

Civil Law Update

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2023 Appellate Training: New and Emerging Legal Issues

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LIABILITY

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Constitutional Claims

3

**Kelly v. State,
N.C. App. (2022) (2)**

Issue:

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.

4

Facts

- Defendants provided a program for eligible students to receive scholarship funding to attend a nonpublic school in the state.
- Included as part of the definition for "nonpublic" schools are religious schools.
- Plaintiffs brought action against the defendants for violations of the North Carolina Constitution in implementing this program.
- Plaintiffs contended in part that the program was unconstitutional in that it would force students to adopt and adhere to certain school's religious beliefs or otherwise be discriminated against for not having those beliefs.

5

Facts (cont'd)

- None of the plaintiffs alleged that they had been denied scholarships under the program or had even applied.
- Defendants moved to transfer the case to a three-judge in the Wake County Superior Court 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 whenever a facial constitutional challenge arises.
- The trial court denied this motion and found that it had proper jurisdiction because the plaintiffs' complaint alleged an as-applied challenge.

6

Court of appeals reversed (Wood, J.)

- Section 1-267.1 of the North Carolina General Statutes states: "Any facial challenge to the validity of an act of the General Assembly shall be transferred [. . .] 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." See also N.C. R. Civ. P. 42(b)(4).
- Determining the difference between an as-applied challenge and a facial challenge depends on the breadth of the remedy requested.
- A claim can be classified as an as-applied challenge if the remedy is "limited to a plaintiff's particular case."

7

Holding (cont'd)

- Here, no plaintiff had applied for a scholarship under the program's terms.
- Plaintiffs only attack the fact that a portion of the program has religious characteristics.
- Thus, the majority held this is a facial challenge that required transfer under the statutes.

8

Dissent (Hampson, J.)

- The statutory scheme requires the trial court to decide if and when to transfer the matter.
- He contended that proper interpretation of the statutes requires a trial court to transfer if it becomes evident that relief cannot be granted without a determination as to the facial constitutionality.
- Thus, trial courts can transfer the case after resolving all issues they have authority to decide.

9

PRETRIAL PROCEDURE

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Personal Jurisdiction

11

State of North Carolina ex rel Stein v. E.I. DuPont de Nemours and Co., N.C. (2022) (15)

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 did not have any contacts of their own with the state.

12

Facts

- North Carolina brought suit against numerous corporate entities, alleging that their predecessor entity released harmful chemicals into the environment.
- North Carolina alleged that the predecessor entity chose to restructure its business to limit future liability and protect its remaining assets.

13

Facts (cont'd)

- 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 for lack of personal jurisdiction.

14

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.

15

Holding (cont'd)

- 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.
- 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.

16

Holding (cont'd)

- 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.

17

**Schaeffer v. SingleCare Holdings, LLC,
N.C. (2023) (17)**

Issue:

Whether activities of foreign corporations and non-resident individuals were sufficient to confer personal jurisdiction.

18

Facts

- Former employee sued employer corporations and individual officers in tort and contract arising from his termination.
- During employment negotiations, former employee lived in California.
- With approval from employer and officers, former employee relocated to North Carolina.
- Corporations are residents of Delaware and Massachusetts.
- Officers are residents of Minnesota and Massachusetts.

19

Facts (cont'd)

- While in North Carolina, former employee continued to substantially perform his work.
- Corporations made efforts to expand their business in North Carolina:
 - Employed at least three other individuals in North Carolina;
 - Solicited applicants for business development;
 - Provided North Carolina consumers with pharmacy discounts;
 - Paid state taxes based on former employee's employment; and
 - Mailed tax documents to his North Carolina address.

20

Facts (cont'd)

- Corporations and officers moved to dismiss former employee's complaint for lack of personal jurisdiction.
- Trial court denied their motions and they appealed.
- Court of appeals unanimously reversed the trial court's denial of the motion to dismiss (in an unpublished opinion).
- Court of appeals recognized that corporations' contacts with North Carolina weighed in favor of finding specific jurisdiction, but concluded that the activities alone were insufficient because the claims at issue did not arise out of, or even relate to, the alleged contacts.

21

Supreme court reversed in part, affirmed in part

- On discretionary review, the supreme court concluded that specific jurisdiction exists over the corporations because they purposefully availed themselves of the privileges of conducting various business-related activities in North Carolina, and former employee's claims arise out of or are related to those activities.
 - Approved of and assisted with former employer's move;
 - Employed other individuals in North Carolina;
 - Provided customers with services in North Carolina;
 - Paid North Carolina taxes based on employees' work there;
 - Continued to communicate with former employee.

22

Holding (cont'd)

- The purposeful availment inquiry is a flexible one, the crux of which is whether a defendant reached out beyond its home—by, for example, exploiting a market in the forum state or entering a contractual relationship there.
- The supreme court acknowledged that one party's unilateral activity is not an appropriate consideration when determining whether a defendant has sufficient contacts with a forum state to justify jurisdiction.
- The court found insufficient evidence that individual officers engaged in activities directed at North Carolina to confer jurisdiction.

23

**Miller v. LG Chem, Ltd.,
N.C. (2023) (20)**

Issue:

Whether the trial court erred in granting a motion to dismiss for lack of personal jurisdiction when a motion to compel was pending for jurisdictional discovery.

24

Facts

- A consumer brought action against a foreign lithium-ion battery manufacturer.
- The consumer served discovery concerning the manufacturer's contacts with North Carolina and eventually moved for an order compelling responses to the discovery requests.
- The trial court dismissed for lack of personal jurisdiction without ruling on the consumer's motion to compel.
- The court of appeals affirmed.
- The dissenting judge asserted that the court should remand to consider whether further jurisdictional discovery was warranted in light of Ford Motor Co. v. Montana Eighth Judicial District Court.

25

Supreme court reversed (per curiam)

- To engage in meaningful appellate review of a discretionary decision, courts must be confident that the trial court applied the appropriate legal standard in the exercise of that discretion.
- The trial court failed to provide any reasons for its implied denial of consumer's requests for further jurisdictional discovery.
- That required reversal of the decision of the court of appeals and remand with instructions to vacate trial court's order and remand to the trial court for reconsideration of the consumer's discovery motion.

26

Statute of Limitations

27

**McKinney v. Goins,
N.C. App. (2023) (24)**

Issue:

Whether the revival window in the SAFE Child Act that resuscitates a civil claim for child sexual abuse previously barred by a statute of limitations runs afoul of the North Carolina Constitution.

28

Facts

- In 2019, the General Assembly unanimously enacted the SAFE Child Act, which created a two-year Revival Window:
Effective from January 1, 2020, until December 31, 2021, this section revives any civil action for child sexual abuse otherwise time-barred under G.S. 1-52 as it existed immediately before the enactment of this act.
- Relying on the Revival Window, student victims of an abuser who had already been convicted of sexual abuse crimes filed a civil suit against the abuser and a county board of education.

29

Facts (cont'd)

- The board argued that the SAFE Child Act was facially unconstitutional and moved to dismiss the complaint.
- A divided three-judge panel granted the motion to dismiss.
- The students and the State—which had intervened to uphold the constitutionality of the SAFE Child Act—appealed.

30

Court of appeals reversed and remanded (Riggs, J. for the court; Gore, J. concurred in result only)

- The court of appeals’ review was limited to whether the Law of the Land Clause of the North Carolina Constitution provides protection from revival.
- Litigants who seek to invalidate legislation as unconstitutional face a steep hill to climb.
- Judge Riggs dove deeply into case law history. Citing various centuries– and decades–old cases, Judge Riggs explained that the notion that an overly broad prohibition on retrospective laws interferes with the ability of the legislature to effectively represent its people.

31

Holding (cont’d)

- Historical precedent established that revival statutes do not per se violate the North Carolina Constitution.
- The board argued that subsequent case law delegitimized this precedent, but Judge Riggs distinguished the board’s cases. One cases in particular that the board relied on—Wilkes County v. Forester, 204 N.C. 163, 167 S.E. 691 (1933)—was distinct in that it did not turn on the question of whether revival statutes violate the North Carolina Constitution and also addressed property rights rather than a procedural defense such as statute of limitations.
- Accordingly, based on case law history, the board failed to show beyond a reasonable doubt that a revival statute is per se unconstitutional.

32

Holding (cont’d)

- Additionally, even if a statute of limitations defense implicates a fundamental right, the SAFE Child Act would pass the strict scrutiny test because it was narrowly tailored.
- The board’s policy argument that the SAFE Child Act was ineffective was undermined by the fact that there are no statutes of limitations for charges of felony child sexual abuse, and the State was able to convict the abuser here.

33

Dissent (Carpenter,J)

- The court overruled binding precedent, an authority reserved for the supreme court only.
- Wilkes applies to all statutes of limitations, not just in the context of real property.
- State courts, unlike federal courts, can issue advisory opinions.
- The Wilkes analysis addressing the general constitutionality of the revival statute at issue therein was thus not dicta but binding precedent.

34

Dissent (cont'd)

- Vested rights are a special category of fundamental rights that are as tangible as property and are protected from any legislative attack.
- The supreme court is the ultimate arbiter as to whether the North Carolina Constitution is violated by legislation.
- Overruling Wilkes may undermine stability in our jurisprudence.
- The three-judge panel should have been affirmed.

35

**Cohane v. Home Missioners of America,
N.C. App. (2023) (30)**

Issue:

Whether the provision of the SAFE Child Act that revives claims "for child sexual abuse" includes claims brought against separate entities for negligent supervision and retention (i.e., claims not brought against the alleged abusers themselves).

36

Facts

- Relying on the revival window of the SAFE Child Act, an adult plaintiff brought civil suits against a minister he alleged sexually abused him as a child, as well as against the religious organization and diocese who managed the minister.
- The plaintiff brought the allegations several decades after the alleged abuse.
- The organization and diocese moved to dismiss the plaintiff's claims, arguing that the claims were not "for child sexual abuse" and therefore not included in the revival window.
- The trial court granted in part the motion to dismiss on the basis that, in its view, the SAFE Child Act did not apply to the plaintiff's civil suits against the organization and the diocese.

37

Facts

- The trial court concluded that the SAFE Child Act's use of the words "for child sexual abuse" in section 4.2(b) must be read narrowly, particularly as compared to a different provision that uses the term "related to child sexual abuse," which the trial court believed was broader than the word "for."
- The plaintiff appealed.

38

Court of appeals reversed and remanded (Gore,J.)

- Previous appellate opinions suggest that there was nothing ambiguous about the SAFE Child Act.
- If a statute is unambiguous, courts must interpret it by its plain language.

39

Holding (cont'd)

- The court of appeals found that the trial court erroneously ignored the plain language of the statute to create a tortured result.
- There is no reason to distinguish the words "related to" and "for."
- The revival window of the SAFE Child Act includes civil claims arising out of child sexual abuse made against entities separate from the alleged abusers, not just civil claims made against the alleged abusers themselves.

40

Dissent (Carpenter, J)

- For the reasons stated in the dissent in McKinney v. Goins, the revival window of the SAFE Child Act is unconstitutional.

41

Rule 9(b)

42

Value Health Solutions Inc. v. Pharmaceutical Research Associates, Inc., N.C. (2023) (38)

Issue:

Whether a claim for negligent misrepresentation must meet the heightened pleading standard of Rule 9(b) in order to withstand a motion to dismiss.

43

Facts

- Two companies engaged in negotiations relating to the purchase of software.
- Over time, negotiations on specific terms began to break down to the point where one company filed suit against the other for numerous contract claims including a negligent misrepresentation claim.
- The complaint contained only one reference to a misrepresentation and that reference did not include any details about who made the representation, when or where it was made, or the specific nature of the misrepresentation.
- The defendant filed a motion to dismiss and the trial court dismissed the negligent misrepresentation claim based on insufficient pleading.

44

Supreme court affirmed in relevant part (Barringer, J.)

- In North Carolina, claims for negligent misrepresentation must satisfy the heightened pleading standard of Rule 9(b).
- The Rule 9(b) heightened standard of pleading with particularity was not met where the plaintiff failed to allege the time, place, speaker or the specific contents of the alleged misrepresentation.

45

Dissent, in part (Earls, J.)

- A claim for negligent misrepresentation should meet the Rule 8 pleading standard due to the plain text of the Rule 9(b) pleading standard.
- Rule 9
 - (b) Fraud, duress, mistake, condition of the mind. – In all averments of fraud, duress or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally.
- But, because the plaintiff failed to allege a duty, the negligent misrepresentation claim was properly dismissed under the Rule 8 standard.

46

Dismissals

47

Cowperthwait v. Salem Baptist Church, Inc., N.C. App. (2023) (45)

Issue:

Whether the trial court properly dismissed an action with prejudice where the plaintiff filed a voluntary dismissal after the judge announced in open court that the judge was dismissing the case but before the trial court entered a written order.

48

Facts

- A summer camper filed a complaint against a church that hosted the summer camp alleging personal injuries sustained nine years prior to filing the complaint.
- Two weeks prior to filing the lawsuit, the camper's counsel had assured the church's liability insurance carrier that he would produce copies of the camper's medical records but failed to do so.
- The church filed its answer and served various discovery documents.
- Two months later, the camper had not provided any discovery responses and the church warned that it would consider filing a motion to compel and seeking possible additional relief if it did not receive any responses in one week.

49

Facts (cont'd)

- The church later filed a motion to dismiss the case for failure to prosecute, or, in the alternative, to compel discovery responses.
- At the hearing, the trial court orally granted the motion.
- Before the trial court could enter its written order, the camper filed a notice of voluntary dismissal.
- At a subsequent hearing, the trial court granted the church's motion to set aside and dismissed the case with prejudice for failure to prosecute.

50

Court of appeals affirmed in part, reversed and remanded in part (Murphy, J.)

- The trial court properly set aside the voluntary dismissal.
- A Rule 41(b) dismissal cannot be done in bad faith and must be filed before a trial court dismisses a plaintiff's claim, even if that dismissal has not yet been set forth in a written order.
- A trial court abuses its discretion in dismissing a case
 - where its reasons relate primarily to the total length of time elapsed since the events that give rise to the claim rather than the time that elapses since the complaint is filed; and
 - where the trial court does not explain how the defendant was prejudiced by that additional delay.

51

Dissent in part (Stroud, C.J.)

- Agreed that the trial court did not err in setting aside the voluntary dismissal.
- Would have affirmed the trial court's order dismissing the complaint with prejudice.
- The trial court made sufficient conclusions of law and made substantial findings of fact that there was an unreasonable delay that occurred and did not abuse its discretion in dismissing the complaint with prejudice.

52

Rule 52

53

**Taylor v. Bank of America, N.A.,
N.C. (2022) (58)**

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.

54

Facts

- Customers filed suit against a bank, alleging fraud arising out of the bank's Home Affordable Modification Program
- 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.

55

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.

56

**Williams v. Marchelle Isyk Allen, P.A.,
N.C. (2022) (61)**

Issue:

Whether a trial court judge is required to make findings of fact when issuing an order compelling discovery.

57

Facts

- A decedent visited a medical facility because of pain in his back, stomach, and hip.
- The facility sent him home with medication, but he returned a few hours later.
- The decedent had a ruptured abdominal aneurysm that needed immediate surgery, so he was transported for surgery.
- The surgery was unsuccessful, and the decedent died.
- Following the decedent's death, a physician assistant was instructed to memorialize her interactions with the decedent in a report provided by her employer.
- The decedent's widow filed an action against several medical professionals and entities.

58

Facts (cont'd)

- Discovery was conducted.
- At the deposition of the physician's assistant, counsel for the widow discovered that the physician assistant's report had not been produced.
- The widow filed a motion to compel.
- The medical professionals and entities contended that the report was privileged by the medical review privilege pursuant to section 90-21.22A of the North Carolina General Statutes.
- The trial court ordered production of the report.

59

Facts (cont'd)

- The medical professionals and entities appealed, and the court of appeals reversed the trial court's order for its failure to make findings of fact.
- The widow appealed to the supreme court.

60

Supreme court reversed

- A trial court's responsibility to make findings of fact on orders is usually imposed by statute.
- While some statutes explicitly require trial courts to make findings of facts in their orders, the medical review privilege does not express this requirement.
- Although Rule 52 imposes a requirement that in a bench trial the court must "find the facts specially and state separately its conclusions of law [before] direct[ing] entry of the appropriate judgment," this matter concerned only an interlocutory order compelling discovery.

61

Holding (cont'd)

- The medical professionals and entities contended that they requested findings of fact at the motion to compel hearing when they asked the trial court "whether [it was] ruling [that] the privilege was waived, the privilege doesn't apply, [or] that the privilege is . . . somehow defeated . . ."
- The court concluded that this was a legal conclusion and not a request for factual findings. "Whether a privilege . . . applies or has been waived is a legal conclusion which is in turn based upon a trial court's evaluation of the evidence presented by the parties."
- The supreme court reversed the decision of the court of appeals that the trial court erred in not making the requested findings of fact.

62

Standing

63

United Daughters of the Confederacy v. City of Winston-Salem by and through Joines, N.C. (2022) (66)

Issue:

Whether the trial court properly dismissed a declaratory judgment action with prejudice under Rules 12(b)(1) and 12(b)(6) because the plaintiff lacked standing.

64

Facts

- City removed a statue on the basis that it posed a threat to public health and safety.
- Association filed a declaratory action against the city and the county, seeking to enjoin them from removing the statue prior to a full adjudication as to the responsibilities of all parties with regards thereto.
- Trial court granted city's and county's respective motions to dismiss for failure to state a claim and for lack of subject matter jurisdiction, dismissing association's claim with prejudice.
- A divided court of appeals affirmed trial court's order, and the association appealed.

65

Supreme court affirmed in part, reversed in part and remanded (Ervin, J.)

- Trial court correctly dismissed plaintiff's claim for lack of subject matter jurisdiction because the association did not have standing.
- Committee to Elect Dan Forest v. Employee Political Action Committee changed long-standing precedent requiring a showing of an injury-in-fact to establish standing under North Carolina law.
- Association was not required to show injury-in-fact here, and, to that extent, the trial court's and court of appeals' decisions relying on that notion were in error.
- Association failed to identify a legal right of which it had been deprived.

66

Holding (cont'd)

- Trial court erred in dismissing complaint with prejudice.
- Dismissing a complaint for lack of subject matter jurisdiction is without prejudice and allows plaintiff to file a new claim on the same basis.
- In contrast, dismissing a complaint for failure to state a claim is always, unless otherwise specified, with prejudice.
- Because the court lacked standing, the trial court erred in dismissing association's complaint for failure to state a claim, and court of appeals erred in affirming on that issue.

67

Concurrence (Newby, C.J.)

- Joined by Justices Berger and Barringer, concurred in the result only.
- Association failed to establish standing because plaintiff failed to demonstrate that its organization or its members have any interest in the monument and did not allege ownership or a legal interest in the monument.
- Supreme court lacked subject matter jurisdiction over association's claims.
- Dismissing the claim based on lack of standing without prejudice was proper.

68

Sovereign Immunity

69

**Farmer v. Troy University,
N.C. (2022) (73)**

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.

70

Facts

- An out-of-state public university opened an office in Fayetteville, North Carolina to recruit military students for its online programs.
- The university 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 that sovereign immunity barred the former employee's suit.
- Trial court granted the university's motion.
- Court of appeals affirmed.

71

Supreme court reversed and remanded (Earls, J.)

- A public university is deemed to be an arm of the state and protected by sovereign immunity.
- 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.
- 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.

72

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.

73

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.

74

TRIAL

75

Jury Selection – Batson Challenge

76

State v. Campbell,
N.C. (2023) (93)

Issue:

Whether the trial court improperly found that the defendant failed to make a prima facie showing of discrimination during jury selection.

77

Facts

- Defendant's counsel sought complete recordation, but expressly did not request that jury selection be recorded. Accordingly, it was not.
- The defendant raised Batson challenges to the state's exclusion of multiple prospective jurors who were black.
- The trial court found that the defendant did not make a prima facie showing that the exclusion was based on racial discrimination.
- The trial court asked if the state wanted to provide a race-neutral reason for its exclusions. The state declined, stating that providing such reasons could imply that the defendant had made a prima facie showing of discrimination. The trial court reiterated that no such showing had been made, but ordered the state to provide race-neutral reasons nonetheless.

78

Facts (cont'd)

- The trial court held that the peremptory exclusions were not discriminatory.
- The defendant appealed to the court of appeals.
- A divided court of appeals found no error.
- The defendant petitioned for a writ of certiorari to the supreme court.
- The supreme court remanded the case to the court of appeals for reconsideration.
- Again, a divided court of appeals concluded the trial court had committed no error, and the defendant appealed.

79

Supreme court affirmed (Berger, J.)

- The first step in analyzing a Batson challenge is to determine whether the defendant made a prima facie showing of racial discrimination.
- Because jury selection was not recorded, there was nothing for the supreme court to review.
- The state was correct in objecting to the trial court's request for race-neutral reasons for its peremptory exclusions when the trial court had already determined that the defendant failed to make a showing of discrimination.

80

Holding (cont'd)

- While percentages may be helpful in determining whether a prosecutor's peremptory exclusion was discriminatory, they are not dispositive.
- The supreme court will not assume error where none appears on the record, and thus it affirmed the court of appeals.

81

Dissenting (Earls, J.)

- The majority of the supreme court ignored evidence of discrimination and turned the Batson challenge into an impossible hurdle.
- The state provided as a reason for excluding a prospective juror the fact that the juror was involved in Black Lives Matter, a predominately black organization. This information was not available to the defendant until after the trial court determined that he had failed to make a prima facie showing of discrimination.
- For the majority to overcome this race-conscious rationale was to pretend it did not happen.

82

**State v. Hobbs,
N.C. (2023) (97)**

Issue:

Whether, on the supreme court's second review of the issue, the trial court erred in concluding that there had been no violation of Batson v. Kentucky at jury selection.

83

Facts

- When the matter originally came before the supreme court, it remanded the case to the trial court to conduct a hearing and make findings of fact under the third Batson step: whether the defendant in question proved that the state engaged in purposeful racial discrimination in its peremptory exclusions.

84

Supreme court affirmed (Newby, C.J.)

- The third step in an analysis of a Batson challenge is whether the peremptory strike was motivated in substantial part by discriminatory intent.
- The trial court is in the best position to determine the prosecutor's credibility, and appellate courts will give the trial court great deference.

85

Holding (cont'd)

- The supreme court had instructed the trial court to consider whether the peremptory exclusions were pretextual, to consider the history of peremptory strikes in the trial court's county, and the statistical comparison between stricken jurors who were white versus black. The trial court followed these instructions.
- Because the trial court fully complied with the supreme court's prior instructions and carefully weighed the evidence, a majority of the supreme court affirmed the trial court.

86

Dissenting (Earls, J.)

- The evidence supported a finding of racial discrimination during jury selection, and the trial court misapplied the Batson standard.
- The defendant was black, and his four victims were all white.
- The trial court erred in its assessment of a study by MSU relating to data of peremptory strikes in Cumberland County from 1990 to 2010, discounting the study because "unqualified recent law school graduates" were employed to conduct it.
- The statistics in the defendant's case raised suspicion, as the state had turned the homogenous pool of prospective jurors into a majority non-black group.

87

Dissent (cont'd)

- Side-by-side comparisons of prospective black jurors versus non-black jurors showed that some of the reasons the state provided to exclude the black jurors applied to non-black jurors who had not been excluded.

88

Evidence: Findings of Fact

89

**In the Matter of H.B.,
N.C. (2023) (110)**

Issue:

Whether the trial court's findings contained proper evidentiary findings to support its conclusions of law when it referred to an admitted exhibit that it identified as credible and reliable rather than delineating specific findings of fact.

90

Facts

- After investigating a child's circumstances and attempting reunification, DSS filed a petition to terminate the mother's parental rights.
- At a hearing, DSS introduced a timeline that summarized its interactions with the mother during attempted reunification and reflected much of the social worker's testimony.
- The timeline was admitted into evidence.
- Trial court entered an order terminating the mother's parental rights, including the following finding of fact:
 "The Court relies on and accepts into evidence the Timeline, marked as DSS Exhibit '...', in making these findings and finds the said report to [be] both credible and reliable."

91

Facts (cont'd)

- Mother appealed.
- Court of appeals affirmed the trial court's order in a divided decision.
- Majority concluded that the trial court properly terminated the mother's parental rights.
- Dissent said that there were insufficient findings to support the trial court's judgment.
- Mother appealed to the supreme court based on the dissenting opinion.

92

Supreme court affirmed (Dietz, J.)

- The trial court found that the timeline and its contents were "credible and reliable."
- When the trial court makes a credibility determination about recited evidence, that transforms the recited evidence from a "mere recitation" into a proper "evidentiary finding."
- Trial court's finding was a proper evidentiary finding because it did not merely accept and rely upon the timeline and its contents, but rather it expressly evaluated the contents and determined that they were credible and reliable.
- This holding should not be viewed as an endorsement of this sort of fact finding. The best practice is to make specific, express findings in the court's written order.

93

Dissenting (Morgan, J.)

- Trial court did not make adequate material findings of fact to support its conclusions of law.
- Trial court's findings "woefully deficient" under Rule 52(a) of the North Carolina Rules of Civil Procedure.
- Majority relaxes the appropriate existing standard.

94

Evidence: Attorney-Client Privilege

95

**Howard v. IOMAXIS, LLC,
N.C. (2023) (112)**

Issue:

Whether a single corporate member can waive attorney-client privilege in a matter in which counsel represents the corporation and its individual corporate members jointly.

96

Facts

- A corporation and its individual corporate members faced litigation.
- The corporation had previously hired a law firm to handle corporate matters.
- The corporation and individual corporate members executed a second engagement letter with the same law firm to handle the pending litigation.
- During a conference call between the law firm, the corporation, and the individual corporate members to discuss the litigation, one member secretly recorded the conversation.
- Later, this member sought to waive the attorney-client privilege.

97

Facts (cont'd)

- The corporation requested a protective order, asserting that it alone held attorney-client privilege.
- The business court disagreed, finding that, when the conference call was made, the law firm was jointly representing the corporation and its corporate members.
- Thus, the individual member who recorded the call held attorney-client privilege and could waive it.

98

Supreme court affirmed

- The corporation argued that the business court should have applied the Bevill test, established by the Third Circuit, to determine whether the conference call was covered by attorney-client privilege. The Bevill test requires a showing that:
 - (1) a client approached corporate counsel for the purpose of seeking legal advice;
 - (2) the client made it clear that the legal advice sought was in an individual capacity rather than in a representative capacity;
 - (3) counsel saw fit to communicate with the client in an individual capacity, knowing that a possible conflict could arise;
 - (4) the conversations was confidential; and
 - (5) the substance of the conversations with counsel did not concern matters within the company or the general affairs of the company.

99

Holding (cont'd)

- The business court instead used a five-factor test used and established by North Carolina courts. This test looks at:
 - 1) the relation between the attorney and client at the time the communication was made;
 - 2) whether the communication was made in confidence;
 - 3) whether the communication relates to a matter about which the attorney is being professionally consulted;
 - 4) whether the communication was made in the course of giving or seeking legal advice for a proper purpose that does not necessarily involve litigation; and
 - 5) whether the client has not waived the privilege.

100

Holding (cont'd)

- The supreme court concluded the Bevill test was inapplicable here because it applies when corporate counsel seeks to create a separate attorney-client privilege, which did not occur here. Rather, at the time of the conference call, the attorney was acting as joint defense counsel for each member, including the renegade member.
- The business court relied on competent evidence to determine that the law firm was acting jointly as litigation counsel at the time of the conference call, rather than as corporate counsel for the corporation alone. Thus, the business court did not err in applying the North Carolina test.

101

Holding (cont'd)

- The supreme court cautioned that its decision is fact-specific. To avoid factual disputes such as this, counsel can:
 - choose not to jointly represent the corporation and its individual members,
 - write an engagement letter that expressly identifies the specific attorneys engaged in in litigation defense versus corporate matters, or
 - provide a clear disclaimer of representation.

102

Evidence: Opening-the-Door Doctrine

103

Seven horizontal lines for notes.

State v. McKoy, N.C. (2023) (116)

Issue:

What rules apply when a party opens the door to certain evidence.

104

Seven horizontal lines for notes.

Facts

- A defendant faced charges of murder. At trial, the defendant claimed he acted in self-defense.
- The victim's mother testified at trial that she and the victim's father had seen the contents of the victim's phone while meeting with the detective.
- The victim's phone purportedly contained photographs of the victim holding guns and text messages about fighting.
- Following the State's motion in limine to prohibit defense counsel from asking the victim's father about the contents of the victim's phone, the trial court allowed defense counsel to question the father outside the presence of the jury to understand the evidence the defendant wanted to introduce.

105

Seven horizontal lines for notes.

Facts (cont'd)

- During this questioning, the father denied that he had been shown the contents of the victim's phone during meetings with the detective.
- The trial court only allowed defense counsel to ask the father in front of the jury whether he had seen the contents of the victim's phone.
- After being found guilty of manslaughter, the defendant appealed to the court of appeals, arguing that the trial court erred by excluding the contents of the victim's phone from evidence.

106

Facts (cont'd)

- A divided court of appeals affirmed the trial court. The dissent concluded that the victim's parents' testimony opened the door to the cell phone evidence and thus the trial court's refusal to admit the evidence entitled the defendant to a new trial.
- The defendant appealed based on the court of appeals' dissent.

107

Supreme court affirmed

- The opening-the-door rule exists so that, when a party offers evidence that raises an inference favorable to his case, the opposing party has the right to explore, explain, or rebut that evidence.
- The opposing party's right, however, is not absolute.
- The trial court as gatekeeper may still exclude the evidence at issue pursuant to Rule 403 of the Rules of Evidence if its probative value is substantially outweighed by, for example, unfair prejudice.
- The trial court did not abuse its discretion in refusing to permit defense counsel to ask the victim's father questions as to the contents of the victim's phone because there was no reasonable possibility that allowing that evidence would have led to a different jury verdict.

108

Evidence: Character

109

**State v. Pickens,
N.C. (2023) (119)**

Issue:

Whether evidence of a teacher's alleged sexual assault of another student was properly admitted at trial pursuant to Rule 404(b) of the North Carolina Rules of Evidence.

110

Facts

- Before trial, a teacher filed a motion in limine to exclude a former middle school student's testimony pursuant to Rule 404(b) of the North Carolina Rules of Evidence. The trial court denied this motion.
- During trial, testimony of the former middle school student's assault by the same teacher was presented before the jury.

111

Facts

- The former middle school student's testimony of the teacher's assault contained many similarities to the details offered by the victim in the present trial:
 - (1) the students were middle-school-aged children attending schools where the teacher taught;
 - (2) the teacher used his position as a middle school teacher to gain access to both victims;
 - (3) the teacher exerted control over both victims during the assaults despite their protests, tears and resistance;

112

Facts

- (4) the teacher engaged in vaginal intercourse or tried to engage in vaginal intercourse with both victims;
- (5) the teacher committed the offenses during school hours or during school-related activities;
- (6) the teacher only removed his pants and underwear halfway during both assaults; and
- (7) the teacher threatened the students after the assaults were completed.

113

Facts (cont'd)

- The jury found the teacher guilty of first-degree rape and first degree statutory sexual offense with a child.
- The court of appeals found that the former middle school student's testimony was properly admitted pursuant to Rule 404(b).

114

Supreme court affirmed In relevant part and reversed on other unrelated grounds.

- Prior bad acts may be considered admissible if they are sufficiently similar and contain some unusual facts present in both crimes that would indicate that the same person committed them.

115

Attorney's Fees

116

Woodcock v. Cumberland County Hospital System, Inc., N.C. (2023) (126)

Issue:

Whether the trial court abused its discretion when it granted defendant's motion for award of attorneys' fees as part of its costs under Rule 41(d).

117

Facts

- Limited partners filed actions in their individual capacity against general partner without first sending a demand letter to general partner.
- General partner repeatedly placed limited partners on notice of the deficiency in their claims through multiple motions and briefs expressly and specifically challenging limited partners' standing.
- Limited partners ignored general partner's standing arguments and persisted litigating their non-justiciable claims despite having multiple opportunities to amend.
- Trial court granted general partner's subsequent motion for award of attorney's fees.

118

Supreme court affirmed

- A justiciable issue is an issue that is real and present as opposed to imagined or fanciful.
- In order to find complete absence of a justiciable issue, it must conclusively appear that such issues are absent even after giving the pleadings the indulgent treatment they receive on motions to dismiss or for summary judgment.
- However, it is also possible that a pleading which, when read alone sets forth a justiciable controversy, may, when read with a responsive pleading, no longer present a justiciable controversy.

119

Appellate Procedure

120

**Mole' v. City of Durham,
N.C. (2023) (129)**

The Supreme Court published a two-sentence per curiam opinion:

Discretionary review improvidently allowed. The decision of the Court of Appeals is left undisturbed but stands without precedential value.

121

Concurring (Dietz, J.)

- "Unpublishing" a court of appeals opinion is not a new function; supreme court has unpublished court of appeals opinions nearly 100 times in the past 50 years.
- Many of those were where there was a recusal and the remaining members of the supreme court were equally divided.
- Approach is rare but necessary when doing otherwise "would only make things worse."
- While "not fond of unpublishing a court of appeals decision," he found that this was a rare case in which doing so was appropriate.

122

Dissenting (Morgan, J.)

- Disagreed with the majority's decision and found that the constitutional issues raised by the parties "easily met" the court's requirements for discretionary review and would have allowed the court to "determine a resolution of plaintiff's constitutionally significant claims."
- Justice Morgan made two recommendations that the court:
 - (1) "definitively decide the critical constitutional issues which have been presented, especially those which are impacted by the North Carolina Constitution," and
 - (2) "follow the institutionalized precedent set by prior per curiam opinions" and "disclose, at the least, the numerical breakdown of the Justices here who favored affirmance, reversal, or some other reviewing disposition of the Court of Appeals"

123

Dissenting (Earis, J.)

- Disagreed with the majority's decision finding that unpublishing a decision was not supported by doctrine or the North Carolina Rules of Appellate Procedure.
- Asserted that the supreme court's use of the "discretionary review was improvidently allowed" disposition "should be rare" because it undermines the court's reliability and "amounts to a waste of money, energy, and time."
- "Furthermore, taking from the Court of Appeals the ability to decide which of its opinions have precedential value without otherwise disturbing anything in the opinion is a disingenuous sleight of hand and a dangerous threat to the fair application of the laws to all citizens."

124

Cryan v. National Council of YMCAs of the U.S., N.C. (2023) (132)

Issues:

What test applies when deciding whether to grant a writ of certiorari.

Whether the supreme court may consider on appeal an issue that is not the basis for a dissent where appeal to the supreme court is based on a dissent in the court of appeals.

125

Facts

- Alleged victims of sexual abuse sued the YMCA under the SAFE Child Act.
- The YMCA moved to dismiss on the ground that the SAFE Child Act violated the N.C. Constitution.
- The trial court determined that the YMCA's motion asserted a facial challenge and entered an order transferring the issue to a three-judge panel.
- The court of appeals issued a writ of certiorari and held that the YMCA had asserted an as-applied challenge.
- The dissenting judge issued an opinion that addressed whether the court of appeals should have issued a writ of certiorari in detail but did not expressly oppose the majority's holding with respect to the as-applied challenge.

126

Supreme court affirmed

- When considering whether to issue a writ of certiorari, the appellate courts must use a two factor test: (1) the likelihood that the case has merit or that error was committed below and (2) whether there are extraordinary circumstances that justify issuing the writ.
- The decision to issue the writ was within the discretion of the court of appeals because "the appeal raised a recurring issue concerning 'a relatively new statutory scheme which has limited jurisprudence surrounding it'" and "involved the trial court's 'subject matter jurisdiction,' which potentially deprives the trial court of any power to rule in the case."

127

Holding (cont'd)

- Moving to the second issue, to confer appellate jurisdiction, a court of appeals dissent must specifically set out the basis for the dissent.
- "Consistent with Rule 16 and this Court's precedent, we hold that dissenting judges must set out their reasoning on an issue in the dissent in order for the dissent to confer appellate jurisdiction over that issue under N.C.G.S. § 7A-30(2)."
- Where the dissenting judge did not expressly address whether he agreed that the challenge was an as-applied challenge, the supreme court lacked jurisdiction to consider that issue.

128

Arbitration

129

**Canteen v. Charlotte Metro Credit Union,
N.C. App. (2022) (136)**

Issue:

Whether a bank could unilaterally add an arbitration provision to an existing agreement with a customer.

130

Facts

- Customer signed an agreement to open a bank account.
- Agreement provided bank could change the terms and would notify customer electronically.
- Years later, bank amended the agreement to include an arbitration clause with a waiver of the option to resolve disputes by class action.
- Bank sent emails to the customer containing hyperlinks to documents detailing the amendment to the agreement and allowing the customer to opt out.

131

Facts (cont'd)

- Customer did not notice the emails and did not opt out of the arbitration provision.
- Customer filed a class action against the bank for charging fees in violation of the agreement.
- Bank filed a motion to stay and to compel arbitration.
- Trial court denied the motion and the bank appealed.

132

Court of appeals reversed and remanded (Dillon,J.)

- Because the agreement contained a provision reserving the right to change the terms, bank was free to amend the dispute forum, including requiring customer to come before an arbitrator.
- Because customer could have informed herself, but failed to do so, the majority would not relieve her from being bound by the amended agreement.

133

Dissent (Arrowood,J.)

- Bank was not allowed to unilaterally add "additional, uncontemplated terms".
- Arbitration agreements are governed by contract principles, which include the covenants of good faith and fair dealing.
- Bank's "cunning method" of notifying the customer of the amendment breaches the covenants of good faith and fair dealing.
- The dissent's view is consistent with prior court of appeals precedent, by which the majority was bound.
- The majority's opinion conflicts with precedent and black letter contract law.

134

WORKERS' COMPENSATION

135

**West v. Hoyle's Tire & Axle, LLC,
N.C. (2022) (147)**

Issue:

Whether an individual who lacks a legal relationship with a deceased employee can be a dependent entitled to death benefits under the North Carolina Worker's Compensation Act.

136

Facts

- Decedent died from a work-related accident.
- The decedent's adult daughter, adult son, estranged wife, and cohabitating fiancée filed a claim for benefits with the Industrial Commission.
- The decedent's daughter, son, and estranged wife filed a motion to dismiss the fiancée for lack of standing pursuant to N.C. Gen. Stat. § 97-39.
- The deputy commissioner granted the motion.
- The full commission affirmed the order.
- The court of appeals affirmed the full commission's order.
- The supreme court granted the fiancée's petition for discretionary review.

137

Supreme court affirmed (Newby, C.J.)

- N.C. Gen. Stat. § 97-39 is a part of a series of statutes that classifies individuals for purposes of the Worker's Compensation Act by dependency.
- The statute provides a presumption of dependency for widows, widowers, and children.
- The statute states "in all other cases questions of dependency . . . shall be determined in accordance with the facts as the facts may be at the time of the accident."

138

Holding (cont'd)

- A 1953 case decided by the court of appeals interpreted this language to apply only to claimants with a legally recognized relationship with the decedent.
- Because the fiancée was not in a legally recognizable relationship with the decedent, she could not be classified as a dependent eligible to file a claim for benefits.

139

Dissent (Hudson, J.)

- The majority's decision and reliance on the 1953 case "undermin[e] the legislature's careful construction of a systematic way of determining benefits and beneficiaries in cases of this kind."
- The act is intended to provide wholly dependent persons (i.e., widows, widowers, and children) and those who are not wholly dependent with differing benefits.
- Partial dependents receive less benefits while a wholly dependent person is entitled to receive the entire compensation benefit payable.

140

Dissent (cont'd)

- The tiered system of this act evidence that the legislature has already accounted for "prioritizing dependents according to the strength of connection with the employee."
- She would have overruled the 1953 case and remanded for consideration of whether the fiancée qualifies for benefits as a partially dependent person.

141

**McAuley v. N.C. A&T Univ.,
N.C. (2022) (149)**

Issue:

Whether a deceased employee's prior timely filing of a worker's compensation claim for an injury is sufficient to establish the North Carolina Industrial Commission's jurisdiction over a dependent's subsequent claim for death benefits allegedly resulting from the same injury.

142

Facts

- A decedent timely filed a worker's compensation claim in the industrial commission after suffering a back injury at work.
- He died soon thereafter, leaving behind a widow.
- The widow filed a claim for death benefits almost three years after the decedent's death.
- The employer moved to dismiss the claim on jurisdictional grounds contending it was untimely under N.C. Gen. Stat. § 97-24.
- The deputy commissioner dismissed the widow's claim.
- The full commission and court of appeals affirmed.
- The widow appealed to the supreme court.

143

Supreme court reversed (Hudson, J.)

- Section 97-24 of the North Carolina General Statutes states in part: "[t]he right to compensation under this Article shall be forever barred unless (i) a claim . . . is filed with the Commission or the employee is paid compensation as provided under this Article within two years after the accident or (ii) a claim . . . is filed within two years after the last payment of medical compensation . . ."
- Separately, section 97-38 governs death benefits claims resulting from the death of an injured employee.

144

Holding (cont'd)

- Majority's grounds for reversal:
 1. The plain language of N.C. Gen. Stat. § 97-24 does not distinguish claims by an employee from claims by a dependent, nor does the statute distinguish worker's compensations claims by an employee from death benefits claims by a dependent. Since the plain language does not make any distinctions between the two claims, an "injured employee's timely worker's compensation claim for an injury thus establishes the Industrial Commission's jurisdiction over a subsequent death arising from the same injury."

145

Holding (cont'd)

2. The original version of the statute stated "[t]he right to compensation under this act shall forever be barred unless a claim be filed with the Industrial Commission within one year after the accident, and if death results from the accident, unless a claim be filed with the Commission within one year thereafter." This language was subsequently removed by the legislature and not included in its current version. This indicates it is no longer the legislature's intent to distinguish between death claims and an injured employee's worker's compensation claim.
3. The principle of liberal construction has been consistently used by the courts when interpreting the Worker's Compensation Act. In reversing this action, the majority said that it was acting in adherence to this principle.

146

Dissent (Barringer, J.)

- Contended the industrial commission lacks jurisdiction over the widow's death benefits claim.
- Grounds for dissenting:
 1. While death benefits are not expressly mentioned in section 97-24(a), "compensation" is defined under N.C. Gen. Stat. § 97-2(11) and the Worker's Compensation Act to include funeral benefits.
 2. Section 97-24(a) discusses compensation broadly under the act by stating: "[t]he right to compensation under this Article shall be forever barred." Because "this Article" is inclusive of section 97-38, the time limitation for filing a claim is governed by section 97-24.

147

Dissent (cont'd)

- 3. This court's precedent treats death benefits and employee's worker's compensation claims as separate and distinct from another.

148

**Sprouse v. Mary B. Turner Trucking Co., LLC,
N.C. (2023) (157)**

Issue:

Whether the court of appeals erred when it made its own credibility determinations by reversing and remanding the North Carolina Industrial Commission's ruling.

149

Facts

- A woman did not immediately report her injuries to her employer after getting into an accident while on the job.
- After experiencing pain and undergoing surgery, the woman submitted a Workers' Compensation Claim with her employer and its insurance carrier.
- The Deputy Industrial Commissioner found in favor of the woman.
- On appeal, the commission also found in favor of the woman, finding that the evidence indicated that her injuries were caused by the accident.
- A divided court of appeals, after making its own credibility determinations in the light not most favorable to the woman, reversed and remanded the commission's opinion and award.

150

Supreme court reversed and remanded

- The role of appellate courts with respect to the commission is merely to determine whether its findings of fact are supported by competent evidence and whether those findings support its conclusions of law.
- Here, the court of appeals deviated from the established standard of review by supplanting its own fact-finding for that of the commission and making its own determinations of credibility.
- The supreme court found that the commission's findings of fact were supported by competent evidence, and, in turn, these findings supported its conclusions of law.
- The supreme court reversed and remanded to the court of appeals with instruction to fully reinstate the commission's opinion and award.

151

INSURANCE

152

Coverage

153

**Ha v. Nationwide Gen. Inc. Co.,
N.C. App. (2022) (145)**

Issue:

Whether proof of mailing a cancellation notice of a homeowner's insurance policy is sufficient to cancel coverage under section 58-44-16 of the North Carolina General Statutes.

154

Facts

- Homeowners held an insurance policy that if in effect would have covered them in the event their home sustained fire damage.
- Homeowners' residence caught on fire, which destroyed their home.
- Sometime before the fire, the homeowners' insurer mailed a notice cancelling its standard fire policy.
- The trial court held that N.C. Gen. Stat. § 58-44-16 applied to the homeowners' insurance policy in this case.
- The insurer sufficiently canceled the policy by providing proof of the mailed cancellation notice.
- The homeowners appealed the judgment.

155

Court of appeals affirmed (Griffith, J.)

- Under N.C. Gen. Stat. § 58-44-16(f)(1), standard fire policies "may be cancelled at any time by th[e] insurer by giving the insured a five days' written notice of cancellation[.]"
- "Giving" is not statutorily defined; should be given its plain meaning.
- Based on its plain meaning the court concluded that the word "includes" the act of mailing notice of cancellation to the insured."
- The insurer satisfied the statute and canceled the policy by mailing the cancellation notice.

156

Dissent (Arrowood, J.)

- For an insurance company to effectively cancel a policy under N.C. Gen. Stat. § 58-44-16, it would need to show proof the notice of cancellation was actually received.
- While applying the plain meaning definition of a non-statutorily defined word is appropriate, it must be reasonable, and the statute must be unambiguous.
- If the statute is unclear, courts must look at statutory construction and legislative intent.
- Generally, our courts have liberally interpreted insurance policies to afford the coverage when reasonable.
- Other jurisdictions when posed with this issue and similar statutory provisions have found proof of mailing is insufficient to cancel an insured's policy.

157

**Radiator Specialty Co. v. Arrowood Indemnity Co.,
N.C. (2022) (141)**

Issue:

When insurance coverage is triggered for injuries that span multiple insurance policies and how coverage is allocated amongst multiple insurers.

158

Facts

- A manufacturer of products containing benzene filed a declaratory judgment action against multiple insurers, seeking a declaration of each party's responsibility with respect to benzene litigation.
- Benzene exposure, unlike other injuries, does not occur at a definite point in time, but spans multiple insurance policy periods.
- Trial court found all insurers were required to reimburse the manufacturer for past costs.
- Court of appeals affirmed trial court's judgment in part and dismissed it in part.
- Manufacturer and insurers petitioned supreme court for discretionary review.

159

Supreme court affirmed in part, reversed in part, and remanded (Earis, J.)

- Benzene exposure itself constitutes an injury; however, only injuries resulting in damages are compensable.
- If coverage was only triggered if disease is manifested, that would leave the manufacturer unable to invoke coverage if said disease manifested after the insurance policy had expired.
- Supreme court affirmed court of appeals to the extent that it "applied an exposure-based approach" to determine when coverage was triggered.

160

Holding (cont'd)

- Supreme court also found that insurers' respective policies supported a pro rata allocation rather than an all sums (joint-and-several liability) approach.
- Supreme court reversed court of appeals' opinion to the extent that it held that "trial court's decision regarding allocation [was] moot," because the trial court properly applied pro rata allocation based on the insurers' policies.

161

Dissent (Barringer, J.)

- Joined by Justice Hudson, dissenting in relevant part.
- Although there was no material question of fact that benzene exposure caused injury here, the majority's approach of concluding, "without analyzing policies or citations," that a continuous trigger theory would be at odds with its "holding that ... the injury that triggers coverage occurs at the time of [benzene] exposure" is unsustainable for future cases in which there could be a material question of fact.
- The majority did not, as it should have, apply principles of insurance policy construction because it read into the policies a pro rata allocation "to which the parties did not agree contractually."
- Insurers were sufficiently equipped on their own "to restructure their risks dynamics and cost-benefit analysis."

162



163
