

2022 Appellate Training:
New & Emerging Legal Issues

CIVIL LAW UPDATE

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LIABILITY

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Negligence

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**Keith v. Health-Pro Home Care Services, Inc.,
N.C. (2022) (3)**

Issue:

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.

4

Facts

- Elderly couple hired health provider to provide in-home aide.
- Health provider told couple all employees underwent a criminal background check.
- Criminal check not adequately performed; aide had several misdemeanors, including some for threatening others.
- Health provider did not confirm whether aide had a valid driver's license as indicated on her application; aide did not.
- Money was stolen from the couple's home; they told the health provider who removed the aide from the home.

5

Facts (cont'd)

- The provider later reassigned the aide to the home.
- A few weeks later, the elderly couple were victims of home invasion perpetrated by the aide.
- They filed negligence suit against the health provider that employed the aide.
- Jury found in favor of the elderly couple; trial court denied motion for judgment notwithstanding the verdict.
- Court of appeals reversed trial court's judgment, remanding for entry of judgment notwithstanding the verdict in favor of the health provider.

6

Supreme court reversed (Barringer, J.)

- A claim for negligent hiring requires:
 - (1) a specific negligent act;
 - (2) incompetency, by inherent unfitness or specific acts of negligence from which incompetence may be inferred;
 - (3) actual or constructive notice of unfitness indicating that the employer could have known the facts had he used ordinary care in "oversight and supervision;" and
 - (4) the injury complained of resulted from the incompetency.
- Elderly couple had to show a nexus between the employment relationship and the injurious act. This was satisfied by the health provider's involvement in employing the aide to work at the couple's home, the health provider's receiving financial benefit for its services, and the employee's intelligence regarding the couple's personal life.

7

Concurrence in part, dissent in part (Newby, C.J.)

- Dissented from the majority because he believes a new trial should have been granted in this case as precedent has established that a "trial court's failure to give a negligent hiring instruction prejudiced the defendant such that defendant is entitled to a new trial."

8

Dissent (Berger, J.)

- The circumstances at issue in the case did not give rise to a legal duty on behalf of the health care provider.
- Contended that an employment relationship alone does not give rise to a duty to third parties, but rather the defendant must “[1] know or should know of the third person’s violent propensities and (2) the defendant has the ability and opportunity to control the third person at the time of the third person’s criminal acts.”
- Employee’s prior convictions were for non-violent offenses.
- The health provider had no ability to control the employee’s actions in the robbery.

9

Negligence: Economic Loss Doctrine

10

Cummings v. Carroll, N.C. (2022) (7)

Issue:

Whether the economic loss rule barred negligence, negligent misrepresentation, and fraud claims that two homeowners asserted against seller, seller’s owner, and seller’s real estate agents after homeowners discovered structural damage to their house.

11

Facts

- Several months after closing on the house, homeowners discovered significant structural damage to the house caused by past water intrusion at the house.
- Homeowners asserted several claims, including negligence, negligent misrepresentation, and fraud claims against seller, seller’s owner, and seller’s real estate agents.
- Defendants moved for summary judgment in their favor; trial court granted. Court of appeals affirmed in part and reversed in part.
- Parties appealed several issues to the supreme court. Seller, seller’s owner, and seller’s real estate agents appealed determination by court of appeals that economic loss rule did not bar homeowners’ tort claims against them.

12

Supreme court found no error

- Supreme court held that court of appeals did not err in determining that economic loss rule did not bar homeowners' tort claims against seller, seller's owner, and seller's real estate agents.
- "[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."
- "Substance" of residential property disclosure statement at issue was not incorporated into purchase contract, so disclosure statement could not be used to apply economic loss rule.

13

Holding (cont'd)

- Distinguished Crescent University City Venture: "[D]oes not control in this instance given that the present case arose in the context of a subsequent sale of an existing residence between individuals or privately held entities that the individual participants controlled rather than in the context of a large commercial real estate transaction in which the rights and responsibilities of the parties were comprehensively controlled by a series of inter-related contracts and sub-contract."
- Declined to adopt court of appeals precedent providing that fraud claims are categorically exempted from economic loss rule.
- Seller's real estate agents could not show the privity of contract needed for economic loss rule to apply.

14

Negligence: Negligent Infliction of Emotional Distress

15

Cauley v. Bean, N.C. App. (2022) (12)

Issue:

Whether a trial court properly dismissed a bicyclist's NIED claims against a minivan driver when the van hit her father, but the complaint contained little detail on the distress suffered.

16

Facts

- Bicyclist, father, and two friends cycling on road near Blowing Rock.
- Minivan driver approached from opposite direction and swerved across road.
- Minivan driver collided with bicyclist's father, ejecting him his bicycle, leading to his death.
- Trial court dismissed all claims by the bicyclist.
- Bicyclist appealed NIED dismissal.

17

Court of appeals affirmed

- Affirmed dismissal on basis bicyclist did not sufficiently plead minivan driver's negligence was actual cause of bicyclist's severe emotional distress.
- A successful NIED claim must establish (1) negligent conduct by the defendant, (2) plaintiff's severe emotional distress was reasonably foreseeable, and (3) the negligent conduct actually caused severe emotional distress.
- Multi-factor analysis weighed toward reasonable foreseeability on basis of bicyclist's relationship to her father and her proximity to him at the time of the accident.
- However, bicyclist failed to sufficiently plead severe emotional distress because she did not allege facts about the type, manner, and degree of harm suffered.

18

Unfair and Deceptive Trade Practices

19

Nobel v. Foxmoor Group, LLC, N.C. (2022) (25)

Issue:

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

20

Facts

- Investor loaned money to company after owners, who were personal friends of investor, encouraged her to invest in newly formed company. One of the owners executed a promissory note. Loan was not repaid. Company was administratively dissolved by secretary of state
- Investor sued owners and company for alleged violation of section 75-1.1, which prohibits unfair and deceptive trade practices in or affecting commerce. Following bench trial, trial court concluded that owners and company violated section 75-1.1 and awarded treble damages to investor.
- Owners and company appealed to court of appeals, which reversed 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.'"
- Investor appealed to supreme court.

21

Supreme court affirmed (Berger, J.)

- To recover under section 75-1.1, a plaintiff must prove, among other elements, that "the action in question was in or affecting commerce."
- "Commerce" generally "includes all business activities, however denominated."
- Existing supreme court precedent (Hajmm Co. v. House of Raeford Farms, Inc.) provides that statute only extends to "activities the business regularly engages in and for which it is organized." This precedent further establishes 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."

22

Supreme court affirmed (Berger, J.) (cont'd)

- Conduct at issue here involved a capital-raising device (the promissory note), so conduct lies outside the scope of section 75-1.1.
- Other supreme court precedent (White v. Thompson) provides that section 75-1.1 extends to "(1) interactions between businesses, and (2) interactions between businesses and consumers." Statute is "not focused on the internal conduct of the individuals within a single market participant, that is, within a single business."
- Investor's claim thus also failed because underlying conduct occurred within a single business. Investor was not a "consumer" of company, "nor engaged in any commercial transaction" with company.

23

Dissent (Earls, J.)

- Views the statute as a broad remedial measure statute designed to protect the general public.

24

Tortious Interference with Contract

25

Button v. Level Four Orthotics & Prosthetics, Inc., N.C. (2022) (28)

Issues:

Whether a CEO's request for certiorari concerning the dismissal of his tortious interference with contract claims should be granted.

Whether a CEO had sufficiently pleaded that his termination at the suggestion of one of his employer's corporate shareholders was unjustified, such that this suggestion constituted tortious interference with his employment contract.

26

Facts

- CEO signs employment agreement with North Carolina employer, which includes negotiations with one of employer's shareholders to lower the interest rate on the employer's debts to the shareholder.
- CEO's primary counterparties during the negotiation of his agreement hold leadership positions simultaneously with the employer, the employer's parent company, and the shareholder.
- Once the CEO takes his position, he seeks additional loans from the shareholder, which in turn conditions the new loan on a higher interest rate for both the new loan and the previous loans.

27

Facts (cont'd)

- CEO objects that this would violate his employment agreement.
- Shareholder issues the loan and presents promissory note at the higher interest rate; CEO refuses to sign.
- The shareholder, through an individual representative who is also a director of the employer, terminates the CEO for cause.
- CEO sues the parent company, the shareholder, and the two individual agents through which the entities acted in the negotiation of his contract and in his termination, for (in relevant part) tortious interference with his employment agreement.

28

Facts (cont'd)

- As relevant here, Defendants moved to dismiss these claims under Rule 12(b)(6).
- Trial court dismissed the CEO's tortious interference claim under 12(b)(6) with prejudice.
- CEO sought a writ of certiorari.

29

Supreme court affirmed (Berger, J.)

- The CEO did not show sufficient merit to receive a writ of certiorari. However, the court still fully analyzed the merits of his claims and seemed to rule conclusively on them.
- Because the shareholder had legitimate business interests with the employer and the CEO's employment, a higher standard applied to it as a "non-outsider."
- The shareholder was entitled to a presumption that its actions were prompted by a legitimate business purpose, and the CEO had the burden to prove otherwise (which is termed as "malice" in tortious interference case law). Still, the CEO's pleadings on this point were conclusory and insufficient to merit certiorari.

30

Concurrence (Earls, J.)

- Interest in judicial economy justifies issuing a writ of certiorari.
- Would have reversed the trial court's dismissal of the tortious interference claims.
- On the merits, the requirement to specifically allege malice imposed by the majority conflicted with principles of notice pleading.
- "The complaint need not affirmatively disprove the possibility that the corporate non-outsiders did act in the interests of the company. Rather, the complaint need only 'allege facts demonstrating that defendants' actions were not prompted by legitimate business purposes.'"

31

Duty

32

Connette v. Charlotte Mecklenburg Hospital Authority, N.C. (2022) (43)

Issue:

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.

33

Facts

- Patient presented for surgical procedure.
- Anesthesia provided by a team, including MD and CRNA.
- Shortly after the anesthesia was administered, the patient went into cardiac arrest and suffered injuries from oxygen deprivation.
- Relying on Daniels and Byrd, trial court did not allow the patient's expert to opine on the professional standard of care applicable to the CRNA.
- Jury returned defense verdict.
- Court of appeals unanimously affirmed.
 - Analyzed evolution of practice of medicine.
 - Observed lack of authority to overrule Byrd.

34

Supreme court reversed (Morgan, J.) (3–2 decision)

- Reversed trial court's exclusion of testimony on standard of care applicable to CRNAs.
- Reviewed statutes, administrative codes, and case law as well as evolution of medicine.
- Concluded CRNAs work in collaboration with physicians, not merely at the direction of physicians.
- Held nurses owe independent duty of care to patients.
- Overruled Byrd as the CRNA in this case had heightened responsibilities as recognized by law.

35

Dissent (Barringer, J.)

- Policy change made by the majority should be made by the legislature.
- No justification to deviate from the longstanding precedent in Byrd.
- Noted majority's newly created theory leaves unanswered questions.
- Would have affirmed the trial court's decision.

36

PRETRIAL PROCEDURE

37

Jurisdiction: Personal Jurisdiction

38

Button v. Level Four Orthotics & Prosthetics, Inc., N.C. (2022) (46)

Issue:

Whether one Florida entity and an individual representative of another Florida entity had purposefully availed themselves of the privilege of conducting activities in North Carolina sufficient to establish personal jurisdiction.

39

Facts

- CEO signed employment agreement with North Carolina-based Employer.
- Florida company was Employer's majority shareholder. Shareholder required Employer to maintain specific insurance and had a process for relocating Employer's executive offices away from Winston-Salem.
- The Individual, a Florida resident, was the managing partner of Shareholder's majority owner (which was also the minority shareholder of the Employer). The Individual negotiated the terms of CEO's employment and part of the employment agreement between the CEO and the Employer, discussed Employer's performance with CEO on at least fifteen occasions via telephone or e-mail, and informed CEO that CEO's termination was a unanimous decision of the individual's employer.

40

Facts (cont'd)

- When the Shareholder presented a promissory note that the CEO refused to sign, the Shareholder, through an individual representative who was also a director of the Employer, terminated the CEO for cause.
- As relevant here, the CEO sued the Florida Shareholder and the Individual through which the entities acted in the negotiation of the CEO's contract and in his termination, for (in relevant part) (1) declaratory judgment of his rights under the employment agreement and (2) tortious interference with his employment agreement.

41

Facts (cont'd)

- The Florida-based Shareholder and the Individual, also a resident of Florida, both moved to dismiss for lack of personal jurisdiction.
- Trial court denied the motion to dismiss for lack of personal jurisdiction.
- Personal jurisdiction defendants appealed.

42

Supreme court affirmed (Berger, J.)

- By applying the well-established statutory and constitutional two-step analysis, by their participation in the running of the North Carolina-based employer, both moving personal jurisdiction defendants had satisfied North Carolina's long-arm statute, specifically N.C. Gen. Stat. § 1-75.4(1)(d).
- For purposes of minimum contacts and "purposeful availment" under the federal Due Process Clause, the parent company had established these contacts through its control of the North Carolina employer as well as through the choice of North Carolina law in the CEO's employment agreement.

43

Holding (cont'd)

- For the individual agent defendant, his participation in ongoing negotiations and communications into North Carolina in connection with the CEO's employment agreement, the North Carolina employer's performance, and the loan agreement in question, were sufficient contacts to satisfy the requirements of due process.

44

Concurrence (Earls, J.)

- Majority correctly decided personal jurisdiction issue.

45

Ponder v. Been, N.C. (2022) (48)

Issue:

Whether North Carolina court could exercise personal jurisdiction in alienation of affection action over out-of-state paramour who exchanged numerous communications with a man's North Carolina wife.

46

Facts

- Upon separation, husband accused wife of having affair with Florida paramour.
- Paramour sent wife frequent communications by email, text message, and telephone.
- Paramour sent wife and children airline tickets to visit him in Florida.
- Wife moved to Florida and began living with paramour.
- Husband filed action for alienation of affection against the paramour in North Carolina court.
- Paramour moved to dismiss for lack of personal jurisdiction.
- Trial court denied motion to dismiss, concluding contacts with North Carolina were "significant."
- Court of appeals reversed, with Judge Bryant writing for the majority, holding contacts insufficient for personal jurisdiction.

47

Supreme court reversed

- Supreme court reversed in a per curiam decision for the reasons stated in the dissenting opinion written by Judge Stroud.
- Evidence that paramour had solicited wife was sufficient to establish personal jurisdiction.
- In keeping with previous supreme court decision in which a defendant's telephone and email contacts with a North Carolina resident established personal jurisdiction under long-arm statute and Due Process Clause.
- Content of communications not important for determination of personal jurisdiction.
- Solicitation can occur regardless of who initiated phone contact.

48

Toshiba Global Commerce Solutions, Inc. v. Smart & Final Stores LLC, N.C. (2022) (65)

Issue:

Whether a foreign entity can be subject to personal jurisdiction in this state pursuant to a contract with a North Carolina entity, despite never having a physical presence in the state.

49

Facts

- A California company that operates grocery stores sought out the services of a North Carolina technology company.
- The California company operates grocery stores in the western United States and not in this state.
- Upon its second attempt to solicit the business of the technology company, the California company contracted with the technology company to maintain, repair, and replenish the point-of-sale systems they use.
- None of these negotiations were held in North Carolina; California company did not maintain any physical presence in North Carolina.

50

Facts (cont'd)

- As a part of the company's agreement, the technology company operated a depot from its North Carolina location repairing and issuing new systems.
- California company breached the agreement by terminating agreement early.
- Court denied the California company's motion to dismiss the action for lack of personal jurisdiction.

51

Supreme court affirmed

- In Burger King v. Rudzewicz, the Supreme Court stated, "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."
- The "contemplated future consequences" under the "terms of the contract" required the technology company to maintain repairs and inventory through its depot. The "actual course of dealings" showed that the California company continuously utilized the technology company's depot.
- Separately, the "terms of the contract" required written notice be sent to the technology company's North Carolina office. In its "actual course of dealing" the California company sent written notice of termination to the North Carolina address.
- Although the California company did not have any physical connections in the state, physical presence is not a prerequisite to jurisdiction.

52

State of North Carolina ex rel Stein v. E.I. DuPont de Nemours and Co., N.C. (2022) (68)

Issue:

Whether the Due Process Clause allows North Carolina courts to exercise personal jurisdiction over companies that received assets from another company, even though the receiving companies do not have any contacts of their own with the state.

53

Facts

- North Carolina brought suit against numerous corporate entities, alleging that the predecessor entity released harmful chemicals into the environment.
- North Carolina alleged the predecessor entity chose to restructure its business to limit future liability and protect its remaining assets.
- During the restructure, the pertinent successor entities executed separation agreements with the predecessor entity, agreeing to assume the predecessor entity's liabilities.
- The successor entities moved to dismiss for lack of personal jurisdiction.
- The business court denied the motion to dismiss.

54

Supreme court affirmed

- Affirmed business court's denial of successor entities' motion to dismiss.
- Generally, a corporation that purchases substantially all of another corporation's assets is not liable for the predecessor's debts or liabilities.
- Successor entities likely have or should have notice of the liabilities of its predecessor in a given jurisdiction.
- Due process allows North Carolina courts to exercise jurisdiction over the successor entities because: (1) the parties expressly agreed to assume liabilities and (2) the state alleged sufficient facts to support the claim that the predecessor entity transferred its assets in an attempt to defraud the state in its position as a creditor.

55

Holding (cont'd)

- Corporate entity 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.
- 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 facto 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.

56

Jurisdiction: Subject Matter Jurisdiction

57

Nation Ford Baptist Church, Inc. v. Davis, N.C. (2022) (73)

Issue:

Whether a court has subject matter jurisdiction over a claimant's action regarding employment decisions made by a religious organization.

58

Facts

- In 1997, a church developed its first set of bylaws, giving the church's board the authority to make employment related decisions.
- In 2008, the church applied for a loan.
- The church attached a new set of bylaws that provided that the church's pastor could only be terminated through a special vote of its congregation.
- In 2015, the church hired a pastor. His employment offer letter stated that he was an at-will employee.
- A few years later, the church's board voted to terminate the pastor.

59

Facts (cont'd)

- The pastor continued to hold services.
- The church filed suit and sought an injunction against the pastor. The pastor filed a counterclaim, third-party complaint, and motion for injunctive relief.
- The pastor sought a declaration that he was the pastor of the church and damages.
- The church filed a motion to dismiss the pastor's claim for lack of subject matter jurisdiction "because resolving [the pastor's] claims would require the court to impermissibly review ecclesiastical matters."
- Trial court denied this motion.
- Court of appeals affirmed in a divided opinion.

60

Supreme court reversed in part, affirmed in part

- Civil courts lack subject matter jurisdiction to resolve disputes involving “purely ecclesiastical questions and controversies.”
- If the underlying claim can be resolved through neutral principles of law, there is no impermissible entanglement with church doctrine and practice.
- Where the pastor’s claim requires the trial court to analyze the church’s bylaws and employment contract, the inquiry does not utilize any doctrinal or ecclesiastical consideration.
- Because the pastor’s proposed remedy would entangle the court into the religious matters of the case, the court cannot declare the pastor the spiritual leader of the church.

61

Service of Process

62

Blaylock v. AKG North America, N.C. App. (2022) (79)

Issue:

Whether filing a notice of removal constitutes a general appearance in state court.

63

Facts

- Employee filed a lawsuit in state court.
- Employee never properly served the company.
- Thirteen months after suit was filed, the company removed the action to the Middle District of North Carolina.
- Company then sought an extension of time.
- Employee filed a motion to remand the action to state court.
- Federal court remanded action to state court.
- Company moved to dismiss for lack of personal jurisdiction due to defective service.
- Trial court granted the company’s motion.

64

Court of appeals affirmed

- In a case of first impression, court of appeals held filing a notice of removal does not constitute a general appearance in state court.
- State court exercises no adjudicatory or discretionary power when presented with a notice of removal.
- Removal governed by federal law.
- Notice of removal halts proceedings in state court.
- By statute, requesting extension of time does not constitute general appearance.
- Actual notice is insufficient to confer personal jurisdiction in cases with defective service of process.

65

Rule 9(j)

66

Miller v. Carolina Coast Emergency Physicians, LLC, N.C. (2022) (95)

Issue:

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.

67

Facts

- Wife of a patient who died in the ER filed suit against hospital and emergency room physician.
- Wife alleged liability for the alleged negligence of the nurses and for the alleged negligence of the physician as an apparent agent.
- Rule 9(j) expert opined the ER physician violated applicable standard of care.
- Rule 9(j) expert testified he did not consider himself to be a nursing expert and never expressed opinions beyond those against the ER physician.

68

Facts (cont'd)

- Hospital filed motion to dismiss for failure to substantively comply with Rule 9(j).
- Wife's counsel filed affidavit that he reasonably expected that the Rule 9(j) expert was willing to testify.
- Trial court denied the hospital's motion.
- Court of appeals unanimously affirmed the trial court's order.
- Supreme court accepted discretionary review.

69

Supreme court (Earls, J.)

- Rule 9(j)(1): the proffered expert must be "a person who is reasonably expected"
 - to qualify as an expert witness under Rule 702 of the Rules of Evidence and
 - who is willing to testify that the medical care did not comply with the applicable standard of care."
- Trial courts must analyze both requirements "in the exact same way":
 - What was known or what reasonably should have been known at the time of the filing.
 - Evidence existed that wife was reasonable in belief that Rule 9(j) expert was willing to testify against the hospital at the time she filed the complaint.

70

Dissent (Barringer, J.)

- Case should be remanded for proper application of Rule 9(j).
- Trial court and court of appeals failed to find whether the Rule 9(j) expert was willing to testify.
- By plain language of the statute, the reasonable expectation language modifies only the proffered expert's qualifications – "a person"
 - who is reasonably expected to qualify as an expert witness under Rule 702 of the Rules of Evidence and
 - who is willing to testify that the medical care did not comply with the applicable standard of care."
- Responsibility of plaintiff's attorney to confirm selected expert focused on every cause of action in the complaint and is willing to testify regarding each of the claims.

71

Immunity

72

Immunity: Governmental Immunity

73

Bartley v. City of High Point, N.C. (2022) (101)

Issue:

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.

74

Facts

- A civilian violated traffic law.
- An officer in an unmarked police car attempted to pull him over, but the civilian continued driving home. The officer followed and attempted to confront him at home giving commands.
- The civilian did not follow the officer's orders, which led to his arrest.
- In arresting the civilian, the officer made a maneuver the civilian described as "body slamming." The officer also handcuffed the civilian for 20 minutes in front of his neighbors.
- Civilian complained that the handcuffs were too tight, but officer ignored him.

75

Facts (cont'd)

- Civilian brought civil actions in tort against the City of High Point and against the officer in his individual and official capacity.
- Trial court granted the motion to dismiss the claims against the City of High Point and against the officer in his official capacity on the grounds of sovereign immunity.
- Trial court denied the officer's motion for summary judgment as to the claims against him in his individual capacity.
- 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.

76

Supreme court affirmed (Earls, J.)

- Rebuttable presumption “that public officials will discharge their duties in good faith and exercise their powers in accord with the spirit and purposes of the law.” May overcome with “substantial and competent evidence” to the contrary.
- May overcome presumption favoring public official immunity if present evidence establishing malice on part of officer. 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.’”
- Civilian testified that the officer “body slammed” him, despite a lack of evidence of him being a threat, armed, or resistant.
- Additionally, the tight handcuffing may also serve as evidence of malice, per the Third and Sixth Circuit.
- The court concluded that the civilian presented sufficient evidence of the officer’s malice to create a genuine issue of material fact.

77

Dissent (Berger, J.)

- Presumption for 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.”
- Because officer was performing his official duties at the time of the disputed interaction, presumption applies.
- There does not appear to be any sufficient evidence of malice.
- The officer attempted to stop the civilian, but he did not comply. This gave rise to probable cause for arrest.
- Furthermore, while civilian originally testified that officer “body slammed” him, the evidence shows that officer bent civilian over on the trunk with hands behind back.

78

Dissent (cont’d)

- This leaves the tight handcuffing as an alleged basis for malice.
- The majority erroneously overlooked holdings from the Fourth Circuit contrary to the Third and Sixth Circuit view that tight handcuffing may be used to show malice.
- Further, civilian’s injuries were minimal and not long lasting.
- Lastly, the officer stating that “had [the civilian] done as he was told he would not be in this situation,” is not evidence of retaliation, but rather an accurate statement of the underlying events.

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Immunity: Sovereign Immunity

80

Farmer v. Troy University,
N.C. (2022) (109)

Issue:

Whether sovereign immunity bars state tort claims in North Carolina against an out-of-state public university operating pursuant to the North Carolina Nonprofit Corporation Act.

81

Facts

- An out-of-state public university opened an office in Fayetteville, North Carolina to recruit military students for its online programs.
- Registered under North Carolina Nonprofit Corporation Act, which includes “sue and be sued” clause.
- An employee sued the university for sexual harassment and wrongful termination (among other claims for damages).
- The university moved to dismiss pursuant to Rules 12(b)(2) and 12(b)(6), asserting sovereign immunity barred the former employee’s suit.
- Trial court granted the university’s motion.
- Court of appeals affirmed.

82

Supreme court remanded (Earls, J.)

- Public university is deemed to be an arm of the state and protected by sovereign immunity.
- 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.
- 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.
- In sum, university explicitly waived its sovereign immunity by registering under the North Carolina Nonprofit Corporation Act and engaging in business or commercial activities.
- The supreme court remanded the case for further proceedings.

83

Concurring (Berger, J.)

- 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.

84

Dissenting (Barringer, J.)

- Denying sovereign immunity violates the United States Constitution and North Carolina’s own standard for waiver of sovereign immunity.
- No clear indication that the sister state consented to be sued in North Carolina Courts.
- North Carolina courts have refused to infer a waiver of immunity in circumstances involving a “sue and be sued” clause.
- Sovereign immunity should be afforded.

85

Lannan v. Board of Governors of the University of North Carolina, N.C. App., pet. disc. rev. filed (2022) (111)

Issue:

Whether a valid implied-in-fact contract—as opposed to an express contract—can waive sovereign immunity.

86

Facts

- Before fall 2020 semester, the universities required enrolled students to pay certain fees to register, remain in good standing, receive credit, and obtain a transcript.
- The fees were earmarked for specific services, including, among others, health services, library services, campus activities, use of campus facilities, and transportation.
- Some students also purchased optional parking permits.
- In August 2020, the universities switched to online learning, evicted students from on-campus housing, and discontinued most of the services for which the fees were earmarked.

87

Facts (cont’d)

- Students filed suit in 2021 for breach of contract for improperly assessing and retaining student fees and parking permit fees after discontinuing campus services.
- Students alleged the universities’ offer of services in exchange for fees established a contract implied in fact.
- Students alleged they performed by paying the fees, but that the universities did not perform due to the shutdown.

88

Court of appeals affirmed

- The state waives its immunity when it enters into a valid contract, including contracts implied in law and implied in fact.
- General Assembly envisioned universities could be sued for claims like this because it passed a statute explicitly granting immunity for claims related to tuition paid for Spring 2020 semester based on an act or omission related to COVID, which would not be necessary if sovereign immunity already prevented such a claim.
- Students pleaded a valid implied-in-fact contract, which waives sovereign immunity.
- The trial court properly denied the state's motion to dismiss.

89

Discovery: Depositions

90

Hall v. Wilmington Health, PLLC, N.C. App. (2022) (113)

Issue:

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.

91

Facts

- Patient sued medical center for medical malpractice. 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 patient and her counsel had related to the COVID-19 pandemic.
- Neither side raised in their filings or at the hearing on the motion the issue of whether counsel should be allowed to be physically present with deponents.
- Trial court granted 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.
- Medical center appealed trial court's order to court of appeals.

92

Court of appeals reversed and remanded (Stroud, C.J.)

- Trial court's order was immediately appealable.
- Court of appeals "has recognized 'that civil litigants have a due process right to be heard through counsel that they themselves provide.'" Because "counsel at depositions represent clients by objecting to improper questions and protecting privileges, among other things, that due process right could apply here."
- Trial court's order therefore affected a substantial right (medical center's constitutional right to due process), so order was immediately appealable.

93

Holding (cont'd)

- Relying on a line of cases that have recognized a due process right to retained counsel in civil cases, court of appeals held that this right "extends to having the assistance of retained counsel at depositions." Cases "emphasize[d] the importance of having retained counsel's assistance throughout the legal process including fact-finding phases such as discovery."
- Court of appeals further concluded that this general right "supports a narrower right to have counsel physically present" during depositions.
- Counsel's physical presence at a deposition is important for purposes of objecting to improper questions and protecting privileges, and counsel's physical presence provides greater protection to a witness than counsel's remote presence. For example, technological glitch could occur when counsel is attempting to instruct a witness not to answer a question on privilege grounds.

94

Holding (cont'd)

- Trial court's order was not narrowly tailored, as was required given the constitutional right involved. Trial court could have allowed remote depositions to address patient and her counsel's concerns without also prohibiting medical center's counsel and its witnesses from being physically together during a deposition.
- Trial court "failed to consider the specific circumstances of the particular witnesses and locations at issue," as 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. Order also failed to account for possible changes in the circumstances surrounding the pandemic, such as the availability of vaccines.
- In sum, trial court's order violated medical center's constitutional right to due process by prohibiting center's counsel from being physically present with center's own witnesses during remote depositions.

95

Dissent (Dillon, J.)

- Did not believe that trial court's 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."
- And even if a substantial right had been implicated by the order, medical center did not show that the right would be lost without an immediate appeal, as there were measures that could have been implemented to protect center's rights, such as remote deposition protocols.

96

Written Orders

97

Taylor v. Bank of America, N.A., N.C. (2022) (120)

Issue:

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.

98

Facts

- Customers filed suit against the bank, alleging fraud.
- Bank moved to dismiss pursuant to Rule 12(b)(6).
- 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.
- Reviewing de novo, the court of appeals concluded that it could not conduct a meaningful review of the conclusions of law because the trial court's order did not include findings of fact.

99

Supreme court vacated and remanded

- Supreme court vacated and remanded to court of appeals to perform de novo review.
- During appellate de novo review of a Rule 12(b)(6) motion, the appellate court freely substitutes its own assessment for the trial court's assessment, which does not involve an assessment or review of the trial court's reasoning.
- Rule 52(a)(2) does not require the trial court to make factual findings and conclusions of law to support its order unless requested by a party.

100

Rule 41

101

M.E. v. T.J., N.C. (2022) (121)

Issue:

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."

102

Facts

- Plaintiff and defendant were in a same-sex dating relationship.
- After plaintiff ended the relationship, defendant allegedly became verbally and physically threatening toward plaintiff, so plaintiff, without the assistance of counsel, sought a domestic violence protective order against defendant.
- Plaintiff filled out the paperwork that clerk of court's staff provided to her to initiate a complaint.
- After trial court informed plaintiff that she was not eligible for the type of domestic violence protective order that she had requested (a Chapter 50B order) because she was in a same-sex dating relationship, plaintiff conveyed to clerk's staff what trial court had told her.

103

Facts (cont'd)

- Clerk's staff gave plaintiff new forms to complete, including forms for a different type of domestic violence protective order that she was eligible for (a Chapter 50C order) and a notice of voluntary dismissal of her original Chapter 50B complaint.
- Plaintiff completed the forms and gave them to clerk's staff for filing.
- Clerk's staff later informed 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 plaintiff.
- Plaintiff struck through the file-stamped notice and handwrote "I do not want to dismiss this action." Clerk's staff wrote "Amended" at the top of the file-stamped notice and refiled it thirty-nine minutes after plaintiff's original filing.

104

Facts (cont'd)

- Trial court heard 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.
- Plaintiff, now represented by counsel, appealed to court of appeals, arguing that 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 U.S. Constitution, as well as her rights under the N.C. Constitution.
- A majority of the court of appeals agreed with plaintiff's constitutional arguments. Judge Tyson dissented.

105

Facts (cont'd)

- Defendant appealed decision of court of appeals to the supreme court based on Judge Tyson's dissent.
- Among other issues, defendant argued that trial court had been deprived of its jurisdiction over plaintiff's action when she filed the notice of voluntary dismissal of her original complaint. Because plaintiff never formally filed a new Chapter 50B complaint and a Rule 60(b) motion was not sought or granted by the trial court, defendant argued that trial court never regained its jurisdiction over the action.

106

Supreme court holding (Hudson, J.)

- Supreme court held that trial court retained jurisdiction over plaintiff's action after she filed the notice of voluntary dismissal of her original complaint.
- Plaintiff's "Amended" notice of voluntary dismissal "functionally served as a motion for equitable relief under Rule 60(b)."
- Plaintiff's later amendment to her complaint, to which the defendant had consented at a hearing on plaintiff's request for a Chapter 50B order, "functionally served as a refiling."
- 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.'"

107

Holding (cont'd)

- Reasoned that policy behind 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. "[S]urvivors 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."
- 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."
- 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.'"

108

Holding (cont'd)

- When trial court allowed plaintiff to amend her complaint, with defendant's consent, "it reasonably could have considered this amendment as, in essence, a refiling after a voluntary dismissal."
- While formal Rule 60(b) motion or a new Chapter 50B complaint would have been preferable, supreme court declined to elevate form over substance in this situation, taking into account that plaintiff had followed all the instructions that clerk's staff had given her.
- Acknowledged that it was unlikely that plaintiff had intended for her amendments to serve as a formal Rule 60(b) motion or a formal refiling, but nevertheless concluded that it was within trial court's broad discretion to treat the amendments as a functional Rule 60(b) motion or refiling based on plaintiff's "plain intention to move forward with her Chapter 50B complaint."

109

Dissent (Berger, J.)

- Would have held that under Rule 41(a), trial court was deprived of its jurisdiction over plaintiff's complaint after she filed her notice of voluntary dismissal of her original complaint.
- Disagreed with majority's decision to treat plaintiff's amendments as functional equivalents of a Rule 60(b) motion and refiling because "plaintiff filed no motion with the Court, there was no final judgment, and her attorneys never requested the relief granted by the majority today."

110

Rule 45

111

Wing v. Goldman Sachs Trust Company, N.A., N.C. App. (2021), disc. rev. allowed (2022) (124)

Issue:

Whether Rule 45(d1) of the 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.

112

Facts

- The underlying litigation involved the validity of certain testamentary instruments.
- The defendants served the plaintiff with discovery requests.
- The plaintiff believed that some responsive documents were in her ex-husband's possession, so she served a subpoena on him.
- The ex-husband produced several documents in response to the subpoena.
- The plaintiff informed the defendants that she had received a complete response to the subpoena, and the defendants requested all the documents.
- The plaintiff objected and only produced documents that she claimed were non-privileged and responsive to the discovery request.
- The defendants filed a motion to compel production of all the subpoenaed documents.
- The trial court granted the defendants' motion, and the plaintiff appealed.

113

Court of Appeals vacated discovery order and remanded

- The court of appeals vacated the trial court's discovery order and remanded.
- The interlocutory discovery order affected a substantial right (the assertion of a privilege), so the appeal was allowed.
- The text of Rule 45(d1):
"Opportunity for Inspection of Subpoenaed Material. – A party or attorney responsible for the issuance and service of a subpoena shall, within five business days after the receipt of material produced in compliance with the subpoena, 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."
- Although Rule 45(d1) does not mention Rule 26, the court determined that the two rules must be read together.

114

Holding (cont'd)

- Rule 26 protects "party who has received privileged or non-responsive documents as a result of the subpoena, at no fault of their own."
- The court was not persuaded by argument that plaintiff waived any objections to producing all the subpoenaed documents by serving the subpoena in the first place. The plaintiff "undertook and complied with the statutorily required steps to protect her privileged and non-responsive and irrelevant documents from disclosure."
- Federal Rule 45 (which "has no counterpart to subsection (d1)") supports the limitation on Rule 45(d1), as does Rule 45(d1)'s legislative history.

115

Holding (cont'd)

- Adopting the defendants' position would cause Rule 45(d1) to "become the only discovery device not subject to assertions of privilege and limitations."
- "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."
- The defendants' argument that they could access all the subpoenaed information by deposing the plaintiff's ex-husband was not persuasive.
- The supreme court has granted the defendant's petition for discretionary review.

116

TRIAL

117

Jury Selection: Batson Challenge

118

State v. Clegg, N.C. (2022) (132)

Issue:

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.

119

Facts

- Defendant, an African American man, was charged with robbery with a dangerous weapon and possession of a firearm by a felon. During jury selection, prosecutor used peremptory strikes to remove two African American women from the jury. Defendant raised a Batson challenge.
- 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." 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.
- Trial court overruled defendant's Batson challenge, concluding that defendant had failed to establish that race was a significant factor in the peremptory strikes.

120

Facts (cont'd)

- Defendant was convicted on robbery charge. Defendant appealed conviction to court of appeals. Court of appeals held that trial court did not err in overruling defendant's Batson challenge.
- Defendant appealed to supreme court.
- Supreme court issued special order, remanding to trial court for reconsideration of Batson challenge in light of new U.S. Supreme Court decision, Foster v. Chatman. Supreme court retained jurisdiction.
- On remand, trial court held a new hearing on defendant's Batson challenge. Trial court again overruled Batson challenge. Defendant appealed to supreme court.

121

Supreme court reversed (Hudson, J.)

- Supreme court analyzed trial court's ruling using three-part Batson test.
- Step 1:
"[A] defendant must make a prima facie showing that a peremptory challenge has been exercised on the basis of race[.]" Not "a high hurdle for defendants to cross." Step 1 becomes moot when prosecutor moves to step 2 by offering race-neutral explanation for peremptory strike and trial court issues a ruling on explanation.
Step 1 became moot here and thus no need to analyze any further; prosecutor did not argue that defendant had failed to make prima facie showing of discrimination and instead offered race-neutral explanations for peremptory strikes.

122

Holding (cont'd)

- Step 2:
"[T]he burden shifts to the state to offer a facially valid, race-neutral rationale for its peremptory challenge." State need not offer "an explanation that is persuasive, or even plausible."
At second Batson hearing, prosecutor offered "slightly different" reasons for peremptory strikes.
Prosecutor asserted that he excluded only one, not both, of jurors due to body language and lack of eye contact.
Prosecutor acknowledged that "I suppose" answer was given by one of the jurors in response to question about her confidence in her ability to focus on the trial, not in response to question about being fair and impartial, as prosecutor had initially asserted. Prosecutor now argued that this juror's exclusion was appropriate because "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.

123

Holding (cont'd)

- Step 2 (cont'd):
Trial court accepted prosecutor's stated race-neutral reasons for both peremptory strikes (concern of bias, body language and lack of eye contact, and concern of lack of focus).
Supreme court held that trial court did not err at step 2 but was "clear" that analysis at step 2 "is limited only to whether the prosecutor offered reasons that are race-neutral, not whether those reasons withstand any further scrutiny." Further scrutiny is reserved for step 3.

124

Holding (cont'd)

- Step 3:

Trial court must “determine if the defendant has established purposeful discrimination.” 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.’”

Supreme court concluded that trial court erred at this step with regard to juror who was excluded on the stated grounds of body language and lack of eye contact and concern about lack of focus. Supreme court did not analyze exclusion of other juror because court determined that it was not necessary in light of holding that at least one juror was improperly excluded on the basis of race.

125

Holding (cont'd)

- Step 3 (cont'd):

At the second hearing, trial court found that “both race-neutral justifications offered by the prosecutor fail[ed]” as to juror in question. Lack of focus reason failed because “prosecutor mis-remembered the question to which [juror] responded ‘I suppose,’ ” and body language/lack of eye contact reason failed because trial court failed to make “sufficient findings of fact” for this reason.

Still, trial court did not find Batson violation, but it should have because “the only valid reasoning remaining for the court to consider was evidence presented by defendant tending to show that the peremptory challenge of [juror] was motivated in substantial part by discriminatory intent.”

126

Holding (cont'd)

- Trial court also erred by holding “defendant to an improperly high burden of proof.” No need for “smoking-gun evidence” that trial court sought. Defendant’s evidence (e.g., 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) was sufficient.
- Trial court further erred by considering certain reasoning about juror’s ability to focus on the trial that was not presented by prosecutor.
- Finally, trial court failed to “adequately consider the disparate questioning and disparate acceptance of comparable White and Black prospective jurors.” Disparate questioning alone does not establish Batson challenge, but it can “inform the trial court’s evaluation of whether discrimination occurred.”

127

Holding (cont'd)

- Trial court’s ruling was thus clearly erroneous as there was a Batson violation.
- Proper remedy was to vacate defendant’s conviction (no new trial because he had already served his entire sentence of active imprisonment and had been discharged from all post-release supervision).

128

Concurrence (Earls, J.)

- Agreed with majority's conclusion that there was a Batson violation as to one of the jurors and that proper remedy was to vacate defendant's conviction.
- Would have also held that there was a Batson violation as to the other juror.
- Urged supreme court to use the "variety of tools at [its] disposal" because there was an "urgent" need to do so. Noted that this was the first time supreme court had vacated a conviction based on a Batson challenge.
- "[T]he Batson framework makes it very difficult for litigants to prove intentional discrimination."

129

Dissent (Berger, J.)

- Would have affirmed trial court's ruling.
- Prosecutor's explanation for excluding juror in question was a mistake acknowledged by both trial court and majority. By definition this cannot be purposeful discrimination.
- Majority did not give enough deference to trial court's findings.

130

Evidence

131

Beavers v. McMican, N.C. App. (2022) (144)

Issue:

Whether evidence of post-separation acts is admissible to support an inference of pre-separation acts in actions for alienation of affection and criminal conversation.

132

Facts

- Ex-husband filed suit against his ex-wife's alleged paramour for alienation of affection and criminal conversation.
- Ex-wife admitted to pre-separation misconduct but did not identify the partner.
- Approximately three months after separating, ex-wife began dating paramour.
- Evidence showed ex-wife and paramour engaged in significant communication pre-separation.
- No direct evidence that the two became romantically involved until after the separation.
- Paramour filed a motion for summary judgment, arguing the ex-husband presented insufficient evidence on both claims.
- Trial court granted the paramour's motion for summary judgment.

133

Court of appeals reversed (Murphy, J.)

- Court of appeals' earlier decision in Rodriguez allowed evidence of post-separation conduct to corroborate evidence of pre-separation conduct if evidence of pre-separation conduct is sufficient to give rise to more than mere conjecture.
- Admissibility not limited to when the defendant has been identified as the paramour in one or more independently sufficient instances of pre-separation conduct.
- Evidence of pre-separation conduct paired with post-separation romantic relationship could convince a jury that paramour was the unidentified person with whom the ex-wife admitted to have a sexual relationship.
- Post-separation behavior constitutes viable corroborative evidence.

134

Concurring (Dillon, J.)

- Wrote separately to address dissenting opinion that heartbalm torts should be abolished.

135

Dissent (Jackson, J.)

- Advocates abolishing torts of alienation of affection and criminal conversation.
- General Assembly intended to make an inference by jury of pre-separation conduct from evidence of post-separation conduct impossible in enacting N.C. Gen. Stat. § 52-13(a).
- Pre-separation conduct nothing more than conjecture.

136

Evidence: Hearsay

137

State v. Reid, N.C. App. (2022) (154)

Issue:

Whether hearsay evidence may be admitted under Rule 803(24) with no evidence in the record of a notice of intent to offer that hearsay evidence.

138

Facts

- Defendant obtained an affidavit attesting that affiant heard another individual confess to the crime for which defendant was convicted.
- Defendant moved for post-conviction relief based on newly obtained evidence.
- The affiant testified at a hearing on the motion.
- Trial court admitted the hearsay evidence under Rule 803(24), vacated the conviction, and ordered a new trial.

139

Court of appeals reversed

- Admitting hearsay evidence under Rule 803(24) is an abuse of discretion if the proponent failed to file a proper notice of intent.

140

Attorney's Fees

141

Reynolds-Douglass v. Terhark, N.C. (2022) (159)

Issue:

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.

142

Facts

- Seller entered contract with a buyer for the purchase of home.
- The contract imposed:
 - (1) fees if buyer terminated agreement; and
 - (2) allowed for recovery of attorney’s fees to prevailing party in event of litigation.
- Buyer canceled agreement; refused to pay contractual fees.
- Seller received a judgment in small claims court.
- Trial court enforced judgment and awarded substantial attorney’s fees.
- Court of appeals affirmed in 2–1 decision.

143

Supreme Court affirmed (Ervin, J.)

- Attorney’s fees are generally not recoverable in this state, unless authorized by statute.
- Section 6–21.2 of the North Carolina General Statutes allows for recovery of fees if an “evidence of indebtedness allows for it.”
- “Evidence of indebtedness” under the statute refers to more than commercial transactions.
- Here, contract was signed by both parties and evidenced a legally enforceable obligation that the buyer pay the seller its fees.
- Thus, the award of the party’s actual attorney’s fees was proper.

144

Dissent (Berger, J.)

- Majority's 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."
- Under statutory provisions, the term "evidence of indebtedness" has been used to refer to "notes, securities, mortgages, deeds of trust, and similar written documents."
- Even if this contract is "evidence of indebtedness" under the statute, the calculation of attorney's fees was incorrect.
- If agreement contains reasonable attorney's fees provision but fails to formulate how to calculate them the provision shall be construed to mean fifteen percent (15%) of the "outstanding balance."
- Contended the proper calculation is: "\$2,500 (earned money deposit) x 15% (statutory rate) = \$375 (in attorney's fees)."

145

Appeals: Jurisdiction

146

State v. Kilette, N.C. (2022) (168)

Issue:

Whether the court of appeals has discretionary power to issue a writ of certiorari.

147

Facts

- A criminal defendant petitioned for a writ of certiorari of the trial court's order; court of appeals denied certiorari.
- Court of appeals found "[the court] lacked authority under Rule 21 of the North Carolina Rules of Appellate Procedure to issue the writ."
- Appealed to supreme court, which held Rule 21 does not limit jurisdiction of court of appeals or the court's ability to issue a writ of certiorari.
- Supreme court remanded.
- Court of appeals denied the petition again 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), which provided in part that the court of appeals lacked authority to issue writ of certiorari.
- Dealer again appealed to supreme court.

148

Supreme court vacated and remanded

- Found precedent provides “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.”
- Expressly overrules State v. Harris, State v. Pimental, and other decisions not in accordance with this proposition.
- 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.”

149

Conflicting Opinions

150

In re K.N., N.C. (2022) (174)

Issue:

Whether a Rule 63 substitute judge who did not preside over the presentation of evidence has authority to make new, dispositive findings of fact under Rule 52.

151

Facts

- After presiding over a hearing, the original judge entered an order.
- Defendant appealed the order.
- The supreme court vacated the order after determining the findings of fact were not supported by the evidence and insufficient to support the decision.
- Before the case was remanded, the original judge passed away.
- On remand, all parties agreed that the matter could be assigned to the chief district court judge per Rule 63 of the Rules of Civil Procedure allowing substitution.

152

Facts (cont'd)

- Substitute judge entered a second order, based on her review of the record, trial transcripts, and proposed findings of fact submitted by parties.
- Did not reopen evidence or hold additional hearings, though she acknowledged she had the authority to do so.
- Defendant appealed the substitute judge's order.

153

Supreme court vacated trial court order and remanded for new hearing

- Rules 52 and 63 impose statutory mandates that are reviewable de novo and cannot be waived.
- Failure to ensure the finder of fact has personal knowledge of the case prejudiced defendant.
- A substitute judge who did not preside over the presentation of evidence lacks the power to find facts or state conclusions of law.
- The function of finding facts is distinctly judicial, not ministerial, and within the sole authority of the presiding judge because only he or she has the opportunity to observe the witnesses and weigh evidence.

154

**WORKER'S
COMPENSATION**

155

**Cunningham v. Goodyear Tire & Rubber Co.,
N.C. (2022) (200)**

Issue:

Whether a worker's 2017 treatment related back to a 2014 injury to prevent time bar of her workers' compensation claim.

156

Facts

- Worker for tire company suffered back injury in 2014 when tire she unloaded from a truck was struck.
- Worker filed internal report with company and insurer and sought treatment immediately after suffering injury.
- Worker eventually referred to podiatrist under belief her continued suffering arose from unrelated foot injury.
- Three years later, in 2017, worker returned to employer's on-site medical facility and complained of continued back injuries. Worker was then told any claims related to her 2014 injury had expired.
- Worker filed requisite forms for workers' compensation claim. Industrial commission found claims time-barred, which was affirmed by findings of full commission.
- Court of appeals reversed, holding under de novo review that 2017 visit related back to 2014 injury.

157

Supreme court affirmed (Hudson, J.)

- Affirmed court of appeals.
- De novo review appropriate for determination whether claim time barred.
- Weight of evidence in record tends to indicate worker's 2017 visit related back to 2014 injury.

158

Dissent (Newby, C.J.)

- Court should grant greater deference to full commission findings.
- Appropriate standard of review was whether full commission determined claim time-barred by competent evidence.

159

Nay v. Cornerstone Staffing Solutions, N.C. (2022) (203)

Issue:

Whether the method employed by the industrial commission to determine an employee's weekly wages presented a question of fact or of law.

160

Facts

- Employee worked for staffing agency performing temporary work with hopes of earning permanent position.
- Employee injured while loading a piece of machinery onto a truck for a landscaping company.
- Employee placed on temporary disability and later sought hearing on basis employer unilaterally lowered amount of benefit.
- Industrial commission issued opinion and award employing fifth method of N.C. Gen. Stat. § 97-2(5), reserved for exceptional circumstances.
- Employee appealed, and court of appeals reversed and remanded after applying de novo review.
- Staffing agency appealed, arguing court of appeals applied wrong standard of review.

161

Supreme court modified and affirmed (Ervin, J.)

- De novo review is appropriate when question becomes whether law appropriately applied to facts.
- Even so, court of appeals overstepped role of appellate courts by making its own factual determinations.
- Accordingly, whether award is “fair and just” subject to any competent evidence standard of review, issue of statutory construction subject to de novo review.
- As here, industrial commission misapplied statute, and matter remanded to industrial commission for entry of order containing findings and conclusions based upon a “correct understanding of the applicable law.”

162

Dissent (Barringer, J.)

- Determination whether a weekly wage is “fair and just” is question of fact.
- Industrial commission issued finding that particular method yielded fair and just results, which was supported by competent evidence.
- Though facts of case could be inferred differently, such a review is not the role of appellate courts.

163

THANK YOU

164