, (3) funding schools that condition enrollment on adopting religious belief that condemn homosexuality, (4) directing taxpayers dollars to institutions that discriminate against persons of the plaintiffs' religious faiths, (5) dividing communities by religion, and (6) denying plaintiffs' the ability to live in a community without state-supported discrimination. Id. ¶ 5. Separately, the plaintiffs also contended that the program violated constitutional rights under Article I, Sections 13, 14, and 19 and Article V, Sections 2(1) and 2(7) of the North Carolina Constitution by funding schools that: prejudices and disciplines students whose beliefs do not conform to the school's doctrine, requires conformity with religious beliefs, mandates religious services as a part of the curriculum, and condemns homosexuality and LGBTQ rights. Id. ¶ 6. Lastly, the plaintiffs contended that the program violated Article 1, Section 15 and Article V, Sections 2(1) and 2(7) of the North Carolina Constitution by transferring taxpayer funds to private schools "without any accountability or requirements ensuring that students will actually receive an education." Id. ¶ 7. The defendants filed a motion to transfer the case to a three-judge panel, arguing that the plaintiffs' complaint "clearly asserts a facial constitutional challenge" and thus "must be heard by a three-judge panel of the Superior Court of Wake County" as required by Section 1-267.1 of the North Carolina General Statutes and Rule 42(b)(4) of the North Carolina Rules of Civil Procedure. Id. ¶ 9. The trial court denied this order and found that the complaint "presents an as-applied challenge to the Program." Id. ¶ 10. Defendants filed an appeal to the court of appeals. Id.

In an opinion by Judge Wood writing for the majority, the court of appeals reversed the trial court's order finding that the case should have been transferred to a three-judge panel. Id. ¶ 34. Section 1-267.1 of the North Carolina General Statutes provides that –

> Any facial challenge to the validity of an act of the General Assembly shall be transferred pursuant to G.S. 1A-1, Rule 42(b)(4), to the Superior Court of Wake County and shall be heard and determined by a three-judge panel of the Superior Court of Wake County, organized as provided by subsection (b2) of this section.

Id. ¶ 19.

Separately, Rule 42(b)(4) compliments section 1-267.1 by stating:

> Pursuant to G.S. 1-267.1, any facial challenge to the validity of an act of the General Assembly, other than a challenge to plans apportioning or redistricting State legislative or congressional districts, shall be heard by a three-judge panel in the Superior Court of Wake County if a claimant raises such a challenge in the claimant's complaint or amended complaint in any court in this State, or if such a challenge is raised by the defendant in the defendant's answer, responsive pleading, or within 30 days of filing the defendant's answer or responsive pleading.

Id.

The court explained that an as-applied challenge considers whether a statute "can be constitutionally applied to a particular defendant, even if the statute is otherwise generally enforceable." Id. ¶ 21 (quoting State v. Packingham, 368 N.C. 380, 383 (2015)). On the contrary, a facial challenge "is an attack on the statute itself" rather than its application. Id. ¶ 22 (quoting State v. Grady, 372 N.C. 509, 522 (2019)). "When determining whether a challenge is as-applied or facial, the court must look at the breadth of the remedy requested." Id. ¶ 24 (citing Doe v. Reed, 561 U.S. 186, 194 (2010)). A claim can be classified as a facial challenge if the remedy sought reaches beyond the circumstances of the adjudicating plaintiffs. Id. Alternatively, a claim can be classified as an as-applied challenge if the remedy is "limited to a plaintiff's particular case." Id. (quoting Libertarian Party v. Cuomo, 300 F. Supp. 3d 424, 439 (W.D.N.Y. 2018)). Here, the court found that the remedy the plaintiffs sought was to void the statute in its entirety. Id. ¶ 28. This remedy reaches beyond just the plaintiffs' particular circumstances. Id. This is supported by case

law, which has indicated that when relief "is not limited to defendant's particular case but enjoins application . . . to other . . . individuals," the challenge is facial. Id. Additionally, the court explained that a "trial court's ability to examine an as-applied challenge is predicated upon the existence of facts specific to a defendant from which to determine whether the statute is unconstitutional as applied." Id. ¶ 30. Here, no plaintiff has applied for a scholarship under the program's terms. Id. ¶ 31. Rather, plaintiffs only attack the fact that a portion of the program has religious characteristics. Id. Since the plaintiffs failed to plead facts sufficient to assert an as-applied challenge and because the plaintiffs' claims effectively would preclude enforcement of any portion of the statute, the court concluded that the action was a facial challenge that required the court to transfer the matter to a three-judge panel. Id. ¶ 32.

Judge Hampson, writing for the dissent found that it was premature and contrary to statutory procedure to decide at such a preliminary stage whether the plaintiffs' asserted as-applied challenge was a facial challenge required to be heard by a three-judge panel. Id. ¶ 35. He explained that the statutory scheme requires the trial court to decide if and when to transfer the matter. Id. Judge Hampson conceded in part that the plaintiffs' complaint seeks broad relief, however, he contended that this is not dispositive. Id. ¶ 39. He highlighted the difference between as-applied and facial challenges as "not about what must be pleaded in a complaint," but rather about the ultimate relief imposed. Id. However, an "inexact prayer for relief does not preclude proper relief from being granted." Id.

Furthermore, the dissent observed that if during litigation, it becomes evident that relief cannot be granted without a determination as to the facial constitutionality, the transfer statutes provide an answer for such circumstance. Id. ¶ 42. Specifically, the dissent highlighted that under Section 1A-1, Rule 42(b)(4) and Section 1-81(a1) of the North Carolina General Statutes, such

determination is a bifurcated process where the court should decide the matters it can, and if the facial validity of the act is still at issue, then the trial court should transfer the case to a three-judge panel. Id. Thus, Judge Hampson concluded that the correct interpretation of this statute provides that trial courts can transfer the case after resolving all issues the courts have authority to decide. Id. (citing Holdstock v. Duke Univ. Health Sys., Inc., 270 N.C. App. 267, 281 (2020)). In dissenting, Judge Hampson also discussed his concern that by granting certiorari in this case, the court ratified a process that any decision related to the transferring of a case to a three-judge panel may become immediately appealable and its decision "forces Plaintiffs to make facial challenges contrary to the precedent of this Court." Id. ¶ 47.

I. Defamation

In Walker v. Wake County Sheriff's Department, ___ N.C. App. ___, 2022-NCCOA-530, petition for disc. rev. filed (N.C. Sept. 6, 2022), the court of appeals considered whether the fair report privilege precluded a defamation action when the news report satisfied the substantial accuracy test.

A certified nursing assistant ("CNA"), employed by Capital Nursing was arrested for an assault on his stepfather. Id. ¶¶ 2, 5. The following morning, an employee of a broadcast network emailed the sheriff's office public information officer requesting additional information on the assault: "I'm guessing it's domestic but if it's related to a client from Capital Nursing I'm interested in more details." Id. ¶ 3. The public information officer responded, "Related to his employer." Id. During the evening news, the network reported:

> New at 6:00 a Wake County man who works with the elderly is facing an assault charge. [The CNA] works for Capital Nursing. According to the warrant [he] hit the victim in the face with a closed fist. The Sheriff's Office telling [sic] us the charge is related to his

> job. We've reached out to Capital Nursing but so far they have refused to comment.

Id. ¶ 4.

The CNA filed a lawsuit alleging defamation against the network for reporting inaccurate allegations that implied he assaulted an elderly resident. Id. ¶ 5. In pertinent part, the complaint alleged that the charges were false, filed by the CNA's stepfather, and not related to his job. Id. The network moved to dismiss the complaint pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. Id. ¶ 7. The trial court granted the motion and the CNA appealed. Id. ¶¶ 8-9.

After reviewing the dismissal de novo, the court of appeals affirmed the trial court's order. Id. ¶ 24. The court of appeals explained that the fair report privilege "exists to protect the media from charges of defamation." Id. ¶ 25 (quoting LaComb v. Jacksonville Daily News Co., 142 N.C. App. 511, 512, 543 S.E.2d 219, 220 (2001)). The privilege applies when a "publication is confined to a substantially accurate statement of the facts and does not comment upon or infer probability guilt of the person arrested." Id. A publication satisfies the substantial accuracy test when it conveys a substantially correct account of the proceedings. Id. (citing Desmond v. News & Observer Publ'g Co., 241 N.C. App. 10, 26, 772 S.E.2d 128, 140 (2015)).

The court of appeals analyzed the broadcast sentence-by-sentence and concluded the information "was not merely substantially accurate, it was an almost verbatim recitation of information in the arrest warrant and [the public information officer]'s email". Id. ¶ 26 (emphasis added). Further, though the network's employee initially suspected the charge was domestic, the fair report privilege applies even if the publisher does not personally believe the defamatory words to be true. Id. ¶ 27. Finally, the court of appeals acknowledged that the public information officer's email response was a flimsy basis upon which to report but noted the network did not report the

CNA assaulted a resident, but rather accurately reported the charge as described in the warrant and relayed information received from the state. Id. ¶ 28. The words of the report were accurate, regardless of the impression those words left with viewers. Id. ¶ 29.

The court of appeals affirmed the dismissal because the broadcast network satisfied the substantial accuracy test and therefore the CNA did not have an actionable defamation claim under the fair report privilege. Id. ¶ 30.

J. Duty

In Connette v. Charlotte Mecklenburg Hosp. Auth., 382 N.C. 57, 2022-NCSC-95, the supreme court considered whether a certified registered nurse anesthetist who collaborates with a doctor to select an anesthesia treatment plan can be liable for negligence in the selection of that treatment.

A patient presented to the operating room for a surgical procedure on her heart. Id. ¶ 2. Anesthesia was provided by a team, including a physician ("MD") and certified registered nurse anesthetist ("CRNA"). Id. Shortly after the anesthesia was administered, the patient went into cardiac arrest. Id. The MD was able to revive the patient after thirteen minutes. Id. As a result of oxygen deprivation, the patient suffered injuries. Id.

The patient, through a guardian ad litem, filed a lawsuit to recover damages for malpractice for allegedly negligent selection of anesthesia. Id. The case was first tried against the MD, the CRNA, and two other treating physicians. Id. ¶ 3. The jury could not reach a verdict as to the claims against the MD and the CRNA and returned a defense verdict for the other treating physicians. Id. Two years later, a second trial proceeded against only the CRNA. Id. ¶ 4. The evidence showed that the CRNA advised the MD, agreed with the MD, and participated with the

MD in the election and administration of the anesthesia plan even though the ultimate decision rested with the MD. Id.

The trial court did not allow the patient's CRNA expert to opine on the professional standard of care applicable to the CRNA under Daniels v. Durham Ctny. Hosp. Corp., 171 N.C. App. 535 (2005) and Byrd v. Marion Gen. Hosp., 202 N.C. 337 (1932). Id. ¶ 5. Specifically, "the trial court prohibited the introduction of testimony from [the patient]'s expert witness Cary which would have tended to show that the standard practice of CRNAs…would have expressly prohibited the course of action followed by [the CRNA]." Id. Based on the law, "the trial court observed that a nurse may be liable for independent action taken against a plaintiff but could not be held liable for planning and selecting the appropriate anesthesia technique because nurses operate under the compulsory supervisions of physicians licensed to practice medicine." Id. (emphasis added). The jury returned a verdict in favor of the CRNA. Id. ¶ 6.

While analyzing the evolution of medicine and observing its lack of authority to overrule a supreme court decision, the court of appeals unanimously affirmed the trial court's exclusion of the testimony of the patient's proffered expert concerning the CRNA's involvement in selection and implementation of the allegedly negligent anesthesia plan. Id. ¶¶ 6, 20. The supreme court reviewed the trial court's decision de novo after concluding that whether nurses owe an independent duty to patients in the selection and planning of treatment is a question of law. Id. ¶ 7.

Writing for the majority on discretionary review, Justice Morgan reviewed the law—statutes, administrative codes, and case law. Id. ¶¶ 8–9. Under Byrd, "a nurse could be held liable for how nursing duties were executed outside the supervision of a physician…[but] a nurse could not be held liable for what the nurse did to 'diligently execute the orders of the physician.'" Id. ¶

9 (quoting Byrd, 202 N.C. at 341–43) (emphasis in original). The supreme court also reviewed the evolution of the nursing profession over the past ninety years, including a licensure requirement implemented in 1965 and the use of collaborative practice agreements. Id. ¶¶ 10–14. Though they fulfill their duties under the supervision of a licensed physician, CRNAs are explicitly permitted to "(1) select and administer preanesthetic medications, (2) select, implement, and manage general anesthesia consistent with the patient's needs and procedural requirement, and (3) initiate and administer several palliative and emergency medical procedures." Id. ¶ 14 (citing Nurse Anesthesia Practice, 21 N.C. Admin. Code 36.0226 and N.C. Gen. Stat. § 90-171.20(7)(e)). The supreme court concluded CRNAs work in collaboration with physicians, not merely at the direction of physicians. Id.

The supreme court overruled Byrd in holding, "even in circumstances where a registered nurse is discharging duties and responsibilities under the supervision of a physician, a nurse may be held liable for negligence and for medical malpractice in the event that the registered nurse is found to have breached the applicable professional standard of care." Id. ¶ 21. The supreme court observed that it is "properly positioned" to make such a ruling "without treading upon the Legislature's domain" because it established the legal principle at issue in Byrd. Id. ¶ 22.

The CRNA in this case had heightened responsibilities as recognized by law, so the supreme court reversed the trial court's evidentiary decision and remanded the case. Id. ¶¶ 23–24.

Writing for the dissent, Justice Barringer concluded the policy change made by the majority should be made by the legislature and no justification existed to deviate from the longstanding precedent in Byrd. Id. ¶¶ 25, 37. Reviewing the administrative code, statutes, and case law, Justice Barringer opined the three are consistent: a "physician is solely responsible for the diagnosis and

treatment of his patient." Id. ¶¶ 40–42 (citing N.C. Gen. Stat. § 90-171.20(7)(e) and (f), 21 N.C. Admin. Code 36.0226, and Byrd, 202 N.C. at 343).

Justice Barringer observed:

> It appears the majority's newly created theory holds CRNAs liable if they negligently collaborate with their supervising physician in choosing a treatment plan. Left unanswered is what constitutes adequate collaboration or what happens when the physician and CRNA disagree.

Id. ¶ 46. The dissenting justices would have affirmed the trial court's decision. Id. ¶ 48.

II. PRETRIAL PROCEDURE

A. Jurisdiction

(1) Personal Jurisdiction

In Button v. Level Four Orthotics & Prosthetics, Inc., 380 N.C. 459, 2022-NCSC-19, the supreme court considered whether two of the defendants— the employer's Florida-based parent company and an agent of one of the employer's Florida-based corporate shareholders—had established minimum contacts with North Carolina to establish personal jurisdiction.

Plaintiff entered into an agreement to serve as CEO of the defendant employer, a North Carolina corporation with its principal place of business in Winston-Salem, North Carolina. Id. at ¶ 2. This agreement allowed the employer to terminate the CEO's employment with or without cause and defined "cause" to include "any willful misconduct or gross negligence which could reasonably be expected to have a material adverse [e]ffect on the business and affairs of" the employer. Id. at ¶ 5.

After a dispute arose regarding a promissory note, the shareholder who had loaned the money (represented by one of the individual defendants, who was simultaneously also a director

of the employer and a manager at the employer's parent company), see id. at ¶ 3, informed the CEO that he was being terminated for cause. Id. at ¶ 12.

The CEO filed a complaint seeking (in relevant part) relief for tortious interference with his employment contract by the shareholder, two of its individual representatives, and the employer's parent company. Id. at ¶ 13. The parent company and one of the individual representatives of the shareholder moved to dismiss all claims for lack of personal jurisdiction. Id. The trial court denied the motions to dismiss for lack of personal jurisdiction. Id. at ¶ 14.

On appeal, the supreme court set forth the well-established two-part test that requires jurisdiction to be warranted both by North Carolina's long-arm statute and under federal due process. Id at ¶ 37. The latter required a showing that the defendant had "purposefully avail[ed] itself of the privilege of conducting business in North Carolina." Id. at ¶ 38. The court held that in this case, both of the defendants who had contested personal jurisdiction were "engaged in substantial activity within North Carolina" by virtue of their control of the employer (a North Carolina entity), and thus jurisdiction was proper under section 1-75.4(1)(d) of the North Carolina General Statutes. Id. at ¶¶ 40–42. It further held that, regarding the employer's parent company, the above contacts, as well as the choice of North Carolina law under the choice of law provision in the relevant agreements and the requirement for the North Carolina employer to hold specific insurance, were sufficient to meet the requirements of due process. Id. at ¶ 46. Regarding the individual defendant, the court acknowledged that it could not simply rely on his position as a corporate officer. Id. at ¶ 47 (quoting Saft Am., Inc. v. Plainview Batteries, Inc., 189 N.C. App. 579, 595, 659 S.E.2d 39, 49 (2008) (Arrowood, J., dissenting), reversed for reasons stated in dissent, 363 N.C. 5, 673 S.E.2d 864 (2009) (per curiam)). However, the supreme court agreed with the trial court that the defendant's contacts with the state such as negotiating the terms of the

CEO's employment with the North Carolina employer, negotiating the interest-rate provision at issue in the employment contract, discussing the performance of the employer company with the CEO by phone and email several times, increasing the interest rate of the loan to the employer, and terminating the CEO through a communication into North Carolina, sufficed to show minimum contacts with the forum for purposes of due process. Id

In Ponder v. Been, 380 N.C. 570, 2022-NCSC-24, the supreme court considered whether a North Carolina court could exercise personal jurisdiction in an alienation of affection action over an out-of-state paramour based on his exchange of text messages with a married woman living in North Carolina.

The supreme court held that personal jurisdiction was established "[f]or the reasons stated in the dissenting opinion" in the court of appeals. Id. When a North Carolina couple legally separated, the husband accused the wife of having an affair with a Florida resident. Ponder v. Been, 275 N.C. App. 626, 627, 853 S.E.2d 302, 304 (2020). He alleged that the wife's paramour had sent her frequent communications by email, text message, and telephone, as well as airline tickets so that she could travel to Florida. Id. Following the separation, the wife moved with her children to Florida and began living with the paramour. Id. The husband filed an action for alienation of affection against the paramour in a North Carolina court. Id.

The paramour moved to dismiss the action for lack of personal jurisdiction. Id. He argued that North Carolina's long-arm statute and the Due Process Clause of the Fourteenth Amendment did not permit North Carolina to exercise personal jurisdiction over him. Id. In opposition to the motion, the husband alleged that the wife and the paramour had communicated by telephone "476 times" during a six-month period. Id. The trial court held that these communications were "significant." Id. at 634, 853 S.E.2d at 308. Based on these communications, the trial court held

that personal jurisdiction existed because the paramour had "availed himself to the laws of the State of North Carolina by actively communicating electronically with [the wife] on or before the date she and [her husband] separated[.]" Id. Thus, the court denied the motion to dismiss. Id.

The court of appeals reversed, with the court of appeals majority observing that the long-arm statute provides for personal jurisdiction if a "solicitation" is carried on within the state by the defendant. Id. at 629, 853 S.E.2d at 305 (citing N.C. Gen. Stat. § 1-75.4(4)(a)). However, the court ruled that no solicitation had occurred. See id. at 634, 853 S.E.2d at 308. Thus, the court of appeals held that the trial court's findings failed to meet the threshold for the exercise of personal jurisdiction over the defendant. Id.

The supreme court reversed the court of appeals and adopted the dissent's approach. Ponder, 2022-NCSC-24. Under this approach, the paramour's electronic communications with the wife were sufficient to establish personal jurisdiction. Ponder, 275 N.C. App. at 636, 853 S.E.2d at 309 (Stroud, J., dissenting). The dissent, as adopted by the supreme court, found that, despite the paramour's argument that he did not initiate contact with the wife, the paramour's actions sufficiently established a "solicitation" of the wife, which would allow for an exercise of personal jurisdiction under the long-arm statute. Id. at 643–44, 853 S.E.2d at 313-14. The dissent observed that the plain language of the long-arm statute does not require a defendant to initiate contact in order to conclude that a solicitation occurred. Id. at 644–45, 853 S.E.2d at 315.

The dissent's approach, adopted by the supreme court, also observed that in a previous supreme court decision, personal jurisdiction existed over a defendant whose only contacts with North Carolina were telephone calls and emails to the plaintiff's wife. Id. at 641, 853 S.E.2d at 312 (citing Brown v. Ellis, 363 N.C. 360, 678 S.E.2d 222 (2009)). The dissent stated that, here, the evidence showed an even greater connection between the paramour and North Carolina than

in Brown: The wife was undisputedly in North Carolina when she received the text messages, unlike the wife in Brown. Id. at 642–43, 853 S.E.2d at 313. Moreover, the paramour had purchased and was paying the bill for a cell phone with a North Carolina zip code for the wife. Id.

The dissent further stated that the husband was not required to prove the precise content of the communications between the paramour and the wife to establish personal jurisdiction. Id. at 645–46, 853 S.E.2d at 315. The dissent also observed that the paramour had sent plane tickets to the wife and her children for them to visit him in Florida, and that the paramour had admitted to loaning the wife $85,000. Id. at 647–48, 853 S.E.2d at 315-16. The dissent's approach, as adopted by the supreme court, held that the numerous communications and other evidence of contacts sufficed to meet the requirements of both the long-arm statute and the Due Process Clause. Id. at 648, 853 S.E.2d at 316.

In Miller v. LG Chem, Ltd., 281 N.C. App. 531, 2022-NCCOA-55, appeal docketed, No. 69A22 (Mar 28, 2022), the court of appeals considered whether a North Carolina trial court properly dismissed an international manufacturing company and its United States subsidiary for lack of personal jurisdiction without compelling further discovery requests. Judge Tyson authored the majority's opinion.

An international manufacturing company headquartered in South Korea produced and manufactured lithium-ion batteries. Id. at ¶ 2. The international manufacturing company alleged it had no meaningful contacts in or connections with North Carolina. Id. The international manufacturing company also held a Delaware corporation as its United States subsidiary. Id. at ¶ 3. While the United States subsidiary did conduct sales and distribution in North Carolina, those activities were limited to petrochemical products. Id.

In 2016, the international manufacturing company became aware that lithium-ion cells it manufactured were being used as "unauthorized standalone rechargeable batteries" in e-cigarette devices. Id. at ¶ 4. The company also knew that at least one battery of this type had caused a fire inside an e-cigarette user's bag. Id. In response, the international manufacturing company added warning labels to the batteries, added a warning to its website against unauthorized use of the batteries, and took steps to limit sell and distribution of the batteries for e-cigarette devices. Id. at ¶ 5.

A customer bought two of the batteries from stores in North Carolina in late 2016 or 2017. Id. at ¶ 6. One of the batteries exploded in the customer's pocket in 2018, causing "severe burns along his left leg." Id.

The customer filed suit in 2019 against the international manufacturing company, its United States subsidiary, and the North Carolina stores where he purchased the batteries, alleging various theories of products liability, negligence, and breach of implied warranties. Id. at ¶ 7. In his complaint, the customer alleged that personal jurisdiction was proper in North Carolina as to the international manufacturing company and its subsidiary because the company caused the batteries to be distributed in the state, the subsidiary did substantial business in North Carolina, and the manufacturing company placed the batteries in the stream of commerce with "knowledge, understanding, and/or expectation that they will be purchased by consumers" in the state. Id.

The international manufacturing company and the subsidiary moved to dismiss for lack of personal jurisdiction. Id. at ¶ 8. The customer served interrogatories and requests for production, but the manufacturing company and subsidiary only provided limited responses. Id. The customer then made a motion to compel. Id. at ¶ 9.

Prior to a hearing on the motion to compel and motion to dismiss, the international manufacturing company and subsidiary filed affidavits attesting the batteries were "never designed, manufactured, distributed, advertised or sold" for use by consumers in e-cigarette devices, and that no distributor or retailer had ever been authorized to sell for that use. Id. at ¶ 10. The customer filed affidavits attesting to the widespread availability of the batteries in North Carolina, noting that the subsidiary had authorized shipment of the batteries to the state and that online marketing materials were available in the state. The affidavits also referred to a press release from an unrelated North Carolina company announcing a deal related to the batteries, and to decisions from other courts rejecting the company's and subsidiary's arguments against personal jurisdiction in related contexts. Id. at ¶ 11.

The trial court granted the motion to dismiss for the international manufacturing company and subsidiary. Id. at ¶ 13. The trial court's order listed in its findings of facts that the company never designed, manufactured, distributed, advertised, or sold the batteries for use by consumers in e-cigarette devices. Id. at ¶ 13. The customer appealed, asserting the trial court abused its discretion in dismissing the case for lack of personal jurisdiction without compelling further response to the discovery requests. Id. at ¶ 15.

The court of appeals began its consideration by discussing the recent decision of the Supreme Court of the United States in Ford on the issue of personal jurisdiction. Id. at ¶ 16. "Plaintiff's claims against a non-resident defendant 'must arise out of or relate to the defendant's contacts with the forum.'" Id. (quoting Ford Motor Co. v. Mont. 8th Jud. Dist. Ct., ___ U.S. ___, ___, 209 L. Ed. 2d 225, 234 (2021)). "Under this 'arise out of or relate to' standard, 'some relationships will support jurisdiction without a causal showing,' but that does not mean anything goes.'" Id. at ¶ 17 (quoting Ford, 209 L. Ed. 2d at 236). Instead, personal jurisdictional analysis

in a products liability action must be limited to the "precise product at issue." Id. at ¶ 18 (citing Ford, 209 L. Ed. 2d at 238). This serves the purpose of protecting product defendants in foreign forums. Id. at ¶ 17 (citing Ford, 209 L. Ed. 2d at 236).

The court of appeals held that the customer's arguments for jurisdiction "show the anything goes danger Justices Kagan, Alito, and Gorsuch warned of in Ford: no real limits on unlimited liability in a foreign jurisdiction over a non-resident defendant with no contacts thereto." Id. at ¶ 19. The "mere fact" that a defendant was connected to the manufacture or distribution of a product available in the state is not sufficient to establish that it purposefully availed itself of North Carolina jurisdiction. Id. (citing Cambridge Homes of N.C., Ltd. v. Hyundai Const., Inc., 194 N.C. App. 407, 416, 670 S.E. 2d 290, 297 (2008)). Instead of a causal connection between the international manufacturing company's activities in North Carolina and the customer's claims, the customer had merely established that the company had injected products into the stream of commerce. Id.

Absent such a causal connection, a plaintiff must establish that the defendant "deliberately," "systematically," and "extensively" serves a market in the forum state "for the very [product] that the plaintiffs allege malfunctioned." Id. at ¶ 21 (quoting Ford, 209 L. Ed. 2d at 237–38).

On this issue, the court of appeals found its own recent opinion instructive. Id. (recognizing Cohen v. Cont'l Motors, Inc., ___ N.C. App. ___, 2021-NCCOA-449). In Cohen, the court of appeals found personal jurisdiction was proper over a Delaware aircraft parts manufacturer that routinely engaged in sales in North Carolina, offered a paid subscription-based online service for North Carolina customers, and maintained close relationships with maintenance subscribers in the state. Id. at ¶ 22 (citing Cohen, 864 S.E. 2d at 819–820). Conversely, the international manufacturing company "ha[d] no contacts whatsoever with or within North Carolina" other than

the batteries it manufactured being available in the state "solely through the actions of unrelated third-parties of its products for uses the [manufacturing company] never intended." Id. at ¶ 25.

The court of appeals also found Ford instructive in considering whether personal jurisdiction was proper. In Ford, the Supreme Court "emphasized that Ford 'advertised, sold, and serviced those two car models [the Ford Explorer and Ford Crown Victoria]'" in the forum states for many years. Id. at ¶ 34 (quoting Ford, 209 L. Ed. 2d at 238). The court of appeals observed that the lithium-ion batteries at issue in the instant case were different than the Ford vehicles because the batteries were never marketed, manufactured, or sold as consumer products by the manufacturing company or subsidiary in North Carolina or elsewhere. Id. at ¶ 35.

The court of appeals held that the trial court properly dismissed the action for lack of personal jurisdiction and did not err in not compelling further discovery on jurisdiction-related issues. "Plaintiff's 'injecting its products into the steam of commerce' theory of jurisdiction over Defendants violates due process, is contrary to established precedents, and is invalid." Id. at ¶ 39.

In a dissenting opinion, Judge Inman argued that the customer's complaint contained allegations sufficient to establish minimum contacts with North Carolina for specific personal jurisdiction. Id. at ¶ 41 (Inman, J., dissenting). Rather than affirm, Judge Inman would have remanded the case to the trial court to reconsider in light of the Ford opinion, which was issued after the trial court's findings, whether the facts presented for its jurisdictional analysis were sufficient. Id. at ¶ 78.

The dissent also found Ford instructive, as well as the recent decision of the supreme court in Mucha v. Wagner. Id. at ¶45 (recognizing Mucha v. Wagner, 2021-NCSC-82). The dissent observed that under Ford specific personal jurisdiction analysis still begins with whether the

defendants "purposefully availed themselves of North Carolina's laws" and whether the "claims arise out of relate to that purposeful availment." Id. at ¶ 60.

For the "purposeful availment" prong, the dissent observed that the issue should not be whether the international manufacturing company "intended" for the batteries to be used in e-cigarette devices, but whether it knowingly caused batteries to be sold and distributed in the state. Id. at ¶ 63. The fact that the customer "is not in the North Carolina market intended by the [company] does not negate the allegations they serve a market for batteries here." Id. at ¶ 65. According to the dissent, knowingly serving a market in a forum state with a particular product is purposeful availment of that jurisdiction's laws. Id. at ¶ 65 (citing Ford, 209 L. Ed. 2d at 236).

For the "arising out of or relating to" prong, the dissent argued that contrary to the majority's opinion, Ford clarified causation was not a required element. Id. at ¶ 68. The dissent observed that the company and subsidiary served a market for lithium-ion batteries in North Carolina, including the sale of the batteries at issue; the customer bought one of those batteries in the state; and the customer was injured by the battery Id. at ¶ 70. According to the dissent, this factual chain was sufficient to establish that the claim is "related to" activity in the state. Id. The dissent recognized the fact that the batteries were not sold for consumer use was relevant to the case, "[b]ut any alleged alteration or misuse of [a battery] is a defense on the merits . . . not a dispositive factor in the specific jurisdiction analysis." Id. at ¶ 71.

As the trial court granted the motion to dismiss based on findings of facts before the Ford opinion was issued, the dissent would have remanded for the trial court to determine if it had sufficient factual basis to grant the motion in light of Ford or if more discovery may be required. Id. at ¶ 77.

In Dow-Rein v. Sarle, 281 N.C. App. 670, 2022-NCCOA-92, the court of appeals considered whether a horse seller in Florida and his corporate entity purposefully availed themselves of the privilege of conducting activities in North Carolina sufficient to establish personal jurisdiction.

A buyer purchased a horse from a seller and his corporate entity in Florida. Id. at ¶ 7. The seller signed a bill of sale in Florida and sent it to the buyer in North Carolina. Id. The buyer wired the purchase price to Florida. Id. The buyer took possession of the horse in Florida and arranged shipment to North Carolina herself. Id. Shortly after arriving in North Carolina, "the horse was diagnosed with chronic lameness that made him unsuitable for [the buyer's] intended use." Id. at ¶ 9.

The seller arranged for a second horse to be shown to the buyer in Maryland but had no further involvement in that sale. Id. That horse too was determined to be unsuitable for the buyer's use due to behavioral issues. Id. The buyer brought suit against several defendants including the seller, alleging on the seller's part that he knew of the issues with the two horses and concealed them to fetch higher prices. Id. at ¶ 10. The seller and his corporate entity moved to dismiss for lack of personal jurisdiction. Id. at ¶ 11. The trial court denied the motion, and after the seller succeeded on appeal, the matter was remanded for additional findings regarding personal jurisdiction, and the trial court again denied the seller's motion to dismiss for personal jurisdiction. Id. at ¶¶ 12–14.

On appeal for the second time, applying the "purposeful availment" standard applicable to specific personal jurisdiction cases as in Mucha v. Wagner, 378 N.C. 167, 2021-NCSC-82 ¶¶ 10–11, the court noted that a defendant "must expressly aim his or her conduct at th[e] state" or "must have targeted the forum state specifically. Id. at ¶ 17 (citing Mucha, 2021-NCSC-82 ¶¶ 16, 20).

The court contrasted two previous cases involving out-of-state sales of horses: in the first, the seller targeted North Carolina with advertisements, shipped the horse to North Carolina, and signed a contract mandating that the horse be examined by a North Carolina veterinarian prior to the sale being final. Id. at ¶ 18 (citing Watson v. Graf Bae Farm, Inc., 99 N.C. App. 210, 213, 392 S.E.2d 651, 653 (1990)). In that case, the seller had purposefully availed himself of North Carolina as a forum. Id. In the second, the North Carolina buyers made initial contact with a seller in Florida, and all key aspects of the sale took place in Florida. Id. at ¶ 19 (citing Hiwassee Stables, Inc., v. Cunningham, 135 N.C. App. 24, 29, 519 S.E.2d 317, 321 (1999)). In that case, the seller had not purposefully availed itself of the forum. Id.

The court also distinguished the facts of the instant case from those in Beem USA Ltd.-Liab. Ltd. P'ship v. Grax Consulting LLC, 373 N.C. 297, 306, 838 S.E.2d 158, 164 (2020), in which an out-of-state entity established an "ongoing business relationship" with an in-state plaintiff and thus purposefully availed itself of the forum. Dow-Rein, 2022-NCCOA-92, at ¶ 21 (citing Beem, 373 N.C. at 306, 838 S.E.2d at 164).

Here, that the buyer initiated the relationship, that the seller did not travel to North Carolina, and that the horse was delivered to the buyer in Florida weighed against finding such a relationship. Id. at ¶ 22. Other business between the buyer and seller for other unrelated matters, which the trial court stated established such a relationship, should not have impacted the analysis. Id. at ¶ 23.

The court of appeals reversed the trial court's denial of the seller's motion to dismiss for lack of personal jurisdiction and remanded for an entry of dismissal

In ITG Brands, LLC v. Funders Link, LLC, ___ N.C. App. ___, 2022-NCCOA-454, the court of appeals considered whether a company that collected payments from merchants in North Carolina may be subjected to personal jurisdiction.

A tobacco manufacturer filed a civil action against a finance company for violating this state's Unfair and Deceptive Trade Practices Act and the Uniform Voidable Transactions Act. Id. at ¶¶ 2-3, ¶ 10. The tobacco manufacturer entered a contract with a marketing company for its services. Id. ¶ 4. The parties negotiated and formed the contract in North Carolina. Id. The marketing company was chartered and headquartered in North Carolina. Id. The marketing company failed to perform under the contract. Id. The tobacco manufacturer sued the marketing company for damages arising from the breach and obtained a favorable judgment. Id. During discovery, it became apparent that the marketing company had no cash flow to meet its ongoing financial obligations, and the finance company provided cash advances and loans to the marketing company. Id. ¶¶ 5,7. The finance company contended that it did not contract with merchants and that it only operates to collect payments from merchants. Id. ¶ 9. The finance company further contended that another entity with a similar name contracted to purchase its accounts receivables, and the finance company acted only as the servicing agent for that entity. Id. Upon the tobacco company's filing of this action, the finance company filed a motion to dismiss, in part, for lack of personal jurisdiction. Id. ¶ 10. The trial court denied the motion. Id.

On appeal, the court of appeals affirmed the trial court's order denying the finance company's motion to dismiss for lack of personal jurisdiction. Id. ¶ 32.

Here, the finance company's minimum contacts supported being subjected to personal jurisdiction in North Carolina courts and did not offend the traditional notions of fair play and substantial justice: (1) the finance company serviced accounts for the company that purchased the accounts receivables; (2) the company that purchased the accounts receivables filed a UCC-1 in North Carolina to perfect its security interest; and (3) the finance company withdrew monies from a North Carolina account daily for five months. Id. ¶ 31. Accordingly, the finance company's

activities in the state provided a reasonable expectation it could be hauled into the state's courts. Id.

For these reasons, the court of appeals affirmed the trial court's denial of the finance company's motion to dismiss under Rule 12(b)(2).

In a series of cases against AutoMoney, Inc., the court of appeals considered whether North Carolina courts had personal jurisdiction over a foreign corporation based on its contacts with North Carolina borrowers. Leake v. AutoMoney, Inc., ___ N.C. App. ___, 2022-NCCOA-490, petition for disc. rev. filed (N.C. Aug. 8, 2022); Wall v. AutoMoney, Inc., ___ N.C. App. ___, 2022-NCCOA-498, petition for disc. rev. filed (N.C. Aug. 8, 2022); Troublefield v. AutoMoney, Inc., ___ N.C. App. ___, 2022-NCCOA-497, petition for disc. rev. filed (N.C. Aug. 8, 2022); Hundley v. AutoMoney, Inc., ___ N.C. App. ___, 2022-NCCOA-489, petition for disc. rev. filed (N.C. Aug. 8, 2022). The panel included Judges Gore, Hampson, and Wood. Each authored one of the four decisions, with the others concurring.

AutoMoney, Inc. is a South Carolina corporation with a principal place of business in Charleston, South Carolina. Leake, ¶ 2; Wall, ¶ 2; Troublefield, ¶ 2; Hundley, ¶ 2. It provides loans secured by motor vehicles. Id. It is a supervised lender under the South Carolina Board of Financial Institutions. Troublefield, ¶ 2.

AutoMoney does not have any physical offices or make car title loans in North Carolina. Leake, at ¶¶ 7–9; Wall, at ¶¶ 6–7; Troublefield, at ¶¶ 9–12; Hundley, ¶ 2. It is not registered to do business in North Carolina nor does it have a representative agent, mailing address, or phone number in North Carolina. Id. AutoMoney allows North Carolina borrowers to make payments over the phone or internet with a debit card and sends collections reminders regardless of the borrower's state of residence. Id. AutoMoney has a website that is accessible to borrowers,

regardless of residency, through which AutoMoney can be contacted. Id. AutoMoney offers its services to North Carolina residents: it advertises in a magazine that is primarily distributed in North Carolina, sends fliers to North Carolina residents, offered rewards in exchange for referrals of North Carolina residents, and has a sign on its South Carolina storefront that says "NC Titles Welcomed". Wall, ¶ 6; Troublefield, at ¶¶ 3, 11; Hundley, ¶ 4. When AutoMoney issued a loan to a North Carolina borrower, it secured the lien through the North Carolina Department of Motor Vehicles. Leake, ¶ 4; Troublefield, ¶ 7.

The plaintiffs in these actions are more than fifteen North Carolina residents who obtained loans from AutoMoney. Leake, ¶ 2; Wall, ¶ 2; Troublefield, ¶ 3; Hundley, ¶ 2. They verified their eligibility before driving to South Carolina to obtain their loans. Leake, ¶ 3; Troublefield, ¶ 3; Hundley, ¶ 3. AutoMoney charged interest rates between 129% and 229% on the loans ranging from $621 to $3,520 in these cases. Leake, ¶ 4; Wall, ¶ 2; Troublefield, ¶ 4; Hundley, ¶ 4. The borrowers made payments from North Carolina. Leake, ¶ 5; Hundley, ¶ 5. AutoMoney contacted the borrowers in North Carolina for collections. Hundley, ¶ 5. When the borrowers failed to make payments, AutoMoney contracted with a North Carolina company to repossess the cars located in North Carolina. Leake, ¶ 5; Wall, ¶ 6; Troublefield, ¶ 12. AutoMoney repossessed more than 442 vehicles in North Carolina. Id.

The North Carolina borrowers filed suits in North Carolina superior courts (Richmond County, Scotland County, and Rockingham County) alleging violations of the North Carolina Borrower Finance Act and Unfair and Deceptive Trade Practices Act associated with the loans. Leake, ¶ 3; Wall, ¶ 3; Troublefield, ¶ 8; Hundley, ¶ 6. In each of the cases, AutoMoney moved to dismiss for lack of personal jurisdiction. Leake, ¶ 11; Wall, ¶ 5; Troublefield, ¶ 9; Hundley, ¶ 6.

The trial courts denied AutoMoney's motions, concluding North Carolina "has a strong interest in the enforcement of its consumer protection law and in protecting its citizens from what under North Carolina law are usurious loan rates." Leake, ¶ 11; Wall, ¶ 9; Troublefield, ¶ 1; Hundley, ¶ 1. In each of the cases, the court of appeals affirmed the trial court's decision. Leake, ¶ 16; Wall, ¶ 48; Troublefield, ¶ 28; Hundley, ¶ 1.

For a North Carolina court to exercise personal jurisdiction over a foreign corporation, the court must determine (1) if the long-arm statute requirements are satisfied and (2) if so, whether an exercise of personal jurisdiction comports with due process. Leake, ¶ 23; Wall, ¶ 17; Troublefield, ¶ 20; Hundley, ¶ 14. Due process requires minimum contacts between the forum state and nonresident. Leake, ¶ 25 (citing Tom Togs, Inc. v. Ben Elias Industries Corp., 318 N.C. App. 361, 365, 348 S.E.2d 782, 786 (1986)); Wall, ¶ 17 (same); Troublefield, at ¶¶ 21–22 (same); Hundley, ¶ 14 (same). The court of appeals explained:

> A State may, consistent with due process, exercise judicial power over a person outside of the State when that person (1) directs electronic activity into the State, (2) with the manifested intent of engaging in business or other interactions within the State, and (3) that activity creates, in a person within the State, a potential cause of action cognizable in the State's courts.

Leake, ¶ 30 (citing Harvey v. Valentine, 172 N.C. App. 812, 816-17, 616 S.E.2d 642, 647–48 (2005)). Further, the "contacts must be the defendant's own choice and not 'random, isolated, or fortuitous." Wall, at ¶¶ 18–20 (quoting Ford Motor Co. v. Montana Eighth Jud. Dist. Ct., 141 S. Ct. 1017, 1025, 209 L. Ed. 2d 225, 234 (2021) and citing Travelers Health Ass'n v. Virginia, 339 U.S. 643, 648, 94 L. Ed. 1154, 1161 (1950)).

Based on the facts above, the court of appeals concluded that AutoMoney created a substantial connection with North Carolina sufficient to confer personal jurisdiction. Leake, at ¶¶

29–32; Wall, at ¶¶ 18–21; Troublefield, at ¶¶ 25–28; Hundley, at ¶¶ 17–21. The court of appeals summarized:

> Because [AutoMoney] had direct contact with North Carolina through its business operations, internet advertisements, and local publication advertisements, [AutoMoney] purposefully availed itself of the privilege of conducting activities within North Carolina…the sum and quality of [AutoMoney]'s contacts with this State, paired with [AutoMoney]'s obvious intent to recruit North Carolina clients, is sufficient to establish personal jurisdiction.

Leake, ¶ 33. It further held that AutoMoney could not have "reasonably and in good faith" advertised in North Carolina and placed liens on property in North Carolina and expect paperwork signed in South Carolina to protect it from the reach of North Carolina courts. Hundley, ¶ 23.

Accordingly, the court of appeals held the trial courts properly exercised personal jurisdiction over AutoMoney. Leake, ¶ 16; Wall, ¶ 48; Troublefield, ¶ 28; Hundley, ¶ 1.

In Bartlett v. Burke, ___ N.C. App. ___, 2022-NCCOA-588, appeal docketed, No. 312P22 (N.C. Oct. 11, 2022), the court of appeals considered whether a foreign entity that is affiliated with an American entity doing business in this forum is subject to personal jurisdiction in this state.

The administrators of several estates filed a wrongful death action against multiple entities, including a jet engine manufacturer and a helicopter distribution company. Id. ¶¶ 15-17. The action arose from a helicopter crash resulting in the death of all passengers. Id. ¶¶ 3-4. The helicopter involved in the crash was equipped with engines built by the defendant manufacturer. Id. ¶ 6. The manufacturer's principal place of business is in France. Id. The manufacturer sold and delivered the underlying engine to a helicopter distribution company in Germany. Id. The helicopter distribution company's principal place of business is in Germany. Id. Several years prior to the underlying accident the helicopter distribution company entered a contract with a helicopter importer. Id. ¶ 10. The importer agreed to promote, market, and support the distribution

company's products for resale in the United States. Id. ¶ 11. Subsequently, the distribution company sold the underlying helicopter to the importer in Germany. Id. ¶ 12. The agreement provided that the importer was responsible for importing the helicopter into the United States. Id. The importer then sold the helicopter to a North Carolina university's health system in Texas. Id. ¶ 13. At trial, the manufacturer and the helicopter distribution company moved to dismiss the actions based on a lack of personal jurisdiction. Id. ¶¶ 19-20. The trial court denied these motions. Id. ¶ 20.

On appeal, the court of appeals reversed the trial court's order denying the manufacturer's and distribution company's motions to dismiss finding there was a lack of personal jurisdiction. Id. ¶¶ 65-66. It is essential for courts when finding specific personal jurisdiction "that there be some act by the which the defendant purposefully avails itself of the privilege of conducting activities within the forum State." Id. ¶ 30 (quoting Burger King v. Rudzewicz, 471 U.S. 462, 474-75 (1985). Therefore, the suit must "arise out of or relate to the defendant's contacts with the forum." Id. ¶ 31 (citing Bristol-Myers Squibb Co. v. Superior Court of Cal., 137 S. Ct. 1773 (2017)). Thus, for specific personal jurisdiction inquiries, our courts must consider whether the defendant had "the minimum contacts with North Carolina necessary to meet the requirements of due process." Id. ¶ 34 (quoting Sherlock v. Sherlock, 143 N.C. App. 300, 303 (2001)). Previously in a separate case, this court has held that "[t]he mere fact that [a defendant] was 'connected' to the manufacture or distribution of [a product] is not sufficient to support a conclusion that [the defendant] purposefully availed itself of North Carolina jurisdiction by injecting its products into the stream of commerce." Id. ¶ 46 (citing Miller v. L.G. Chem, Ltd., 281 N.C. App. 531, 536 (2022)). Rather, a court –

> [M]ay exercise personal jurisdiction over a defendant who delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State, but not over a defendant who directed marketing and sales efforts at the United States without engaging in conduct purposefully directed at the forum state.

Id. ¶ 47 (quoting Mucha v. Wagner, 378 N.C. 167,173, 2021-NCSC-82, ¶ 15 (2021)).

In holding that the jet engine manufacturer and helicopter distribution company were not subject to personal jurisdiction in North Carolina, the court compared the circumstances of this case with Ford Motor Company v. Montana Eighth Judicial District Court, 151 S. Ct. 1017 (2021), Cohen v. Continental Motors, Inc., 279 N.C. App. 123 (2021), and Miller v. L.G. Chem, Ltd., 281 N.C. App. 531 (2022). Id. ¶ 35, ¶ 44, ¶ 45.

Here, the court of appeals concluded that the helicopter distribution company was not subject to personal jurisdiction in North Carolina. Id. ¶ 60. Unlike Ford in Ford Motor Company v. Montana Eighth Judicial District Court, 151 S. Ct. 1017 (2021), the helicopter distribution company "does not import nor operate a dealer network within the United States," but rather their units are sold directly to the helicopter importer abroad in Germany. Id. ¶ 55. Additionally, while the helicopter distribution company operates a website for the purpose of providing technical support information, the existence of a passive website alone cannot provide a court the basis for exerting jurisdiction over the party. Id. ¶ 56, ¶ 58. Rather, a website can be the basis when the defendant "(1) directs electronic activity in the State, (2) with the manifested intent of engaging in business or other interactions within the State, and (3) that activity creates [. . .] a potential cause of action cognizable in the State's courts." Id. ¶ 58. (quoting Havey v. Valentine, 172 N.C. App. 812, 816-17 (2005). Here, unlike the website in Cohen v. Continental Motors, Inc., 279 N.C. App. 123 (2021), the website does not solicit paid subscriptions. Id. ¶ 59. Therefore, the court of appeals

found that the helicopter distribution company did not purposefully avail itself of this forum. Id. ¶ 60.

Likewise, the court also found that the engine manufacturer was not subject to personal jurisdiction in North Carolina. Id. ¶ 62. Here, like in Miller v. L.G. Chem, Ltd., 281 N.C. App. 531 (2022), the manufacturer never intended to develop a market for standalone engines in the state. Id. ¶ 61. The manufacturer never "advertised, sold, or distributed any engines for sale to individual users or consumers" in the state. Id. Rather, all the manufacturer's commercial activities have been done on a worldwide scope and not specific to the forum. Id. ¶ 62. Without more, merely placing a product into the "stream of commerce" does not establish proper personal jurisdiction. Id.

Thus, the court of appeals reversed the trial court's order.

In Toshiba Global Commerce Solutions, Inc. v. Smart & Final Stores LLC, ___ N.C. ___, 2022-NCSC-81, the supreme court considered whether a foreign company that contracted with a North Carolina company could be subject to personal jurisdiction in this state, despite never having a physical presence in the state.

A technology company filed an action against a grocery company for breach of contract and related claims. Id. ¶ 1. The technology company is a North Carolina company, and the grocery company is a California company that does business in the western part of the country. Id. This action arises from a contractual dispute regarding a service agreement where the technology company agreed to provide maintenance and repair services for the grocery company's point of sale systems. Id. The parties' relationship first began in 2017 when the grocery company contacted the technology company. Id. ¶ 6. At that time, the technology company returned a formal proposal but ultimately was not chosen for the grocery company's business. Id. The grocery company later contacted the technology company for a second time seeking its services. Id. The parties negotiated

a contract in 2019. Id. Negotiations were held primarily over the phone and through email. Id. The finalized agreement provided that the technology company would provide repair services for all of the grocery company's point of sale machines for three years. Id. Furthermore, the agreement provided that the grocery company could extend the agreement period for an additional year with written notice to the technology company's North Carolina headquarters. Id. A little more than a year after the parties entered the contract, the grocery company terminated the agreement without cause. Id. ¶ 1. At trial, the grocery company moved to dismiss the technology company's complaint for lack of personal jurisdiction. Id. ¶ 1. The trial court denied this motion. Id.

On appeal, the supreme court affirmed, finding that a sufficient connection existed for personal jurisdiction in North Carolina. Id. ¶ 24. Due Process is not offended when a court finds personal jurisdiction where "the suit was based on a contract which had substantial connection with that state." Id. ¶ 9 (citing McGee v. Int'l Life Ins. Co., 355 U.S. 220, 223 (1957) (concluding personal jurisdiction was proper against a nonresident insurance company because its contract had a substantial connection with the forum state)). The court found this case to be analogous to the landmark case of Burger King v. Rudzewicz, 471 U.S. 462 (1985). Id. ¶ 13. In Burger King, the Supreme Court concluded that a nonresident in a contract dispute was subjected to personal jurisdiction in a forum where he had no physical ties, held any offices, or even visited. Id. ¶ 11. In making its determination the court explained that "prior negotiations and contemplated future consequences, along with the terms of the contract and the parties' actual course of dealing . . . must be evaluated [when considering a defendant's] minimal contacts with the forum." Id. ¶ 10. Here, like in Burger King, these factors were sufficient to satisfy the minimum contacts test for personal jurisdiction. Id. ¶ 12. The grocery company actively solicited and engaged in a relationship with the technology company knowing the technology company was based in North

Carolina. Id. ¶ 13. The court found that the grocery company sought a long-term contractual relationship as opposed to a one-off transaction with the North Carolina company. Id. This is analogous to Burger King, as the defendant in that case entered contract negotiations with the purpose of becoming a "long-term franchise," and not a "one-off transaction." Id. Additionally, like in Burger King, the parties entered a contract for an extended period of several years. Id. ¶ 14. Furthermore, the technology company had additional contacts as it continuously maintained, replaced, and repaired the grocery company's point of sale systems in its depot. Id. The evidence showed that the technology company performed "more than 2,600 repairs" and made "more than 4,200 shipments" to maintain inventory. Id. ¶ 15. The "contemplated future consequences" under the "terms of the contract" required the technology company to maintain repairs and inventory through its depot. Id. ¶ 17. Furthermore, the "actual course of dealings" showed that the grocery company continuously availed itself of the technology company's depot. Id. Separately, the "terms of the contract" required written notice to be sent to the technology company's North Carolina office, and the grocery company in its "actual course of dealing" sent written notice of termination to the North Carolina address. Id. These circumstances were sufficient to find the grocery company made a substantial enough connection to be subject to personal jurisdiction in this state. Id. While it was undisputed that the grocery company did not have any physical connections in the state, physical presence is not a prerequisite to jurisdiction. Id. ¶ 19 (citing to Walden, 571 U.S. 277, 285 (2014)). Furthermore, the fact that the contract was formed and negotiations occurred outside the forum state does not preclude a defendant from being subject to jurisdiction in a forum state. Id. ¶ 20.

Thus, for the foregoing reasons, the supreme court held that the trial court did not err by denying the grocery company's motion to dismiss for lack of personal jurisdiction.

In State of North Carolina ex rel Stein v. E.I. DuPont de Nemours and Company, ___ N.C. ___, 2022-NCSC-110, the supreme court considered whether the Due Process Clause allows North Carolina courts to exercise personal jurisdiction over the companies that received assets from another company, even though the receiving companies do not have any contacts of their own with the state. Id. ¶ 1.

The state brought suit against numerous corporate entities, which all had a relationship to the predecessor entity, alleging that it knowingly operated a plant in North Carolina that released harmful chemicals into the environment for many years. Id. ¶ 2. The state further alleged that the predecessor entity chose to restructure its business to limit future liability and protect its remaining assets after it recognized the scope of potential liability related to the release of chemicals. Id. ¶ 6. During the restructure, the pertinent successor entities executed separation agreements with the predecessor entity, agreeing to assume the predecessor entity's liabilities. Id. ¶ 10.

The successor entities moved to dismiss the action on the grounds that the trial court could not exercise personal jurisdiction over them because they are merely Delaware holding companies that do not conduct business in North Carolina. Id. ¶ 11. In denying the motion to dismiss, the business court held that "the Due Process Clause permits jurisdiction to be exercised over a corporate successor when (1) the predecessor is subject to the jurisdiction in the forum; and (2) state law subjects the successor to liability." Id. ¶ 12, 21. It was undisputed that the original entity was subject to the state's jurisdiction. Id. ¶ 12. Accordingly, the court analyzed whether the law imputes liability to the successor entities in the case at bar. Id.

The supreme court explained that generally, a corporation that purchases substantially all of another corporation's assets is not liable for the predecessor's debts or liabilities. Id. However, relying on two of four exceptions set forth in Budd Tire Corp. v. Pierce Tire Co., 90 N.C. App.

684 (1988), the supreme court concluded that North Carolina can exercise personal jurisdiction over the new entities in this case. DuPont de Nemours, 2022-NCSC-110, ¶¶ 12, 37.

The supreme court recognized that the jurisdictional inquiry requires a two-part analysis: first, it must determine whether the long-arm statute permits the exercise of jurisdiction; then it must determine whether exercise of jurisdiction would violate the Due Process Clause of the Fourteenth Amendment of the United States Constitution. Id. ¶¶ 16–17. The supreme court acknowledged that in circumstances like these, the "successor likely has or should have notice of the liabilities of its predecessor in a given jurisdiction." Id. ¶ 23. In this case, the supreme court concluded that due process allows the North Carolina courts to exercise jurisdiction over the new entities because: "(1) the parties expressly agreed to assume [the predecessor entity's] liabilities in the April 2019 Separation Agreement . . .; and (2) the State alleged sufficient facts at the motion to dismiss stage to support the claim that [the predecessor entity] transferred its assets to [the successor entities] in an attempt to defraud the State in its position as a creditor." Id. ¶ 23. The court cautioned: "[a] company cannot expressly assume liabilities from its predecessor, fail to limit those liabilities geographically, and then disclaim liability based on the notion that it did not expect to be brought to court in a particular forum." Id. ¶ 31. It further explained that successor liability is permitted where:

> (1) a party assumes another entity's debts or liabilities through an express or implied agreement; (2) the transfer constitutes an actual or de factor merger of corporations; (3) a transfer of assets occurred for the purpose of defrauding the corporation's creditors; or (4) the purchasing corporation is a continuation of the selling corporation because it has the same shareholders, directors, and officers.

Id. ¶ 37.

Accordingly, the supreme court affirmed the business court's denial of the motion to dismiss and remanded the action for additional proceedings. Id. ¶ 39.

(2) In Rem Jurisdiction

In Carmichael v. Cordell, 281 N.C. App. 305, 2022-NCCOA-26, the court of appeals considered whether a North Carolina court had in rem jurisdiction over accounts and funds a California decedent purportedly transferred to her North Carolina son.

A couple married in California in 1961. Id. at ¶ 2. The husband was born in California and lived there his entire life. Id. The couple lived in California throughout their marriage and had two daughters there. Id. The wife also had a son from a previous relationship. Id. The son was a resident of North Carolina. Id. The husband never traveled to, conducted business in, or had any others ties to North Carolina. Id.

The wife died in January 2020 in California. Id. Throughout their 58 years of marriage, the couple had acquired assets in California, which, according to the husband, would be classified as community property by that state. Id. After the wife died, the husband learned that the wife had set up separate accounts for her son, purportedly leaving the son as the sole beneficiary and changing the associated address to the son's North Carolina address. Id. at 3.

The son claimed ownership of three accounts, "which named him as the sole beneficiary for twenty years." Id. at 4. In April 2020, the husband threatened and soon thereafter filed suit against the son in California. Id. In his first amended complaint, filed in July 2020, the husband sought declaratory relief and made claims against the son related to elder abuse and breach of fiduciary duty. Id. at 5. Less than a week later, the son filed suit in North Carolina seeking declaratory relief regarding disposition of the accounts. Id. at 6.

The husband filed a motion to dismiss the son's North Carolina suit for lack of personal jurisdiction, which the trial court granted. Id. at ¶ 7. The son appealed. Id.

The court of appeals considered whether the trial court erred by failing to find North Carolina possessed jurisdiction over the husband or the property and proceeds at issue. Id. at ¶ 10.

The court of appeals began its personal jurisdiction analysis by recognizing the plaintiff carries the burden of establishing a prima facie statutory basis for jurisdiction upon challenge from the defendant. Id. at ¶ 11 (citing Williams v. Inst. for Comput. Stud., 85 N.C. App. 421, 424, 355 S.E.2d 177, 179 (1987)). This is a two-step process, with consideration first for North Carolina's long-arm statute and then to the Due Process Clause of the federal constitution's Fourteenth Amendment. Id. Even if jurisdiction would be proper under the long-arm statute, the Due Process Clause limits a state's power to assert jurisdiction over a non-resident defendant. Id. at ¶ 12 (citing Beem USA Ltd. v. Grax Consulting, LLC, 373 N.C. 297, 302, 838 S.E.2d 161162 (2020)).

The court of appeals first considered whether a North Carolina court had in personam jurisdiction over the husband. Id. at ¶ 13. For this analysis, the court recognized the husband was a resident of California and considered the extent the husband purposefully availed himself of the privilege of conducting activities in the North Carolina, whether the son's claims arose out of the husband's actions directed at the state, and "whether the exercise of personal jurisdiction would be constitutionally reasonable". Id.

The court of appeals held in personam jurisdiction would not be proper as the husband had not purposefully availed himself of activities in North Carolina. Id. at ¶ 15. The court recognized the husband had never been to or conducted business in North Carolina, rendering in personam jurisdiction "unreasonable" because the husband had no contacts with the state, except for his relationship with the son. Id.

Next, the court considered the sufficiency of in rem or quasi in rem jurisdiction based on the location of the property. Id. at ¶ 16. Like in personam jurisdiction, in rem jurisdiction "should be evaluated in accordance with the minimum contacts standard," requiring the property to have minimum contacts with the state. Id. (citing Ellison v. Ellison, 242 N.C. App. 386, 390, 776 S.E.2d 522, 525526 (2015)).

By statute, in rem jurisdiction is proper "[w]hen the subject of the action is real or personal property in this State and the defendant has or claims any lien or interest therein." N.C. Gen. Stat. § 1-75.8(1). The court of appeals noted it had previously held in rem jurisdiction as properly established when a decedent's property was located in North Carolina, and the action sought to exclude a defendant from interest in the property. Carmichael, 2022-NCCOA-26, at ¶ 17 (citing Lessard v. Lessard, 68 N.C. App. 760, 762, 316 S.E.2d 96, 97 (1984)). The court also found Ellison analogous, which had held that "[w]hen the subject matter of the controversy is property located in North Carolina, the constitutional requisites for jurisdiction will generally be met." Id. at ¶ 18 (citing Ellison, 242 N.C. App. at 391, 776 S.E.2d at 526).

"Here, [the husband] initiated the controversy by threatening to sue [the son] claiming an interest in the accounts in North Carolina." Id. at ¶ 19. The court of appeals held that through the lens of the son's interest, the father's actions, and the property's location, in rem jurisdiction was sufficiently and reasonably established in North Carolina because the father's complaint in California sought to exclude the son from property in North Carolina. Id. The court reasoned the husband "essentially reached into North Carolina" in asserting claim to the wife's accounts and proceeds, "which were being held in this state by a citizen of this state." Id.

The court of appeals held that while the trial court properly declined to find in personam jurisdiction, it erred in granting the motion to dismiss because in rem jurisdiction was sufficiently

established. Id. at ¶ 24. "[The son's] interest in the bank accounts and funds located in North Carolina permits the courts of this state to exercise in rem jurisdiction over his declaratory judgment action to address his claims." Id.

(3) Subject Matter Jurisdiction

In Nation Ford Baptist Church, Inc. v. Davis, 382 N.C. 115, 2022-NCSC-98, the supreme court considered whether a court has subject matter jurisdiction over a claimant's action regarding employment decisions made by a religious organization.

A church filed an action against its former pastor to prevent him from accessing its facilities and speaking with staff. Id. ¶ 9. This dispute arose from the employment relationship between the church and its former pastor. See id. In 1997, the church adopted a set of bylaws giving it the ability to make decisions regarding employment matters. Id. ¶ 6. However, upon applying for a bank loan in 2008, the church attached bylaws that varied from its previous set. Id. ¶ 7. These new bylaws provided that the "Bishop of the Church could be dismissed only by a 75% vote of the congregation attending a Special General Meeting called for that purpose." Id. In 2015, the church hired the pastor. Id. The pastor's offer letter stated that the pastor was an "at-will employee." Id. Due to a lack of success under his tenure, the church's board voted to terminate its employment relationship with the pastor. Id. ¶ 8. Despite the vote, the pastor continued to hold services in the church. Id. These actions led to the church filing this suit and seeking an injunction. Id. ¶ 9. In response to this filing, the pastor filed a counterclaim, third-party complaint, and motion for injunctive relief seeking:

> (1) a declaratory judgment that he remained the "Bishop, Senior Pastor, and spiritual leader" of the church, that he was not an "at-will employee," that the bylaws included in the 2008 loan application controlled the terms of his employment, that his termination was unlawful, and that his appearances on church

> property were lawful; (2) injunctive relief allowing him to resume his employment; (3) damages arising from the Board's breach of fiduciary duty it owed him; (4) damages arising from the Board's tortious interference with his employment relationship; and (5) access to the Church's financial records and establishment of a constructive trust for funds the Board had allegedly misappropriated.

Id.

Subsequently, the church filed a motion to dismiss the pastor's claims on the grounds that the trial court lacked subject matter jurisdiction "because resolving [the pastor's] claims would require the court to impermissibly review ecclesiastical matters." Id. ¶ 10. The trial court denied this motion. Id. In a divided opinion, the court of appeals affirmed. Id. ¶ 5.

On appeal, the supreme court reversed in part and affirmed in part holding that some of the pastor's claims may be adjudicated solely through neutral principles of law. Id. ¶ 29. Civil courts lack subject matter jurisdiction to resolve disputes involving "purely ecclesiastical questions and controversies." Id. ¶ 17 (citing Braswell v. Purser, 282 N.C. 388 (1972)). However, this concept does not provide religious organizations with absolute immunity. Id. ¶ 18. Rather, the impermissible entanglement doctrine precludes judicial involvement only in circumstances involving "disputes [that] implicate controversies over church doctrine and practice." Id. ¶ 19 (citing Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church, 393 U.S. 440, 445 (1969)). In considering jurisdictional challenges, "[t]he dispositive question is whether resolution of the legal claim requires the court to interpret or weigh church doctrine." Id. ¶ 20 (citing Smith v. Privette, 128 N.C. App. 490, 494 (1998)). If the underlying claim can be resolved through neutral principles of law, there is no impermissible entanglement. Id. ¶ 20 (citing Johnson v. Antioch United Holy Church, Inc., 214 N.C. App. 507, 512 (2011)).

In analyzing whether the factual circumstances of this case gave rise to an adjudication that can be resolved by legal principles, the court found an earlier court of appeals decision in Tubiolo v. Abundant Life Church, Inc., 167 N.C. App. 324 (2004), to be analogous. Id. ¶ 21. In Tubiolo, several one-time church members claimed the church violated its bylaws in improperly terminating their membership. Id. The court stated that the trial court could consider whether the member's membership was improperly terminated because "the persons purporting to terminate their membership were without authority to take that action." Id. The church's bylaws established who possessed authority to terminate membership, and its members argued that the bylaws were improperly adopted. Id. The court of appeals determined that "whether the bylaws were properly adopted and who was authorized to terminate membership were inquiries that could be made without resolving any ecclesiastical or doctrinal matters." Id. Here, the court extended the framework in Tubiolo to the factual circumstances of this case. Id. ¶ 22. To resolve the pastor's claims, the trial court must consider: (1) whether the newer version of bylaws will be applied to the pastor's employment contract, (2) who had the authority to act for the church in employing the pastor, (3) who had the authority to act on behalf of the church to terminate the pastor, and (4) whether the pastor had an at-will employment relation or had certain contractual rights. Id. If under the inquiry, the trial court concludes that the church acted outside its authority under the governing bylaws, then the pastor will be entitled to declaratory relief. Id. This inquiry does not utilize any doctrinal or ecclesiastical consideration. Id. However, the pastor's proposed remedy under the first claim would entangle the court in the religious matters of the case, as the court can neither declare the pastor the spiritual leader of the church nor can it require that the pastor be allowed to conduct services. Id. ¶ 23.

Additionally, the supreme court has previously stated that a court is not permitted to examine "the church's view of the role of the pastor, staff, and church leaders . . . [b]ecause a church's religious doctrine and practice affect its understanding of each of these concepts." Id. ¶ 24 (citing Harris v. Matthews, 361 N.C. 265, 273 (2007)). The pastor's claims that required the court to consider whether he "in good conscience . . . act[ed] honestly, in good faith and in the best interests of the Church," whether the church acted "without justification" in terminating the pastor, and whether certain funds "were properly devoted to the Church's benefit," questioned the substantive reasoning of the board and are not otherwise based on the church's bylaws. Therefore, the court was forbidden under the First Amendment to adjudicate these claims. Id.

The church's argument that the trial court lacks subject matter to hear all claims entirely if any "condition or element of a cause of action" involves ecclesiastical matters was wrong. Id. ¶ 27. Rather, at this stage a court must only assure itself that any of the plaintiff's claims can possibly be adjudicated and that any form of relief can possibly be granted. Id. If a court can answer that consideration in the affirmative, then it has jurisdiction to proceed on the claims. Id. The court found that the pastor's claims could proceed for declaratory judgment establishing which bylaws applied, whether the church properly followed its bylaws, and whether there was an employment contract that incorporated the bylaws. Id. ¶ 29. On the contrary, where the claims required entanglement into ecclesiastical matters or implicated church doctrine and practice, the claims should be dismissed. Id.

Thus, for the foregoing reasons, the supreme court affirmed in part and reversed in part the lower court's denial of the church's motion to dismiss.

B. Service of Process

In County of Mecklenburg v. Ryan, 281 N.C. App. 646, 2022-NCCOA-90, the court of appeals considered whether service by publication was proper by Mecklenburg County on a visually impaired, wheelchair-confined homeowner when the homeowner had informed the county email was the best way to reach her, and the county failed to email her notice of pending litigation.

A homeowner had been confined to a wheelchair since 1989 and legally blind since 1992. Id. at ¶ 2. The homeowner owned and lived at a property in Charlotte. Id. In 2018, Mecklenburg County, through outside counsel, instituted a civil action to foreclose on the property for past due property taxes. Id.

A summons was issued in January 2018, but never served. Id. at ¶ 3. An alias and pluries summons was issued in April. Id. Mecklenburg County, through the sheriff's department, attempted personal service but was unsuccessful. Id. The deputy reported the property "appeared vacant." Id. Mecklenburg County's attempts at service via certified mail and via delivery service were likewise unsuccessful. Id. The homeowner had previously informed the county that "because of her disabilities, it can be difficult for her to access mail, and the best way to reach her was via email." Id. The county made no attempt to email her regarding the pending litigation. Id.

After these failed attempts, the county served the homeowner by publication, which was completed in late May 2018. Id. at ¶ 4. In August, Mecklenburg County filed an "Affidavit of Jurisdiction and Failure to Plead," motion for entry of default, and motion for default judgment. Id. The entry of default and default judgment were entered against the homeowner the day they were filed. Id.

In December 2019, the homeowner moved to set aside the August 2018 default judgment among other things. Id. at ¶ 12. The trial court entered an order in relevant part finding

Mecklenburg County exercised due diligence prior to the default. Id. at ¶ 13. The homeowner appealed. Id.

The court of appeals considered a number of issues, including whether to set aside the default judgment due to insufficient service of process.

On the issue of service by publication, the court of appeals observed that the North Carolina Rules of Civil Procedure allow "service of process by publication on a party that cannot, through due diligence, be otherwise served." Id. at ¶ 19 (quoting Dowd v. Johnson, 235 N.C. App. 6, 9, 760 S.E. 2d 79, 83 (2014)). Due diligence "dictates that plaintiff use all resources reasonably available" to reach a defendant, and when the method for proper service is within plaintiff's knowledge or ascertainable with due diligence, service by publication is improper. Id. (citing Fountain v. Patrick, 44 N.C. App. 584, 587, 261 S.E. 2d 514, 516 (1980); N.C.R. Civ. P. 4(j)).

While there is "no restrictive mandatory checklist for what constitutes due diligence," a party "must use all reasonably available resources to accomplish service of process." Id.

The homeowner argued that the county failed to exercise due diligence because it made no attempt to serve her via email. Id. at ¶ 21. The court found a 2017 case regarding a homeowner's association's attempts to assert a lien while the property owner was in Africa analogous and binding. Id. (citing In re Foreclosure of Ackah, 255 N.C. App. 284, 804 S.E. 2d 794 (2017), aff'd per curiam, 370 N.C. 594, 811 S.E. 2d 143 (2018)). In Ackah, a homeowner's association attached a lien to a property due to the owner's failure to pay association dues. 255 N.C. App. at 296, 804 S.E. 2d at 796. Certified letters to the address and to family members were returned "unclaimed." Id. The homeowner's association then posted a notice on the door of the property. Id. The court of appeals held that the homeowner's association failed to exercise due diligence as it had the property owner's email address and made no attempt to at least notify her via email of the pending

litigation, "rather than simply resorting to posting a notice on the [p]roperty." Id. at ¶ 287, 804 S.E. 2d at 796.

As in Ackah, the court of appeals held that in the instant case Mecklenburg County could have notified the homeowner via email but failed to do so. Ryan, 2022-NCCOA-90 at ¶ 22. The court observed it was "undisputed that the Mecklenburg County Tax Office had [the homeowner's] email on file." Id. Further, the trial court found that the county had prior notice from the homeowner that email was the best means to reach the homeowner due to her disabilities. Id. Accordingly, the court of appeals held that the service by publication was improper, as the county failed to exercise the due diligence required.

In Blaylock v. AKG North America, ___ N.C. App. ___, 2022-NCCOA-549, the court of appeals considered whether filing a notice of removal constitutes a general appearance that waives defenses for insufficiency of process and service of process.

An employee of a company filed suit for sexual harassment, hostile work environment, and failure to supervise/intervene. Id. ¶ 2. Days after the employee filed suit, the sheriff attempted, but failed, to serve the company as the address was in a different county. Id. ¶ 3. Over the next year, the employee never properly served the company. Id.

Thirteen months after suit was filed, the company removed the action to the Middle District of North Carolina on the grounds that the employee asserted federal claims in his complaint. Id. The company asserted improper service of process in its notice of removal. Id. The company then sought an extension of time within which to respond to the complaint. Id. The employee filed a motion to remand the action to state court, disavowing any reliance on federal law. Id. ¶ 4. The federal court remanded the case back to state court. Id.

The company moved to dismiss the employee's complaint pursuant to Rules 12(b)(2), 12(b)(4), 12(b)(5), and 12(b)(6) of the Rules of Civil Procedure, asserting the court lacked personal jurisdiction because of defective service. Id. ¶¶ 5–6.

The trial court granted the company's motion to dismiss. Reviewing the trial court's decision de novo, the court of appeals affirmed. Id. ¶¶ 10–11. The court of appeals held that actual notice cannot cure insufficient service of process and Rule 4 of the North Carolina Rules must be strictly enforced for the court to exercise jurisdiction over a defendant. Id. ¶ 13 (citing Grimsley v. Nelson, 342 N.C. 542, 545, 467 S.E.2d 92, 94 (1996) and Stewart v. Shipley, 264 N.C. App. 241, 244, 825 S.E.2d 684, 686 (2019)).

The employee argued the company's attorney made a general appearance, waiving jurisdictional defenses by (1) removing the case to federal court and (2) seeking extensions of time. Id. ¶ 14. Statutorily, obtaining an extension of time does not constitute a general appearance. Id. ¶ 15 (citing N.C. Gen. Stat. § 1-75.7(1) (2021)). As a matter of first impression, the court of appeals analyzed whether filing a notice of removal constitutes a general appearance, which would confer personal jurisdiction regardless of whether service was defective. Id. ¶¶ 15–16, 18 (citing Alexiou v. O.R.I.P., Ltd., 36 N.C. App. 246, 247, 243 S.E.2d 412, 413, cert. denied, 295 N.C. 465, 246 S.E.2d 215 (1978)).

The court of appeals explained that a general appearance is made when a "defendant by motion or otherwise invokes the adjudicatory powers of the court in any other matter not directly related to the questions of jurisdiction". Id. ¶ 16 (citing Swenson v. Thibaut, 39 N.C. App. 77, 89, 250 S.E.2d 279, 288 (1978). Collecting cases addressing whether specific actions constitute a general appearance, the court of appeals articulated "[i]n order to constitute a general appearance,

'[t]he appearance must be for a purpose in the cause, not a collateral purpose.'" Id. ¶ 17 (quoting Bullard v. Bader, 117 N.C. App. 299, 301, 450 S.E.2d 757, 759 (1994)).

The court of appeals analyzed the courts' roles when a defendant removes an action. Id. ¶ 20. Removal is governed by federal statute and once a defendant files a notice of removal, all proceedings in state court are stopped. Id. Concluding that state courts do not exercise discretion or adjudicatory authority during the removal process, the court of appeals held filing a notice of removal does not constitute a general appearance. Id. ¶¶ 20–22. Accordingly, the court of appeals affirmed the trial court's order. Id. ¶ 26.

C. Statute of Limitation

In K&S Resources, LLC v. Gilmore, ___ N.C. App. ___, 2022-NCCOA-409, petition for disc. rev. filed (N.C. July 25, 2022), the court of appeals considered whether the statute of limitations ran from the date of the original judgment or the date of the amended judgment which included additional findings of facts and conclusions of law but kept the ultimate relief intact.

Plaintiff filed a complaint in the trial court on August 9, 2019, seeking a renewal of a prior amended judgment against defendant. Id. ¶ 2. In the first action against the defendant, a prior plaintiff sought damages from the defendant for the breach of a commercial lease. Id. ¶ 3. Judgment in that action was entered in favor of the prior plaintiff on July 20, 2009. Id. In the first action, the defendant moved to amend the judgment on July 30, 2009, which the court subsequently entered on September 29, 2009, nunc pro tunc July 20, 2009. Id. In the amended judgment, the court made additional findings of fact and conclusions of law. Id. Both judgments ordered the defendant to pay the plaintiff the costs for the breach, pre-judgment interest, post-judgment interest, and reasonable attorney's fees. Id. ¶ 4. The prior plaintiff was unsuccessful in recovering any of the amount ordered. Id. ¶ 5. In 2016, the prior plaintiff in the original action assigned the amended

judgment to the plaintiff of this current action. Id. As mentioned earlier, the complaint for the second action was filed on August 9, 2019, and sought renewal of the prior amended judgment. Id. ¶ 2. The trial court in this second action granted summary judgment to the plaintiff. Id. ¶ 6.

On appeal, the court of appeals reversed the trial court's order granting summary judgment on behalf of the plaintiff. Id. at 28. Section 1-47(1) of the North Carolina General Statutes "governs the statute of limitations on the renewal of a prior judgment, for other than real property." Id. ¶ 10. The statute states:

> [w]ithin ten years an action . . . [u]pon a judgment or decree of any court of the United States, or of any state or territory thereof, from the date of its entry. No such action may be brought more than once or have the effect to continue the lien of the original judgment.

Id.

The plaintiff contended that the statute of limitations began running from the filing date of the amended judgment, as opposed to the original judgment. Id. ¶ 12. To determine whether the statute of limitations ran from the original judgment date or the amended judgment date, the court of appeals determined the answer depends on whether the amended judgment was entered pursuant to Rule 52 or Rule 59 of the North Carolina Rules of Civil Procedure. See id. ¶ 18. Rule 52(b) provides that "[u]pon motion of a party made not later than 10 days after entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly." Id. ¶ 16. Furthermore, Rule 52(b) enables a trial court that has "omitted certain essential findings of fact" to "correct this oversight and avoid remand by the appellate court for further findings." Id. This differs from Rule 59, which is "appropriate if the court has failed in the original judgment to afford the relief to which the prevailing party is entitled" or "a party seeks to have an order or judgment vacated in its entirety." Id. ¶ 17. Under Rule 59(e), "a motion to alter

or amend the judgment" may be brought if it is brought under one of the grounds stated under 59(a). Id. Rule 59(a) provides:

> On a motion for a new trial in an action tried without a jury, the [trial] court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.

Id.

The court concluded that an amended judgment under Rule 59(e) in accordance with this section is a new judgment. Id. ¶ 18. In contrast, under Rule 52(b) a trial court may amend the judgment to include additional findings of fact and conclusions of law but does not interfere with the prevailing party's relief. Id. In such instances, the validity of the original judgment remains intact. Id. Under the circumstances of this case, the trial court added additional findings of fact and conclusions of law. Id. ¶ 19. However, the trial court declined to enter the specific facts and conclusions of law requested by the defendant, nor did the trial court recalculate damages. Id. Accordingly, the relief afforded to the plaintiff in the initial action remained the same. Id. Thus, the defendant's motion to amend the judgment was pursuant to Rule 52(b) and not Rule 59(e), and the 10-year statute of limitation barred the action. Id. ¶ 13, ¶ 19.

For these reasons, the court of appeals reversed the trial court's order denying defendant's motion for summary judgment.

In Izzy Air, LLC v. Triad Aviation, Inc., ___ N.C. App. ___, 2022-NCCOA-523, the court of appeals considered whether the borrowing provision of section 1-21 of the North Carolina General Statutes requires application of the statute of limitations in the state in which the action accrued or of North Carolina's statute of limitations.

Aircraft owners hired a maintenance corporation to perform repairs to the engine of their air aircraft. Id. ¶ 2. The aircraft was owned by a Delaware corporation and two South Carolina residents. Id. The maintenance corporation's facility was located in Burlington, North Carolina. Id. Aircraft owners shipped the engine of the aircraft from South Carolina to the North Carolina facility. Id. The engine was repaired, overhauled, inspected, and tested in North Carolina. Id.

The maintenance corporation provided the aircraft owners with a limited warranty. Id. ¶ 3. The limited warranty included a choice-of-law provision, providing that North Carolina law would apply in the event there was a dispute under the warranty. Id.

After the engine was returned, the aircraft owners experienced engine failure shortly after taking off from a South Carolina airport. Id. ¶ 4. The aircraft owners made an emergency landing in a South Carolina field and the plane was damaged beyond repair. Id. They notified the maintenance corporation, but it refused to honor the express warranty on the work performed. Id. ¶ 5.

The aircraft owners filed a complaint alleging violation of North Carolina's Unfair and Deceptive Trade Practices Act almost four years following the engine failure. Id. ¶ 6. The statute of limitations applicable to claims brought under North Carolina's Unfair and Deceptive Trade Practices Act is four years. Id. ¶ 13. The statute of limitations applicable to the same claim in South Carolina is three years. Id. ¶ 9. The maintenance corporation filed a motion to dismiss the complaint, arguing the claim was time-barred as North Carolina's borrowing statute (section 1-21 of the North Carolina General Statutes) required application of South Carolina's three-year statute of limitations. Id. The trial court agreed and dismissed the claim with prejudice. Id.

In affirming the trial court's decision, the court of appeals explained "where a claim arising in another jurisdiction is barred by the laws of that jurisdiction, and the claimant is not a resident

of North Carolina, the claim will be barred in North Carolina as well." Id. ¶ 11 (quoting George v. Lowe's Cos., 272 N.C. App. 278, 280, 846 S.E.2d 787, 788 (2020)). The court of appeals recognized that it was undisputed that the aircraft owners were not residents of North Carolina, that they were residents of South Carolina, and that they filed their suit more than three, but less than four, years after the action accrued. Id. ¶ 12. Based on those undisputed facts, the court of appeals concluded the borrowing statute applied to bar the aircraft owners' claim. Id.

The court of appeals rejected the aircraft owners' argument that the choice-of-law provision contained in the limited warranty subjected their claim to North Carolina's four-year statute of limitations. Id. ¶ 13. The choice-of-law provision applied only to disputes arising out of the warranty, not all potential litigation. Id. The court of appeals observed the choice-of-law provision did not specifically apply to the UDTP claim and that "neither an intentional breach of contract nor a breach of warranty, standing alone, is sufficient to maintain a UDTP claim." Id. (citing Mitchell v. Linville, 148 N.C. App. 71, 74, 557 S.E.2d 620, 623 (2001)). Further, even applying the choice-of-law provision, North Carolina's borrowing statute requires that South Carolina's statute of limitations applies. Id. ¶¶ 15-16.

The court of appeals also rejected the aircraft owners' argument that the borrowing statute did not apply because the cause of action arose out of the maintenance corporation's flawed repair performed in North Carolina. Id. ¶ 17. The "North Carolina Supreme Court has not addressed the proper choice-of-law test for UDTP claims, and there is split authority" in the court of appeals. Id. ¶ 18. Courts have utilized both the significant relationship test and lex loci approach. Id. Under either test, the aircraft owners' claim arose in South Carolina:

> Under the most significant relationship test, the [aircraft owners] reside in South Carolina, [aircraft owners] shipped the engine to [the maintenance corporation] from South Carolina, the airplane

> accident occurred in South Carolina, [aircraft owners] sustained their injuries in South Carolina, and [aircraft owners'] alleged efforts to notify [the maintenance corporation] of the accident occurred in South Carolina. While North Carolina is not without connection to the occurrence giving rise to the action, South Carolina has the more significant relationship.
>
> Under the lex loci approach, [aircraft owners] sustained their injuries in South Carolina and the last act giving rise to [their] claim occurred in South Carolina when [their] airplane engine failed in South Carolina and they were forced to attempt an emergency landing in South Carolina. Thus, under the lex loci approach, [aircraft owners'] "claim arose" in South Carolina.

Id. ¶¶ 21-23.

Accordingly, the court of appeals affirmed the trial court's order dismissing the action as barred by South Carolina's statute of limitations pursuant to section 1-21 of the North Carolina General Statutes. Id. ¶ 24.

In Morris v. Rodeberg, ___ N.C. App. ___, 2022-NCCOA-555, appeal docketed, No. 96A22 (N.C. Sep. 21, 2022), the court of appeals considered the statute of limitations applicable to medical malpractice claims that accrue when the plaintiff is a minor over the age of ten given the intersection of sections 1-17 and 1-15(c) of the North Carolina General Statutes.

A thirteen-year-old patient underwent a laparoscopic appendectomy in February 2015. Id. ¶¶ 2–3. Following the procedure, the patient developed an infection, requiring an extended hospital stay. Id. ¶ 4.

In September 2020, the patient filed a medical malpractice lawsuit, nearly five years after the claim accrued. Id. ¶¶ 5, 8. The patient alleged the suit was initiated within the statute of limitations under section 1-17(b) of the North Carolina General Statutes as the claim accrued while the patient was a minor and the complaint was filed within one year of the patient attaining the age of majority (or before attaining the age of nineteen). Id. ¶ 6. The providers moved to dismiss the

patient's complaint under Rule 12(b)(6) of the North Carolina Rules of Civil Procedure, arguing section 1-17(c) applied to the patient's claim and the statute of limitations expired three years after the surgery regardless of his status as a minor. Id. The patient argued subsection (c) of section 1-17 did not apply. Id. ¶ 9.

The trial court denied the providers' motions to dismiss. Id. ¶ 11. The providers filed a petition for certiorari review by the court of appeals, which was granted. Id. ¶ 17.

The court of appeals held section 1-17(c) applies to medical malpractice actions brought by all minors and "provides a three-year limitations period for accrual of a medical malpractice claim for a minor over the age of ten." Id. ¶ 20. Accordingly, the patient's claim was untimely as he was over the age of ten when the claim accrued and did not initiate suit until nearly five years after the claim accrued. Id.

Writing for the majority, Judge Gore explained that subsections (b) and (c) of section 1-17 operate to reduce the statute of limitations on suits alleging medical malpractice. Id. ¶¶ 25–26 (citing King v. Albemarle Hosp. Auth., 370 N.C. 467, 470–71, 809 S.E.2d 847, 849 (2018)). Subsection (b) applies to malpractice actions (not limited to medical malpractice), requiring a claim that accrued when an injured party was a minor to be filed by the time that individual reaches nineteen years of age. Id. ¶ 25. This narrows subsection (a), which allows an injured individual to bring a claim within three years after attaining the age of majority. See id. Subsection (c), a later addition to the statute, further narrows the time specifically in medical malpractice actions. Id. ¶ 26.

Based on the foregoing, the court of appeals held the trial court erred in denying the providers' motions to dismiss. Id. ¶ 36.

Judge Hampson dissented. Judge Hampson opined the court of appeals should have exercised judicial restraint, denied the petition for certiorari review, and declined to "wade into a question of first impression involving novel statutory interpretation". Id. ¶ 37. Judge Hampson interprets subsections (b) and (c) of 1-17 and section 1-15(c) to provide that "a minor injured by alleged medical negligence [has] until the age of nineteen to bring suit, unless the action accrues before the minor turns seven, in which case, the minor has until age ten to bring suit." Id. ¶ 46. In this case, Judge Hampson would apply the statute of limitations set forth in section 1-17(b), permitting this patient to timely initiate suit before attaining the age of nineteen. Id.

D. Statute of Repose

In Gaston County Board of Education v. Shelco, LLC, ___ N.C. App. ___, 2022-NCCOA-550, the court of appeals considered whether a plaintiff's claims are barred by the statute of repose where the complaint does not conclusively allege facts necessary to that determination.

As relevant here, a county board of education filed an action against an engineer and subcontractor who were hired as part of building a public high school. Id. ¶ 4. The underlying project included the construction of several retaining walls around the school's athletic complex. Id. ¶ 6. This portion of the construction was completed in 2011. Id. A year later, the board became aware that portions of the wall were cracking. Id. In May 2013, the board, the contractor, and architect signed a certificate of completion for the project. Id. ¶ 7. The certificate was not signed by the subcontractor and engineer. Id. Subsequently, all parties signed a tolling agreement with a stated effective date of March 1, 2019, that tolled the statute of limitations until September 15, 2020. Id. ¶ 8. In November 2020, the board filed action against the engineer and the subcontractor for the defects in the retaining walls. Id. ¶ 9. Shortly thereafter, the engineer and subcontractor filed Rule 12(b)(6) motions to dismiss the board's complaint based on the state's six-year statute

of repose under section 1-50 of the North Carolina General Statutes. Id. The trial court granted the engineer's and subcontractor's Rule 12(b)(6) motions based on the statute of repose because they did not sign the 2013 certificate of completion, which means the tolling agreement did not place the board's claims within the repose period because the retaining wall was completed in 2011, more than six years before the effective date of the tolling agreement. Id. ¶ 10.

On appeal, the court of appeals reversed. Id. ¶ 33. Under section 1-50 of the North Carolina General Statutes:

> No action to recover damages based upon or arising out of the defective or unsafe condition of an improvement to real property shall be brought more than six years from the later of
> [1] the specific last act or omission of the defendant giving rise to the cause of action or
> [2] substantial completion of the improvement . . . or specified area or portion thereof (in accordance with the contract[.]

Id. ¶ 16.

While the board has the burden of proof to present evidence that the statute of repose does not defeat the plaintiff's claim, the burden does not arise at the pleading stage. Id. ¶ 18. Accordingly, a Rule 12(b)(6) motion to dismiss is only appropriate at the pleading stage if the complaint alleges facts that "conclusively show[s] that it was not filed within the applicable statute of repose." Id. Here, the board did not allege in its complaint either the date for the "specific last act" giving rise to the action or the date of "substantial completion" as provided under the repose statute. Id. Therefore, dismissal was inappropriate. Id.

Nevertheless, the engineer and subcontractor contended that the act necessary for substantial completion of the retaining walls occurred in 2011. Id. ¶ 28. They further argued that substantial completion does not have to relate to the entire project, but rather a specific area or portion thereof, i.e., the retaining walls. Id. The engineer and subcontractor argued that this is

appropriate based on section 1-50 of the North Carolina General Statutes, which states in part that substantial completion is the "degree of completion of a project, improvement or specified area or portion thereof [. . .] upon attainment of which the owner can use the same for the purpose in which it was intended." Id. ¶ 27. The court agreed that the plain interpretation of this statute provides that "the date of substantial completion occurs with respect to a particular contractor when the part of the improvement the contractor was hired to provide services for has reached a 'degree of completion' where 'the owner can use the same for the purpose for which was intended." Id. ¶ 29. The court clarified this statute by a contrasting example:

> [W]hen an owner contracts with a company to build the foundation of a house, the statute of repose begins when the foundation is completed such that the owner can contract with someone else to build the frame, etc. The entire house need not to be complete for the statute of repose to run against the contractor hired to build the foundation. Of course, if one contractor is hired to build the entire house, then the statute of repose to sue the contractor for laying a bad foundation would not start until the entire house was completed, as the contractor contracted to build the entire house.

Id.

Under these facts, the board alleged that the engineer was contracted to "provide geotechnical engineering service for the Project," as opposed to performing services for the retaining wall only. Id. ¶ 30. Additionally, as stated earlier, there are no allegations when the entire project was completed. Id. Lastly there is no allegation that the date of completion was determined by written agreement as the board did not allege that the engineer was a party to the certificate of completion. Id.

Likewise, the board did not state any allegations that the subcontractor was hired to work on the retaining wall alone. Id. ¶ 31. The subcontractor similarly was not a party to the certificate of substantial completion. Id. Furthermore, the board's contract with the architect, who contracted

for services with the subcontractor, provided that the architect was to "provide architectural [and other] services for the Project." Id.

Thus, for the foregoing reasons, the court reversed the trial court's granting of the engineer and subcontractor's 12(b)(6) motion to dismiss based on the statute of repose.

E. Res Judicata

In Doe 1K v. Roman Catholic Diocese of Charlotte, 283 N.C. App. 171, 2022-NCCOA-287, petition for disc. rev. filed (N.C. May 31, 2022), the court of appeals considered whether res judicata served to bar claims that were earlier dismissed because the trial court deemed them abandoned. Id. at ¶ 5.

In 2011, the plaintiff had sued the Diocese for alleged sexual abuse by one of its former priests that occurred in 1977–78 while the plaintiff was a teenager. Id. at ¶ 1. The trial court dismissed the plaintiff's claims (sounding in negligence, conspiracy, and intentional infliction of emotional distress) in their entirety. Id. The court of appeals affirmed that dismissal, and also concluded that the plaintiff had "abandoned" most of these claims since he dropped them from an amended complaint. Id.; see also Doe 1K v. Roman Cath. Diocese of Charlotte, NC, 242 N.C. App. 538, 542 & n.2, 775 S.E.2d 918, 921 (2015).

In 2019, the General Assembly passed the SAFE Child Act, which purported to revive previously time-barred claims for child sexual abuse. Id. at ¶ 2. In 2020, the plaintiff filed a similar set of claims against the Diocese, including the ones he previously "abandoned." Id. at ¶ 3. The Diocese moved once more to dismiss these claims. Id. In addition to opposing the motion, the plaintiff also moved to transfer the case to a Wake County three-judge panel pursuant to section 1-267.1 of the North Carolina General Statutes. The trial court dismissed the action and denied the motion to transfer. Id.

The court of appeals affirmed this second dismissal. Id. at ¶ 10. It held that the claims were barred by res judicata. Id. at ¶ 12. The dismissal of the 2011 Complaint was a final judgment, and that judgment was affirmed on appeal. Id. at ¶ 13. While the plaintiff did bring new legal claims in the 2020 lawsuit, these claims all arose out of the "same core factual allegations," and therefore the 2020 lawsuit merely served to assert new legal theories, rather than new claims entirely. Id. at ¶ 14. The parties were, of course, identical between the 2011 and 2020 complaints. Id. at ¶ 15. Therefore, the claims were barred. Id.

The court added in dicta that had res judicata not applied, these claims would have fallen within the Revival Provision of the SAFE Child Act. Id. at ¶ 16. However, because the claims were barred, the court did not reach the issue of whether denying transfer to the three-judge panel was erroneous. Id. at ¶ 17.

The court issued a nearly identical decision in Doe v. Roman Catholic Diocese of Charlotte, ___ N.C. App. ___, 2022-NCCOA-288, petition for disc. rev. filed (N.C. May 31, 2022).

F. Rule 9(j)

In Gray v. Eastern Carolina Medical Services, PLLC, ___ N.C. App. ___, 2022-NCCOA-520, petition for disc. rev. filed (N.C. Sept. 6, 2022), the court of appeals considered whether plaintiff could have reasonably expected her Rule 9(j) expert to qualify to testify under Rule 702 of the Rules of Evidence.

The administratrix of an estate[1] filed suit seeking damages for allegedly negligent medical treatment provided at Pitt County Detention Center. Id. ¶ 2. Prior to his incarceration, a detainee was diagnosed with pneumonia and prescribed antibiotics. Id. During the three weeks he was

[1] The decedent died from an apparent drug overdose two years after the allegedly negligent care at issue. Id. ¶ 4.

incarcerated at Pitt County Detention Center, the detainee submitted many requests for sick call and was prescribed an inhaler, over-the-counter pain medications, and antibiotics. Id. After his transfer to another facility, the detainee was transported to the hospital, where he was diagnosed with acute left-sided empyema and sepsis. Id. ¶ 3. He was then transferred to a higher acuity hospital, where he was diagnosed with septic shock due to staphylococcus, necrotizing pneumonia, acute respiratory failure, and acute kidney failure. Id. ¶ 4. He was intubated and had his left lung surgically removed. Id. The detainee was discharged from the hospital after a five-day admission and released from the North Carolina Department of Corrections one year later. Id.

The administratrix filed suit against two physicians who supervised care provided at Pitt County Detention Center as well as the nurses who treated the detainee. Id. ¶¶ 5–6. One of the physicians is board certified in psychiatry and addiction medicine, was previously board certified in internal medicine, and practices as a general practitioner in supervising care at Pitt County Detention Center. Id. ¶ 5. The other is board certified in internal medicine. Id.

The providers filed motions to dismiss pursuant to Rule 9(j). Id. ¶ 7. The administratrix voluntarily dismissed her case and refiled a complaint including a Rule 9(j) certification. Id. ¶¶ 7–8. She identified her Rule 9(j) expert as a physician who is board certified in internal medicine, pulmonary disease, and critical care medicine. Id. ¶ 10. During the year preceding the care at issue, the Rule 9(j) expert served as a pulmonary and critical care physician at a tertiary care hospital, and the director of pulmonary specialists and rehabilitation program. Id. He supervised medical staff, including nurses, in his practice. Id. After the Rule 9(j) expert's deposition (which was limited to evaluating his qualifications), the providers argued their motions to dismiss. Id. ¶¶ 11–12.

The trial court dismissed the action for failure to comply with Rule 9(j). Id. ¶ 13. The court of appeals conducted an analysis of whether the administratrix could have reasonably expected the Rule 9(j) expert to qualify under Rule 702(b). Id. ¶¶ 17–40.

No dispute existed that the Rule 9(j) expert did not specialize in the same specialties as the physicians, so he could not have been expected to qualify under Rule 702(b)(1)a. Id. ¶ 18. But the court of appeals concluded the administratrix could have reasonably expected the Rule 9(j) expert to qualify under Rule 702(b)(1)b. Id. ¶ 20. The court emphasized that the Rule 9(j) expert need not actually qualify to satisfy the gatekeeping requirement. Id. Further, the trial court is required to "examine the facts and circumstances known or those which should have been known to the pleader at the time of filing, and to the extent there are reasonable disputes or ambiguities in the forecasted evidence, the trial court should draw all reasonable inferences in favor of the nonmoving party". Id. (quoting Preston v. Movahed, 374 N.C. 177, 189, 840 S.E.2d 174, 183–84 (2020)).

The court of appeals concluded that the trial court impermissibly drew inferences against the administratrix in finding that she knew or should have known her Rule 9(j) expert was not practicing in a similar specialty as the physicians against whom she filed suit. Id. ¶¶ 21, 24. The evidence showed that the Rule 9(j) expert was asked to provide opinions on the standard of care for the treatment of a patient with pneumonia. Id. ¶ 23. The court of appeals specifically found that the trial court misapplied the requirements of Rule 9(j) in concluding that the 9(j) expert "did not practice in a similar specialty as any of the defendants which included within it the primary care of patients during the applicable period." Id. ¶¶ 24–25, 28.

The court of appeals found that the physicians were holding themselves out as internal medicine physicians in a primary care practice; that the evidence supported an inference that

pulmonary disease medicine and critical care medicine are sub-specialties of internal medicine; and it was reasonable for the administratrix to expect her Rule 9(j) expert to be considered in a similar specialty. Id. ¶¶ 26–27. Regarding supervision of the nurses, the court of appeals concluded the Rule 9(j) expert's supervision of nurses in the hospital setting was not so dissimilar from a general practice setting to render it unreasonable to expect him to qualify as an expert. Id. ¶¶ 38–39. The court of appeals further observed that there was no evidence to suggest that a pulmonologist would treat pneumonia differently than an internist. Id. ¶ 37.

The court of appeals remanded the case for further proceedings. Id. ¶ 42.

In Miller v. Carolina Coast Emergency Physicians, LLC, 382 N.C. 91, 2022-NCSC-97, the supreme court considered whether a trial court must dismiss a complaint that facially complies with Rule 9(j) when it is subsequently determined that the plaintiff's Rule 9(j) expert witness is unwilling to testify that the defendant violated the applicable standard of care in one of various ways alleged in the complaint.

The wife of a patient who was pronounced dead in the emergency department of a hospital filed suit against the hospital and emergency room physician seeking damages for medical negligence. Id. ¶¶ 3–4. In her complaint, the wife advanced two theories of liability against the hospital: (1) direct liability for the alleged negligence of the nurses and (2) vicarious liability for the alleged negligence of the physician as an apparent agent. Id. ¶ 5.

The wife retained a Rule 9(j) expert who opined that the emergency room physician violated the applicable standard of care. Id. ¶ 6. He also testified the remaining care appeared to comply with the applicable standard of care, to the extent he reviewed it. Id. Finally, the Rule 9(j) expert testified that he did not consider himself a nursing expert and never expressed opinions to the wife's counsel beyond those expressed regarding the emergency room physician. Id. Based

on his testimony, the hospital filed a motion to dismiss for failure to substantively comply with Rule 9(j). Id. ¶ 7.

In opposition, the wife's counsel filed an affidavit stating that the Rule 9(j) expert communicated his ability and willingness to testify that the hospital did not comply with the appropriate standard of care prior to the filing of the lawsuit. Id. ¶ 8. The trial court denied the hospital's motion finding the wife reasonably expected the Rule 9(j) expert to testify against the hospital. Id.

The trial court later excluded both experts proffered by plaintiff and entered summary judgment for the hospital and emergency room physician. Id. ¶¶ 9–10. The court of appeals unanimously affirmed the trial court's order denying the hospital's motion to dismiss for failure to comply with Rule 9(j). Id. ¶ 11. The court of appeals concluded that there was no evidence in the record to support that the Rule 9(j) expert informed the wife's counsel that he was unwilling to testify that the hospital was negligent. Id. ¶ 12.

Writing for the majority after discretionary review, Justice Earls reviewed the two requirements set forth in Rule 9(j)(1): the proffered expert must be (1) reasonably expected to qualify to testify under Rule 702 of the Rules of Evidence and (2) willing to testify that the medical care did not comply with the standard of care. Id. ¶ 15. Justice Earls explained that trial courts must analyze both requirements "in the exact same way": "[i]n evaluating the second requirement, just as with the first Rule 9(j) requirement, what matters is what was known or what reasonably should have been known at the time of the filing." Id. ¶ 18 (relying upon Preston v. Movahed, 374 N.C. 177, 183–86, 840 S.E.2d 174 (2020)). The majority concluded that, given the evidence taken in the light most favorable to the wife, the Rule 9(j) expert was willing to testify against the hospital

at the time of the filing of the complaint and the wife had no reason to doubt his competence, thoroughness, or honesty. Id. ¶¶ 18, 22.

Accordingly, the supreme court affirmed the trial court's denial of the hospital's Rule 9(j) motion to dismiss. Id. ¶ 32.

Writing on behalf of the dissent, Justice Barringer suggested that the case should be remanded for a proper application of Rule 9(j) because the trial court failed to find whether the Rule 9(j) expert was willing to testify. Id. ¶ 34. Justice Barringer explained that "Rule 9(j)'s requirement that an expert be willing to testify is not dependent on plaintiff's reasonable belief that the expert is willing to testify." Id. ¶ 37. Looking at the plain language of the statute, the reasonable expectation language modifies only the proffered expert's qualifications. Id. ¶ 38. "[I]f the legislature wished the term "reasonable expectation" to apply to both requirements, it would have positioned it to modify both clauses". Id. ¶ 39. Accordingly, "Rule 9(j)'s requirement that an expert be willing to testify does not depend on the plaintiff's reasonable expectation but rather simply requires that plaintiff's proffered witness actually be willing to testify." Id. ¶ 40.

Justice Barringer also observed that "[a]s the pleader's representative, it is the responsibility of plaintiff's attorney to confirm that the selected expert focused on every cause of action in the complaint and is willing to testify regarding each of the claims." Id. ¶ 44. The Rule 9(j) expert testified regarding his lack of willingness to testify that the hospital—through its nurses—breached the applicable standard of care. Id. ¶ 46. The dissent explained that the wife's counsel should have known that the Rule 9(j) expert was not willing to testify against the hospital. Id. ¶ 47. Given the lack of specific findings contained in the trial court's order, the dissent would have remanded the Rule 9(j) issue for further proceedings and proper application. Id. ¶ 53.

G. Standing

In The Society for the Historical Preservation of the Twentysixth North Carolina Troops, Inc. v. City of Asheville, 282 N.C. App. 700, 2022-NCCOA-218, petition for disc. rev. filed (N.C. Apr. 21, 2022), the court of appeals considered whether a historical interest group had standing to sue a city and county over removal of a monument.

A historical interest group filed suit against the city of Asheville and Buncombe County over a plan to remove and deconstruct the Vance Monument in Asheville. Id. at ¶ 2. The group alleged that it undertook a project to restore and preserve the monument in 2015 pursuant to a contract with the city. Id. The group claimed it raised nearly $140,000 to pay for the restoration of the monument. Id. The group sought a temporary restraining order, injunction, and declaratory judgment to prevent removal of the monument. Id. at ¶ 4.

The group included a "Donation Agreement" with the city as an exhibit to its complaint. Id. at ¶ 5. The agreement specified that the city agreed to accept the restoration work subject to certain terms and conditions, estimated the value of the work at $115,000, and reserved the right of the city to reject any work or materials that failed to meet site specifications. Id.

In January 2021, the group filed a petition to preserve the monument with the North Carolina Historical Commission. Id. at ¶ 6. The group filed suit in March 2021, and the city immediately filed a motion to dismiss. Id.

The trial court granted the motion to dismiss. Id. at ¶ 9. The trial court reasoned that any agreement between the parties had been fulfilled, and that further the group's claims were not sufficiently "apposite to those" of United Daughters of the Confederacy v. City of Winston-Salem, 275 N.C. App. 402, 853 S.E.2d 216 (2020), which was then pending review by the supreme court. Soc'y for Hist. Pres., 2022-NCCOA-218, at ¶¶ 7–9. The group appealed. Id. at ¶ 11.

The court of appeals considered whether the trial court erred in dismissing the group's complaint for lack of standing and failure to state a claim, and further whether United Daughters was appropriately applied. Id. at ¶ 11.

The court of appeals first considered the issue of standing as it relates to the group's declaratory judgment request. Id. at ¶ 13. The court observed that historically a plaintiff was required to demonstrate three elements to establish standing [1] "injury in fact, a concrete and actual invasion of a legally protected interest; [2] the traceability of the injury to a defendant's actions; and [3] the probability that the injury can be redressed by a favorable decision." Id. at ¶ 13 (citing Neuse River Found., Inc. v. Smithfield Foods, Inc., 155 N.C. App. 110, 114, 574 S.E.2d 48, 51-52 (2002)) (cardinals added).

However, the supreme court held the North Carolina Constitution "does not include an injury-in-fact requirement for standing where a purely statutory or common law right is at issue." Id. at ¶ 14. "When a person alleges the infringement of a legal right arising under a cause of action at common law, a statute, or the North Carolina Constitution, . . . the legal injury itself gives rise to standing." Comm. to Elect Dan Forest v. Emps. Pol. Action Comm., 2021-NCSC-6, ¶ 82, 376 N.C. 558. The word "injury means, 'at a minimum, the infringement of a legal right; not necessarily injury in fact or factual harm.'" Soc'y for Hist. Pres., 2022-NCCOA-218 ¶ at 14 (quoting Comm. To Elect Dan Forest, 2021-NCSC-6 ¶ 81).

"Accordingly, to establish standing, a plaintiff must demonstrate the following: [1] a legal injury; [2] the traceability of the injury to a defendant's actions; and [3] the probability that the injury can be redressed by a favorable decision." Id. at ¶ 15 (cardinals added). In pursuing a declaratory judgment regarding rights to the monument, the group must demonstrate it possessed

some legally protected interest the city and county invaded. Id. at ¶ 16 (citing United Daughters, 275 N.C. App. at 407, 853 S.E.2d at 220).

The group put forth a number of arguments for its legally protected interests, including that it had standing under a breach of contract theory, that it possessed representational standing for its members as individual taxpayers, and that it had succeeded the interests of those who designed, funded, and erected the monument. Id. at ¶ 17.

The court of appeals considered whether the donation agreement established standing for the group. Id. at ¶ 18. The court held that it did not, as the agreement was limited to restoration "and does not contemplate ongoing preservation efforts." Id. at ¶ 19. The agreement established the relationship between the parties for the restoration of the monument but did not bind the city or county to any preservation action after the monument the restoration was complete. Id. at ¶¶ 20–22. Accordingly, the group could not establish standing under a breach of contract theory. Id. at ¶ 22.

The court then turned to the group's claims for a temporary restraining order and preliminary injunction. Id. at ¶ 24. The court found it "somewhat unclear what legal injury [the group] asserts, and noted its brief included "non-sequitur discussion of chattels" and the assertion that the group has "an abiding and cognizable legal interest in the Vance Monument because it is a legacy organization." Id. at ¶ 26.

"None of these arguments establish a legal injury suffered by [the group] sufficient to establish standing." Id. at ¶ 27. The court of appeals held the fact that the group had filed a petition with the Historical Commission did not establish standing, as that matter was for the commission to decide. Id. Further, the assertion of a legal interest as a "legal organization" was specifically rejected in United Daughters. Id. at ¶ 28. "Similarly in this case, [the group] has not alleged any

ownership rights to the statue, and accordingly has failed to demonstrate any legal interest in the statue." Id.

The court of appeals further held that the trial court had not erred in dismissing the group's claims because the agreement between the parties did not bind the city or county to "maintain[] the Vance Monument in place for all eternity." Id. at ¶ 30–31.

H. Immunity

(1) Governmental

In Bartley v. City of High Point, 381 N.C. 287, 2022-NCSC-63, the supreme court considered whether a law enforcement official may successfully assert a public official immunity defense against civil liability when an opposing party shows evidence of malicious behavior.

A civilian filed a civil suit against the City of High Point and one of its officers in his individual and official capacities for malicious prosecution, false imprisonment/arrest, and assault and battery. Id. ¶ 8. The suit arose after the officer arrested the civilian following a confrontation from an illegal traffic maneuver. Id. ¶ 2, ¶¶ 6–7. On the day in question, the civilian was traveling home behind a pickup truck traveling at a low rate of speed. Id. ¶ 2. The civilian impatiently passed the truck by crossing the double yellow line they were traveling along. Id. At that point, the officer, who was driving behind the civilian in an unmarked vehicle activated his lights, air horn, and sirens to catch up to the civilian car. Id. Despite signaling the civilian to pull over, the civilian continued driving to his house. Id. Upon parking in his driveway and getting out of his car, the civilian first noticed the officer. Id. ¶ 3. The officer, who was plain clothed, ordered the civilian back into his car. Id. The civilian informed the officer, who had not identified himself as an officer, that he was on private property and refused his command. Id. According to the civilian's testimony, the officer subsequently "body slammed" him onto his trunk, handcuffed him, and informed him he was being

detained. Id. ¶ 4. Additionally, the civilian testified that he remained in handcuffs for "20-25 minutes even after he was patted down [. . .] and even though a backup officer had been called to the scene." Id. ¶ 6. The civilian further testified he informed the officer that the handcuffs were too tight and hurt his wrists, to which the officer replied that "had he done as he was initially told, he would not have been in this situation." Id. The civilian documented bruising and marks from the handcuffs in photographs. Id. As a result of the incident, the civilian was charged with resisting, delaying, and obstructing a public officer. Id. ¶ 7. These charges were eventually dismissed, and the civilian filed this civil action. Id. ¶¶ 7, 8.

At trial, the City of High Point and the officer asserted governmental and public official immunity defenses. Id. ¶ 8. The trial court granted summary judgment on the claims against the City of High Point and the officer in his official capacity on the grounds of sovereign immunity. Id. ¶ 9. However, the trial court denied the officer's motion for summary judgment as to the claims against him in his individual capacity. Id. Subsequently, the officer appealed the partial summary judgment motion to the court of appeals. Id. ¶¶ 9, 10. A divided panel of the court of appeals affirmed the trial court's order, holding that the officer was not entitled to summary judgment on the ground of public immunity. Id. ¶ 10.

On appeal, in an opinion by Justice Earls writing for the majority, the supreme court affirmed the judgment finding a material issue of fact as to whether public immunity was a sufficient defense under the circumstances. Id. ¶ 34. Public official immunity serves to "shield public officials from tort liability when those officials truly perform discretionary acts that do not exceed the scope of their official duties." Id. ¶ 19 (citing Hipp v. Ferrall, 273 N.C. 167 (1917); Templeton v. Beard, 159 N.C. 63 (1912)). However, an official "will not enjoy the immunity's protections if his actions 'was (1) outside the scope of official authority, (2) done with malice, or

(3) corrupt.'" Id. ¶ 20 (citing Wilcox v. City of Asheville, 222 N.C. App. 285, 230 (2012)). It is presumed under North Carolina law "that public officials will discharge their duties in good faith and exercise their powers in accord with the spirit and purposes of the law." Id. ¶ 21. Thus, it is a rebuttable presumption when a "party produces competent and substantial evidence that an officer failed to discharge his duties in good faith." Id. (citing Leete v. Cnty. of Warren, 341 N.C. 116 (1995)). Under this framework, the court concluded that the civilian presented competent and substantial evidence that the officer acted with malice to show a material issue of fact as to the applicability of the public official immunity doctrine. Id. ¶ 25.

A "malicious act is one which is '(1) done wantonly, (2) contrary to the actor's duty, and (3) intended to be injurious to another.'" Id. ¶ 23 (citing Wilcox, 222 N.C. App. at 289). While case law has been clear that a police officer has the right to use force to discharge his duties and overcome any resistance when making an arrest, he "may not act maliciously in the wanton abuse of his authority or use unnecessary and excessive force." Id. ¶ 26. This proposition has also been codified under section 15A-401(d) of the North Carolina General Statutes. Id. Here, the civilian claimed that the officer was acting maliciously when the officer body slammed him against the trunk and tightly handcuffed the civilian without justification. Id. ¶ 27. In his deposition, the officer acknowledged that the civilian did not resist arrest, threaten him, or try to evade the arrest. Id. Furthermore, the civilian was unarmed during the incident. Id. In considering these facts the court found that evidence of malice could be discerned from the use of a body slam maneuver on a non-resistant individual who posed no threat to the safety of the officer or others. Id.

Further, the court found that the officer's refusal to loosen the handcuffs upon being informed of its harm as well as the red marks and bruises on the civilian's wrists is also evidence of malice. Id. ¶ 28. This is especially true as there is evidence of retaliation from the officer stating

that "had he done as he was initially told, he would not be in the situation that he was in," and by keeping the civilian handcuffed for twenty minutes in front of his neighbors. Id. In coming to this conclusion, the court found the Third and Sixth Circuit to be "instructive on whether tight handcuffing resulting in physical injury indeed constitutes excessive force and therefore some evidence of malice." Id. ¶ 29. These circuits have concluded that "excessively tight or forceful handcuffing, particularly handcuffing that results in physical injury, constitutes excessive force." Id. (citing Kopec v. Tate, 361 F.3d 772, 777 (3d Cir. 2004); Martin v. Hiedeman, 106 F.3d 1308, 1313 (6th Cir. 1997)). Furthermore, the court assessed the Sixth Circuit's test for evaluating whether a handcuffing claim may survive summary judgment. Id. ¶ 30. This test provides "a plaintiff must offer sufficient evidence to create a genuine issue of material fact that: (1) the plaintiff complained the handcuffs were too tight, (2) the officer ignored those complaints, and (3) the plaintiff experienced 'some physical injury' resulting from the handcuffing." Id. (citing Morrison v. Bd. of Trs., 583 F.3d 394, 401-02 (6th Cir. 2009)). Here, the civilian's evidence shows that he complained about the tightness of the handcuffs and the officer failed to take heed to his complaint. Id. ¶ 31. While the officer's testimony disputes the civilian's versions of events on the contrary, "it is not the version of events that is determinative on summary judgment, where the question before [the court] is whether the evidence in the light most favorable to the non-moving party is sufficient to establish malice that defeats a claim of public official immunity." Id. Thus, the court concluded that the civilian presented sufficient evidence of the officer's malice to create a genuine issue of material fact that public official immunity applies to defeat the civilian's action against the officer. Id. ¶ 32.

For the foregoing reasons, the supreme court affirmed the trial court's order denying summary judgment to the officer on public official immunity grounds.

Justice Berger, writing for the dissent, would have found that the officer met his burden to sustain a summary judgment determination. Id. ¶ 44. In the dissent, Justice Berger reemphasized that the law affords a presumption to public officials that "they will discharge their duties in good faith and exercise their powers in accord with the spirit and purpose of the law." Id. ¶ 43. (Leete, 341 N.C. 116, 119 (1995)). Since, the officer was performing his duties as a law enforcement officer at the time of the disputed conduct, he is entitled to this presumption. Id. ¶ 44. Furthermore, to overcome this heavy burden a challenging party must present competent and substantial evidence. Id.

First, Justice Berger asserted that the civilian failed to produce such evidence showing the officer's malice. Id. ¶ 46. The dissenting opinion acknowledges that the officer attempted to stop the civilian for a traffic violation, but the civilian refused to comply and resisted arrest. Id. ¶ 45. Accordingly, the officer acted with probable cause prior to arresting the civilian. Id. Next, the dissent argued that the majority erroneously puts emphasis on the fact that the civilian testified that the officer "body slammed" him. Id. ¶ 46. Rather, the evidence indicated that the officer only bent the civilian over the waist on his car after the officer perceived him to be resisting arrest. Id. Further, the civilian testified that he suffered no harm from this maneuver. Id. This would leave the only possible perceived harm to be the tightness of the handcuffs, which Justice Berger again emphasized was done with probable cause and within the officer's duties. Id. Therefore, the dissent would have concluded that the evidence did not establish the officer acted with malice. Id.

Second, Justice Berger asserted that the civilian failed to supply competent and substantial evidence that the officer acted with the "intent to injure." Id. ¶ 51. To establish this requisite intent, "the plaintiff must show at least that the officer's actions were so reckless or so manifestly indifferent to the consequences as to justify a finding of willfulness and wantonness equivalent in

spirit to actual intent." Id. ¶ 47 (citing Brown v. Town of Chapel Hill, 233 N.C. App. 257, 265 (2014)). The dissent found erroneous the majority's decision finding this element to be established through the testimony indicating that the officer refused to loosen the handcuffs and the civilian suffered bruises. Id. Rather than evaluating federal cases from the Third and Sixth Circuit recognizing that tight handcuffing resulting in injury constitutes excessive force, the dissent would have first evaluated Fourth Circuit cases, which support an opposite conclusion. Id. ¶ 48. Furthermore, the injury suffered by the civilian was minimal, id. ¶ 49, especially considering the civilian received no medical care and did not have any "sensitivity, strange feeling, nerve damage, tingling, and lack of use of his wrists." Id. As a matter of fact, the civilian "could not even remember if the alleged redness on his wrists lasted until the next day." Id. Lastly, the dissent disputed that the instruction the officer gave stating "if [the civilian] had done as he was instructed, he would not be in 'this situation,'" as determinative of evidence of actual intent. Id. ¶ 50-51. Rather this assertion was a de-escalation attempt and an accurate statement in that "had [the civilian] simply complied with the officer's instructions he would not have been handcuffed and arrested." Id. ¶ 51. Thus, the dissent would have concluded that the civilian failed to produce sufficient evidence to meet his "heavy burden' to forecast specific facts constituting malice, and [the officer] is entitled to judgment as a matter of law." Id.

(2) Sovereign

In Cedarbrook Residential Center, Inc. v. N.C. Department of Health & Human Services, 281 N.C. App. 9, 2021-NCCOA-689, appeal docketed, No. 36A22 (N.C. Jan. 25, 2022), the court

of appeals considered whether sovereign immunity precluded negligence claims by a senior living facility against a state agency. Judge Arrowood authored the majority's opinion.

The North Carolina Department of Health and Human Services ("DHHS") conducted surveys of a senior living facility in 2015 and 2016. Id. at ¶ 2. Documented deficiencies from these surveys included supervision issues, reports of "prostitution and sexual acts in exchange for sodas," and cockroach infestations. Id. at ¶ 42 (Tyson, J., dissenting). Based on those surveys, DHHS issued statements of deficiencies, suspended admissions to the senior living facility, and eventually formulated a "directed plan of protection" against the facility. Id. at ¶ 2. In 2018, the senior living facility filed an affidavit and claim for damages with the Industrial Commission, alleging negligence by DHHS in formulating remedial actions. Id.

DHHS filed a motion to dismiss with the Industrial Commission under Rules 12(b)(1), 12(b)(2), and 12(b)(6), as well as a motion to stay discovery. Id. at ¶ 3. A deputy commissioner denied DHHS's motions. Id. DHHS then appealed to the full commission, which affirmed the denial of DHHS's motions. Id. DHHS filed notice of appeal to the court of appeals. Id.

The court of appeals considered, among other things, whether the Industrial Commission erred in denying DHHS's motion to dismiss because sovereign immunity barred the senior living facility's claims. Id. at ¶ 4.

DHHS first argued that the North Carolina Tort Claims Act did not apply, garnering protection for the agency under the doctrine of sovereign immunity. Id. at ¶ 10. The court of appeals recognized that the state and agencies have "absolute and unqualified" immunity from suit, barring waiver of consent. Id. (citing Guthrie v. N.C. State Ports Auth., 307 N.C. 522, 534, 299 S.E.2d 618, 625 (1983)). However, the Tort Claims Act provides limited waiver of sovereign immunity for suit "under circumstances where the State of North Carolina, if a private person,

would be liable to the claimant." Id. (quoting N.C. Gen. Stat. § 143-291). DHHS argued that the Tort Claims Act did not apply because a private person cannot be held liable for regulatory actions, and therefore a state agency could not be held liable for the same. Id. at ¶ 12.

The court of appeals held that DHHS's interpretation misconstrued the meaning of "private person" under the Tort Claims Act. Id. Rather than limiting the scope of what types of claims may be brought, the court held that the Tort Claims Act "will be construed so as to effectuate its purpose of waiving sovereign immunity so that a person injured by the negligence of a State employee may sue the State as he would any other person." Id. (quoting Zimmer v. N.C. Dep't of Transp., 87 N.C. App. 132, 136, 360 S.E.2d 115, 117–18 (1987)) (emphasis added). Therefore, inclusion of the phrase "private person" in the Tort Claims Act "pertains to the nature of the proceedings but does not operate to bar waiver to sovereign immunity." Id.

DHHS further contended that the Tort Claims Act was inapplicable because the North Carolina Administrative Procedure Act provides mechanisms for challenging penalties in the regulation of adult care facilities. Id. at ¶ 13. The court of appeals held that the availability of an administrative remedy did not preclude seeking remedy under the Tort Claims Act. Id. at ¶ 14. The court of appeals recognized its own recent opinion providing that an entity regulated by DHHS had an "adequate state remedy" under the Tort Claims Act. Id. (citing Nanny's Korner Day Care Ctr., Inc. v. N.C. Dep't of Health & Hum. Servs., 264 N.C. App. 71, 80, 825 S.E.2d 34, 41, appeal dismissed, review denied sub nom., Nanny's Korner Day Care Ctr., Inc. v. N.C. Dep't of Health & Hum. Servs., Div. of Child Dev. & Early Educ., 372 N.C. 700, 831 S.E.2d 89 (2019)). Recognizing itself bound by precedent, the court of appeals reasoned that the Tort Claims Act was applicable to the senior living facility's claims against DHHS and affirmed the Industrial Commission's denial of DHHS's motion to dismiss. Id. at ¶ 33.

Judge Tyson dissented, arguing that the senior living facility's claims did not fit within the limited exceptions within the Tort Claims Act. Id. at ¶ 39 (Tyson, J., dissenting).

On the issue of sovereign immunity, the dissent argued inclusion of the phrase "private person" in section 143-291 was a limiting factor in whether the facility could bring a claim. Id. at ¶ 54. According to the dissent, DHHS's actions in inspecting and disciplining the senior living facility arose from its duties under statute. Id. As no "reasonable private person" owed a duty to inspect or discipline a senior living facility, the scope of DHHS's acts were inherently governmental and regulatory in nature, and therefore protected by the doctrine of sovereign immunity. Id. at ¶ 57.

In Farmer v. Troy University, ___ N.C. ___, 2022-NCSC-107, the supreme court considered whether state tort claims against an out-of-state public university are barred in North Carolina under the doctrine of sovereign immunity. Id. ¶ 1.

An out-of-state public university opened an office in Fayetteville, North Carolina for the purpose of recruiting military students for its online programs. Id. ¶ 1. An employee who worked in the Fayetteville office sued the university, alleging sexual harassment, wrongful termination, intention infliction of emotional distress, tortious interference with contractual rights, negligent retention and/or supervision, and state constitutional claim. Id. ¶¶ 3–6. The university filed a motion to dismiss pursuant to Rules 12(b)(2) and 12(b)(6), asserting sovereign immunity barred the former employee's suit based on the United States Supreme Court's decision in Franchise Tax Board of California v. Hyatt, 139 S. Ct. 1485 (2019) ("Hyatt III"). Id. ¶¶ 7–8.

The trial court granted the university's motion to dismiss. Id. ¶ 8. The court of appeals affirmed. Id. The supreme court granted discretionary review. Id. Reviewing the issues de novo, the majority held that the university's "actions in registering as a non-profit corporation in North

Carolina and engaging in business here subject to the sue and be sued clause of the North Carolina Nonprofit Corporation Act, N.C.G.S. §55A-3-02(a)(1), constituted an explicit waiver of its sovereign immunity." Id. ¶ 1.

The supreme court acknowledged that the public university is deemed to be an arm of the state and protected by sovereign immunity by the state's constitution. Id. ¶ 12. It went on to explain that the United States Constitution requires states to afford each other sovereign immunity from private suits brought in other states unless the privilege is explicitly waived. Id. ¶ 13 (citing Hyatt III, 139 S. Ct. at 1490, 1499.

The supreme court recognized that a state can waive its right to sovereign immunity and may be sued in a sister state when it has availed itself of a "sue and be sued" clause. Id. ¶¶ 14–16 (citing Thacker v. Tennessee Valley Auth., 139 S. Ct. 1435 (2019)). Noting that the "sue and be sued" clause is not without its limits, the supreme court clarified: "In cases involving governmental activities in which a sue and be sued clause is present, immunity will only apply 'if it is clearly shown that prohibiting the type of suit at issue is necessary to avoid grave interference with a governmental function's performance.'" Id. ¶ 16 (quoting Thacker, 139 S. Ct. at 1443). In this case, the university registered under the North Carolina Nonprofit Corporation Act, which includes a "sue and be sued clause." Id. ¶ 15. Further, it engaged in business or commercial—rather than governmental—activities, including marketing services and recruiting students. Id. ¶ 17.

In sum, when the out-of-state public university entered and conducted business in North Carolina subject to the North Carolina Nonprofit Corporation Act, which includes a sue and be sued clause, it explicitly waived its sovereign immunity. Id. ¶¶ 18, 22. Accordingly, the supreme court remanded the case for further proceedings. Id. ¶ 25.

Justice Berger wrote a concurring opinion. Id. ¶¶ 26–39. He explained that he would have reached the same result but would have decided immunity was waived with greater emphasis on the proprietary actions taken by the university that were commercial—as opposed to governmental—in function. Id. ¶¶ 26, 30. He explained, "[h]aving affirmatively acted to obtain the benefit of conducting business in North Carolina, and operating pursuant to the North Carolina Nonprofit Corporation Act, [the university] has consented to suit in this state for its commercial activities." Id. ¶ 39.

Justice Barringer authored a dissenting opinion, which Justice Newby joined. Id. ¶¶ 40–61. The dissent opines that Hyatt III should control the outcome and the university should be afforded sovereign immunity. Id. ¶ 46. The dissent found no clear indication that the sister state consented to be sued in North Carolina courts. Id. ¶ 55. Further, North Carolina courts have refused to infer a waiver of immunity in circumstances involving a "sue and be sued" clause, opting instead to strictly construe statutes conferring immunity. Id. ¶ 56. Accordingly, the dissent concluded denying sovereign immunity violates the United States Constitution and North Carolina's own standard for waiver of sovereign immunity. Id. ¶ 61.

In Lannan v. Board of Governors of the University of North Carolina, ___ N.C. App. ___, 2022-NCCOA-653, petition for disc. rev. filed (N.C. Nov. 8, 2022, the court of appeals court considered whether a valid implied-in-fact contract—as opposed to an express contract—can waive sovereign immunity. Id. ¶ 31.

Students who paid fees for student services filed a breach of contract claim against two universities who suspended campus activities during the COVID-19 pandemic. Id. ¶ 5. The students paid fees to register, remain in good standing, receive credit, and obtain transcripts for the fall 2020 semester. Id. ¶ 2. The fees were earmarked for specific services, including, among

others, health services, library services, campus activities, use of campus facilities, and transportation. Id. ¶ 3. Some students also purchased optional parking permits. Id. ¶ 4. In August 2020, the universities shut down campuses, evicted students from on-campus housing, instructed students to seek health services elsewhere, closed libraries, discontinued student activities, closed facilities, and restricted transportation. Id. ¶ 5.

The students filed suit, alleging that the universities entered a contract implied-in-fact with the students by offering the services, which the students accepted by paying the fees. Id. ¶ 7. The students claimed they did not receive the services, benefits, or opportunities for which they paid nor did they receive a refund following the shutdowns. Id. ¶ 8. The universities moved to dismiss the students' claims, arguing that they are entitled to sovereign immunity from the suit. Id. ¶ 13. The trial court denied the motion to dismiss, and the universities appealed. Id. ¶ 14.

Reviewing the trial court's order de novo, the court of appeals concluded that the universities waived sovereign immunity by entering an implied contract with the students. Id. ¶ 51. The court explained that the state waives sovereign immunity by entering a valid contract. Id. ¶ 34. Thus, it analyzed whether the state waives its sovereign immunity by entering an implied-in-fact contract, which is "an actual contract inferred from the circumstances, conduct, acts or relations of the parties, showing a tacit understanding." Id. ¶ 41. The court concluded that the universities agreed to accept and enroll the students, and the students agreed to pay and did pay certain fees, supporting the existence of an implied-in-fact contract. Id. ¶ 46. Further, the court noted that the general assembly must have envisioned that the universities could be sued for this type of claim because it explicitly passed a statute granting immunity to claims related to tuition or fees paid for the Spring 2020 semester, which would not have been necessary if it believed sovereign immunity already protected the state from these claims. Id. ¶ 50.

Accordingly, the court of appeals concluded that a contract implied-in-fact can waive sovereign immunity and that the students adequately pleaded a breach of implied contract claim. Id. ¶¶ 51, 63. The court affirmed the trial court's denial of the universities' motion to dismiss. Id. ¶ 71.

I. Discovery

(1) Depositions

In Hall v. Wilmington Health, PLLC, 282 N.C. App. 463, 2022-NCCOA-204, the court of appeals considered whether a trial court's order prohibiting a medical center's counsel from being physically present with the center's own witnesses during remote depositions violated the center's constitutional right to due process.

A patient sued the medical center for medical malpractice. Id. at ¶ 4. In June 2020, the patient filed a motion under Rules 30(b)(7) and 26(c) of the North Carolina Rules of Civil Procedure, requesting that depositions be conducted remotely based on concerns that she and her counsel had related to the ongoing COVID-19 pandemic. Id. at ¶ 7. The trial court granted the patient's motion, ruling that all future depositions would be taken remotely and that no counsel could be physically present with deponents during remote depositions. Id. at ¶¶ 11–12. The trial court entered this order, despite neither side raising in their filings or at the hearing on the motion the issue of whether counsel should be allowed to be physically present with deponents. Id. at ¶ 12. The medical center appealed the trial court's order to the court of appeals.

The court of appeals reversed the trial court's order with Judge Stroud writing the majority opinion.

The court of appeals first addressed whether the trial court's order, which was interlocutory, was immediately appealable. On this issue, the court of appeals explained that it

"has recognized 'that civil litigants have a due process right to be heard th[r]ough counsel that they themselves provide.'" Id. at ¶ 19 (quoting Tropic Leisure Corp. v. Hailey, 251 N.C. App. 915, 920, 923–24, 796 S.E.2d 129, 133, 135 (2017)). Relying on this precedent, the court of appeals reasoned that because "counsel at depositions represent clients by objecting to improper questions and protecting privileges, among other things, that due process right could apply here." Id. As a result, the court of appeals determined that the trial court's order affected a substantial right—the medical center's constitutional right to due process—rendering the order immediately appealable. Id. at ¶¶ 20–21.

The court of appeals next addressed whether the trial court's order violated the medical center's constitutional right to due process. Relying on a line of cases that have recognized a due process right to retained counsel in civil cases, the court of appeals held that this right "extends to having the assistance of retained counsel at depositions." Id. at ¶ 42. According to the court of appeals, these cases "emphasize[d] the importance of having retained counsel's assistance throughout the legal process including fact-finding phases such as discovery." Id.

Having determined that there is a due process right to retained counsel at depositions, the court of appeals then concluded that this right "supports a narrower right to have counsel physically present" during depositions. Id. at ¶ 47. The court of appeals reasoned that counsel's physical presence at a deposition is important for purposes of objecting to improper questions and protecting privileges and that counsel's physical presence provides greater protection to a witness than counsel's remote presence. Id. To support its reasoning, the court of appeals gave the example of a technological glitch that could occur when counsel is attempting to instruct a witness not to answer a question on privilege grounds. Id. at ¶ 48.

The court of appeals also ruled that the trial court's order was not narrowly tailored, as was required given the constitutional right involved. Id. at ¶ 50. In particular, the court of appeals observed that the trial court could have allowed remote depositions to address the patient and her counsel's concerns without also prohibiting the medical center's counsel and its witnesses from being physically together during a deposition. Id. at ¶¶ 50–51.

Finally, the court of appeals determined that the trial court "failed to consider the specific circumstances of the particular witnesses and locations at issue," noting that there were different travel restrictions for the two locations (North Carolina and Chicago) where the depositions that prompted the patient's motion were going to take place. Id. at ¶ 52. The trial court's order also failed to account for possible changes in the circumstances surrounding the pandemic, such as the availability of vaccines. Id. at ¶ 53.

The court of appeals thus held that the trial court's order violated the medical center's constitutional right to due process by prohibiting the center's counsel from being physically present with the center's own witnesses during remote depositions. Id. at ¶ 58.

For these reasons, the court of appeals reversed and remanded.

Judge Dillon wrote a dissenting opinion. Judge Dillon did not believe that the order affected a substantial right, since there was "nothing in the appealed order prohibiting [the medical center's] counsel to be present and fully participate in depositions, albeit remotely." Id. at ¶ 62. And even if a substantial right had been implicated by the order, the medical center, according to Judge Dillon, did not show that the right would be lost without an immediate appeal, as there were measures that could have been implemented to protect the center's rights, such as remote deposition protocols. Id. at ¶¶ 65–66.

(2) Sanctions

In Dunhill Holdings, LLC v. Lindberg, 282 N.C. App. 36, 2022-NCCOA-125, the court of appeals considered whether and to what extent sanctions were warranted against a holding company and its owner for discovery violations related to litigation with the owner's former spouse.

In July 2017 a holding company filed suit against its owner's former spouse asserting various claims including theft, fraud, conversion, and breach of fiduciary duty. Id. at ¶ 3. During discovery, the former spouse challenged the sufficiency of the discovery responses provided by the holding company and owner, and in June 2018, the trial court entered an order compelling discovery. Id. at ¶ 8. After the holding company and owner were unsuccessful in seeking a stay of discovery, the former spouse again filed a motion to compel discovery, and the trial court entered a second order compelling discovery in March 2019. Id. at ¶ 18.

The former spouse then noticed depositions of the holding company under Rule 30(b)(6), and of the owner individually. Id. at ¶ 20. A few days before the Rule 30(b)(6) deposition, the owner and holding company produced an additional 129,000 pages of documents. Id. at ¶ 22. At the deposition, the corporate representative was "completely unprepared" to address many of the designated topics. Id. The former spouse filed a motion for sanctions against the holding company. Id.

The owner was then deposed. Id. at ¶ 23. The owner repeatedly refused to answer questions, refused to comment on documents he or the holding company had produced, made personal attacks on the former spouse's counsel, was tardy on numerous occasions, and "improperly assert[ed] attorney-client privilege when there was clearly no communication

between lawyer and client." Id. The former spouse amended her motion for sanctions to include the owner. Id.

In August 2019, the trial court entered an order sanctioning the holding company and owner. Id. at ¶ 25. In the August 2019 order, the trial court "[c]haracterized the 129,000-page document production on the eve of [the holding company's] depositions as a 'document dump,'" and found the unprepared Rule 30(b)(6) witness violated the court's prior order compelling discovery. Id. The trial court further found that the owner and holding company had "jointly violated" the court's prior orders and "worked together to intentionally evade discovery obligations." Id. at ¶ 26. The holding company and the owner appealed the sanctions order. Id. at ¶ 28.

The court of appeals considered whether the trial court abused its discretion in sanctioning the holding company and owner for their document productions. Id. at ¶ 37. The holding company and owner argued that "the fundamental problem with these orders . . . is that there was no predicate violation of a court order." Id. Specifically, the holding company and owner argued that the March 2019 order did not show a violation of the June 2018 order, and likewise that the August 2019 order did not show a violation of the March 2019 order. Id.

For the August 2019 order, the court considered, among other issues, whether the 129,000 pages of document produced immediately prior to the 30(b)(6) deposition was itself an indication that the holding company and owner failed to comply with the prior orders. Id. at ¶ 61. If the documents were responsive, then production itself put them in violation of the order "unless all of the documents produced were supplemental." Id. (emphasis added). Among the documents, 29,000 pages were emails from accounts of individuals who worked at the holding company. Id. at ¶ 62.

The court noted that the holding company "clearly had possession, custody, or control over the email accounts of its own employees," and thus these documents could not be supplemental. Id. The remaining 100,000 pages were bank and credit card statements. Id. at ¶ 63. The court held that these, too, could not be supplemental as either the holding company or owner had the "legal right to obtain . . . on demand" these documents." Id. (citing Pugh v. Pugh, 113 N.C. App 375, 380, 438 S.E.2d 214, 218 (1994)). As the holding company had possession, custody, or control over the documents, they should have been produced under one of the earlier discovery orders.

Second, the court considered whether the trial court abused its discretion in sanctioning the holding company and owner for their deposition conduct. Id. at ¶ 68. Identifying, amongst other facts, that the owner delayed the deposition by five hours and forty-seven minutes through "repeated tardiness," the court affirmed the sanctions against the owner. Id. ¶ 83. "Thus, the court sanctioned [the owner] for his deposition misconduct alone and had ample support for its decision to do so." Id.

For the holding company, the court rejected arguments its corporate representative testified to matters known or reasonably known to it "without addressing the scope of Rule 30(b)(6) under North Carolina law." Id. ¶¶ 89–90. The court observed that even assuming the law offered by the holding company was good law—consisting, as it was, of mostly unpublished federal district court opinions—the arguments made would fail applying the undisputed facts of the case to even that law. Id. ¶ 90.

To conduct this analysis, the court applied the "unchallenged, and therefore binding" findings of fact to each of the holding company's five legal arguments related to Rule 30(b)(6) depositions, lifted verbatim from the holding appellate company's brief. Id. ¶ 90.

For example, the company's first argument focused on preparation of Rule 30(b)(6) deponents. Id. The company argued:

> When it comes to preparation for the deposition, the touchstone of this Rule is reasonableness. See, e.g., Brazos River Auth. v. GE Ionics, Inc., 469 F.3d 416, 432-33 (5th Cir. 2006).[footnote omitted] Recognizing that "an individual cannot be expected to know every possible aspect of the organization's inner workings," courts have invariably acknowledged that the "standard for sanctions in this context is high." Runnels v. Norcold, Inc., No. 1:16-cv-713, 2017 WL 3026915, at *1 (E.D. Va. Mar. 30, 2017) (unpublished) (citing cases). A designee is not expected to present "a fully reliable and sufficiently complete account of all the bases for the contentions made and positions taken by the corporate party." Stoneeagle Servs., Inc. v. Pay-Plus Sols., Inc., No. 8:13-CV-2240-T33MAP, 2015 WL 12843846, at *2 (M.D. Fla. Apr. 29, 2015) (unpublished).

Id. ¶ 91. "The cases Dunhill presents indicate that reasonableness means that the designated individuals do not have to know everything completely but rather must know a reasonable amount and be reasonably prepared to answer questions." Id. ¶ 92. Applying the undisputed facts to even the holding company's best-case-scenario legal framework, the court found no merit to an argument the Rule 30(b)(6) witness was reasonably prepared as the witness was unprepared to answer many questions and took no steps to learn information required by the deposition topics. Id. at ¶¶ 92–93.

The court of appeals likewise rejected arguments based on best-case-scenario law where the witness showed preparation by vaguely referencing documents, lacked any information whatsoever on others, and could not point to any evidence to support any of the holding company's claims. Id. at ¶¶ 93–102. "Put another way, this was not an imperfect deposition; as to certain topics on which the designees provided no answers, this deposition in effect did not happen at all." Id. at ¶ 98.

Finding no error by the trial court, the court of appeals upheld all of the deposition-related sanctions. Id. ¶ 102.

J. Written Orders

In Taylor v. Bank of America, N.A., ___ N.C. ___, 2022-NCSC-117, the supreme court considered whether the court of appeals erred by remanding a case to the trial court to make findings of fact and conclusions of law in its order granting defendant's Rule 12(b)(6) motion to dismiss. Id. ¶ 1.

Customers filed suit against the bank, alleging fraud and other claims arising out of the bank's Home Affordable Modification Program. Id. ¶ 2. The bank moved to dismiss the complaint pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. Id. The trial court granted the bank's motion, concluding all claims were barred by the applicable statute of limitations or doctrines of res judicata and collateral estoppel. Id. Because the trial court's order did not include findings of fact, the court of appeals concluded that it could not conduct a meaningful review of the conclusions of law. Id.

The supreme court held that, given the order granted a Rule 12(b)(6) motion to dismiss and the record did not reflect that any party requested findings of fact and conclusions of law under Rule 52(a)(2), the court of appeals erred. Id. ¶ 6. The supreme court reviewed the meaning of de novo, explaining that when an appellate court undertakes a de novo review of a Rule 12(b)(6) motion, it considers whether a complaint states a claim just as the trial court does and "[i]t freely substitutes its own assessment . . . for the trial court's assessment." Id. ¶ 7. The review "does not involve an assessment or review of the trial court's reasoning." Id. Further, pursuant to Rule 52(a)(2), the "trial court is not required to make factual findings and conclusions of law to support its order unless requested by a party." Id. ¶ 8.

Accordingly, the supreme court vacated the court of appeals' decision and remanded for the court of appeals to perform a de novo review to determine whether the allegations of the complaint were sufficient to state a claim. Id. ¶ 9.

K. Rule 41

In M.E. v. T.J., 380 N.C. 539, 2022-NCSC-23, the supreme court considered whether the trial court retained jurisdiction over a pro se plaintiff's domestic violence action after she struck through her notice of voluntary dismissal of her original complaint and handwrote "I do not want to dismiss this action."

The plaintiff and the defendant were in a same-sex dating relationship. Id. at ¶ 5. After the plaintiff ended the relationship, the defendant allegedly became verbally and physically threatening toward the plaintiff, so the plaintiff, without the assistance of counsel, sought a domestic violence protective order against the defendant. Id. The plaintiff filled out the paperwork that the clerk of court's staff provided to her to initiate a complaint against the defendant. Id. at ¶¶ 5–7. After the trial court informed the plaintiff that she was not eligible for the type of domestic violence protective order that she had requested (a protective order under Chapter 50B of the General Statutes) because she was in a same-sex dating relationship, the plaintiff conveyed to the clerk's staff what the trial court had told her. Id. at ¶¶ 8–9. The clerk's staff gave the plaintiff new forms to complete, including forms for a different type of domestic violence protective order for which she was eligible (a Chapter 50C protective order) and a notice of voluntary dismissal of her original Chapter 50B complaint. Id. at ¶ 9. The plaintiff completed the forms and gave them to the clerk's staff for filing.

After filing the plaintiff's notice of voluntary dismissal, the clerk's staff informed the plaintiff that she could still request a Chapter 50B order, even if the trial court was going to

ultimately deny it and gave the file-stamped notice of voluntary dismissal back to the plaintiff. Id. at ¶ 10. The plaintiff then struck through the file-stamped notice and handwrote "I do not want to dismiss this action." Id. The clerk's staff wrote "Amended" at the top of the file-stamped notice and refiled it thirty-nine minutes after the plaintiff's original filing. Id. The trial court heard the plaintiff's request for a Chapter 50B order and denied it on the basis that Chapter 50B did not include same-sex dating relationships within its definition of covered personal relationships. Id. at ¶¶ 11–14.

The plaintiff, now represented by counsel, appealed to the court of appeals, arguing that the trial court's denial of her request for a Chapter 50B domestic violence protective order violated her rights under the Due Process and Equal Protection Clauses of the Fourteenth Amendment of the United States Constitution, as well as her rights under the North Carolina Constitution. Id. at ¶¶ 16–17. A majority of the court of appeals agreed with the plaintiff's constitutional arguments. Id. at ¶ 20. Judge Tyson dissented. Id. at ¶ 21. The defendant appealed the decision of the court of appeals to the supreme court based on Judge Tyson's dissent. Id. at ¶ 29.

Among other issues, the defendant argued that the trial court had been deprived of its jurisdiction over the plaintiff's action when she filed the notice of voluntary dismissal of her original complaint. Id. at ¶ 30. And because the plaintiff "never formally filed a new Chapter 50B complaint and no request for Rule 60(b) relief was sought or granted by the trial court," the defendant further argued that the trial court never regained its jurisdiction over the action. Id.

On appeal, in a majority opinion written by Justice Hudson, the supreme court held that the trial court retained jurisdiction over the plaintiff's action after she filed the notice of voluntary dismissal of her original complaint.

The supreme court first held that the plaintiff's "Amended" notice of voluntary dismissal "functionally served as a motion for equitable relief under Rule 60(b)" of the North Carolina Rules of Civil Procedure. Id. at ¶ 40. The supreme court next held that the plaintiff's later amendment to her complaint, to which the defendant had consented at a hearing on the plaintiff's request for a Chapter 50B order, "functionally served as a refiling." Id. at ¶¶ 12, 40.

In reaching these conclusions, the supreme court explained that "rather than erecting hurdles to the administration of justice, '[t]he Rules of Civil Procedure [reflect] a policy to resolve controversies on the merits rather than on technicalities of pleadings.'" Id. at ¶ 43 (quoting Quackenbush v. Groat, 271 N.C. App. 249, 253, 844 S.E.2d 26 (2020)). The supreme court reasoned that the policy behind the Rules of Civil Procedure was especially important for domestic violence protective orders under Chapter 50B, since these remedies were enacted with pro se litigants in mind. Id. at ¶ 44. As the supreme court noted, "survivors of domestic violence who turn to courts for protection typically do so shortly after enduring physical or psychological trauma, and without the assistance of legal counsel." Id. at ¶ 44. The supreme court further noted that Rule 60(b) gives trial courts broad discretion to grant equitable relief from a final judgment, order, or proceeding for "mistake, inadvertence, surprise, or excusable neglect." Id. at ¶ 46 (quoting N.C. Gen. Stat. § 1A-1, Rule 60).

Applying these principles, the supreme court stated that there was "plainly no doubt as to plaintiff's intentions as expressed through the amended form: she "d[id] not want to dismiss th[e] action." Id. at ¶ 47. In addition, when the trial court allowed the plaintiff to amend her complaint, with the defendant's consent, "it reasonably could have considered this amendment as, in essence, a refiling after a voluntary dismissal." Id. And though a formal Rule 60(b) motion or a new Chapter 50B complaint would have been preferable, the supreme court declined to elevate form

over substance in this situation, taking into account that the plaintiff had followed all the instructions that the clerk's staff had given her. Id. at ¶¶ 47–48. Finally, the supreme court acknowledged that it was unlikely that the plaintiff had intended for her amendments to serve as a formal Rule 60(b) motion or a formal refiling, but the court nevertheless concluded that it was within the trial court's broad discretion to treat the amendments as a functional Rule 60(b) motion or refiling based on the plaintiff's "plain intention to move forward with her Chapter 50B complaint." Id. at ¶ 48.

For these reasons, the supreme court held that the trial court did not err in exercising jurisdiction over the plaintiff's action.

Justice Berger wrote a dissenting opinion with Chief Justice Newby and Justice Barringer joining. Justice Berger would have held that under Rule 41(a) of the North Carolina Rules of Civil Procedure, the trial court was deprived of its jurisdiction over the plaintiff's complaint after she filed her notice of voluntary dismissal of her original complaint. Id. at ¶¶ 70–76. Justice Berger also disagreed with the majority's decision to treat the plaintiff's amendments as functional equivalents of a Rule 60(b) motion and refiling because the "plaintiff filed no motion with the Court, there was no final judgment, and her attorneys never requested the relief granted by the majority today." Id. at ¶ 77.

L. Rule 45

In Wing v. Goldman Sachs Trust Company, N.A., 280 N.C. App. 550, 2021-NCCOA-662, rev. allowed, cert. dismissed, 868 S.E.2d 852 (N.C. Mar. 9, 2022), the court of appeals considered whether Rule 45(d1) of the North Carolina Rules of Civil Procedure required a party who issued a subpoena to produce all the documents that the party received in response to the subpoena upon a request by adverse parties.

In a lawsuit involving the validity of certain testamentary instruments, the defendants served the plaintiff with discovery requests. Id. at ¶¶ 2–4. The plaintiff believed that some responsive documents were in her ex-husband's possession. Id. at ¶ 4. After unsuccessful attempts to recover the documents from her ex-husband, the plaintiff served a subpoena on him, and the ex-husband produced documents in response to the subpoena. Id. at ¶¶ 5–8. The plaintiff informed the defendants that she had received a complete response to the subpoena, and the defendants requested all the documents that she had received. Id. at ¶ 9. The plaintiff objected to the defendants' request and only produced documents that she claimed were non-privileged and responsive to the defendants' prior discovery requests. Id. at ¶¶ 9–10.

The defendants filed a motion to compel production of all the subpoenaed documents, which the trial court granted. Id. at ¶¶ 11–12. The plaintiff appealed the trial court's discovery order to the court of appeals.

The court of appeals vacated the trial court's discovery order and remanded with instructions to enter an order requiring the plaintiff to only produce non-privileged and responsive documents.

As a threshold matter, the court of appeals determined that although the trial court's discovery order compelling production of alleged privileged and non-responsive documents was interlocutory, the order affected a substantial rights privilege claim. Id. at ¶¶ 14–16. The court of appeals thus allowed the appeal, even though it was interlocutory.

The court of appeals next analyzed Rule 45(d1)'s scope. Rule 45(d1) states that a party who issues a subpoena must "serve all other parties with notice of receipt of the material produced in compliance with the subpoena and, upon request, shall provide all other parties a reasonable opportunity to copy and inspect such material at the expense of the inspecting party." Id. at ¶ 20

(quoting N.C. Gen. Stat. § 1A-1, Rule 45(d1)) (emphasis omitted). Although Rule 45(d1) does not mention Rule 26, the court of appeals determined that Rule 45(d1) must be read together with Rule 26. Id. at ¶¶ 21–24. According to the court of appeals, Rule 26 protects a "party who has received privileged or non-responsive documents as a result of the subpoena, at no fault of their own." Id. at ¶ 23.

The defendants argued that the plaintiff waived any objections to producing all the subpoenaed documents by serving the subpoena in the first place. Id. at ¶¶ 11, 25. However, the court of appeals disregarded the defendants' argument, holding instead that the plaintiff "undertook and complied with the statutorily required steps to protect her privileged and non-responsive and irrelevant documents from disclosure." Id. at ¶ 27. She produced the documents that she deemed were non-privileged and responsive to the defendants' prior discovery requests, provided a log of the documents that she withheld based on her privilege claim, and asserted that some documents were neither relevant nor responsive to any discovery request. Id. at ¶¶ 25–27.

In addition, the court of appeals consulted Rule 45 of the Federal Rules of Civil Procedure, which "has no counterpart to subsection (d1)," concluding that there is no automatic discovery of all subpoenaed documents under the federal rule. Id. at ¶ 29. The court of appeals also analyzed Rule 45(d1)'s legislative history. In particular, the court of appeals reasoned that by "codifying the notice-and-request procedure [in Rule 45(d1)], the General Assembly expressly reaffirmed the federal process and left the questions about the propriety of interparty requests for documents to be governed by the existing discovery rules." Id. at ¶ 31.

Based on its interpretation of Rule 45(d1)'s scope, the court of appeals disagreed with the defendants' argument that Rule 45(d1) gave defendants unlimited access to the subpoenaed documents upon their request. Id. at ¶¶ 28, 33. In the view of the court of appeals, adopting the

defendants' position would cause Rule 45(d1) to "become the only discovery device not subject to assertions of privilege and limitations." Id. at ¶ 33. The court of appeals also expressed concern that ruling in the defendants' favor would mean that "[a] party would never be able to use a subpoena to recover her own confidential and privileged documents, and a subpoena recipient would be free to harass the requesting party by producing sensitive, embarrassing, irrelevant and privileged documents that are not responsive to the discovery request." Id. Lastly, the court of appeals was not persuaded by the defendants' argument that they could access all the subpoenaed information by deposing the plaintiff's ex-husband, stating that this argument was not supported by the rules governing depositions. Id. at ¶ 35.

For these reasons, the court of appeals vacated the trial court's discovery order compelling production of all the subpoenaed documents and remanded.

M. Rule 56

In Bryant v. Wake Forest Univ. Baptist Med. Ctr., 281 N.C. App. 630, 2022-NCCOA-89, the court of appeals considered whether a doctor had sufficiently shown an absence of material fact necessary to receive summary judgment on his former patient's claims against him for actual and constructive fraud, res ipsa loquitur, breach of fiduciary duty, and medical malpractice.

The patient had received surgery from the doctor to treat her advanced-stage endometriosis, an often painful or uncomfortable reproductive system disorder. Id. at ¶ 4. Part of the treatment procedure involved implantation of a Gore-Tex adhesion barrier at the site where a fibroid had been removed. Id. The barrier was attached with non-absorbable sutures, signaling that it was intended to remain indefinitely. Id. The patient saw the doctor for a few follow-up visits, but discontinued treatment a few months after the surgery. Id. at ¶ 5. The patient and doctor disagreed as to whether, during these follow-up visits, the doctor communicated his recommendation that

she undergo an additional procedure. Id. 18. Nearly a decade later, the patient returned to the same hospital for additional reproductive treatment, where her surgeon found the Gore-Tex barrier still attached. Id. at ¶ 6. The patient sued the doctor who implanted the Gore-Tex and the hospital at which she was treated for actual and constructive fraud, res ipsa loquitur, and medical malpractice. Id. at ¶ 7. The patient's expert's corrected deposition testimony mentioned that Gore-Tex barriers were intended to be removed two to eight weeks after the procedure patient received. Id. at ¶¶ 8–9. The doctor and hospital moved for summary judgment, which the trial court granted, dismissing the patient's claims with prejudice. Id. at ¶ 10.

The court of appeals, in reviewing the findings and holdings of the trial court, first addressed the patient's actual fraud claim. Id. at ¶ 16. It found no evidence in the record below to support that the doctor concealed the implantation of the Gore-Tex, as it was noted in the operative note to the procedure and the post-operative record. Id. The patient had also failed to show any evidence that the doctor did not intend to remove the barrier after eight weeks, or that he falsely represented or concealed this intention.[2] Id. at ¶ 17. In fact, the doctor continued to state even in litigation that he fully intended for the Gore-Tex to remain inside the patient permanently. Id. In addition, the court did not find that there was any evidence showing that the doctor fraudulently concealed the need for a second procedure from the patient. Id. at ¶ 18.

[2] The opinion states: "[a]lthough [the patient] presented expert testimony that the Gore-Tex barrier needed to be removed after eight weeks, she did not present any evidence tending to show that it was [the doctor]'s intention to remove the Gore-Tex barrier after eight weeks, or that he falsely represented or concealed this from [the patient] with the intent to deceive her." Id. at ¶ 17 (emphasis added). This is likely a typographical error, since the patient would damage her own fraud case by showing evidence that the doctor intended to remove the barrier. The court likely meant to write that the patient did not present evidence that this was not the doctor's intention.

Next, the court addressed the patient's constructive fraud/breach of fiduciary duty claims. Id. at ¶ 19. These two claims are similar, constructive fraud being in essence a specific type of breach of fiduciary duty in which the breach is intentional and operates to the benefit of the fiduciary. Id. at ¶ 20. The court disposed of this claim because there was no evidence showing a benefit conferred on the doctor. Id. at ¶ 21–22. The mere continuation of the patient-doctor relationship was not sufficient. Id. at ¶ 22.

The court addressed res ipsa loquitur next. It held that—unlike cases in which the negligence is self-evident due to the precise malpractice that occurred—in the ordinary medical malpractice case, "the question of injury and the facts in evidence are peculiarly in the province of expert opinion." Id. at ¶ 25 (citing Bluitt v. Wake Forest Univ. Baptist Med. Ctr., 259 N.C. App. 1, 5, 814 S.E.2d 477, 480 (2018)). The court of appeals agreed with the trial court that the decision of whether and when to properly remove a Gore-Tex barrier after a surgical procedure was not something a layperson could determine without the assistance of expert testimony. Id. at ¶ 27.

The patient's medical malpractice claim centered on which of three statutes of limitations for medical malpractice applied, and specifically whether the patient's claim satisfied the "one-year-from-discovery period for foreign objects subject to a ten-year period of repose[.]" Id. at ¶ 29 (citing N.C. Gen. Stat. § 1-15(c); Black v. Littlejohn, 312 N.C. 626, 634, 325 S.E.2d 469, 475 (1985)). For this "foreign object" limitations period to apply, the Gore-Tex barrier would need to be a "foreign object" within the definition of the statute, i.e., one with "no therapeutic or diagnostic purpose or effect[.]" Id. at ¶¶ 29–30 (citing N.C. Gen. Stat. § 1-15(c)). Addressing an issue of first impression for the court of appeals, the court held that, in line with canons of statutory construction, "no therapeutic or diagnostic purpose or effect" means that the object never served

such purpose or accomplished such effect. Id. at ¶¶ 35–36. It also noted that this result comported with public policy and legislative intent. Id. at ¶ 39.

The court finally summarily disposed of the patient's claim for punitive damages, as that claim could not stand alone once all of her other claims were dismissed. Id. at ¶ 43.

The court of appeals affirmed the trial court's grant of summary judgment in favor of the doctor and hospital. Id. at ¶ 44.

N. Confession of Judgment

In RH CPAs, PLLC v. Sharpe Patel, PLLC, ___ N.C. App. ___, 2022-NCCOA-493, appeal docketed, No. 237A22 (N.C. Aug 1, 2022), the court of appeals considered whether the trial court appropriately enforced the clerk's entry of judgment pursuant to a confession of judgment.

Partners at an accounting firm announced their intent to separate and form their own company. Id. ¶ 3. After mediation regarding the terms of separation resulted in impasse, the partners filed suit against the firm. Id. ¶ 4. Through discovery, the firm learned that the partners had been planning to leave for months and contacted employees and clients about their planned departure while still fiduciaries of the firm. Id.

The parties entered a settlement agreement, requiring the partners to make a series of payments – in an amount to be determined by an agreed upon neutral accounting firm – to the firm in exchange for their release from obligations under the partnership agreement. Id. ¶ 5. The settlement agreement also included a confession of judgment, which provided that the partners agreed to pay $500,000 in the event they defaulted on payment under the agreement and were provided written notice fifteen days before the confession of judgment could be filed. Id.

The partners and the firm attempted to agree upon an accounting firm to help determine the amount of the payments the partners were to pay the firm under the settlement agreement. Id.

¶¶ 7–8. The partners instructed a different accounting firm, without the firm's permission, to calculate the amount of payments owed. Id. ¶ 8.

The firm sent the partners a notice of breach of settlement agreement and additional notices of default over the course of three months. Id. ¶ 9. The firm filed the confession of judgment with the clerk when the partners failed to cure their default. Id. ¶ 10. The clerk entered judgment in an amount greater than what the partners' accounting firm concluded the partners owed to the firm. Id. ¶¶ 9–10.

The partners appealed the entry of judgment to superior court pursuant to section 1-301 of the North Carolina General Statutes. Id. ¶ 11. The partners also sought to stay the clerk's judgment and moved for relief pursuant to Rules 52, 58, 59, 60, and 68.1 of the Rules of Civil Procedure. Id. The trial court denied the partners' motions for relief. Id. ¶ 1.

Writing for the majority, Judge Inman concluded entry of the confession of judgment and denial of relief requested by the partners was proper. Id. ¶¶ 14–15. The majority disagreed with the dissent's characterization that the firm's filing of the confession of judgment was fraudulent or a misrepresentation. Id. ¶ 22. Finally, the court of appeals concluded that the partners sought the wrong remedy in seeking relief from judgment entered pursuant to a proper confession of judgment. Id. ¶ 23.

In his dissenting opinion, Judge Tyson opined that the partners demonstrated a misrepresentation by the firm and, therefore, should be entitled to relief. Id. ¶ 25. He concluded that the settlement agreement lacked mutually agreed upon terms regarding the accounting firm to be retained to determine the amount of the payments the partners agreed to pay the firm. Id. ¶ 27. Accordingly, the firm had no right to file the confession of judgment. Id. Further, Judge Tyson

disagreed with the majority that the partners sought the wrong remedy because the risk of reputational harm cannot be addressed by suing for damages. Id. ¶ 35.

III. TRIAL

A. Jury Selection

(1) Batson Challenge

In State v. Clegg, 380 N.C. 127, 2022-NCSC-11, the supreme court considered whether a prosecutor's exclusion of two African-American prospective jurors violated an African-American criminal defendant's constitutional right to equal protection of the laws.

The defendant, an African-American man, was charged with robbery with a dangerous weapon and possession of a firearm by a felon. Id. at ¶ 2. During jury selection, the prosecutor used his peremptory strikes to remove two African-American women from the jury. Id. The defendant, through his counsel, challenged these two peremptory strikes under Batson v. Kentucky, 476 U.S. 79 (1986), which prohibits racial discrimination in jury selection. Clegg, 2022-NCSC-11, at ¶¶ 1–2. In response to the defendant's Batson challenge, the prosecutor asserted that he excluded both prospective jurors "based on their body language[ ] and . . . their failure to look at me when I was trying to communicate with them." Id. at ¶ 2. The prosecutor further asserted that he excluded one of the prospective jurors because of her potential bias toward the defendant and the other one because she answered "I suppose" in response to a question about whether she could be fair and impartial. Id. The defendant argued that the prosecutor's stated reasons for the peremptory strikes were pretextual. Id. The trial court overruled the defendant's Batson challenge, concluding that he had failed to establish that race was a significant factor in the

peremptory strikes. Id. The jury found the defendant guilty of robbery with a dangerous weapon, and he was sentenced to imprisonment. Id. at ¶ 3.

The defendant appealed his conviction to the court of appeals, which held that the trial court did not err in overruling the defendant's Batson challenge. Id. at ¶¶ 3–8. The defendant then appealed the decision of the court of appeals to the supreme court. Id. at ¶ 9. The supreme court issued a special order, remanding the case to the trial court for "reconsideration of defendant's Batson challenge based upon the existing record and the entry of a new order addressing the merits of defendant's Batson challenge in light of the United States Supreme Court decision in Foster v. Chatman, [578] U.S. [488], 136 S. Ct. 1737, 195 L.Ed.2d 1 (2016)," a case that that was decided after the trial court's ruling. Clegg, 2022-NCSC-11, at ¶ 10. The supreme court also retained jurisdiction to "undertake any necessary additional proceedings." Id.

On remand, the trial court held a new hearing on the defendant's Batson challenge. Id. at ¶ 11. The trial court ultimately concluded that it could not find, based on the record before it, that the prosecutor had engaged in "purposeful discrimination" and therefore overruled the defendant's Batson challenge again. Id. at ¶¶ 30–33. The defendant appealed the trial court's ruling to the supreme court. Id. at ¶ 34.

Based on the three-part test set out in Batson and the applicable clearly erroneous standard of review, the supreme court reversed the trial court's ruling on the defendant's Batson challenge with Justice Hudson writing the majority opinion.

At step one of the Batson test, "a defendant must make a prima facie showing that a peremptory challenge has been exercised on the basis of race[.]" Id. at ¶ 51 (citation omitted). This showing is not "a high hurdle for defendants to cross." Id. (citation omitted). Moreover, the first step becomes moot if a prosecutor moves to the second step by offering a race-neutral

explanation for a peremptory strike and the trial court issues a ruling on the explanation. Id. at ¶ 52. That is what happened here. The prosecutor did not argue that the defendant had failed to make a prima facie showing of discrimination; instead, he offered race-neutral explanations for his peremptory strikes, thus rendering step one moot. Id. at ¶¶ 53–54. For this reason, the supreme court determined that it did not need to analyze whether the defendant had met his initial burden. Id. at ¶ 54.

At step two of the Batson test, "the burden shifts to the state to offer a facially valid, race-neutral rationale for its peremptory challenge." Id. at ¶ 55 (citation omitted). As the supreme court explained, the state need not offer "an explanation that is persuasive, or even plausible." Id. (citation omitted). During the second Batson hearing, "the prosecutor offered slightly different reasons for his peremptory strikes." Id. at ¶ 57. This time, the prosecutor asserted that he excluded one, not both, of the prospective jurors for body language and lack of eye contact. Id. As for the "I suppose" response that one of the prospective jurors had given, the prosecutor acknowledged that the juror had given this response to a question about her confidence in her ability to focus on the trial, not in response to a question about being fair and impartial, as the prosecutor had asserted when his peremptory strikes were first challenged. Id. at ¶¶ 58–59. Nevertheless, the prosecutor argued that this prospective juror's exclusion was appropriate because her "I suppose" response, her short and equivocal answers to follow-up questions on the issue, and her body language and lack of eye contact together created a concern about whether she could remain engaged throughout the trial. Id. at ¶ 58.

The trial court accepted the prosecutor's stated race-neutral reasons for the peremptory strikes (concern of bias, body language and lack of eye contact, and concern of lack of focus), even though they were slightly different from those that he had asserted during the first hearing, finding

that the state had met its burden under step two of the Batson test. Id. at ¶¶ 60–62. The supreme court held that the trial court did not err in reaching this finding. Id. at ¶ 62. However, the supreme court was "clear" that the analysis at step two "is limited only to whether the prosecutor offered reasons that are race-neutral, not whether those reasons withstand any further scrutiny; that scrutiny is reserved for step three." Id.

At step three of the Batson test, the trial court must "determine if the defendant has established purposeful discrimination." Id. at ¶ 63. To make this determination, the trial court "carefully weighs all of the reasoning from both sides to ultimately 'decid[e] whether it was more likely than not that the [peremptory] challenge was improperly motivated.' " Id. (citation omitted). The supreme court held that the trial court erred in its step three analysis and conclusion regarding the prospective juror who was excluded on the stated grounds of body language and lack of eye contact and concern about lack of focus. Id. at ¶¶ 64, 74.

For this prospective juror, the trial court found that "both race-neutral justifications offered by the prosecutor fail[ed]." Id. at ¶ 83. Specifically, the trial court determined that the lack of focus reason failed because the "prosecutor mis-remembered the question to which [the juror] responded 'I suppose'" and that the body language and lack of eye contact reason failed because the trial court had not made "sufficient findings of fact to establish a record of [the juror's] body language." Id. at ¶ 67. According to the supreme court, after reaching this conclusion, the trial court should have ruled that the defendant had established a Batson violation because, at that point, "the only valid reasoning remaining for the court to consider was evidence presented by defendant tending to show that the peremptory challenge of [that prospective juror] was motivated in substantial part by discriminatory intent." Id. at ¶¶ 83–84.

The trial court also erred by holding the "defendant to an improperly high burden of proof." Id. at ¶ 85. The supreme court reasoned that the trial court failed to properly apply the defendant's burden by looking for "smoking-gun evidence of racial discrimination similar to what has been present in previous U.S. Supreme Court cases that have found Batson violations." Id. at ¶ 86. The supreme court explained that there was no need for such smoking-gun evidence here because the direct and circumstantial evidence presented by the defendant—including statistical evidence about the disproportionate use of peremptory strikes against African-American prospective jurors and evidence of disparate questioning and acceptance of comparable white and African-American prospective jurors—sufficiently supported the defendant's Batson challenge. Id. at ¶¶ 81, 84, 86–87.

The supreme court further concluded that the trial court erred by considering certain reasoning about the prospective juror's ability to focus on the trial that was not presented by the prosecutor. Id. at ¶¶ 88–89. As the supreme court explained, "[i]f the stated reason does not hold up, its pretextual significance does not fade because a trial judge, or an appeals court, can imagine a reason that might not have been shown up as false." Id. at ¶ 88 (citation omitted). Lastly, the supreme court determined that the trial court failed to "adequately consider the disparate questioning and disparate acceptance of comparable white and Black prospective jurors." Id. at ¶ 90. Although disparate questioning alone does not give rise to a Batson violation, when viewed with other evidence, it can "inform the trial court's evaluation of whether discrimination occurred." Id. at ¶ 94 (citation omitted).

Accordingly, the supreme court held that a Batson violation occurred when one of the prospective jurors was excluded, which rendered the trial court's contrary ruling clearly erroneous. Id. at ¶¶ 95–96. In light of this holding, the supreme court determined that it did not

need to consider whether the trial court's ruling as to the other prospective juror was also clearly erroneous because "[t]he Constitution forbids striking even a single prospective juror for a discriminatory purpose." Id. at ¶ 64 (citation omitted).

The supreme court next addressed the proper remedy for the Batson violation. The supreme court explained that although a new trial would ordinarily be the remedy for a Batson violation, another trial was not appropriate here because the defendant had already served his entire sentence of active imprisonment and had been discharged from all post-release supervision. Id. at ¶¶ 96–97.

For these reasons, the supreme court vacated the defendant's conviction and remanded the case to the trial court.

Justice Earls wrote a concurring opinion. Justice Earls agreed with the majority's conclusion that there was a Batson violation as to one of the prospective jurors and that the proper remedy for the violation was to vacate the defendant's conviction. Id. at ¶ 101. However, Justice Earls would have also held that there was a Batson violation as to the other prospective juror. Id. at ¶ 102. Noting that this was the first time the supreme court had vacated a conviction based on a Batson challenge, Justice Earls also urged the supreme court to use the "variety of tools at [its] disposal" because there was an "urgent" need to do so. Id. at ¶¶ 114, 116. In her view, "the Batson framework makes it very difficult for litigants to prove intentional discrimination." Id. at ¶ 113.

Justice Berger wrote a dissenting opinion with Chief Justice Newby and Justice Barringer joining. Justice Berger would have affirmed the trial court's ruling. Id. at ¶ 121. According to Justice Berger, the prosecutor's explanation for excluding the prospective juror in question was a mistake acknowledged by both the trial court and the majority. Id. at ¶¶ 119–20. In Justice Berger's view, "[t]he mistaken explanation provided by the prosecutor cannot, by definition, be purposeful

discrimination." Id. at ¶ 120. In addition, Justice Berger believed that the majority did not give the trial court's findings the deference to which those findings were entitled on appellate review. Id. at ¶¶ 129, 147.

In State v. Bennett, 282 N.C. App. 585, 2022-NCCOA-212, petition for disc. rev. filed (N.C. May 10, 2022), the court of appeals considered the question of whether the trial court had clearly erred in (1) its acceptance of the prosecutor's race-neutral explanations for striking two black jurors, and (2) its determination that defendant had not met his burden of proving purposeful discrimination.

The defendant had been charged with possession of a precursor chemical with intent to manufacture methamphetamine, two counts of trafficking methamphetamine, and one count of possessing a firearm by a felon. Id. at ¶ 2. The defendant made Batson objections after the prosecutor struck black potential jurors R.S. and V.B., in succession, but not a third juror who was not black. Id. at ¶ 3.

Potential juror R.S. told the prosecutor during selection that he had been the victim of a breaking and entering though he thought the police handled it in a satisfactory manner, and that he recognized another potential juror from around town though that would not affect his ability to be impartial. Id. The prosecutor used a peremptory challenge to strike R.S. from the jury. Id. Potential juror V.B. told the court that she had never been the victim of a crime, a defendant or witness in any case, that neither she nor any close relative or friend had a negative experience with police, and she reiterated several times that nothing was preventing her from being impartial in the case if she were selected. Id. at ¶ 4. The prosecutor used another peremptory challenge to strike V.B. from the jury. Id.

Potential juror R.C., who was not black, told the prosecutor essentially the same thing that V.B. did. Id. at ¶ 5. She also said that she had work obligations and needed to take her daughter-in-law to a doctor's appointment but conceded that these were not serious problems. Id.

The defendant challenged the strikes of R.S. and V.B. under Batson, arguing that there was no reason for them to be stricken other than their race. Id. at ¶ 6. The trial court, noting that the prosecutor had accepted three black jurors already, denied the motion. Id. This denial was appealed to the court of appeals (which affirmed) and then to the supreme court (which reversed the denial). Id. at ¶¶ 7–8. The supreme court rejected the argument that the acceptance of some black jurors necessarily negated a prima facie showing of discrimination. Id. at ¶ 8. The supreme court remanded with instructions to proceed through the remaining two steps of the Batson analysis. Id. at ¶ 9. On remand, the prosecutor explained that R.S. had withheld information that he had been previously convicted, despite the jury as a whole being asked twice to disclose any prior convictions. Id. at ¶ 10. The prosecutor further explained that V.B. had given inconsistent and unclear answers regarding his question whether she would be comfortable passing judgment on a crime she did not witness, and further noted that V.B.'s business was part of a drug investigation. Id. at ¶ 11.

After these explanations, the defendant argued that the explanations were pretextual under the third step of Batson. Id. at ¶ 14. He argued that R.S.'s undisclosed conviction and V.B.'s business's involvement in the drug investigation were pretext because the prosecutor never directly asked them about these issues (the prosecutor responded that he did not want to embarrass them). Id. at ¶¶ 15–16. The prosecutor further explained that while a non-black juror had a similarly inconsistent/unclear answer on a different question, that question was not as central to the case as the one on which V.B. had stumbled. Id. at ¶ 17. The defendant also argued that the trial court

should consider the susceptibility of racial bias in the case as the defendant was black and charged with a drug offense – to which the prosecutor responded that there were no victims here, so cross-racial crime could not bias the jury. Id. at ¶ 18. Finally, the defendant argued based on statistical studies that peremptory challenges had been used in racially biased ways in Sampson County overall; the prosecutor challenged the methodology of the studies and disputed that it was fair to impute these findings to him even if they were valid. Id. at ¶ 19. The trial court overruled the defendant's Batson objections for both prospective jurors. Id. at ¶ 21. It held that under the second step of the Batson analysis, the prosecutor had met his burden to provide race-neutral reasons for using peremptory challenges. Id. Under the third step of the analysis, it found that the totality of the circumstances indicated the prosecutor's proffered reasons were the actual reasons for the challenges. Id. at ¶ 22. The trial court again credited the prosecutor's acceptance of other black jurors in discounting the allegation of biased selection. Id. at ¶ 23. The defendant appealed directly to the supreme court, which remanded to the court of appeals to resolve the remaining Batson questions under the trial court's order. Id. at ¶ 24.

The court first set forth the three-step Batson analysis:

> First, the party raising the claim must make a prima facie showing of intentional discrimination under the totality of the relevant facts in the case. Second, if a prima facie case is established, the burden shifts to the State to present a race-neutral explanation for the challenge. Finally, the trial court must then determine whether the defendant has met the burden of proving purposeful discrimination.

Id. at ¶ 25. It noted that the supreme court had already found that the defendant met the first step, and that it would therefore review the trial court's decisions as to steps two and three. Id. at ¶ 26. A trial court's ruling under a Batson analysis is subject to clear error review, requiring the

reviewing court to have a "definite and firm conviction that a mistake has been committed" before it may properly reverse the decision below. Id. at ¶¶ 27–28.

Under Batson step two, the court first addressed the State's argument that the defendant had not preserved the step two challenge. Id. at ¶¶ 29–30. The court held that on its review of the trial transcript, the defendant began to challenge a lack of evidence under step two, but the court cut his attorney off before he could finish his sentence – therefore, the argument was preserved. Id. at ¶ 32. The court also rejected the State's argument that by challenging the race-neutral explanation as more properly a for-cause strike, the defendant contradicted himself on appeal by accepting that the State offered a race-neutral explanation. Id. at ¶¶ 33–34.

The court explained that the requirements of the second step of Batson are less stringent than what is necessary to exercise a "for cause" strike of a juror. Id. at ¶ 35. However, the prosecutor must go beyond a simple denial of discriminatory motive or averment of his own good faith. Id. at ¶ 36. Further, this offered explanation need not be "persuasive, or even plausible." Id. The Supreme Court of the United States had even held that Batson step two is satisfied where "the State produces only a frivolous or utterly nonsensical justification for its strike." Id. at ¶ 38 (citing Johnson v. California, 545 U.S. 162, 171, 125 S. Ct. 2410, 2417, 162 L.Ed.2d 129 (2005)). Scrutiny of the explanation provided is step three; step two merely requires provision of that explanation. Id. In this light, the court of appeals affirmed the trial court's ruling on step two. Id. at ¶ 39. The Supreme Court had previously held that it was error to combine steps two and three, focusing on not just the existence of a race-neutral reason but its persuasiveness as a threshold inquiry. Id. at ¶ 43.

Turning to step three, the court explained that this step was the appropriate place to inquire as to the persuasiveness of a prosecutor's race-neutral explanation. Id. at ¶ 44. The court must

consider that explanation "in light of all of the relevant facts and circumstances, and in light of the arguments of the parties." Id. at ¶ 45 (quoting State v. Hobbs, 374 N.C. 345, 352, 841 S.E.2d 492, 499 (2020)). The court may properly consider statistical evidence of a prosecutor's use of peremptory strikes; evidence of disparate questioning and investigation; side-by-side comparisons of black prospective jurors who were struck and white prospective jurors who were not; misrepresentation of the record when defending strikes during a Batson hearing; relevant history of the State's strikes in past cases; and other circumstances. Id. at ¶ 46. However, the court ruled that the prosecutor did not need to turn over the results of his office's investigation into the criminal histories of each potential juror – the Batson analysis is heavily influenced by the court's evaluation of the prosecutor's credibility, and its decision not to ask for those results to be produced simply demonstrated that it found the prosecutor's statements credible. Id. at ¶ 50–51. It further highlighted that the defendant was given the opportunity to recess and conduct his own investigation, but that he declined. Id. at ¶ 51. The same considerations counseled that the trial court was correct to deny his objection as to the striking of V.B. for the drug investigation consideration. Id. at ¶ 52. While the court agreed that disparate investigation on voir dire with a potential juror on a subject later used to justify a strike could be pretextual, it was not necessarily so. Id. at ¶ 56. Here, the prosecutor gave a sufficient explanation of why he did not broach these issues – he did not want to embarrass the potential jurors. Id. at ¶ 57. This embarrassment could be avoided by separate voir dire, but this would be time-consuming, and the trial court did not err in not requiring that to be conducted. Id. at ¶ 57.

The court also addressed the defendant's proffered comparative juror analysis between the two black jurors who were stricken and others in the venire and on the jury. Id. at ¶ 60. It rejected the argument that because the supreme court had already determined that there was no

significant dissimilarity between the answers given by another juror and V.B., as the court examined that dissimilarity only in the context of step one, at a much lower burden. Id. at ¶ 63. It held that the prosecutor gave sufficient explanation for his strike, and that it was not simply based on the demeanor of the black prospective juror. Id. at ¶¶ 65–69.

The court explained that under the third step, North Carolina courts consider the susceptibility of the particular case to racial discrimination, and that they focus on whether the racial makeup of key figures such as the defendant(s), victim(s), attorneys, and witnesses "crosses racial lines[.]" Id. at ¶ 72. The court expressly disclaimed that the susceptibility analysis should include broader considerations of systemic racism in the justice system as a whole or in certain types of cases. Id. at ¶ 73–75. In this case, the defendant was black, there were no victims, and none of the witnesses' races had been identified. Id. at ¶ 74. On that basis, the trial court did not err in holding that the case was not susceptible to racial discrimination. Id. at ¶ 75.

Addressing the defendant's argument that the trial court erred in disregarding the history of discriminatory strikes by the State, the court agreed with three of the four challenges to the trial court's reasoning. Id. at ¶ 77. The trial court had discounted the studies that showed a history of biased usage of peremptory challenges on the basis that law students performed the work, but the court of appeals could find no clear reason that this would make a study unreliable – indeed, in his concurrence in a seminal Batson case, Justice Breyer favorably cited a study where law students provided research assistance. Id. (citing Miller-El v. Dretke (Miller-El II), 545 U.S. 231, 268, 125 S. Ct. 2317, 2341, 162 L.Ed.2d 196 (2005) (Breyer, J., Concurring)). Further, the court of appeals disagreed with the trial court's assertion that the lack of prosecutorial opinions made the conclusions of little value. Id. at ¶ 78. It also disagreed with the trial court's assertion that the study being based on a cold record is a methodological weakness, pointing out that this is how all

Batson precedents (and indeed all appellate case law ever made in this country) have proceeded. Id. at ¶ 79. Finally, while it agreed with the defendant's fourth challenge—that the trial court improperly discounted the studies because they did not include the specific prosecutor involved in the case—the court also outlined that the office's policies had changed since the years of the study and that these changes were not examined in the studies. Id. at ¶ 83. Nevertheless, the court of appeals found the other factors already examined in its analysis to be more persuasive than the exclusion of the study and held that the trial court did not err in holding that the defendant failed to meet his burden under Batson step three. Id.

Defendant's final argument was that the trial court gave improper weight to the fact that black jurors were ultimately accepted by the State. Id. at ¶ 84. The court of appeals disagreed, explaining that the defendant's authorities on this point were cases in which the last-minute acceptance of one black juror after dismissing several did not sanitize discriminatory behavior. Id. at ¶¶ 84–88. Here, five of the twelve jurors empaneled were black, which was greater than proportional representation compared to the demographics of Sampson County. Id. at ¶ 88.

In light of this analysis, the court of appeals affirmed the trial court's denial of the defendant's Batson objections.

B. Evidence

In Beavers v. McMican, ___ N.C. App. ___, 2022-NCCOA-547, the court of appeals considered whether evidence of post-separation acts is admissible to support an inference of pre-separation acts in actions for alienation of affection or criminal conversation.

An ex-husband filed suit against his ex-wife's new significant other and alleged paramour for alienation of affection and criminal conversation. Id. ¶ 3. After twelve years of marriage, the ex-husband discovered texts on his ex-wife's phone in which she referenced a prior instance of

sexual intercourse and sent nude photos to a contact identified as "Bestie". Id. ¶¶ 3–4. The ex-wife admitted that she engaged in sexual acts with "Bestie" but denied the two had sexual intercourse. Id. She also admitted that she had sexual intercourse with a co-worker named "Dustin". Id. The ex-husband was unable to discover "Dustin's" identity and suspected "Dustin" may be a pseudonym. Id. ¶ 6.

Approximately three months after separating, the ex-wife began dating the significant other, who was her coworker. Id. ¶¶ 6–7. Evidence showed the ex-wife and her significant other had an extensive relationship based on volume of texts messages and communication across other platforms. Id. ¶ 7. However, there was no direct evidence that the two became romantically involved until after the separation. Id.

The new significant other filed a motion for summary judgment, arguing the ex-husband presented insufficient evidence of at least one element of both offenses (malicious acts of the defendant produced the loss of love and affection for alienation of affection claim and sexual intercourse between the defendant and spouse during the marriage for criminal conversation claim). Id. ¶¶ 8, 18, 25. After a hearing, the trial court granted the significant other's motion to dismiss. Id.

Writing for the majority, Judge Murphy reviewed the court of appeals' earlier decision in Rodriguez v. Lemus, 257 N.C. App. 498, 495, 810 S.E.2d 1, 5 (2018), in which it held "evidence of post-separation conduct may be used to corroborate evidence of pre-separation conduct . . . so long as the evidence of pre-separation conduct is sufficient to give rise to more than mere conjecture." Id. ¶ 21. The court of appeals rejected the significant other's argument that Rodriguez limits the admissibility of corroborating evidence to when the defendant has been identified as the paramour in one or more independently sufficient instances of pre-separation conduct. Id. ¶ 23.

The court of appeals recognized that "[a]dultery is nearly always proved by circumstantial evidence." Id. (quoting In re Est. of Trogdon, 330 N.C. 143, 148, 409 S.E.2d 897, 900 (1991)).

The court of appeals held the trial court erred in granting the significant other's motion for summary judgment. Id. ¶ 24. "The evidence of a friendship and frequent contact between [the ex-wife] and [her new significant other] that existed prior to the relationship, as well as their romantic and sexual relationship after separation, while not sufficient for a jury to conclude the final element of alienation of affection had been met on its own, could convince a jury that [the new significant other] was 'Bestie'—or if different, the person with whom she admitted she had engaged sexual intercourse." Id. The court of appeals concluded the post-separation behavior constitutes "viable corroborative evidence for the purposes of satisfying the burden of production where the identify of a pre-separation extramarital sexual partner is unknown." Id. ¶ 27.

Judge Dillon concurred, writing separately to address the dissent's argument that heartbalm torts should be abolished. Id. ¶ 31.

Judge Jackson dissented, opining that heartbalm torts should be abolished. Id. ¶¶ 51–71. In analyzing the case before the court, Judge Jackson opined that Rodriguez was decided incorrectly and that the General Assembly, based on his review of the legislative history of section 52-13(a) of the North Carolina General Statutes, did not intend for a jury to be permitted to infer pre-separation conduct based on evidence of post-separation conduct. Id. ¶ 72. Further, he would have held that the post-separation evidence presented in this case gives rise to nothing more than conjecture and is insufficient to overcome a motion for summary judgment. Id. ¶¶ 86–99.

(1) Lay Witness

In companion cases Clark v. Clark, 280 N.C. App. 384, 2021-NCCOA-652, and Clark v. Clark, 280 N.C. App. 403, 2021-NCCOA-653, the court of appeals considered whether a trial court

erred in admitting expert witness testimony. (Note: The opinion regarding the husband's appeal is available at 2021-NCCOA-652. The opinion regarding the paramour's appeal is available at 2021-NCCOA-653. As both appeals arise from the same facts, and both opinions are largely identical, this summary cites to the husband's appeal, 2021-NCCOA-652, unless otherwise noted.)

A couple married in 2010. Clark, 2021-NCCOA-652 at ¶ 2. Despite a rocky start to their relationship, the couple attended marriage retreats and eventually had two children. Id. at ¶¶ 2–3. In 2016, the husband, an Army officer, met another Army officer-, who stayed in the same barracks and attended the same training. Id. at ¶ 4. The two began a relationship. Id. at ¶¶ 4–5. After learning about the relationship, the wife threatened to call the paramour, leading to a fight between the couple, and the husband left their marital home in September 2016. Id. at ¶ 10.

Despite the husband's departure, he and the wife maintained an "emotionally and sexually intimate relationship." Id. at ¶ 11. Throughout June and July 2017, the husband and wife continued a sexual relationship "and recorded themselves doing so." Id. at ¶ 12.

Also in July 2017, the husband and the paramour conceived a child together via in vitro fertilization. Id. In August 2017, the husband traveled to Boston for training. Id. When the husband ceased responding to the wife's messages, she "sent him a topless photo," which she claimed she did not send to anyone else. Id. The husband and wife ended their sexual relationship in September 2017. Id. at ¶ 13. A month later, the wife sent "a picture of female genitalia" to the husband in a text message. Id. The same month, she also discovered that the paramour was pregnant with the husband's child. Id.

In January 2018, the wife discovered an online advertisement she believed was about her:

> Liz is super hot! Shows you what plastic surgeons and eating disorders can do for you in 2018. There's a reason she's been divorced twice and can't take care of her kids. She's a plaything,

> nothing more. Hope you fellas are wearing condoms, she's got herpes.

Id. at ¶ 14. The wife responded to the ad and observed the associated username was linked to the husband's personal email address. Id. at ¶ 15.

In March 2018, the wife began communicating on a social media platform with someone she believed was the husband. Id. ¶ 16. The individual sent the wife the same topless photograph the wife had sent to the husband, claiming the photograph was "all over the place." Id. In May 2018, the wife discovered a social media "weight loss" advertisement featuring a post-pregnancy photograph of her and the same topless photograph. Id. at ¶ 17.

Throughout 2018, the wife's friends and associates contacted her regarding postings on social media platforms and chatrooms soliciting "no strings attached sex." Id. at ¶ 18. Business records from the social media platform indicated the postings could be traced to an IP address matching a residence shared by the husband and paramour. Id.

When the wife messaged the individual on the platform, the individual replied, "We are going to do continue doing everything in our power to make your life miserable." Id. at ¶ 19.

In August 2018, the wife filed claims against the husband and/or the paramour for, among other things, intentional infliction of emotional distress and alienation of affection. Id. at ¶ 20.

The trial court barred the wife from use of expert witness testimony, due to a late filing, but allowed the witness, a digital forensics examiner, to testify as a lay witness. Id. at ¶¶ 21–22. At trial, the witness laid the foundation for entry of a flash drive and "demonstrated that [the wife] had only sent the 'topless photo' of herself to [the husband]." Id. at ¶ 22. After a jury trial, the trial court entered judgment on all claims against the husband, id. at ¶ 23, and some of the claims

against the paramour, Clark, 2021-NCCOA-653 at ¶ 22. After the denial of post-trial motions by the husband and paramour, both appealed. Id. at ¶ 23; Clark, 2021-NCCOA-652 at ¶ 23.

The court of appeals considered whether the trial court erred by admitting evidence and testimony from the digital forensic witness, even though he was not qualified as an expert witness. Clark, 2021-NCCOA-652 at ¶ 25. Finding no error, the court of appeals affirmed. Clark, 2021-NCCOA-652 at ¶ 67; Clark, 2021-NCCOA-653 at ¶ 74. The court reviewed the issue of whether the digital forensic witness testified as an expert de novo but reviewed whether the trial court erroneously admitted his testimony for an abuse of discretion. Id. at ¶ 27. The court observed that the witness testified about the general process for making a forensic or digital copy of an electronic device, and specifically how he made a copy of the wife's devices. Id. at ¶ 29. The witness then laid the foundation for a flash drive containing the wife's files and demonstrated that the wife did not send the topless photograph to anyone other than the husband. Id. Based on review of the testimony, the court of appeals held the forensics witness testified as a lay witness, not an expert. Id. "[The digital forensics witness] testified as to what he 'saw or experienced' in creating copies of [the wife's] devices . . . [h]e did not interpret or assess the devices or accounts but explained the process he used for [the wife's] devices was one that he did daily." Id.

The court of appeals further noted that even presuming arguendo the digital forensics witness had testified as an expert, the husband and paramour failed to demonstrate prejudice. Clark, 2021-NCCOA-652 at ¶ 30. The wife herself testified about the text messages, emails, and social media postings. Id. Therefore, the digital forensics witness's testimony was not "pivotal in determining whether [the husband and paramour] posted the wife's pictures," but merely corroborated the wife's own testimony. Id. Accordingly, the court of appeals found no error in the trial court's decision to allow the digital forensics witness to testify. Id.

(2) Expert

In State v. Watson, ___ N.C. App. ___, 2022-NCCOA-687, the court of appeals considered whether an expert witness can provide admissible opinion testimony for a report created by an out-of-court expert.

A driver appealed his conviction for driving while impaired. Id. ¶¶ 2–3. The driver had been stopped by a police officer for a traffic infraction. Id. ¶ 4. The officer suspected the driver to be intoxicated and performed several tests. Id. ¶¶ 4–5. After these assessments, the driver was arrested. Id. ¶ 5. A blood sample was collected and analyzed by an analyst in the State Bureau of Investigation's crime lab. Id. ¶ 6. The analyst prepared a report relaying that the driver's blood alcohol concentration was .27 grams per 100 milliliters on the night of the arrest. Id. Another agent in the lab conducted administrative and technical review of the analyst's report. Id. Before trial the driver filed a notice of objection to "the introduction during trial of any affidavits and written statements" regarding the chemical analysis of the driver's blood. Id. ¶ 2. Subsequently, the state provided notice that it intended to introduce the crime lab's toxicology report concerning the driver's chemical analysis of his blood on the night of his arrest. Id. However, before the driver's trial began, the agent who conducted the analysis and prepared the report left the State Bureau of Investigation's office. Id. As a result, the state filed a notice to substitute the agent with the individual who did the administrative and technical review of the driver's case as its forensic toxicology expert. Id. The driver objected to introducing the toxicology report without the original analyst's testimony. Id. At trial, the substituted agent was admitted as an expert witness for forensic toxicology. Id. ¶ 7. Over the driver's objection, the agent testified that after reviewing the report, it was her opinion that the driver's sample had a blood alcohol concentration of .27 grams. Id. The jury found the driver guilty of driving while impaired. Id. ¶ 3.

On appeal, the court of appeals found no error by the trial court in admitting the substituted agent's testimony and toxicology report. Id. ¶ 12. The driver contended that the trial court erred in admitting the toxicology report "because no expert with knowledge of how the toxicology tests were performed testified." Id. ¶ 9. Rule 703 governs types of evidence on which an expert may rely. Id. ¶ 10. The court of appeals explained that under Rule 703, "[a]n expert may properly base his or her opinion on tests performed by another person, if the tests are reasonably relied on in the field." Id. (quoting State v. Fair, 354 N.C. 131, 162, 557 S.E.2d 500, 522 (2001)). In this case, the substituted agent was admitted as an expert in the field of forensic toxicology. Id. ¶ 11. The agent was the administrative and technical reviewer for the driver's case. Id. At trial, the agent described in detail the scientific method for analyzing the driver's blood samples and her review of the report before forming an independent opinion about the blood alcohol concentration amount in the driver's blood sample. Id. Taking this into consideration, the court concluded that under Rule 703 the toxicology report was admissible to show the basis of the substituted agent's opinion. Id. However, the court explained that a limitation to the admissibility of the toxicology report could have been applied here, if the driver's counsel had properly objected. Id. ¶ 12. The court specified that because the report was being used as the basis of an expert's opinion, and not for substantive evidence, the driver was entitled to an instruction limiting its consideration for this purpose only. Id. However, the driver only provided a general objection and did not request a limiting instruction. Id. Because the driver did not request a limiting instruction, the court found that the trial court did not commit reversable error. Id.

Thus, for the foregoing reasons, the court found no error in the trial court's determination to permit the substituted agent's expert testimony.

(3) Hearsay

In State v. Thomas, 281 N.C. App. 159, 2021-NCCOA-700, review denied, 2022 WL 16730080 (N.C. Nov. 2, 2022), the court of appeals considered whether a witness's statements to the police, made during an audio-recorded interview and in an email that a third party transcribed for her, were admissible at a criminal trial under the hearsay exceptions for past recorded recollections and former testimony.

A man was accused of murder. Id. at ¶ 1. At trial, the state sought to introduce two statements that the witness had previously made to a police investigator. Id. at ¶¶ 5–6, 10. The witness made the first statement during an interview by the investigator that the investigator recorded on a digital recorder. Id. at ¶ 5. She made the second statement in an email to the investigator that a family member of the witness transcribed for her. Id. at ¶ 6. The state argued that the statements were admissible under Rule 803(5) of the Rules of Evidence, as a past recorded recollection, and under Rule 804(b)(1), as former testimony. Id. at ¶ 10. Over the man's objections, the trial court admitted into evidence the two statements. Id. The man was convicted, and he appealed the trial court's ruling on the witness's statements, among other things, to the court of appeals. Id. at ¶¶ 13–14.

The court of appeals affirmed, holding that the trial court did not err in admitting into evidence the witness's statements.

As it did at trial, the state argued on appeal that the witness's statements were admissible under both Rule 803(5) and Rule 804(b)(1). Id. at ¶ 15. "Rule 804(b)(1) only reaches '[t]estimony given as a witness at another hearing of the same or a different proceeding.'" Id. (quoting N.C. Gen. Stat. § 8C-1, Rule 804(b)(1)). The witness's statements were admitted at a prior trial of the man. Id. at ¶¶ 10 n.1, 15. However, the state did not introduce the prior trial testimony reflecting

those statements; instead, the state only introduced and read into the record the witness's actual statements. Id. at ¶ 15. As a result, Rule 804(b)(1) did not apply in this case. Id. Furthermore, the trial court admitted the statements into evidence under Rule 803(5), not Rule 804(b)(1), so the court of appeals limited its analysis to Rule 803(5). Id. at ¶ 16.

"Rule 803(5) provides that a type of out-of-court statement labeled 'recorded recollection' is admissible as an exception to the general rule against hearsay." Id. at ¶ 18 (quoting N.C. Gen. Stat. § 8C-1, Rule 803(5)). Rule 803(5) has been construed broadly to include audio recordings. Id. Rule 803(5) has three requirements. Id. at ¶ 19. In this case, only the third requirement, whether the witness's statements reflected her knowledge correctly, was at issue. Id. at ¶ 20.

The court of appeals first observed that the witness's statements "involve[d] a set of facts in the middle of the spectrum" because the witness did not testify that the statements reflected her knowledge correctly, but she also did not disavow the statements. Id. at ¶ 23. Nevertheless, the court of appeals determined that both statements were admissible under Rule 803(5).

As for the audio-recorded statement, the witness testified at trial that she knew it was her voice in the recording, even though she did not know she was being recorded at the time. Id. She also testified that she was telling the police investigator in the recording what she "had been through" and was "laying it all out." Id. Based on this testimony, the court of appeals concluded that the audio-recorded statement reflected the witness's knowledge correctly, despite the witness's other testimony that she was "just ranting" in the recording, which the court characterized as an indication of the witness's emotional state, not the truthfulness of her statement. Id.

The email statement was also properly admitted into evidence. That the witness had dictated the statement to a family friend did not make the statement inadmissible, since the court

of appeals has previously allowed statements written by others to be admitted into evidence when the declarant had a chance to review the statement. Id. at ¶ 24. Although the witness did not testify that she reviewed the email statement, she did sign and date it when she hand-delivered it to the police investigator and confirmed that it was her writing. Id. This sufficiently supported a finding that the statement reflected the witness's knowledge correctly, though it was "a close call." Id.

For these reasons, the court of appeals held that the trial court did not err in its ruling on the admissibility of the witness's two statements.

In State v. Reid, 380 N.C. 646, 2022-NCSC-29, the supreme court considered whether hearsay evidence may be considered competent evidence for a Motion for Appropriate Relief ("MAR") following a criminal trial.

A criminal defendant was found guilty of first-degree murder and common law robbery, and subsequently filed a series of post-conviction motions. Id. at ¶ 7. One of those was a motion for appropriate relief on the grounds of newly discovered evidence, based upon a witness's affidavit. Id. at ¶¶ 9–10. The affidavit provided that an individual other than the defendant had admitted to committing the crime in a conversation with the affiant/witness. Id. at ¶ 9. Later, at a hearing on the motion for appropriate relief, the affiant/witness testified to hearing this individual's admission. Id. at ¶ 12. Though both statements were hearsay, the trial court found that the State was on notice that the criminal defendant would offer such evidence at trial, and admitted them under the residual exception to hearsay, Rule 803(24) of the North Carolina Rules of Evidence. Id. at ¶¶ 12, 42. Based on this evidence, the trial court vacated the murder conviction and ordered a new trial. Id. at 12.

The court of appeals reversed the trial court, holding the trial court abused its discretion in granting a new trial. Id. at ¶ 14. The court of appeals reasoned that because the criminal defendant

failed to provide written notice of an intent to offer hearsay evidence pursuant to Rule 803(24), the hearsay evidence was inadmissible and therefore not competent. Id.

In a wide-ranging opinion, the supreme court reversed the court of appeals, holding the trial court did not abuse its discretion. Id. at ¶ 50. Justice Earls wrote for the majority. On the issue of the competency of hearsay evidence, the supreme court identified two flaws in the reasoning offered by the court of appeals. Id. at ¶¶ 42–43

First, the supreme court held that if the court of appeals was correct in its analysis that admissibility of the hearsay evidence was dispositive of the competency of that evidence, then the issue of Rule 803(24) notice was not properly preserved for appellate review. Id. at ¶ 42. The supreme court observed that the record reflected no objection had been made to the evidence at the time it was offered. Id. "Evidence that is admitted without objection is competent evidence." Id. Therefore, the court concluded that because no objection was made, the hearsay evidence would be competent evidence if admissibility were the appropriate standard. Id.

Second, the supreme court held that the court of appeals applied the incorrect standard to determining whether the hearsay evidence was competent. Id. at ¶ 43. The correct standard for a MAR hearing is whether the evidence is "material, competent, and relevant in a future trial," and not in the hearing itself. Id.

To determine whether the evidence was competent, the supreme court then enunciated a six-factor test for the admissibility of evidence under Rule 803(24):

> (1) whether proper notice has been given, (2) whether the hearsay is not specifically covered elsewhere, (3) whether the statement is trustworthy, (4) whether the statement is material, (5) whether the statement is more probative on the issue than any other evidence which the proponent can procure through reasonable efforts, and (6) whether the interests of justice will be best served by admission.

Id. at ¶ 44 (quoting State v. Valentine, 357 N.C. 512, 518, 591 S.E.2d 846 (2003)). "We have deemed the third factor, whether the testimony was trustworthy, the 'most significant requirement." Id. (quoting State v. Smith, 315 N.C. 76, 93, 337 S.E.2d 833 (1985)).

The supreme court recognized the trial court applied this same six-factor analysis to determining the admissibility of the hearsay evidence for the hearing. Id. at ¶ 45. The supreme court found that based on this hearsay analysis and other issues considered, the trial court was within its discretion and committed no legal error and did not abuse its discretion in allowing a new trial based on the MAR hearing. Id. at ¶¶ 46, 50.

Chief Justice Newby dissented and would have affirmed the court of appeals but did not reach the hearsay issue. Id. at ¶ 51 (Newby, C.J., dissenting).

a. Prior Testimony

In State v. Joyner, ___ N.C. App. ___, 2022-NCCOA-525, petition for disc. rev. filed (N.C. Sept. 6, 2022), the court of appeals considered whether testimony during a civil hearing by a declarant who was unavailable for a subsequent criminal proceeding falls within the former testimony exception to the hearsay rule where the subject of the testimony involved the same events.

A man offered to perform home improvement work for an elderly woman who lived alone. State v. Joyner, ___ N.C. App. ___, 2022-NCCOA-525, ¶ 2. The elderly woman hired the man to paint and clean her gutters. Id. After beginning work, the man told the elderly woman that he found something that appeared to be rotten wood laying in the gutter. Id. He showed her photos of rotten wood and explained that she needed her roof repaired. Id. The elderly woman hired the man to repair her roof. Id. The man invoiced the elderly woman $1,500 for the roof repair, $750 of which the elderly woman paid upfront. Id. ¶ 3.

After the man purportedly finished the roof repair, the elderly woman requested that he return to repair an issue with her toilet. Id. ¶ 4. The man, who did not have a plumber's license, inspected the toilet, concluded it was broken, and informed the elderly woman that a leak was causing water damage under her house. Id. The man invoiced the elderly woman $2,200, which she paid in full upfront. Id.

As the man left to obtain materials to repair the toilet and leak, an officer initiated a traffic stop after concluding the man was operating without an active license. Id. ¶ 5. After the traffic stop, the officer reviewed the man's criminal history, which revealed previous charges for obtaining property by false pretenses, defrauding the elderly, and breaking and entering. Id. The officer, knowing the neighborhood in which the man reported performing work was predominately elderly, visited the elderly woman's house to inquire about the work the man was performing. Id. ¶ 6. The officer contacted the building inspector for a professional opinion as to whether the man performed the work as he represented to the elderly woman. Id. ¶ 7.

Upon inspection, the building inspector found no rot, structural damage to the house, or plumbing issues. Id. ¶ 7. The man returned to the elderly woman's house and was taken into custody. Id.

A roofing expert subsequently inspected the elderly woman's home and found no evidence of new shingles being installed, rotten wood being removed, or any work completed to prevent roof damage. Id. ¶ 8. The expert acknowledged the man completed minimal work, which he estimated to be worth approximately $300. Id.

Before the man was indicted, his mother went to the elderly woman's home and had her sign a pre-drafted affidavit, which spelled the elderly woman's name incorrectly and was subsequently notarized. Id. ¶ 9. After he was indicted for obtaining property by false pretenses

and exploitation of an older adult or disabled adult while in a business relationship, the elderly woman filed an action for a civil no-contact order against the man. Id. ¶ 10. Though the man was properly served with the complaint and notice of hearing, he did not appear at the hearing. Id. The court entered a no-contact order, prohibiting the man from communicating with the elderly woman. Id.

Before the man's criminal trial, the elderly woman passed away. Id. During the criminal trial, the trial court admitted the elderly woman's testimony from the no-contact hearing. Id. The jury found the man guilty of obtaining property by false pretenses and exploitation of an older adult by a person in a business relationship. Id. ¶ 11. The trial court imposed two sentences of fifteen-to-twenty-seven months to be served consecutively. Id.

The man appealed arguing, in part, the trial court erred by admitting the elderly woman's former testimony. Id. ¶ 1. The court of appeals reviewed the trial court's admission of the elderly woman's prior testimony de novo and found no error. Id. ¶ 23.

The court of appeals explained that the elderly woman was unavailable as she passed before the man's criminal trial. Id. ¶¶ 24-25. Rule 804(b)(1) of the North Carolina Rules of Evidence provides that prior testimony from an unavailable witness is admissible when the testimony was

> Given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceedings, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

In this case, the court of appeals explained the trial court properly admitted the elderly woman's prior testimony because "the no contact hearing dealt with the same issues and facts that were the subject of [the man]'s criminal trial" and the man "had a similar opportunity to ask [the

elderly woman] questions regarding the facts and issues that were the subject of his criminal trial at the civil hearing." State v. Joyner, ___ N.C. App. ___, 2022-NCCOA-525, ¶ 25.

C. Attorney's Fees

In Reynolds-Douglass v. Terhark, 381 N.C. 477, 2022-NCSC-74, rehearing dismissed, 874 S.E.2d 601 (N.C. July 21, 2022), the supreme court considered whether a real estate contract constituted "evidence of indebtedness" under section 6-21.2 of the North Carolina General Statutes to allow the recovery of reasonable attorney's fees.

A seller of a home brought an action against a prospective buyer for fees arising from a real estate contract. Id. ¶ 5. The seller in this action placed his home on the market looking for potential buyers. Id. Subsequently, the home caught the interest of the prospective buyer. Id. ¶ 3. As a result, the buyer executed an "Offer to Purchase and Contract." Id. The agreement required in part that the prospective buyer pay a $2,000 due diligence fee and a $2,500 earnest money deposit. Id. The agreement further defined the specifics and terms of the due diligence fee and the earnest money deposit. Id. The due diligence fee is defined in part as "[a] negotiated amount [. . .] by Buyer to Seller with this Contract for Buyer's right to terminate the Contract." Id. The earnest money deposit section describes the deposit as "monies paid or required to be paid with this transaction [. . ..] In the event of breach [. . .] the [d]eposit shall be paid to Seller as liquidated damages." Id. The preceding section additionally provided that "[i]f legal proceedings are brought [. . .] to recover the Earnest Money Deposit, the prevailing party in the proceeding shall be entitled to recover [. . .] reasonable attorney fees and court costs in connection with the proceeding." Id. Sometime after executing the contract, the prospective buyer informed the seller that he intended to cancel the contract. Id. ¶ 4. Despite the cancellation, the prospective buyer did not pay either the due diligence fee or the earnest money deposit contemplated under the agreement. Id. Prior to

going to trial, the seller initiated an action in small claims court for the disputed amount. Id. ¶ 5. The magistrate judge awarded fees in the seller's favor. Id. A separate action was then initiated where a trial court granted summary judgment in favor of the seller and awarded the seller a substantial award including: the $2,000 due diligence fee, the $2,500 earnest money deposit, $776.22 in prejudgment interest, and $13,067.70 in attorney fees. Id. ¶ 7. On appeal, the court of appeals affirmed the trial court's order. Id. ¶ 8. The court specified that the trial court was also authorized to award attorney's fees under section 6-21.2 of the North Carolina General Statutes. Id. ¶ 9.

On appeal, in an opinion by Justice Ervin writing for the majority, the supreme court affirmed the trial court's judgment finding that the seller was entitled to the due diligence fee, the earnest money deposit, and attorney's fees. Id. ¶ 29. Generally, attorney's fees are not recoverable unless authorized by statute. Id. ¶ 20 (citing Stillwell Enters., Inc. v. Interstate Equip. Co., 300 N.C. 286, 289 (1980)). However, and in accordance with this general rule, section 6-21.2 of the North Carolina General Statutes allows for the recovery of attorney's fees in actions in part:

> If such note, conditional sale contract or other evidence of indebtedness provides for the payment of reasonable attorney's fees by the debtor, without specifying any specific percentage, such provision shall be construed to mean fifteen percent (15%) of the "outstanding balance" owing on said note, contract or other evidence of indebtedness.

Id.

In determining whether the term "evidence of indebtedness" in the statute extended to the Offer to Purchase Contract in this case, the court explained its analysis of the statute in Stillwell Enters., Inc. v. Interstate Equip. Co., 300 N.C. 286, 289 (1980). Id. at ¶¶ 21-22. In Stillwell, the court found that a lease agreement for a road scraper that including a provision entitling the lessor

to attorney's fees if a dispute arose constituted "evidence of indebtedness" under the statute. Id. ¶ 21. Specifically, the court held:

> [Section 6-21.2] applies not only to notes and conditional sale contracts, but also to such "other evidence of indebtedness" as [. . .] "any other such security interest agreement which evidences both a monetary obligation and a lease of specific goods." [. . .] [A]n evidence of indebtedness is a writing which acknowledges a debt or obligation, and which is executed by the party obligated thereby." More specifically, we hold that the term "evidence of indebtedness" as used in N.C.G.S. § 6-21.2 has reference to any printed or written instrument, signed or otherwise executed by the obligor(s), which evidences on its face a legally enforceable obligation to pay money.

Id. ¶ 22.

Here, the Offer to Purchase and Contract was "signed by both parties, and on its face, evidences a legally enforceable obligation that [the buyer] pay the plaintiff both the due diligence fee and the earnest money deposit." Id. ¶ 23. The court clarified that the statutory language should not narrowly define "evidence of indebtedness," to solely commercial situations. Id. ¶ 24.

Additionally, the majority held that the trial court's award of attorney's fees in the amount of $13,067.70 was proper as the "relevant fees were incurred in the course of defending the judgment that [the seller] initially received [in small claims court]." Id. ¶ 28.

Justice Berger, writing for the dissent, found misplaced the majority's conclusion that North Carolina law allows for the allowance of attorney's fees in a dispute arising out of a contract for the sale of real property. Id. ¶ 31. The dissenting opinion again emphasized the rule that attorney's fees are not recoverable unless expressly allowed by statute. Id. ¶ 33. The dissent asserted that the court's interpretation of section 6-21.2 of the North Carolina General Statutes "would allow collection of attorney's fees for any case in which there is written evidence of a legally enforceable debt." Id. ¶ 35. This interpretation is contrary to "the legislature's purpose in

enacting the law and its subsequent determination that the statute's purpose was to supplement laws intended to govern commercial transactions." Id. Further, the dissent contended that the legislative intent that the statute only be applied to commercial transactions is evidenced in how the North Carolina General Statutes reference "evidence of indebtedness." Id. ¶ 36. Under this state's statutory provisions, the term "evidence of indebtedness" has been used to refer to "notes, securities, mortgages, deeds of trust, and similar written documents," which differ significantly from residential real estate contracts. Id. (referencing N.C. Gen. Stat. § 25-9-109(d)(14) (2021); N.C. Gen. Stat. § 45-36.3(a) (2021); N.C. Gen. Stat. § 47-20(d) (2021); N.C. Gen. Stat. § 53-232.10(a) (2021); N.C. Gen. Stat. § 54B-244(b)(3)(h) (2021); N.C. Gen. Stat. § 58-7-173(1), (6)-(7) (2021); N.C. Gen. Stat. § 78A-2(11) (2021); N.C. Gen. Stat. § 122D-3(4) (2021)).

The dissent argued that even if the statute applied beyond commercial transactions, the amount awarded in this case does not comply with the statute's formulation for attorney's fees. Id. ¶ 38. Section 6-21.2 of the North Carolina General Statutes provides that when "evidence of indebtedness' provides for the payment of reasonable attorneys' fees [. . .] without specifying any specific percentage, such provision shall be construed to mean fifteen percent (15%) of the 'outstanding balance." Id. Here, the contract provides that a prevailing party may recover attorney's fees in an action to recover the earnest money deposit. Id. ¶ 39. The contract is silent on the means of formulating the fees. Id. The majority should have ascertained the outstanding balance of the contract and awarded fifteen percent of its value. Id. ¶ 42. The dissent contended that under this guidance the proper calculation is: "$ 2,500 (earnest money deposit) x 15% (statutory rate) = $375 (in attorney's fees)." Furthermore, the legislature has never authorized attorney's fees based on an attorney's time spent on a case. Id. ¶ 41. It is for these reasons that Justice Berger dissented.

D. Contempt

In Hirschler v. Hirschler, 281 N.C. App. 30, 2021-NCCOA-690, the court of appeals considered whether a trial court may sua sponte issue an order for civil contempt when notice has only been provided for a criminal contempt hearing. Judge Wood authored the majority's opinion.

In 2017, a trial court entered a custody order granting a mother primary physical custody of a then-teenaged minor. Id. at ¶ 2. In late June 2020, the teenaged minor informed the mother of the minor's desire to stay with the father in Florida, rather than return to North Carolina. Id. The mother, father, and teenaged minor exchanged texts and emails, but the minor remained in Florida. Id. The father told the mother that he would not "forcibly put [the minor] into a car and drive [the minor] to the exchange against [the minor's] will." Id. at ¶ 3. In late July 2020, the mother filed a motion for contempt and an "Ex Parte Motion for Emergency Court," requesting the trial court to hold the father in criminal contempt. Id. By September, despite the mother's travels to Florida to speak to the teenaged minor, the minor remained in Florida. Id.

The trial court held a hearing in September 2020, directing the father to appear and show cause why he should not be held in criminal contempt. Id. At the conclusion of the hearing, the trial court sua sponte held the father in civil contempt for violating the custody order and ordered the father to be immediately taken into custody and jailed, until he returned the minor to the mother. Id. at ¶ 4. The father immediately filed a notice of appeal and motion to stay the contempt order. Id. The teenaged minor turned eighteen before the court of appeals considered the father's appeal. Id. at ¶ 5.

The court of appeals considered whether a trial court may sua sponte issue an order of civil contempt when a defendant has received notice of only a criminal contempt hearing. Id. The court recognized that it may not, though dismissed the case as moot. Id.

The court of appeals observed there are "three permissible methods for when a civil contempt proceeding can be initiated:" (1) by a motion of an aggrieved party giving notice to the alleged contemnor to appear before the court for a civil contempt hearing, (2) by order of a judicial official directing the alleged contemnor to appear at "at a specified reasonable time" and show cause why he should not be held in civil contempt, or (3) by notice of a judicial official that the alleged contemnor will be held in contempt unless he appears "at a specified reasonable time" and shows cause why he should not be held in civil contempt. Id. at ¶ 7 (citing N.C. Gen. Stat. § 5A-23). As applicable, the motion, order, or notice must be served on the alleged contemnor "at least five days in advance of the hearing unless good cause is shown." Id. (quoting N.C. Gen. Stat. § 5A-23(a)–(a1)).

The court of appeals offered that the father operated under the "reasonable assumption" the September 2020 hearing was for criminal contempt, and not civil contempt, because the mother's motion mentioned only criminal contempt, the district court's order and notice only mentioned criminal contempt, and at the hearing the mother's attorney recognized and agreed the hearing was only for criminal contempt. Id. at ¶ 8. "Essentially, at no point was Defendant given any required notice he could be subjected to civil contempt." Id. at ¶ 9.

The court of appeals further recognized that the trial court erroneously concluded that civil contempt was a lesser form of criminal contempt. Id. at ¶ 10. While such an interpretation "may have been appropriate under prior versions of the contempt statute, the change in the statute in 2021 does not support this conclusion." Id. The court of appeals observed under the revised contempt statute, an alleged contemnor expressly "shall not" be held in criminal contempt for the same conduct as he is held in civil contempt, and vice versa. Id. (citing N.C. Gen. Stat. §§ 5A-

12(d), 5A-23(g)). "In other words, civil contempt is not a lesser form of contempt than criminal contempt and the trial court erred here in concluding otherwise." Id. at ¶ 11.

Finally, the court of appeals dismissed the case as moot as the custody order was no longer in force as the minor had reached eighteen years old. Id. at ¶ 12.

> While we recognize the error of the trial court in holding Defendant in civil contempt after conducting a hearing only on criminal contempt, we dismiss this appeal as moot. [The teenaged minor] has reached the age of maturity, and the court no longer has jurisdiction to enforce the custody order.

Id. at ¶ 13.

Judge Inman concurred in a separate opinion stating that the issue of the validity of the contempt order need not be reached. Id. at ¶ 14. "Because we have dismissed the appeal as moot, however, I would not address the merits of Defendant's challenge to the sua sponte civil contempt order." Id.

E. Appeals

(1) Sanctions

In Shebalin v. Shebalin, ___ N.C. App. ___, 2022-NCCOA-410, the court of appeals considered whether sanctions should be imposed on a party that frivolously seeks an appeal despite underlying circumstances rendering the appeal moot and insistence from opposing counsel that the appeal is an impermissible interlocutory appeal.

Ex-spouses were involved in a "high conflict" parental dispute. Since it was "high conflict" the trial court entered a series of "Consent Orders Appointing Parenting Coordinators." Id. at ¶2. These orders lasted each time for a period up to one or two years. Id. Upon the expiration of the last order and as high conflict continued, the ex-wife filed a Motion for Appointment of Parenting Coordinator. Id. ¶ 3. The ex-husband opposed this motion and moved to dismiss. Id. Following a

hearing, the trial court sided with the ex-wife and entered an "Order for Appointment of Parenting Coordinator," ("2020 Order") articulating that "a Parenting Coordinator shall be appointed for a one[-]year term," and that the trial court "retain[ed] jurisdiction" on future orders. Id. ¶ 4. However, the 2020 Order failed to establish the individual to serve as the parenting coordinator. Id. Following this order, the ex-husband filed a notice of appeal. Id. While awaiting the appeal, the trial court held a hearing to appoint a parenting coordinator in compliance with the issuing of the court's 2020 Order. Id. ¶ 5. The ex-husband through counsel objected to the hearing on the basis that the 2020 order had been appealed. Id. In response counsel for the ex-wife stated that: "A [parenting coordinator] was not identified. An order appointment was not conducted. No order has been signed, so it's my position . . . that this is a premature appeal; that it's an impermissible interlocutory appeal." Id. ¶ 6. Subsequently, the trial court postponed appointment until several months later. Id. ¶ 7. At the second hearing, the ex-husband again objected to the proceeding. Id. ¶ 8. The ex-husband's basis for his objection was that "the trial court did not have jurisdiction to proceed [. . .] by virtue of [his] Notice of Appeal." Id. Again, the ex-wife's counsel argued the appeal was an impermissible interlocutory appeal. Id. After this discourse, the trial court entered an "Order Appointing Parenting Coordinator" ("2021 Order"), which appointed a new parenting coordinator for a year lasting until March 2022. Id. ¶ 9. On appeal, the ex-husband asserted that the 2020 Order was a final order. Id. ¶ 11. In response to the ex-husband's assertions, the ex-wife filed a Motion to Dismiss Appeal on February 17, 2022, contending the 2020 Order was interlocutory; the ex-wife then filed her appellate brief on March 4, 2022, and another Motion to Dismiss Appeal, based on mootness, on May 20, 2022. Id.

On appeal, the court of appeals dismissed the case and imposed sanctions. Id. ¶ 21. The court of appeals found the 2020 Order to be interlocutory, because rather than disposing of the

case, the case required further action by the trial court. Id. ¶ 14. Specifically, the 2020 Order set "a framework that the 2021 Order utilized in appointing a specific parenting coordinator for a term of one year." Id. Furthermore, the court concluded that the interlocutory nature of his appeal was apparent in the name of the orders and through the ex-wife's objections at the Order Appointing Parenting Coordinator hearings. Id. ¶¶ 14, 15.

Upon determining that the appeal was interlocutory, the court-imposed sanctions on the ex-husband and his counsel. Id. ¶ 20. Specifically, the court taxed the ex-husband in his individual capacity and his counsel for double the appeal costs. Id. Additionally, the court ordered the ex-husband to cover the attorney fees incurred by the ex-wife in defending the appeal. Id. The court awarded these sanctions by finding that the ex-husband's appeal was frivolous. Id. ¶ 19. Under Rule 34 of the North Carolina Rules of Appellate Procedure, sanctions are justified if:

> (1) the appeal was not well grounded in fact and was not warranted by existing law or good faith argument for the extension, modification, or reversal of existing law;
> (2) the appeal was taken or continued for an improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; [and/or]
> (3) a petition, motion, brief, record, or other item filed in the appeal was grossly lacking in the requirements of proprietary, grossly violated appellate court rules, or grossly disregarded the requirements of a fair presentation of the issues to the appellate court.

Id. ¶ 17 (citing N.C.R. App. P. 34(a)).

If a party succumbs to any of these violations, a court may impose as sanctions: (1) dismissal of the appeal, (2) monetary damages, and (3) any other sanction it deems proper and just. Id. For monetary damages, courts may include "single or double costs," "damages occasioned by delay," and "reasonable expenses, including reasonable attorney fees, incurred because of the frivolous appeal or proceeding." Id.

Here, the court of appeals found that the sanctions were justified because the interlocutory nature of the 2020 Order was easily apparent, ex-wife's counsel explained its interlocutory nature on multiple occasions, and the purpose of the 2020 Order, which was to appoint a parenting coordinator, had already been met. Id. ¶ 18. Based on these circumstances, the court found the ex-husband's appeal was "not well grounded in fact[,]" "was not warranted by existing law[,]" "needless[ly] increase[d] . . . the cost of litigation[,]" and "grossly disregarded the requirements of a fair presentation of the issues." Id. ¶ 19.

Thus, the court of appeals dismissed the appeal and remanded the matter to the trial court for a determination on attorney fees.

(2) Jurisdiction

In State v. Killette, 381 N.C. 686, 2022-NCSC-80, the supreme court considered whether the court of appeals has the discretionary power to issue a writ of certiorari.

A drug dealer petitioned for a writ of certiorari for review of the trial court's order denying a motion to suppress. Id. ¶ 7. On appeal, the court of appeals held against the dealer stating, in part, that "[the court] lacked authority under Rule 21 of the North Carolina Rules of Appellate Procedure to issue the writ." Id. ¶ 8. As a result, the court of appeals denied the dealer's petition for a writ of certiorari. Id. The dealer then sought review in the supreme court. Id. The supreme court instructed the court of appeals to exercise its discretion to deny or allow the dealer's petition. Id. ¶ 9. Applying State v. Ledbetter, 371 N.C. 192 (2018) and State v. Stubbs, 368 N.C. 40 (2015), the court held that Rule 21 does not limit the jurisdiction of the court of appeals or the court's ability to issue a writ of certiorari. Those decisions provided through express language that Rule 21 does not prevent the court of appeals from issuing writs of certiorari, nor can the Rules take away the court's jurisdiction under the state constitution and under acts of the General Assembly. Id. The issue was

remanded back to the court of appeals. Id. On its second review of the issue, the court of appeals again denied the petition. Id. ¶ 10.

The court reasoned in part that the petition must be denied due to the court's decisions in State v. Pimental, 153 N.C. App. 69 (2002) and State v. Harris, 243 N.C. App. 137 (2015). Id. ¶ 11. These cases provide in part that the court of appeals lacks authority to issue writs of certiorari. Id. Subsequently, the dealer petitioned the supreme court for discretionary review. Id. ¶ 13.

On appeal, the supreme court vacated and remanded the determination by the court of appeals that it lacked the ability to issue a writ of certiorari under the circumstances. Id. ¶ 14. The supreme court clarified that the court of appeals "possess[es] jurisdiction and authority to exercise its discretion in reviewing and deciding to allow or deny defendant's petition." Id. The court stated that this proposition should have been made clear in its decisions from Ledbetter, Stubbs, and State v. Thomsen, 369 N.C. 22 (2016). Id. ¶ 15. Furthermore, the court also stated that those opinions provide "regardless of whether Rule 21 contemplates review of defendant's motion to dismiss [. . .] if a valid statute gives the Court of Appeals jurisdiction to issue a writ of certiorari, Rule 21 cannot take it away." Id. Accordingly, the supreme court held that "the Court of Appeals has jurisdiction and authority to issue the writ of certiorari here, although it is not compelled to do so, in the exercise of its discretion," and that they were expressly overruling "Pimental, Harris, and any other Court of Appeals decisions that incorrectly hold or imply that the Court of Appeals lacks jurisdiction or authority to issue a writ of certiorari in similar circumstances, or which suggests that Rule 21 limits its jurisdiction or authority to do so." Id. ¶ 16.

Thus, for the foregoing reasons, the supreme court vacated and remanded the court of appeal's determination denying the dealer's writ of certiorari regarding the trial court's order excluding his motion to suppress.

(3) Interlocutory Appeals

In Lakins v. Western North Carolina Conference of United Methodist Church, 283 N.C. App. 385, 2022-NCCOA-337, the court of appeals considered whether (1) interlocutory appeal was proper for an order granting a motion to transfer pending motions to dismiss to a three-judge panel, and (2) whether a grant of certiorari was nevertheless proper. Id. at ¶ 1.

In 2019, the General Assembly passed the SAFE Child Act, which purported to revive previously time-barred claims for child sexual abuse. Id. at ¶ 2. It also extended the statute of limitations for child sexual abuse to ten years and added a provision by which a claim for child sexual abuse would be revived for the two years following a felony conviction for conduct related to the sexual abuse suffered by the plaintiff. Id.

Plaintiff brought suit against the United Methodist Church (the "Church") and The Children's Home (the "Orphanage") in April 2020, alleging child sexual abuse committed against him in the 1970s. Id. at ¶ 3. His claims sounded in negligence; negligent hiring, retention, and supervision; breach of fiduciary duty; and constructive fraud. Id. The Church and Orphanage moved to dismiss under Rule 12(b)(6); the Church also sought dismissal under Rule 12(b)(1) for lack of subject matter jurisdiction. Id. at ¶ 4. While these motions were pending, plaintiff moved to transfer the case to a three-judge panel. Id. at ¶ 5. The trial court granted this motion due to the constitutional challenges raised in the defendants' 12(b)(6) motions but did not rule on the remainder of the 12(b)(6) challenges or the Church's 12(b)(1) challenge. Id. Defendants appealed. Id. In the alternative, they sought certiorari to decide the matter. Id. at ¶ 6.

The court of appeals first dismissed the appeals as interlocutory and not (yet) affecting a substantial right. Id. at ¶ 14. While defendants were correct that the denial of proper venue to hear an action is a substantial right under North Carolina law, transferring to a three-judge panel of the

Wake County Superior Court did not implicate or threaten this right. Id. at ¶¶ 10–11. Further, while the Church was correct that a violation of "ecclesiastical entanglement" doctrine and the ensuing violation of the First Amendment does affect a substantial right, since this motion had not yet been ruled upon, the appeal was nonetheless premature. Id. at ¶¶ 12–13.

However, the court of appeals allowed defendants' request for certiorari. Id. at ¶ 14–15. Certiorari may be granted in cases where there is no right of appeal from an interlocutory order, when "review will serve the expeditious administration of justice or some other exigent purpose." Id. at ¶ 16. The court held that such a purpose was served by allowing certiorari here. Id. at ¶ 17.

On the merits, the court held that North Carolina law requires transfer to a three-judge panel of Wake County Superior Court whenever a party properly advances a facial challenge to a statute's constitutionality. Id. at ¶ 19 (citing N.C. Gen. Stat. § 1-267.1(b2). The court reviewed the subject matter jurisdiction and statutory construction issues presented de novo. Id. at ¶ 19. A review of the three-judge panel statutes—and Rule 42(b)(4) implicating them—made clear that all facial challenges were to be transferred to the panel. Id. at ¶ 22.

The court did not decide whether defendants' challenges were facial or as applied, but it did highlight that defendants expressly stated their challenges were solely as applied throughout their motions. Id. at ¶¶ 23–27. Since the court's decision in Cryan v. Nat'l Council of YMCAs of United States issued after the trial court's transfer order, the court vacated the trial court's judgment and remanded for further proceedings in light of that change in law regarding facial and as-applied challenges. Id. at ¶¶ 28–29.

Finally, the court turned to the Church's ecclesiastical entanglement 12(b)(1) motion. Id. ¶ 30. While it agreed with the Church that it was premature to decide the merits of the claim, it also agreed that the trial court should have resolved the merits before transferring any of the matter

to a three-judge panel, since it was "not contingent upon the outcome of the challenge to the [SAFE Child Act]'s facial validity." Id. ¶ 31. Rule 42(b)(4) states that no transfer to a three-judge panel should occur until "all other matters" beyond the facial challenge are resolved. Id. ¶¶ 32–33. The court noted in dicta that if the trial court determined that the Church's ecclesiastical entanglement arguments had merit, the trial court would have a duty to "stay, quash or dismiss the suit[,] at least with respect to [the Church]." Id. ¶ 36 (internal quotation marks omitted). It noted that while Rule 42(b)(4) allows a court to decline to rule on a motion "based solely upon Rule 12(b)(6)" and instead send the matter to a three-judge panel, that language excluded the possibility that the trial court could likewise decline to rule on the Church's 12(b)(1) motion regarding ecclesiastical entanglement. Id. ¶ 38. The court remanded this claim to the trial court for resolution on the merits. Id. ¶ 40.

In Fore v. Western North Carolina Conference of United Methodist Church, ___ N.C. App. ___, 2022-NCCOA-404, appeal docketed, No. 217A22 (N.C. July 15, 2022), the court of appeals considered whether a party is required to give a notice of hearing to other named parties when seeking an ex parte order for confidential records of a third party.

Plaintiff filed a civil action against a foster home and church conference. Id. ¶ ¶ 1-2. These claims arose from alleged abuse the victim suffered by her former foster home employee-parents during the 1970s. Id. ¶ 2. Plaintiff filed a motion for production of criminal investigation records pursuant to Section 132-1.4 of the North Carolina General Statutes, seeking confidential records of alleged sexual abuse of any of the foster home's employees from "surrounding counties' sheriff's offices, Department of Social Services, and police departments." Id. ¶ 4. The Plaintiff did not provide the foster home and church a notice of hearing for her motion and proposed order. Id.

¶ 5. The trial court entered an order allowing the release of these records ex parte. Id. Subsequently, the foster home and church filed a notice of appeal. Id. ¶ 6.

On appeal, with Judge Tyson writing for the majority, the court of appeals dismissed the foster home and church's interlocutory appeal. Id. ¶ 28. The foster home and church argued that its substantial rights were violated because they were not given prior notice and an opportunity to oppose the victim's motion for production of criminal investigation records. Id. ¶ 9. The court determined that no formal notice was needed, "because the order to produce was related to and made to, and was obtained from, non-joined third parties." Id. Additionally, the court found the foster home and church were barred from raising any "DSS' or non-joined former employees' third parties' purported rights to notice of records as a jus tertii defense, when neither are parties to this action, [because the foster home and church] cannot collaterally attack the orders and judgments entered in other cases to which they were not a party." Id. ¶ 21.

Similarly, the court of appeals found that the foster home and church did not have standing to challenge the trial court order. Id. ¶ 24. To have standing, the claim must be prosecuted in the name of the real party in interest. Id. ¶ 23. Here, the entity whose records were requested are the "real party in interest" with standing to challenge the motion. Id. ¶ 24. The foster home and church do not fall within this classification as they are not the party investigated in the records request. Id. Thus, the foster home and church do not have standing because they are not the real party in interest. Id.

The court of appeals dismissed the foster home and church's interlocutory appeal.

Judge Stroud, writing for the dissent, found that the foster home and church adequately demonstrated a substantial right sufficient for reversal of the trial court order because the court should not have acted without proper notice of the hearing to all parties. Id. ¶ 29. Judge Stroud

would have found that prior notice with opportunity to be heard is fundamental in the concept of due process, and that this due process "extend[s] to the issue at hand where Defendants had no notice of Plaintiff's request to the trial court for entry of an ex parte order requiring disclosure of documents from DSS and several law enforcement agencies to Plaintiff." Id. ¶ 30.

The dissent further discussed that ex parte motions are generally treated as the exception to the general rule and are allowed only in specific circumstances. Id. ¶ 38. Otherwise, under Rule 5 of the North Carolina Rules of Civil Procedure, every motion is required to be served upon the other party. Id. The importance of notice is further defined in local superior and district court rules and the rules for professional responsibility. Id. Furthermore, the victim failed to identify a statutory basis for having her motion heard ex parte contrary to this notion. Id.

Thus, Judge Stroud dissented from the dismissal of the appeal.

F. Conflicting Opinions

In In re K.N., 381 N.C. 823, 2022-NCSC-88, the supreme court considered whether a Rule 63 substitute judge has the authority to make Rule 52 findings of fact when he or she did not preside over the presentation of evidence.

The Department of Health and Human Services petitioned the court to terminate a biological father's parental rights after the court found the child was neglected and dependent. Id. ¶ 3. An order terminating the biological father's parental rights was entered, including findings of fact and conclusions of law. Id. ¶¶ 3–4. On appeal, the supreme court vacated the termination order after determining the findings of fact were not supported by the evidence and insufficient to support the determination that the biological father neglected the child. Id. ¶ 5, see also In re K.N., 373 N.C. 274, 277 (2020).

Several months before the supreme court vacated the first termination order and remanded the case for further proceedings, the judge who presided over the presentation of evidence passed away. In re K.N., 2022-NCSC-88, ¶ 7. Though counsel for the biological father originally objected to a substitute judge revising a vacated order based on evidence she had not heard, all parties ultimately agreed that the matter could be assigned to the chief district court judge pursuant to Rule 63. Id. ¶ 7. The chief judge – as the substitute judge – entered an order terminating the biological father's parental rights, including findings of fact that were more robust than the first termination order. Id. ¶ 9. She based her decision on her review of the record, trial transcripts, and proposed findings of fact submitted by the parties. Id. ¶ 8. She did not reopen evidence or hold additional hearings, though she acknowledged her authority to do so. Id.

On appeal, the supreme court vacated the substitute judge's termination order. Id. ¶ 11. The supreme court concluded that a Rule 63 "substitute judge who did not preside over the matter lacks the power to find facts or state conclusions of law." Id. ¶ 17 (citing In re E.D.H., 2022-NCSC-70 (finding a substitute judge had the authority to perform the ministerial action of signing an order to be filed after a retired judge who presided over the matter performed the judicial action of making findings of fact and conclusions of law) and In re C.M.C., 373 N.C. 24 (2019) (finding a judge who presided over the presentation of evidence had the authority to enter a subsequent termination order correcting an improperly signed termination order previously entered by a judge who did not preside over the presentation of evidence)).

The supreme court explained that the function of finding facts is specific to the judge presiding because "only that judge has the opportunity to observe the witnesses and weigh the evidence." In re K.N., 2022-NCSC-88, ¶ 24. Further, the supreme court explained that the 2001 amendment to Rule 63 (omitting the requirement that a verdict be returned or findings of fact and

conclusions of law be filed) did not modify the functions that a substitute judge is permitted to perform, but rather expanded the stage of a case during which a substitute judge might have authority to intervene. Id. ¶ 22. Finally, the supreme court held that the biological father did not waive his right to appeal the termination order by agreeing that the chief district court judge could be assigned the matter because Rules 52 and 63 impose statutory mandates, which are reviewable de novo, and the failure to ensure the finder of fact has personal knowledge of the case prejudiced biological father. Id. ¶ 13.

By making new findings of fact and conclusions of law without having presided over the presentation of evidence, the substitute judge contravened the requirements of Rule 52 and Rule 63 of the Rules of Civil Procedure. Id. ¶ 18. Accordingly, the supreme court vacated the termination order and remanded the case for a new hearing. Id. ¶ 24.

G. Arbitration

In R.E.M. Construction, Inc. v. Cleveland Construction, Inc., ___ N.C. App. ___, 2022-NCCOA-557, the court of appeals considered whether an arbitration panel exceeded its authority in determining an equitable award.

A general contractor terminated a subcontractor from a project in Asheville. Id. ¶ 2. The subcontractor filed suit to recover damages. Id. ¶ 4. A panel of arbitrators issued an award, determining the subcontractor was improperly terminated. Id. ¶ 5. After determining the subcontract included insufficient evidence on which to base a calculation of contractual damages, the panel awarded damages it determined "would fashion an equitable remedy" under the American Arbitration Association Rules. Id. ¶ 6.

After the trial court confirmed the award, the general contractor challenged the amount of the award determined by the panel (but not the decision's merits). Id. ¶¶ 10–11.

The court of appeals observed that an award of equitable remedies does not exceed an arbitrator's authority if (1) state law allows for the remedy and (2) the arbitration contract does not unequivocally preclude the remedy. Id. ¶ 15 (citing WMS, Inc. v. Weaver, 166 N.C. App. 352, 357, 602 S.E.2d 706, 709 (2004)). State law unquestionably allows a panel of arbitrators to fashion equitable remedies. Id. Thus, the court of appeals analyzed whether the subcontract at issue "unequivocally precluded" the panel's award. Id.

Finding the subcontract did not preclude the equitable remedy the panel fashioned, the court of appeals affirmed the trial court's confirmation of the arbitrators' award. Id. ¶ 16. The court of appeals found that the subcontract expressly vested the panel with broad discretion, including the discretion to craft equitable remedies. Id. Accordingly, the panel did not exceed its authority. Id.

In Snipes v. Titlemax of Virginia, Inc., ___ N.C. App. ___, 2022-NCCOA-558, petition for disc. rev. filed (N.C. Sept. 8, 2022), the court of appeals considered whether an arbitrator's failure to apply a choice of law provision that was contrary to the essence of the contract permits a court to vacate an arbitration award under the Federal Arbitration Act.

A borrower and her lender underwent arbitration to remedy the borrower's claim that their loan agreement violated the North Carolina Consumer Finance Act. Id. ¶ 5. The underlying dispute arose from a loan issued by the lender to the borrower for $2,500. Id. ¶ 2. The agreement provided that the borrower's loan was secured by title to her vehicle and had an interest rate of approximately 144%. Id. Pertinent to the underlying dispute in this case are two provisions in the agreement. Id. The first provision at issue stated that the "Loan Agreement shall be governed by the laws of Virginia." Id. The second provision provided an exception to the choice of law provision and stated that "the Waiver of Jury Trial and Arbitration Provision is governed by the

Federal Arbitration Act." Id. At arbitration, the arbitrator issued an award in the borrower's favor and awarded her damages. Id. ¶ 6. In coming to this conclusion, the arbitrator stated that he had to choose between applying Virginia law or North Carolina law. Id. He further articulated the differences between the two laws as the underlying "loan carried an interest rate of nearly 150%, a rate that clearly violates the North Carolina Consumer Finance Act, but that is arguably not illegal in Virginia." Id. Nevertheless, the arbitrator's analysis failed to mention or consider the express Virginia choice of law provision. Id. Rather, the arbitrator focused almost exclusively on the North Carolina Consumer Finance Act in his analysis. Id. Upon receiving her favorable result in arbitration, the borrower sought to have a trial court confirm the award and enter judgment. Id. ¶ 7. In opposition, the lender filed a motion to vacate the award. Id. In doing so, the lender contended, in part, that the arbitrator's award "strayed both away from the interpretation and application of the agreement." Id. The trial court granted the lender's motion and vacated judgment. Id. ¶ 8.

On appeal, the court of appeals affirmed the trial court's judgment vacating the arbitrator's award. Id. ¶ 39. Generally, under the Federal Arbitration Act, a court must affirm an arbitration award "unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11" of the act. Id. ¶ 10. Therefore, an arbitrator's award under the act may only be vacated in the limited circumstances prescribed under section 10(a). Id. ¶ 12. Section 10(a) allows for judgment to be vacated in situations where:

> (1) where the award was procured by corruption, fraud, or undue means; (2) where there was evident partiality or corruption in the arbitrators, or either of them; (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or if any other misbehavior by which the rights of any party have been prejudiced; or (4) where the arbitrators

> exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter was not made.

Id.

The language of the statute indicates that these circumstances for challenging an arbitrator's award are exclusive. Id. However, courts have permissibly read other doctrines into this text. Id. ¶ 13. Amongst those doctrines is the essence of the contract doctrine. Id. This doctrine has been accepted as a proper ground for review of these claims and a challenge under this doctrine falls within the exception in section 10(a) of the Federal Arbitration Act. Id. ¶ 23 (referencing Oxford Health Plans LLC v. Sutter, 569 U.S. 564, 569-70 (2013) (explaining under section 10(4) of the Federal Arbitration Act an arbitrator's award decision may be overruled if decided only his own policy rather than "drawing its essence from the contract"). Under the doctrine, the bar for an arbitrator's award meeting this standard is high. Id. ¶ 26. The doctrine will not provide a basis for vacating an award if the arbitrator "arguably construe[d] or appl[ied] the contract." Id. Therefore, this doctrine allows courts to vacate an award only when the arbitrator "strayed from his delegated task of interpreting a contract, not when he performed that task poorly." Id. ¶ 27. An arbitrator's disregard for an unambiguous contract falls within this classification. Id. ¶ 28. Here, the loan agreement unambiguously asserted that Virginia law applied where it states: "[t]his Loan Agreement shall be governed by the laws of the State of Virginia." Id. ¶ 30. However, the arbitrator's award never considers or mentions the choice of law provision in its analysis. Id. ¶ 32. Because the award "contradicted the plain and unambiguous" terms of the agreement, the award was contrary to the essence of the contract. Id.

Thus, for the foregoing reasons, the court of appeals affirmed the trial court's order vacating the borrower's arbitration award.

IV. INSURANCE

A. UIM

In North Carolina Farm Bureau Mutual Insurance Co. v. Dana, 379 N.C. 502, 2021-NCSC-161, the supreme court considered the amount of underinsured motorist coverage that should be distributed to a husband and his deceased wife's estate to compensate for injuries sustained in an automobile accident. Justice Ervin authored the majority's opinion.

In 2016, an intoxicated driver collided with a vehicle owned by the deceased wife, seriously injuring and eventually killing the wife, injuring the husband, and killing a passenger in the intoxicated driver's vehicle. Id. at ¶ 2. A man in a third vehicle was also injured. Id. At the time of the accident, the intoxicated driver carried an insurance policy with bodily injury limits of $50,000 per person and $100,000 per accident. Id. at ¶ 3. Subject to court approval, the intoxicated driver's insurer proposed payments of $43,750 to the wife's estate, $32,000 to the husband, $23,500 to the passenger's estate, and $750 to the other injured man. Id.

The wife was also insured by an underinsured motorist carrier with limits of $100,000 per person and $300,000 per accident. Id. at ¶ 4. The underinsured motorist carrier proposed to pay the $100,000 per person limit to both the husband and the wife's estate, less payments from the intoxicated driver's insurer. Id. The underinsured motorist carrier's proposal yielded underinsured payments of $68,000 to the husband and $56,250 to the wife's estate, each totaling with the payments from the liability carrier, coverage to the $100,000 per-person limit. Id.

The husband argued that his and the wife's estate were entitled to the full amount of the per-accident coverage, less the amounts paid by the intoxicated driver's insurer. Id. at ¶ 5. Under the husband's proposal, the underinsured motorist carrier would be obligated to pay a total of

$200,000 in underinsured motorists coverage—$74,750 more than under carrier's own proposal––which consisted of the underinsured policy's $300,000 per-accident limit less the $100,000 in liability coverage provided by the intoxicated driver's insurer. Id.

The underinsured motorist carrier sought a declaratory judgment concerning the amount of coverage it must provide in 2017. Id. at ¶ 6. A year later, after competing motions for summary judgment, the trial court found for the husband and wife's estate that the per-accident limits applied. Id. The underinsured motorist carrier appealed. The court of appeals affirmed, relying on an approach articulated in North Carolina Farm Bureau Mutual Insurance Co. v. Gurley, 139 N.C. App. 178, 181, 532 S.E.2d 846 (2000), whereby how liability coverage was exhausted determined the applicable underinsured coverage limit. Id. at ¶ 7. Under the Gurley approach, if a liability policy was exhausted on a per-person basis, then the per-person limit of the underinsured coverage applies; if a liability policy was exhausted on a per-accident basis, then the per-accident limit of the underinsured coverage applies. Id. (citing Gurley, 139 N.C. App. at 181, 532 S.E.2d 846).

The supreme court granted discretionary review. Id. at ¶ 7. The supreme court centered its analysis on the provision of the general statutes detailing underinsured motorist coverage, "to say the least, a lengthy and complicated statutory subsection that contains a considerable amount of language that seems to bear upon the proper resolution of the issue that is before us in this case." Id. at ¶ 12 (discussing N.C. Gen. Stat. § 20-279.21(b)(4)). The court observed that "repeated references to the issue of the limitation of liability" in the statutory provision further evidenced its applicability. Id. at ¶ 14.

The supreme court then turned to construing the statutory provision at issue. Id. The court noted that unlike a prior subsection, the provision detailing underinsured coverage does not

expressly discuss per-accident and per-person limits. Id. at ¶ 15. Further, the provision at issue refers to both a "limit" and "limits" of liability. Id. These facts precluded the court from determining the statutory language was clear and unambiguous. Id. The supreme court then considered the legislative intent of the Financial Responsibility Act, identifying that the statute served the purpose of protecting "innocent victims who may be injured by financially irresponsible motorists." Id. at ¶ 16 (quoting Proctor v. N.C. Farm Bureau Mut. Ins. Co., 324 N.C. 221, 224, 376 S.E.2d 761 (1989)). Accordingly, the court held the provision should be construed liberally to accomplish that beneficial purpose. Id. (citing Moore v. Hartford Fire Ins. Co. Grp., 270 N.C. 532, 535, 155 S.E.2d 128 (1967)).

The supreme court noted that while the terms "limit of liability" and "limits of liability" were not statutorily defined, the terms have well-understood meanings in insurance-related contexts. Id. at ¶ 17. Further, the court was "not persuaded" based on the relative complexity of the statute "that too much emphasis should be placed upon the General Assembly's use of the singular, rather than the plural, in attempting to construe the relevant statutory language." Id.

With these principles and providing a "careful reading of the relevant portions," the supreme court held that the provision incorporated "at least by implication" both per-person and per-accident liability limits within the underinsured motorist coverage provision. Id. at ¶ 18. This led the court to a "common sense resolution" that the total amount of underinsured coverage available when multiple claimants is limited by the per-accident limit, with the total amount of coverage available to any individual claimant constrained by the per-person limit. Id. at ¶ 19.

Rather than relying on a rule where the per-person or per-accident limit applied in all circumstances, or the more rigid framework of Gurley, the supreme court embraced this "hybrid

approach" it identified as "most reflective" of legislative and shareholder expectations of the amount of coverage available. Id. at ¶ 21.

The court noted that while the rule in Gurley had been relied on for approximately twenty years—even throughout General Assembly revisions to the statute at issue—the Gurley court itself cautioned against results when an injured party covered under an underinsured motorist policy would receive "more compensation than if [the tortfeasor] had been either fully insured or uninsured altogether." Id. at ¶ 22 (citing Gurley, 139 N.C. App. at 182, 532 S.E.2d 846). "In view of the fact that applying the rule adopted in Gurley to the facts in this case would have exactly the effect that the rule in question was explicitly intended to avoid," the supreme court found no reason to perceive the fact the General Assembly had not modified the provision as a basis for concluding the legislature embraced a mechanical application of the Gurley rule, which would yield a result the Gurley court specifically cautioned against. Id.

The supreme court held that the statutory language supported an approach where the amount available to any claimant treated the per-accident limit as the sum available to all claimants, subject to a caveat that payment to any individual claimant is limited to the per-person amount. Id. at ¶ 23. Accordingly, the supreme court reversed the court of appeals and remanded to the trial court, with coverage for the husband and the wife's estate collectively capped at the per-accident limit, with both individual claimants limited to the per-person limit of the underinsured motorist policy. Id.

In a concurring opinion, Justice Berger agreed with the outcome reached by the majority but disagreed on the majority's reasoning. Id. at ¶ 34–35 (Berger, J., concurring). Justice Berger offered that, unlike the majority's approach, "the [Financial Responsibility Act] does not address the particular question at issue in this case." Id. 35. Instead, under Justice Berger's approach the

terms of the underinsured policy alone should control. Id. While the majority cautioned against reliance on the policy terms alone, Justice Berger offered that this was a "false flag" because the insurance industry is heavily regulated, with issued policies "virtually uniform" and each requiring approval by the Insurance Commission. Id. at ¶ 49.

In Osborne v. Paris, 283 N.C. App. 399, 2022-NCCOA-338, review denied, 876 S.E.2d 292 (N.C. Aug. 17, 2022), the court of appeals considered the interplay between the uninsured and underinsured motorist coverage provisions in North Carolina's financial responsibility act and whether an insurer acted in bad faith or engaged in unfair trade practices in denying additional coverage to a motorcycle passenger.

A motorcycle attempted to pass a car on the left in a non-passing zone. Id. at ¶ 3. The car was signaling a right turn but turned left instead. Id. The motorcycle and car collided, ejecting the passenger from the motorcycle. Id. The passenger sustained serious injuries, which required extensive medical treatment. Id.

The motorcycle was uninsured. Id. at ¶ 4. The car was insured at the North Carolina minimum of $30,000 per person for liability coverage. Id. Three days after the liability insurer tendered its limits, the passenger, through counsel, sent a letter to the same insurer demanding $160,000 of uninsured motorist coverage and $70,000 of underinsured motorist coverage, for a total of $230,000. Id. at ¶¶ 5–6. The liability insurer had also issued three other policies: one to the passenger ($30,000 uninsured coverage), one covering a different motorcycle not involved in the accident (another $30,000 uninsured coverage), and one for the passenger's parents with whom she lived ($100,000 combined uninsured/underinsured coverage). Id. at ¶ 6.

Four days after demanding payment, the passenger filed suit against the driver of the car, the operator of the motorcycle, and the insurer. Id. at ¶ 7. She alleged the insurer breached its

obligation to pay uninsured and underinsured coverage to her, displayed bad faith in refusing to settle, and engaged in unfair and deceptive trade practices. Id.

Within the month, the insurer issued three checks totaling $130,000. Id. at ¶ 8. The insurer then moved for summary judgment, which the trial court granted. Id. at ¶ 9. The passenger appealed. Id.

The court of appeals considered whether the passenger was entitled to uninsured and underinsured coverage under the passenger's parents' combined policy, and whether the insurer improperly credited the amount paid under the two uninsured-only policies by the amount of the driver's liability coverage. Id. at ¶ 2. The court further considered the passenger's direct claims against the insurer. Id.

Turning to the first issue of the combined policy, the court recognized that statutes dealing with the same subject matter must be read in pari materia and "harmonized, if possible, to give effect to each." Id. at ¶ 12 (citing Hoffman v. Edwards, 48 N.C. App. 559, 564, 269 S.E.2d 311, 313 (1980)). Further, while the purpose of North Carolina's financial responsibility law "is to protect the innocent victims of vehicle negligence, 'that fact does not inevitably require that one interpret the relevant statutory language to produce the maximum possible recovery for persons injured as a result of motor vehicle negligence regardless of any other consideration.'" Id. at ¶ 15 (quoting N.C. Farm Bureau Mut. Ins. Co. v. Dana, 2021-NCSC-161 ¶ 20) (emphasis added).

The passenger argued that as section 20-279.21(b)(4) of the North Carolina General Statutes provides that underinsured motorist coverage must be provided "in addition to" liability and uninsured coverage, an insurer is required to pay to both uninsured and underinsured limits for a combined policy. Id. at ¶¶ 17–20. Here, the passenger claimed she should have received

under her parents' single, combined policy $100,000 in uninsured coverage plus $100,000 in underinsured coverage. Id. at ¶ 17.

The court of appeals observed that "[w]e are not persuaded that Subsection (b)(4) requires insurance companies to pay the combined limit amount for both uninsured and underinsured coverage regardless of the insurance policy language." Id. at ¶ 21. The court reasoned that this provision of subsection (b)(4) reiterates that a policy must meet minimum liability and uninsured motorist coverage requirements, and that drivers simply have the option to purchase additional underinsured motorist coverage. Id. Finding no issue with the trial court's grant of summary judgment related to the $100,000 tendered from the combined uninsured/underinsured policy, the court of appeals affirmed on the first issue. Id. at ¶ 22.

Turning to the second issue, the court of appeals considered whether the insurer properly setoff the $30,000 in liability coverage against the two uninsured policies covering the passenger. Id. at ¶ 24. Here, the court again looked to section 20-279.21(b) of the North Carolina General Statutes. Id. at ¶¶ 26–30. The court recognized that while subsection (b)(4) allows crediting the amount recovered from a liability carrier for underinsured motorist coverage, subsection (b)(3) allows no such credit for uninsured motorist coverage. Id. at ¶ 30. Relying on the canon of construction that the General Assembly acts with full knowledge of prior and existing law, the court of appeals concluded that the setoff was not appropriate for the uninsured motorist policies. Id. Therefore, the court of appeals modified the trial court's judgment and ordered the insurer to pay the additional $30,000 of the setoff.

Finally, the court of appeals considered whether the trial court's grant of summary judgment should be reversed on the passenger's claims of bad faith refusal to settle and unfair practices against the insurer. Id. at ¶ 32. The court of appeals refused to entertain the claims or

allow for further discovery under Rule 56(f) of the North Carolina Rules of Civil Procedure, considering the court's own detailed analysis of the policies and statutes required to come to a determination, and the lack of controlling case law. Id. at ¶¶ 32–33. "[W]e cannot conclude that [the passenger] has raised or even forecast evidence to raise a dispute issue of genuine fact regarding whether [the insurer] acted in bad faith or engaged in unfair trade practices in denying further coverage." Id. at ¶ 33.

In Dean v. Rousseau, 283 N.C. App. 480, 2022-NCCOA-376, petition for disc. rev. filed (N.C. July 7, 2022), the court of appeals considered whether the statute of limitations bars an action against an uninsured motorist carrier where the complaint was filed prior to the statute of limitations, but service occurred after the limitations period expired.

The administrator of the decedent's estate filed a complaint for wrongful death and survivorship against an uninsured motorist following a car crash that resulted in the decedent's death. Id. ¶ 2. This complaint was filed against the individual motorist on November 12, 2020, which was two days before the statute of limitations was to expire. Id. ¶ 2, ¶ 12. The motorist did not have car insurance, however, the decedent had insurance policies covering uninsured motorists with two of her insurance carriers. Id. ¶ 2. A civil summons was issued on the same day the complaint was filed. Id. ¶ 3. Service of the summons and complaint was made by the Commissioner of Insurance on December 1, 2020, and January 26, 2021. Id. Subsequently, both carriers filed answers and motions to dismiss against the administrator pursuant to Rule 12(b)(6) of the Rules of Civil Procedure. Id. ¶ 4. The carriers argued that the administrator failed to serve them within the applicable statute of limitations. Id. The trial court granted the uninsured motorist carriers' motions to dismiss, and the administrator appealed. Id.

On appeal, the court of appeals affirmed the trial court's orders on the uninsured motorist carrier's motion to dismiss. Id. ¶ 14. Section 20-279.21(b)(3)(a) of the North Carolina General Statutes establishes claims by uninsured motorists against uninsured motorist carriers. Id. ¶ 7. However, the statute fails to provide a time limitation for service of an insured carrier. Id. ¶ 8. Thus, the court evaluated prior case law. In doing so, the court of appeals affirmed the trial court's decision based on precedent holding in favor of insurance carriers on this issue. Id. ¶ 12 (citing In re Civil Penalty, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) (stating "[w]here a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court.")). These cases articulated that uninsured carriers must be served within the statute of limitations period. See Thomas v. Washington, 136 N.C. App. 750, 754-56, 525 S.E.2d 839, 842-43 (2000) (holding in a suit for personal injuries arising from a car accident that failure to serve an uninsured motorist carrier within the statutory time limit barred the driver's claim despite the timely issuance of alias and pluries summons to named defendants); Davis v. Urquiza, 233 N.C. App. 462, 467, 757 S.E.2d 327, 332 (2014) (holding "[w]here a plaintiff seeks to bind an uninsured motorist carrier to the result in a case, the carrier must be served by the traditional means of service, within the limitations period"); and Powell v. Kent., 257 N.C. App. 488, 492, 810 S.E.2d 241, 245 (2018) (holding that "while we are unable to discern any requirement in N.C. Gen. Stat. § 20-279.21(b)(3)(a) that specifically requires in an uninsured motorist action that service of process also be accomplished before the date the statute of limitation expires, we are bound by the prior determination in Thomas and Davis."). This approach differs from other articulations of the statutes of limitations that "cases are timely when filed within the statute of limitations, with service of process permitted within the time frames set forth in Rule 4 of the North Carolina Rules of Civil Procedure, even when service

is accomplished after the statute of limitations has expired." Dean, 2022-NCCOA-376 ¶ 11 (citing Powell, 257 N.C. App. at 492, 810 S.E.2d at 245). The court of appeals affirmed but requested clarification from the general assembly or the supreme court. Id. ¶ 13.

In North Carolina Farm Bureau Mutual Insurance Company, Inc. v. Herring, ___ N.C. App. ___, 2022-NCCOA-456, appeal docketed, No. 227A22 (N.C. July 26, 2022) the court of appeals considered whether a driver under her mother's uninsured motorist insurance policy qualified as a "resident" when she did not reside exclusively at her mother's home.

An insurer filed a complaint against a driver seeking a declaratory judgment of the parties' rights with regards to the insurer's uninsured motorist insurance policy (UIM). Id. ¶ 5. The action arose from an automobile accident, in which a driver sustained injuries. Id. ¶ 2. The driver sought to recover compensation for the accident under the UIM policy that the insurer issued to her mother and stepfather. Id. Under the policy, only the mother and stepfather were named insureds, and the policy stated that the insurer would "pay compensatory damages which the Insured is legally entitled to recover from the owner or operator of an uninsured motor vehicle because of . . . bodily injury sustained by an insured and caused by an accident." Id. ¶¶ 2-3. An "insured" was defined under the policy as "you or any family member." Id. "Family member" was further defined as "a person related to you by blood, marriage, or adoption who is a resident of your household." Id. However, the word "resident" was not defined under the policy. Id. In examining the driver's claim, the insurer conducted an interview with the driver where she testified that she lived with her mother for four months out of the year, with she spent the remaining time spent with her father. Id. ¶ 4. She stated that she "always" maintained this relationship. Id. The driver also testified that her father's address was listed on her driver's license, and she is registered to vote in that county. Id. Based on this testimony, the insurer filed a motion for summary judgment. Id. ¶ 5. The driver

also filed a motion for summary judgment. Id. To support her motion, the driver filed several affidavits from family members stating that she maintained a permanent room at her mother's home, she had not maintained her own private residence for at least fifteen years, she routinely accepted mail at her mother's home, and her mother intended to include her under the policy as a member of her mother's household. Id. ¶ 6. The trial court filed an order granting summary judgment to the driver. Id. ¶ 7.

On appeal, with Judge Griffin writing for the majority, the court of appeals affirmed the trial court's judgment finding that there was sufficient evidence to establish that the driver maintained her residence in her mother's household. Id. ¶ 8. When faced with a question of an interpretation of an insurance policy, the court aims to reach the intent of the parties at the time the policy was issued. Id. ¶ 10 (citing Woods v. Nationwide Mut. Ins. Co., 295 N.C. 500, 505 (1978)). "Insurance policies must be given a reasonable interpretation and where there is no ambiguity they are to be construed according to its terms." Id. (quoting Jamestown Mut. Ins. Co. v. Nationwide Mut. Ins. Co., 266 N.C. 430, 435 (1966)). However, when an ambiguity arises and there are two plausible interpretations, "the provision will be construed in favor of coverage and against the company." Id. Here, the word "resident" is ambiguous. Id. ¶ 11. Residency determinations are individualized and fact specific; one seeking coverage must show that she "actually lived in the same dwelling as the insured for a relatively meaningful period of time." Id. ¶ 13. However, the residency does not have to be exclusive to receive coverage. Id. In evaluating the record, the court concluded that the evidence supported a finding that, at the very least, the driver maintained split residence at her mother and father's home. Id. ¶17. The court supported this conclusion with the driver's sworn statement that she had "always" lived in her mother's home for "four months out of the year," that she had a permanent room in her mother's home with

clothing and toiletries, and that she was included as a driver on the UIM policy. Id. ¶ 15. Furthermore, while the driver did not consistently reside at her mother's home, for purposes of establishing residence under the policy, the residence does not need to be continuous or without interruption. Id. (citing Davis v. Md. Cas. Co., 76 N.C. App. 102, 106 (1985)).

Thus, the court of appeals affirmed the trial court's grant of summary judgment to the driver under the UIM.

Judge Dillon, writing for the dissent, concluded that the evidence when taken in a light most favorable to the driver shows that the driver was a resident of a household. Id. ¶ 23. He contended the trial court properly denied the insurer's motion for summary judgment. Id. However, the judge disagreed that the evidence conclusively established that the driver was a resident of her mother's household at the time of the accident. Id. ¶ 24. He argued summary judgment in this case would be a high bar as the burden rests with the driver to prove her residency. Id. ¶ 26.

The dissent contended that the evidence on which the driver relied is primarily based on self-serving statements in her affidavits, and as an interested party, the credibility of the statements should be considered by a jury. Id. ¶ 28. Secondly, the dissent argued that there is other evidence present in the record that creates an issue of fact. Id. ¶ 29. Specifically, the dissent looked to the driver's sworn statement that she identified her current address to be her father's address. Id. The driver further testified that prior to living at her father's current address she lived with her father at another address for ten years. Id. Separately, the driver also admitted that her voting registration and car title is registered, and she receives her bank statements and other mail at her father's address. Id. ¶ 30.

Lastly, the dissent indicated that the driver did not cite a decision from the state supreme court that an adult may be a resident of two separate households for the purpose of insurance

coverage. Id. ¶ 33. On the contrary, Bruton v. N.C. Farm Bureau Mutual Insurance Company, 127 N.C. App. 496 (1997) closely aligns with the facts in this case. Id. ¶ 33. In Bruton, the court held that an adult child was not a resident for purposes of coverage where the child spent "two to three weekends per month and stored some toiletries' at his father's home, but where the evidence also showed that he 'spent a majority of his time at his girlfriend's home" and utilized his girlfriend's address for his mail and other facets of life administration. Id.

Based on this evidence, the dissent would have found that there was an issue of fact concerning whether the driver was a resident of the mother's household.

In North Carolina Farm Bureau Mutual Insurance Company v. Hebert, ___ N.C. App. ___, 2022-NCCOA-556, appeal docketed, No. 281A22 (N.C. Sept. 8, 2022), the court of appeals considered whether a motorist with bodily injury liability insurance coverage can recover through his own underinsured motorist insurance policy after liability coverage under his own policy was paid out to the motorist and other passengers involved in an accident and after he recovered under his parent's underinsured motorist insurance policy.

An insurer filed a complaint for declaratory judgment of insurance coverage owed to a motorist arising from an accident. Id. ¶ 5. The motorist was a passenger in his own vehicle when it collided with another car. Id. ¶ 2. The driver of the vehicle and another of its passengers died, and the remaining passengers sustained injuries. Id. The motorist's vehicle was covered by a personal automobile policy issued by the insurer. Id. ¶ 3. The policy provided coverage for bodily injury liability of $50,000 per person, but no more than $100,000 per accident. Id. The policy also provided coverage for underinsured motorists for $50,000 per person, but no more than $100,000 per accident. Id. Subsequently, the insurer paid $100,000 under the liability coverage for the accident, which was divided amongst the four passengers in the accident, with the motorist

receiving $100. Id. Separately, the motorist also qualified as an insured for the underinsured motorist coverage (UIM) of a personal automobile policy issued by the insurer to the motorist's parents. Id. ¶ 4. This UIM coverage provided coverage for $100,000 per person, but no more than $300,000 per accident. Id. At trial, the insurer argued that because the motorist's vehicle was not an underinsured motor vehicle under the motorist's policy, the UIM coverage under the motorist's policy was inapplicable. Id. ¶ 5. The insurer further alleged that the "multiple claimant exception" to an underinsured motorist vehicle found in section 20-279.21(b)(4) of the North Carolina General Statutes did not apply to the parent's policy because the motorist's vehicle was not insured under the policy. Id. Accordingly, the insurer contended that the motorist was only entitled to $99,900 – the $100,000 per person policy limit in the UIM coverage minus the $100 the motorist previously received in liability coverage. Id. The insurer moved for judgment on the pleadings. Id. ¶ 7. The trial court denied the insurer's motion and concluded that the motorist's policy provided UIM coverage for the motorist's claim. Id. The court then entered judgment on the pleadings for the motorist. Id.

On appeal, with Judge Gore writing for the majority, the court of appeals affirmed the judgment holding that because the multiple claimant exception does not apply the trial court properly denied the insurer's motion for judgment on the pleadings. Id. ¶ 17. The insurer contended that section 20-279.21(b)(4) of the North Carolina General Statutes precluded the motorist's recovery because the UIM limits of the motorist's policy are not greater than the bodily injury liability limits of his policy. Id. ¶ 9. The statute provides in part that:

> An "underinsured motor vehicle" [. . .] includes an "underinsured highway vehicle," [. . .] of which the sum of the limits of liability under all bodily injury liability bonds and insurance policies applicable at the time of the accident is less than the applicable limits

> of the underinsured motorist coverage for the vehicle involved in the accident and insured under the owner's policy.

Id. ¶ 10.

In 2004, this statute included an amendment with the multiple claimant exception. This statute provides that –

> For the purposes of an underinsured motorist claim asserted by a person injured in an accident where more than one person is injured, a highway vehicle will also be an "underinsured highway vehicle" if the total amount actually paid to that person under all bodily injury liability and insurance policies applicable at the time of the accident is less than the applicable limits of underinsured motorist coverage for the vehicle involved in the accident and insured under the owner's policy. Notwithstanding the immediately preceding sentence, a highway vehicle shall not be an "underinsured motorist vehicle" for purposes of an underinsured motorist claim under an owner's policy insuring that vehicle provides underinsured motorist coverage with limits that are greater than that policy's injury liability limits.

Id. This state has interpreted this exception to be limited to circumstances "when the amount paid to an individual claimant is less than the claimant's limits of the UIM coverage after liability payments to multiple claimants." Id. ¶ 13 (quoting Integon Nat'l Ins. Co. v. Maurizzo, 240 N.C. App. 38, 44 (2015)). However, the majority found that state law permits interpolicy stacking to calculate the applicable limits of underinsured motorist coverages, id. ¶ 12, and that the multiple claimant exception did not apply, id. ¶ 17.

Judge Arrowood, writing for the dissent, concluded that the multiple claimant exception applied. Id. ¶ 18. In dissenting, Judge Arrowood reiterated the definitions under section 20-279.21 of the North Carolina General Statutes. Id. ¶¶ 19-20. As previously stated, the first definition of "underinsured motor vehicles," includes highway vehicles where "the sum of the limits of liability under all bodily injury liability bonds and insurance policies applicable at the time of the accident

is less than the applicable limits underinsured motorist coverage for that vehicle involved in the accident and insured under the owner's policy." Id. ¶ 21. Here, because the sum of the liability limits is equal to the applicable limits of underinsured motorist coverage, the vehicle does not qualify under this definition. Id.

Likewise, the vehicle did not qualify under the second definition either. Id. ¶ 21. The second definition, under the multiple claimants' exception, provides that in accidents with more than one person injured "if the total amount paid to the person under all bodily injury liability bonds and insurance applicable at the time of the accident is less than the applicable limits of underinsured motorist coverage for the vehicle involved in the accident and insured under the owner's policy," the vehicle will qualify as an underinsured vehicle. Id. ¶ 20. However, the statute further provides that the vehicle is not included within the definition "unless the owner's policy insuring that vehicle provides underinsured motorist coverage with limits that are greater than that policy's bodily injury liability limits." Id. Again, the dissent Arrowood found this definition not satisfied as the underinsured motorist coverage was equal to the body injury liability. Id. ¶ 21. Further, the dissent contended that since this language centers on the motorist's own policy, interpolicy stacking should not be allowed. Id. ¶ 22. Thus, Judge Arrowood contended that the exception applied and that the trial court was not permitted to stack defendant's policy limits with his parent's policy. Id. ¶ 24.

V. WORKER'S COMPENSATION

In Moye-Lyons v. N. Carolina Dep't of Pub. Instruction, 283 N.C. App. 26, 2022-NCCOA-260, the court of appeals considered the question of whether the plaintiff failed to file a timely

claim under the Worker's Compensation Act; and therefore, whether the Industrial Commission erred in finding that it had no jurisdiction over her claim.

The plaintiff was a part-time unlicensed teacher who, after being denied the ability to obtain an advanced teaching license due to deficiencies in her credentials, allegedly suffered a stroke and developed Bell's Palsy in April 2007 due to the distress this news caused her. Id. ¶ 5. The teacher then suffered from a spiral of gradually worsening mental health issues, which saw her involuntarily and voluntarily committed for mental health treatment several times over the course of the years 2007–2017. Id. ¶¶ 5–8. In October 2018, the teacher initiated a claim for workers' compensation benefits based on her April 2007 injury. Id. ¶ 9. The Deputy Commissioner dismissed her claim with prejudice in June 2019, determining that she had not filed the claim in a timely manner. Id. ¶ 10. On appeal, the full commission affirmed the decision to dismiss her claims. Id. It further held that the two-year limitations period to bring her claims under N.C.G.S. § 97-24 was not tolled due to her incompetence, because the evidence showed that the teacher was no longer mentally incompetent as of November 2009. Id. ¶ 11.

The court reviews decisions of the commission de novo, including its jurisdictional factual findings. Id. ¶ 14 (citing Capps v. Southeastern Cable, 214 N.C. App. 225, 226-27, 715 S.E.2d 227, 229, (2011)). It must make determinations of jurisdictional facts by the greater weight of the evidence. Id. ¶ 15.

The court had previously held that the two-year filing window is not a statute of limitation, but rather a condition precedent to the right to compensation. Id. ¶ 16 (citing Reinhardt v. Women's Pavilion, Inc., 102 N.C. App. 83, 84, 401 S.E.2d 138, 139 (1991)). Where there was no evidence of the timely filing of the claim or of the submission of a voluntary settlement agreement, dismissal would be proper. Id. There was no evidence of either condition being met, so the teacher's claims

would be dismissed unless the filing window had tolled due to incompetence. Id. ¶ 17. Incompetence is the lack of "sufficient capacity to manage the adult's own affairs or to make or communicate important decisions concerning the adult's person, family, or property[.]" Id. ¶ 19. It is not sufficient that a person exhibits these symptoms; the state must first adjudge her incompetent. Id. Plaintiff had not undergone this process. Id. ¶ 20. However, the court noted that the commission was also able to make such an adjudication for the purposes of its own time limitations, and so looked to its findings below. Id.

The full commission had determined that the teacher was not mentally incompetent during the relevant time period. Id. ¶ 22. The court also determined, from its own review of the extensive records the teacher provided before the commission, that there was in fact ample evidence of her competence during this time period. Id. ¶ 24–26. It noted that while she was diagnosed with schizophrenia, this diagnosis was not sufficient since she was successfully and responsibly seeking treatment and participating in her own treatment. Id. ¶ 26. Further, she had been cleared to return to part-time work by her psychiatrist in November 2009. Id. She did not experience a hospitalization until more than three and a half years from her previous episode. Id. ¶ 27.

The court also declined to follow the findings of the proceedings the teacher underwent in the course of being involuntarily committed at various times from 2009 to 2015. Id. ¶ 29. It held that these proceedings were designed to determine whether a person was a danger to themselves or others, not whether she was competent to manage her own affairs. Id. ¶¶ 29–30. The court found the commission was also able to disregard findings by the Social Security Administration ("SSA") that the teacher was incompetent during the time period in question, as the commission had broad authority to consider all relevant evidence and draw its conclusions. Id. ¶ 31. Further, the Court noted positively the commission's conclusion that SSA would have made that decision

based on federal laws and standards, rather than the state authorities properly considered in determining incompetence under North Carolina law. Id. ¶ 34–35. Nor was the commission bound by the SSA's assignment of a representative payee for the teacher in relation to her claim for benefits. Id. ¶¶ 37–39.

In sum, the court held that the commission exercised its broad discretion permissibly and made its decision on the basis of the entire record, including the teacher's medical records, the SSA decisions, and the teacher's involuntary commitment proceedings. Id. ¶ 41. It agreed that the weight of the evidence demonstrated that the teacher was not mentally incompetent during the two years following her April 2007 injury, and thus her claim was not timely filed. Id. ¶¶ 41–42.

In McAuley v. North Carolina A&T State University, 280 N.C. App. 473, 2021-NCCOA-657, appeal docketed, No. 9A22 (N.C. Jan. 10, 2022), the court of appeals considered whether section 97-24 of the Workers' Compensation Act permitted the industrial commission to exercise jurisdiction over a wife's claim for death benefits that she filed more than two years after her husband passed away where the husband had filed a workers' compensation claim before he died.

In January 2015, the husband injured his back while working for a university. Id. at ¶ 2. The following month, he filed a workers' compensation claim with the university. Id. The husband passed away shortly after filing his claim. Id. Almost three years after her husband's death, the wife filed a claim for death benefits with the industrial commission. Id. at ¶ 3. The university filed a response to the wife's claim, arguing that the industrial commission lacked jurisdiction to hear her claim under section 97-24 and also filed a motion to dismiss the claim as time-barred under sections 97-22 and 97-24. Id. The industrial commission dismissed the wife's claim with prejudice, concluding that it lacked jurisdiction to hear the claim. Id. at ¶¶ 1, 4–5. The wife appealed the industrial commission's decision to the court of appeals. Id. at ¶ 5.

The court of appeals affirmed the industrial commission's determination that it lacked jurisdiction to hear the wife's claim with Judge Carpenter writing the majority opinion.

As the court of appeals explained, "the timely filing of a claim for compensation is a condition precedent to the right to receive compensation and failure to file timely is a jurisdictional bar for the Industrial Commission." Id. at ¶ 9 (citation omitted). Accordingly, the court of appeals analyzed whether the wife's claim was timely under section 97-24, which establishes a two-year deadline for filing certain claims. Id. at ¶ 10. Although section 97-24 does not specifically mention death benefits, the court of appeals reasoned that the statute's two-year deadline contemplates and applies to claims for death benefits based on the statute's reference to "compensation," a term that the Workers' Compensation Act defines to include funeral benefits. Id. at ¶ 11.

In addition, the court of appeals determined that the wife's "claim for death and funeral benefits arose only upon [her husband's] death, not concurrent with [her husband's] own, separate filing of a Form 18 for workers' compensation benefits. Id. at ¶ 13. As a result, the husband's claim, which he filed within section 97-24's two-year deadline, "had no effect" on the wife's claim in this case, and the court of appeals therefore rejected the wife's argument that her claim was timely based on the filing of her husband's claim. Id. at ¶¶ 12–13.

The court of appeals also declined to apply the relation-back doctrine set out in Rule 15(c) of the Rules Civil Procedure to the wife's claim, concluding that the court's case law did not permit relation back in this case because the wife's claim did not exist when the husband filed his claim, and the statute of limitations had expired on the wife's claim. Id. at ¶¶ 14–15. Finally, the court of appeals explained that section 97-38, which states that an employer will make payments when "death results proximately from a compensable injury or occupational disease and within six years

thereafter," did not save the wife's claim because "a compensable injury would not be at issue prior to a timely filing of a claim for workers' compensation benefits." Id. at ¶¶ 16–17.

For these reasons, the court of appeals held that the industrial commission lacked jurisdiction under section 97-24 to hear the wife's claim for death benefits because the claim was untimely.

The dissent, written by Judge Arrowood, would have held "that under N.C. Gen. Stat. § 97-24(a), a dependent is not required to file a separate and distinct claim within the two-year statutory period, so long as an initial claim satisfies the limitation period." Id. at ¶ 19. According to Judge Arrowood, the plain language of section 97-24 only requires that "a claim" be filed "within two years after the accident," which the wife's husband did when he filed his claim. Id. at ¶ 23 (quoting N.C. Gen. Stat. § 97-24(a)). In Judge Arrowood's view, his interpretation of section 97-24 was supported by a prior amendment to section 97-24 that removed language requiring that a separate claim be filed for death benefits. Id. at ¶¶ 26–27. Lastly, Judge Arrowood reasoned that the law surrounding wrongful death claims, including the application of Rule 15(c) to such claims, further supported a holding that the industrial commission had jurisdiction to hear the wife's claim. Id. at ¶¶ 28–29.

In Cunningham v. Goodyear Tire & Rubber Co., 381 N.C. 10, 2022-NCSC-46, the supreme court considered whether a worker's return visit to her employer's medical dispensary in 2017 related back to a 2014 injury in the context of timely filing her worker's compensation claim. Justice Hudson wrote for the majority.

A worker worked nearly continuously for a tire manufacturer for at least seventeen years. Id. at ¶ 2. On May 27, 2014, during a twelve-hour shift, the worker was attempting to pick up a tire off a truck when the tire was struck, causing her to injure her back. Id. at ¶ 4. The worker

filed an internal report with her employer, was placed on light duty, and returned to full duty six weeks later without missing any work. Id. She never completed state workers' compensation forms; however, the worker testified she thought they were already completed, and the record reflected her employer's insurer was on notice of her injury. Id. at ¶ 5.

During the light duty period, the worker sought treatment through the employer's onsite medical facility and via a physical therapist. Id. at ¶ 6. She saw the physical therapist again in early 2015. Id. at ¶ 7–8. She began experiencing foot pain and was referred to a podiatrist, who diagnosed her with plantar fasciitis. Id. at ¶ 9. The worker did not return to the on-site facility again until 2017. Id. After extensive treatment, the podiatrist told the worker her "problems did not come from her feet but were caused by her back problems stemming from her May 27, 2014 injury." Id. at ¶ 9.

In April 2017, when the worker returned to the on-site medical facility related to the prior injury and a more recent injury, she was informed that the insurer had closed her file related to the 2014 injury. Id. at ¶¶ 10–11. In May 2017, the worker filed separate Form 18s for the 2014 and 2017 injuries. Id. at ¶ 13.

The commission denied the 2017 claim and found the 2014 claim time-barred. Id. The worker appealed the denial to the full commission, alleging that the most recent payment under the 2014 injury was in 2017. Id. The full commission again denied the 2017 claim and found the 2014 claim time-barred. Id. The worker appealed to the court of appeals. Id. at ¶ 14.

The court of appeals held that the full commission erred, finding by a greater weight of the evidence the 2017 visit was related to the 2014 injury. Id. at ¶ 15 (citing Cunningham v. Goodyear Tire & Rubber Co., 273 N.C. App. 497, 506–07 (2020)). The dissent in the court of appeals argued that whether the claim was time barred by section 97-24(a) of the North Carolina General Statutes

should be considered under the same standard of review as an award, (1) whether competent evidence exists and (2) whether the commission's findings of facts justify its conclusions of law. Id. The employer and insurer appealed.

The supreme court considered whether the court of appeals erred in holding that the worker's 2017 visit related to the onsite facility related back to her 2014 injury. Id. at ¶ 28. The supreme court affirmed the court of appeals. Id.

Recognizing that de novo review was appropriate, the supreme court looked to the record. Id. at ¶ 29. Testimony from the worker's physical therapist tended to show that the worker never fully recovered from the 2014 injury. Id. Further, testimony from the worker's later treating physician indicated she suffered from chronic back pain, stemming from the time of the 2014 injury. Id.

Conversely, the supreme court found that the commission pointed to no evidence that the worker had ceased seeking treatment prior to 2017. Id. at ¶ 30. Accordingly, the supreme court held that by the greater weight of the evidence the worker's claim was not time barred as she received payment in 2017 related to her 2014 injury. Id. at ¶ 32.

Chief Justice Newby dissented arguing, like Judge Tyson in the court of appeals dissent, that the appropriate standard of review was whether the commission issued its finding under competent evidence. Id. at ¶ 34 (Newby, C. J., dissenting). The dissent argued that precedent had established the industrial commission to be the fact-finding body for workers' compensation claims. Id. at ¶ 35 (citing Gore v. Myrtle/Mueller, 362 N.C. 27, 40, 653 S.E.2d 400, 409 (2007)). "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.'" Id. (quoting Medlin v. Weaver Cooke Constr., LLC, 367

N.C. 414, 423, 760 S.E.2d 732, 738 (2014)). Therefore, in his view, the majority, and the court of appeals, erred in granting insufficient deference to the full commission's findings. Id. at ¶ 45.

In Nay v. Cornerstone Staffing Solutions, 380 N.C. 66, 2022-NCSC-8, the supreme court considered whether the industrial commission's method to determine that an injured worker's weekly wages were "fair and just to both parties" presented a question of fact or of law. Justice Ervin wrote for the majority.

In August 2015, an employee began working for a staffing agency. Id. at ¶ 2. Most of the workers employed by the staffing agency were placed in "temp-to-perm" positions, where a temporary worker is placed with an employer in the hopes of a permanent position. Id. at ¶ 3. The employee began work at a temp-to-perm position with a company that updates athletic fields and performs landscaping work. Id. at ¶ 4. In November 2015, the employee and another worker attempted to lift a "heavy machine" into a truck. Id. at ¶ 5. The employee suffered from back pain after the accident and applied for and was awarded temporary disability. Id. at ¶¶ 6–7.

In July 2017, the employee requested a hearing with the industrial commission, asserting that the staffing agency "unilaterally lowered the amount" of disability benefits he had been receiving. Id. at ¶ 8. The industrial commission filed an opinion and award finding that the staffing agency acted appropriately in reducing the benefit amount. Id. at ¶ 9. In making this determination, the industrial commission reviewed the five methods for calculating an employee's average weekly wages set out in section 97-2(5) of the North Carolina General Statutes. Id. The industrial commission determined in a finding of fact that "exceptional reasons exist" for employing the fifth method for unique circumstances. Id. So applied, the employee's five months with the landscaping company would be divided over an entire 52-week year to determine weekly

pay. Id. It reasoned this method was fair to both the employee and staffing agency because the employee was a temporary worker. Id.

The employee appealed. Id. Before the court of appeals, the employee argued the commission erred in finding the fifth method was appropriate, that the third method – where the employee's wages for less than 52 weeks would be divided by the number of weeks he did work – would be fair and just to both parties, and that the staffing agency benefitted from a windfall because the wrong method was applied. Id. at ¶ 10. The court of appeals agreed, holding that the industrial commission's decision to use the fifth method was subject to de novo review. The court of appeals reasoned that the industrial commission's finding that the fifth method was "fair and just" was actually a conclusion of law. Id. The court of appeals reversed and remanded to the industrial commission with guidance that the methods in section 97-2(5) of the North Carolina General Statutes were ranked by order of preference. Id. at ¶¶ 11–12. The court of appeals further opined that the third method would fair and just. Id. at ¶ 12. The staffing agency appealed.

The staffing agency argued that the court of appeals erroneously applied a de novo standard of review to the industrial commission's findings. Id. at ¶ 16. "The difference between a question of law, on the one hand, and a question of fact, on the other is well-established, although often difficult to determine." Id. at ¶ 25. The supreme court reviewed a history of analogous cases to determine whether the industrial commission's determination that the fifth method was "fair and just" was a question of fact or of law. Id. at ¶¶ 17–28. The supreme court found in reviewing these cases that "all of them focus upon the extent to which particular 'fairness and justness' determinations reflect a proper understanding of the relevant statutory language." Id. at ¶ 27.

Here, while a finding of "fair and just" may be a factual finding, it becomes a legal question when such a determination rests upon a misapplication of the law. Id. at ¶ 28. Here, the industrial

commission based its finding on what the employee had earned, rather than what he "would be earning" but for the injury. Id. Even so, the supreme court held that the court of appeals overstepped its review in "ma[king] its own factual determinations . . . rather than simply reviewing the Commission's decision." Id. The "most appropriate disposition" would be to remand the matter to the commission for entry of an order containing facts and conclusions based upon a "correct understanding of the applicable law." Id.

Justice Barringer authored a dissent which Chief Justice Newby joined. According to the dissent whether a calculated weekly wage is fair and just is a question of fact. Id. at ¶ 30 (Barringer, J., dissenting). "This Court's precedent has never indicated otherwise." Id. Accordingly, de novo review was not warranted. Id. at ¶ 43. Further, as the industrial commission based its finding that the fifth method was applicable on competent evidence, no action was required by the appellate courts. Id. at ¶ 51. "Perhaps different factual inferences could be drawn from the evidence. However, that is not the role of the appellate courts." Id. at ¶ 52. Therefore, the dissent would affirm the industrial commission's opinion and award. Id. at ¶¶ 52–53.

In Mahone v. Home Fix Custom Remodeling, 281 N.C. App. 676_, 2022-NCCOA-93, the court of appeals considered whether an employee in a workers' compensation case was required to present expert testimony to a reasonable degree of medical certainty that his traumatic brain injury was caused by a workplace accident.

The employee worked as a sales representative for a home remodeling company. Id. at ¶ 2. During a sales call, the employee fell more than twenty feet after the floor of the attic where he was working collapsed. Id. After the fall, the employee was diagnosed with traumatic brain injury. Id. at ¶ 11. The employee filed a workers' compensation claim. Id. at ¶ 7. The industrial commission reviewed the employee's claim and issued an opinion and award, which found, among

other things, "that '[a]lthough the medical records in this case indicate that [the employee] was diagnosed with a mild [traumatic brain injury] following the 24 July 2018 incident, the Full Commission finds [the employee] presented no expert medical opinion evidence causally linking the 24 July 2018 incident with [the employee's] traumatic brain injury." Id. at ¶ 16.

In particular, the industrial commission found that although the employee's doctor "wrote a letter to the Commission indicating that the [traumatic brain injury] was related to the 24 July 2018 incident, [the doctor] did not offer an opinion to a reasonable degree of medical certainty and was not deposed by the parties." Id. As a result, the industrial commission determined that the employee was not entitled to compensation for his traumatic brain injury. Id.

The employee appealed the industrial commission's decision to the court of appeals, arguing that the commission applied the incorrect legal standard in evaluating whether the employee's traumatic brain injury was compensable. The court of appeals held that the industrial commission erred in denying the employee compensation for his traumatic brain injury.

To start, the court of appeals explained that it "has repeatedly held that a doctor is not required to testify to a reasonable degree of medical certainty" in a workers' compensation case. Id. at ¶ 31 (quoting Erickson v. Siegler, 195 N.C. App. 513, 524, 672 S.E.2d 772, 780 (2009)). "All that is required is that it is 'likely' that the workplace accident caused plaintiff's injury. Id. (quoting Erickson, 195 N.C. App. at 524, 672 S.E.2d at 780). The court of appeals determined that, based on the industrial commission's findings, it appeared that the commission had "required [the employee] to present expert testimony, either at a hearing or deposition, to a reasonable degree of medical certainty, that his [traumatic brain injury] was causally related to the accident." Id. at ¶ 34. This, however, was not the correct standard to apply. Id. Instead, the employee "was

required to present expert opinion evidence, not necessarily in the form of testimony, that it was likely that the accident caused [his] injury." Id.

Here, the employee's doctor offered documentary evidence, in the form of a letter, that sufficiently linked the employee's workplace accident to his traumatic brain injury, and the doctor's letter was not "was not speculative or guesswork." Id. Thus, it did not matter that the doctor was not deposed or that he did not testify at the hearing on the employee's claim. Id. His letter provided sufficient evidence to satisfy the employee's burden of proving causation by a preponderance of the evidence. Id.

For these reasons, the court of appeals reversed the industrial commission's opinion and award on the compensability of the employee's traumatic brain injury and remanded to the commission to make findings and conclusions applying the correct standard.

In Forte v. Goodyear Tire & Rubber Company, 283 N.C. App. 120, 2022-NCCOA-281, the court of appeals considered whether the industrial commission was required to (1) expressly state that it found good grounds to reconsider the evidence and alter a workers' compensation award issued by the deputy industrial commissioner and (2) expressly state what it determined those good grounds to be.

An employee of a tire company alleged that he injured himself while at work. Id. at ¶¶ 6–9. Several months after the alleged injury, the employee reported the injury to the tire company and later filed a workers' compensation claim, which the company contested. Id. at ¶ 10. The deputy industrial commissioner issued an opinion and award concluding that the employee had sustained a compensable workplace injury by accident. Id. at ¶ 11. The tire company filed an appeal with the industrial commission. Id. at ¶ 12. The industrial commission issued an opinion

and award determining that the employee had not sustained a compensable workplace injury by accident. Id. The employee appealed the industrial commission's decision to the court of appeals.

The court of appeals affirmed the industrial commission's opinion and award.

The employee argued that the industrial commission's opinion and award was subject to reversal because the commission did not expressly state that it found any good grounds to reconsider the evidence and alter the deputy industrial commissioner's award and because it did not expressly state what it determined those good grounds to be. Id. at ¶¶ 3, 13. The court of appeals disagreed. Id. at ¶ 4, 15.

Under section 97-85(a) of the North Carolina General Statutes, the industrial commission "may reconsider the evidence before the deputy commissioner, receive further evidence, and amend the deputy commissioner's award 'if good ground be shown' to do so." Id. at ¶ 14. "Whether this 'good ground' standard is satisfied 'is a matter within the sound discretion of the full Commission, and the full Commission's determination in that regard will not be reviewed on appeal absent a showing of manifest abuse of that discretion.'" Id. (quoting Crump v. Indep. Nissan, 112 N.C. App. 587, 589, 436 S.E.2d 589, 592 (1993)).

The court of appeals explained that North Carolina appellate courts "have never addressed whether the Full Commission must make an express finding that good grounds exist, or expressly state the reasoning for that determination." Id. at ¶ 15. Given this lack of controlling law, the court of appeals borrowed a rule from its case law: that "when a trial court has discretion to act upon a showing of good cause and makes no express findings, [the reviewing court will] presume the trial judge found the necessary 'good cause' and examine whether the record supports that finding." Id.

Here, the industrial commission stated that it had entered its opinion and award pursuant to section 97-85, and nothing in the record showed that the commission misunderstood the law when evaluating its authority to reconsider the deputy industrial commissioner's findings. Id. at ¶ 16. Accordingly, the court of appeals presumed that the industrial commission found the necessary good grounds to reconsider the evidence and alter the deputy industrial commissioner's award. Id. The court of appeals also concluded that the industrial commission's decision was not a product of manifest abuse of the commission's discretion based on the commission's findings and conclusions, including the commission's finding that the employee's testimony was not credible. Id. at ¶¶ 17, 24.

For these reasons, the court of appeals affirmed the industrial commission's conclusion that the employee had not sustained a compensable workplace injury by accident.

In Dominguez v. Francisco Dominguez Masonry, Inc., ___ N.C. App. ___, 2022-NCCOA-447 (2022), the court of appeals considered whether corrective workers compensation payments constituted a "last payment" for purposes of the statute of limitations period provided in section 97-25.1 of the North Carolina General Statutes.

An employee sought additional medical compensation from his employer and its insurer after he suffered disabling injuries in the course of his work. Id. ¶ ¶ 1-2. The employee's job title required him to frequently "bend his knees, squat, kneel, and do heavy lifting." Id. Over time, the employee was diagnosed with diseases relating to pain he experienced in his knees. Id. On May 14, 2007, the industrial commission issued an order awarding the employee treatment for the employee's knees and indemnity compensation for his medical expenses. Id. The employer issued these expenses through June 5, 2015. Id. On August 18, 2017, the employer's insurer noticed an older indemnity check had not been cashed by the employee. Id. ¶ 4. As a result, the insurer

contacted the employee, in which he confirmed that he had not received the check. Id. The check was dated for July 14, 2011. Id. On August 28, 2017, the employee requested a replacement check, which the insurer issued on September 19, 2017. Id. On February 12, 2018, the employee requested additional medical compensation by filing a Form 33 with the industrial commission. Id. ¶ 5. The employer and insurer moved to dismiss the employee's claim contending that his action was time barred by section 97-25.1 of the North Carolina General Statutes. Id. The commission denied the motion and granted the employee's request. Id. at ¶¶ 5-6. The employer and insurer appealed the commission's determination. Id. ¶ 6.

In an opinion by Judge Zachary writing for the majority, the court of appeals affirmed the industrial commission's order that the employee's application for additional compensation was not time barred. Id. ¶ 21. Section 97-25.1 of the North Carolina General Statutes provided in part –

> The right to medical compensation shall terminate two years after the employer's last payment of medical or indemnity compensation unless, prior to the expiration of this period, either (i) the employee files with the Commission an application for additional medical compensation which is thereafter approved by the Commission, or (ii) the Commission on its own motion orders additional medical compensation.

Id. ¶ 11.

Therefore, the employer and insurer contended that the last payment was June 5, 2015, and in accordance with the statute the employee's additional application was time barred by the two-year statute of limitations. Id. ¶ 13. This state has emphasized that interpretations of workers compensation statutes "should be liberally construed whenever possible to avoid denying benefits based on narrow interpretations of its provisions." Id. ¶ 14 (citing Robertson v. Hagood Homes, Inc., 160 N.C. App. 137 (2003)). Here, the court concluded that under the "plain and ordinary meaning" of the statute, the employee's right to additional medical compensation had not yet

terminated because he received his last payment on September 19, 2017. Id. ¶ 16. The court explained that the employer and insurer's contention that the September 2017 payment is not applicable to this consideration would "add a provision to a statute that has been omitted." Id. ¶ 17. Thus, the majority found that the statute liberally provides that "the two-year limitation period begins when an employer provides (1) indemnity or medical compensation (2) for the last time."

Therefore, for the foregoing reasons, the court affirmed the industrial commission's order awarding the employee additional medical compensation.

Judge Tyson, writing for the dissent, contended that a reissuance of previously paid funds does not restart or toll the statute of limitations period set out in section 97-25.1 of the North Carolina General Statutes. Id. ¶ 39. The dissent explained that "it is the clear intent of our legislature to limit claims for additional medical compensation to a specified period of time." Id. ¶ 33 (citing Harrison v. Gemma Power Sys., LLC, 234 N.C. App. 664 (2014)). While when evaluating statutes courts should "first look to the plain meaning of the statute," if a "literal interpretation [. . .] leads to absurd results or contravene the manifest purpose of the Legislature [. . .] the reason and purpose of the law shall control." Id. at ¶¶ 29-30. Therefore, the dissent contended that the majority's opinion acts to "obliterate any statute of limitations delineated" in the underlying statute. Id. ¶ 38. Since Judge Tyson found the result contrary to the statute's purpose, he dissented.

VI. ETHICS

A. Disqualification

In Rosenthal Furs, Inc. v. Fine, 282 N.C. App. 530, 2022-NCCOA-208, the court of appeals considered whether a trial court erred in disqualifying an attorney from representing his firm or himself, pro se, in a legal malpractice action.

A business filed a complaint alleging legal malpractice, constructive fraud, and negligent misrepresentation against an attorney and his firm. Id. at ¶ 2. The business's claims arose out of the attorney's and firm's prior representation of the business in a commercial lease dispute. Id. The attorney filed a notice of limited appearance on behalf of his firm, and a motion to dismiss on behalf of the firm and himself. Id. at ¶ 3.

The business filed a motion to disqualify the attorney as counsel for himself or his firm under Rule 1.9 and 3.7 of the North Carolina Rules of Professional Conduct. Id. at ¶ 4. The business argued the attorney was "a material and necessary witness in the litigation as [the attorney's] conduct, advice, filings, decisions, statements, acts, and omissions are the subject of th[e] legal malpractice suit." Id. Further, the business argued the attorney's representation of the firm and himself was materially adverse to the interests of the business, and the attorney had not requested or received the business's consent. Id.

At the hearing, the attorney acknowledged that based on an ethics opinion from the North Carolina State Bar "it's up to the trial court to decide" whether Rule 3.7 precluded his ability to represent himself or the firm in the malpractice action. Id. at ¶ 5. The trial court granted the business's motion and disqualified the attorney. Id. at ¶ 6. After the trial court denied a motion for reconsideration, the attorney appealed. Id. at ¶ 7.

The court of appeals began its analysis by observing as interlocutory the order granting the motion to disqualify. Id. at ¶ 8. However, "[t]he North Carolina Supreme Court has previously held that orders disqualifying counsel affect a substantial right and are immediately appealable." Id. (citing Goldston v. Am. Motors Corp., 326 N.C. 723, 726, 392 S.E.2d 735, 736 (1990)). The court of appeals identified two issues: Whether the trial court erred in disqualifying the attorney from representing his firm, and whether the trial court erred in disqualifying the attorney from representing himself. Id. at ¶ 9.

The court of appeals first considered whether the attorney could represent his firm. The court of appeals recognized that it had previously held a trial court held the power to disqualify an attorney under Rule 3.7 when the attorney was likely to be a necessary witness. Id. at ¶ 13 (citing Harris & Hilton, P.A. v. Rassette, 252 N.C. App. 280, 284 798 S.E.2d 154, 157 (2017)).

Acknowledging this principle, the attorney and firm instead argued that the trial court prematurely disqualified the attorney because Rule 3.7 states that "a lawyer shall not advocate at a trial." Id. at ¶ 14 (quoting N.C. R. Pro. Conduct 3.7). However, the court of appeals looked to a 2020 Ethics Committee opinion offering that while the Rule 3.7 disqualification does not automatically extend to pretrial matters, a court has discretion to disqualify an attorney "if the pretrial activities involve evidence that, if admitted at trial, would reveal the lawyer's dual role." Id. (quoting 2020 Formal Ethics Opinion No. 2, N.C. State Bar). Accordingly, the court of appeals held the trial court acted within its discretion in disqualifying the attorney from representing his firm. Id. at ¶ 15.

As to the issue of whether the attorney could represent himself, the attorney argued that North Carolina law provides any litigant the right to represent himself, and that all pro se litigants carry a "dual role" as counsel and witness. Id. at ¶ 16. The court of appeals further recognized

that another Ethics Committee opinion provided that an attorney may represent himself at trial with no inherent prohibition within Rule 3.7. Id. at ¶ 17 (citing 2011 Formal Ethics Opinion No. 3, N.C. State Bar). "Thus, as a general rule, a lawyer-litigant has a right to appear pro se and Rule 3.7 does not automatically operate to disqualify a lawyer-litigant from appearing pro se even when the lawyer-litigant is likely to be a necessary witness." Id.

However, although Rule 3.7 does not serve as an automatic bar, "the question remains whether circumstances may arise permitting a court to disqualify a lawyer from appearing pro se in a particular case." Id. at ¶ 19 (emphasis added). While the trial court relied in part on Rule 3.7 as basis for disqualifying the attorney from representing himself, this was not the sole basis for disqualification. Id. at ¶ 22.

The court of appeals noted that the trial court's findings "reflect concern" about the attorney's ability to operate and advocate objectively in the "tripartite role of litigant, lawyer, and key witness." Id. "Given the litany of concerns reflected in the trial court's Order, we cannot conclude the trial court's exercise of its inherent authority to control proceedings—including control of the lawyers appearing before it—was arbitrary or unsupported by reason." ¶ 24.

Therefore, the court of appeals affirmed and held that the trial court did not abuse its discretion in disqualifying the attorney from representing himself or his firm. ¶ Id.