CIVIL LAW UPDATE
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2021 Appellate Training: New & Emerging Legal Issues

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In Caroline-A-Contracting v. J. Scott Campbell Construction Co., 276 N.C. App. 158, 2021-NCCOA-62, the court of appeals considered whether the collateral source rule applies in a construction dispute to payments to an injured party made by a source independent of the negligent actor.

A general contractor was building a house and hired a subcontractor to build a retaining wall on the property. Id. at ¶ 2. During construction, the wall collapsed on two occasions because of failure of the water drainage system and a compromised foundation from significant rains. Id. at ¶ 2. The subcontractor entered into a contract with a second subcontractor to repair and replace the wall. Id. at ¶ 2. While the second subcontractor was reconstructing the wall, the general contractor ordered the second subcontractor to stop working on the project because of the second subcontractor's substandard quality of work. Id. at ¶ 3. The general contractor then directly contracted with a third subcontractor to perform repairs and rebuild the wall at a cost of $106,000.00. Id. at ¶ 3. Both the general contractor and the subcontractor refused to pay the second subcontractor for its work. Id. at ¶ 3.

The second subcontractor filed separate lawsuits against the general contractor and the subcontractor. Id. at ¶ 4. The general contractor counterclaimed for damages as a result of the second subcontractor's alleged negligence. Id. at ¶ 6. After learning that the original subcontractor had paid money to the general contractor for damages related to the retaining wall, the second subcontractor moved for summary judgment, contending that the general contractor was not allowed to recover money damages from the second subcontractor that had already been paid by a third party. Id. at ¶ 7-8. Based on the general contractor's argument that the collateral source rule

should exclude evidence of the original subcontractor's payments, the trial court denied the second subcontractor's motion for summary judgment. Id. at ¶ 8. The second subcontractor was ultimately found liable for damages in the amount of approximately $41,600.00 because of its negligence in reconstructing the retaining wall. Id. at ¶ 1. The jury awarded $5,000.00 to the second subcontractor in quantum meruit for its supplies and efforts to remediate the site. Id. at ¶ 11.

On appeal, the court of appeals considered whether the trial court erred in treating the payments by the original subcontractor as a "collateral source". Id. at ¶ 14. The court observed that the collateral source rule is "an exception to the general common-law principle that there should be only one recovery for one injury." Id. at ¶ 17. Specifically, the collateral source rule provides that a "tort-feasor should not be permitted to reduce [its] own liability for damages by the amount of compensation the injured party receives from an independent source." Id. at ¶ 15 (citing Katy v. Capriola, 226 N.C. App. 470, 482, 742 S.E.2d 247, 256 (2013)).

In applying the collateral source rule, the court of appeals said that the "defining characteristic of a collateral source is its independence from the tortfeasor." Id. at ¶ 16 (citing Hairston v. Harward, 371 N.C. 647, 656, 821 S.E.2d 384, 391 (2018)). The court considered that (i) the subcontractor had little involvement with reconstructing the wall beyond its contract with the second subcontractor and (ii) that the general contractor's counterclaim against the second subcontractor was based on negligence rather than breach of contract. Id. at ¶ 20-21. Ultimately, the court concluded that the subcontractor's payments to the general contractor were "entirely independent of [the second subcontractor's] negligence", the subcontractor's payments did not relieve the second subcontractor from liability to the general contractor for damage caused at the site, and the subcontractor had no obligation beyond his own contractual obligations to the general

contractor to remedy any damages. Id. at ¶ 22. The court dismissed concerns that the general contractor would recover twice for the same injury by referencing precedent in prior decisions that have established that the injured party – here, the general contractor – should reap any such windfall rather than the tortfeasor. Id. at ¶ 26 (citing Wilson v. Burch Farms, Inc., 176 N.C. App. 629, 639, 627 S.E.2d 249, 257 (2006)).

(1) Negligent Hiring

In Keith v. Health-Pro Home Care Services, Inc., 275 N.C. App. 43, 853 S.E.2d 28 (2020), the court of appeals considered (1) whether a plaintiff could allege ordinary negligence – as opposed to negligent hiring, supervision, or retention – against a home-care service whose employee committed a robbery of the plaintiff's home; and (2) whether sufficient evidence of proximate cause existed to withstand a motion for judgment notwithstanding the verdict.

An elderly couple hired a home-care service to provide in-home care. Id. at 44, 853 S.E.2d at 34. The home-care service sent an aide to the couple's home. Id. The service had completed a background check of the aide, which showed she had prior misdemeanors but no prior felonies. Id. at 38, 853 S.E.2d at 51. The aide received praise from the couple and from other clients for being quiet, polite, and a good worker. Id. at 82, 853 S.E.2d at 55. A few months after the aide began working in their home, the couple discovered that approximately $1,290 had been taken from their home. Id. at 45, 853 S.E.2d at 34. The couple reported the theft to the home-care service, and the service determined that the aide was one of the possible culprits, along with other aides who had been working in the home. Id. The service assured the couple that none of these aides would return to their home. Id. However, the aide was still assigned to the couple's home. Id.

Approximately one year later, the aide and two accomplices perpetrated a home invasion and armed robbery of the couple's home in the middle of the night after work hours. Id. at 46, 853 S.E.2d at 34-35. The couple sued the home-care service for negligence and punitive damages. Id. at 45-46, 853 S.E.2d at 35. During trial, the trial court allowed the action to go to the jury as a claim for "ordinary negligence" as opposed to "negligent hiring." Id. at 47, 853 S.E.2d at 35-36. The jury found in favor of the couple, and after the verdict was announced, the home-care service moved for judgment notwithstanding the verdict, which the trial court denied. Id. at 47, 853 S.E.2d at 36.

The court of appeals, in a majority opinion written by Chief Judge McGee, reversed and remanded the trial court's decision to instruct the jury on ordinary negligence. Id. at 83-84, 853 S.E.2d at 56-57. The court held that claims for ordinary negligence and negligent hiring have different elements, and that the trial court erred by instructing the jury on the elements of ordinary negligence when the couple's complaint was based on negligent hiring. Id. at 64, 853 S.E.2d at 44-45. The court also held that, even if the couple had properly pleaded the ordinary negligence claim, the couple had not established the element of proximate cause. Id. at 66, 853 S.E.2d at 46.

The court of appeals held that the trial court erred by instructing the jury on ordinary negligence because the couple's claim was actually a claim for negligent hiring. Id. The court held that a negligent hiring claim consists of certain elements that an ordinary negligence claim does not. Id. at 63, 853 S.E.2d at 44. To prove a negligent hiring claim, a plaintiff must also show that, at the time the employee commits the act in question, (1) the employee must be in the employer's premises or in a place where the employee is privileged to enter based on her status as an employee; and (2) the employer has the ability, necessity, and opportunity to control the employee's actions. Id. (citing Restatement (Second) of Torts § 317 (1965)).

The court reviewed the couple's allegations and determined they had pleaded a claim for negligent hiring because their allegations only involved whether the home-care service should have hired the aide or should have continued to employ the aide in the same capacity. Id. Specifically, the court observed that the couple's allegations included that (1) the home-care service had not sufficiently investigated the aide's background; (2) the service should have realized the aide was unfit given certain details in her background check; (3) the service believed the aide may have taken money from the couple but still assigned her to their home; (4) the service did not investigate the aide after the initial theft; and (5) the service should have known that the aide had two child support notices, which suggested motive for the aide's responsibility for future crimes against the couple. Id. Because a claim for negligent hiring imposes a higher burden on a plaintiff, the court held that the jury should have been instructed on the elements of negligent hiring, as opposed to those for ordinary negligence. Id. at 64, 853 S.E.2d at 45. Therefore, the court ruled that the trial court should have granted the home-care service's motion for JNOV. Id.

Even assuming arguendo that the ordinary negligence claim was properly pleaded, the court held that the couple had failed to establish the requisite element of proximate causation Id. at 82, 853 S.E.2d at 56. The court held that to establish a claim for ordinary negligence, the couple needed to establish that the home-care service could foresee the aide would conspire with dangerous individuals to perpetrate a home invasion robbery against the couple. Id. The court held that based on the knowledge about the aide before the robbery—her polite demeanor, her previous misdemeanor convictions, her overdue child support payments, and that she was among the suspects who may have stolen money from the couple—a reasonably prudent person would not have foreseen that the aide would perpetrate an armed robbery against the couple. Id. Thus, the court held that even if the ordinary negligence claim had been properly pleaded, the couple

failed to establish the requisite element of proximate cause. Accordingly, the trial court should have granted the home-care service's motion for JNOV as to the claim for ordinary negligence. Id.

For these reasons, the majority reversed the trial court's order and remanded for entry of an order granting JNOV in favor of the home-care service. Id. at 83-84 853 S.E.2d at 56-57

Judge Dillon dissented, stating that the trial court did not commit reversible error by denying the service's motion for JNOV. Id. at 84-85, 853 S.E.2d at 57 (Dillon, J., dissenting). The dissent observed that the supreme court has previously characterized a claim alleging negligent retention as a common-law claim. Id. (citing Craig v. New Hanover Cty. Bd. of Educ., 363 N.C. 334, 335-36, 678 S.E.2d 351, 353 (2009)). Even though the robbery occurred outside of work hours, the dissent would have held that the home-care service owed a duty to the couple for the aide's actions because the aide learned information about the couple and met the couple through her employment with the home-aide service and then used this information and this connection to commit the criminal act. Id. at 86, 853 S.E.2d at 58. The dissent would also have held that sufficient evidence existed for the jury to infer that the home-aide service breached its duty to the couple because there was sufficient evidence that the aide was dishonest and capable of the robbery. Id. The dissent observed that (1) a dishonest caregiver may take advantage of her access to information through her job; (2) the aide's previous theft made it likely she would steal again; and (3) the home-care service could have foreseen that the aide may wait to be off duty to steal again because she was under suspicion from the earlier thefts committed during work hours. Id. at 89, 853 S.E.2d at 60. Thus, the dissent would have upheld the trial court's denial of the home-care service's motion for JNOV.

(2) Loss of Chance

In Parkes v. Hermann, 376 N.C. 320, 852 S.E.2d 322 (2020), the supreme court decided that the loss of chance for an improved outcome is not itself a cognizable and compensable cause of action in North Carolina.

A woman awoke at approximately 12:15 a.m. and, based on feelings of heaviness in her left side and tongue and her slurred speech, told her husband she thought she might be having a stroke. Id. at 321, 852 S.E.2d at 323. Her family took her to the hospital, and by 1:35 a.m. she was in the hospital complaining of slurred speech and numbness. Id. Around 3:00 a.m., the emergency room physician contacted the woman's primary care physician and incorrectly reported she had no neurological defects. Id. At about 6:00 a.m., staff at the hospital noted the woman had slurred speech, facial droop on her left side, and left arm drift. Id. at 321-22, 852 S.E.2d at 323. The primary care physician arrived at the hospital around 7:15 a.m. and noted the woman was exhibiting neurological signs and symptoms. Id. The primary care physician admitted the woman to the hospital and ordered a neurological consult. Id. The neurologist explained that the window of time within which a tissue plasminogen activator ("tPA") treatment may have benefited the woman had closed. Id. The evidence showed[1] that a timely tPA treatment would have had a 40% chance of improving the woman's ultimate neurological outcome. Id. at 322, 852 S.E.2d at 323-24.

The woman sued the emergency room physician for negligence. Id. at 322, 852 S.E.2d at 323. She asserted that his failure to timely diagnose the stroke caused her permanent injuries and

[1] The expert testimony showed that while a tPA placebo results in a 20-26% chance of good neurological outcome, tPA treatment itself have a 39% chance of a good outcome, but the treatment has a 6.4% chance of doing harm. Id. at 323, 852 S.E.2d at 324.

medical expenses. Id. She also asserted a "loss-of-chance" claim, which alleged that the doctor's failure to timely treat her with tPA caused her to lose an increased opportunity for an improved neurological outcome. Id.

The emergency room physician moved for summary judgment on both claims. Id. He argued that the woman's injuries were caused by the stroke, not his failure to treat her with tPA, and that North Carolina does not recognize a cause of action for loss-of-chance. Id. at 323, 852 S.E.2d at 324.

The trial court granted summary judgment in favor of the emergency room physician, and the court of appeals affirmed. Id. at 322, 852 S.E.2d at 323. The court of appeals first recognized that the emergency room physician's negligence did not proximately cause the woman's complained-of injury. Id. While the "traditional approach" to loss-of-chance claims allows recovery for the full value of healthier outcomes where a claimant can show it is more likely than not that the negligence prevented that outcome, "a plaintiff cannot recover for a loss of less than a 50% chance." Id. at 323, 852 S.E.2d at 324. Here, "[b]y presenting evidence of only a 40% chance [of improvement], [the woman] failed to show it was more likely than not that [the doctor's] negligence" resulted in her injuries. Id. at 322, 852 S.E.2d at 324. Next, the court of appeals stated that the supreme court had not recognized a loss-of-chance claim as a cause of action. Id. at 323, 852 S.E.2d at 324.

On appeal, the supreme court affirmed. Writing for the court, Justice Newby first noted that the woman's 40% likelihood of an improved outcome failed to meet the "more likely than not" standard for proximate cause in traditional medical malpractice. Id. at 324, 852 S.E.2d at 324. The court then directly confronted "whether losing the chance for an increased opportunity for an improved outcome is a cognizable and compensable claim in North Carolina." Id. at 324,

852 S.E.2d at 325. It squarely held that the loss of chance itself "is not" a cognizable claim, because to hold otherwise "would award for the possibility that a defendant's negligence contributed to" an injury. Id. at 325, 852 S.E.2d at 325 (emphasis added). Recognizing the possibility of injury as an injury "would require a departure from our common law on proximate causation and damages," which the supreme court declined to do. Id. Instead, "[s]uch a policy judgment is better suited for the legislative branch of government." Id. at 326, 852 S.E.2d at 325-26 (footnote omitted).

Justice Earls issued a 22-page dissent from the decision, which she believes "unnecessarily creates an unjust rule." Id. at 338, 852 S.E.2d at 333 (Earls, J. dissenting). The dissent took the view that the woman here did not ask the court to exercise a policy judgment or create a new cause of action, but only "to do something it routinely and necessarily does: . . . to adapt and apply common law principles to evolving conditions and new factual circumstances." Id. at 329, 852 S.E.2d at 327. Under Justice Earls' view, "[t]he fact that advances in medical science allow researchers to demonstrate that a treatment is 35% (or 49.9%) effective, rather than 50.01% effective, is not a reason for denying the sole remedy available to patients wronged by medical malpractice." Id. at 338-39, 852 S.E.2d at 334. The majority's refusal to extend the remedy is the court "[a]bdicating [] responsibility." Id. at 329, 852 S.E.2d at 328.

In addition, the dissent noted that the supreme court historically surveys or investigates other jurisdictions when confronting an issue of first impression under North Carolina common law, as it did here. Id. at 334, 852 S.E.2d at 331. Justice Earls explained that at least twenty-five jurisdictions have adopted the "'loss of chance' doctrine," id. at 325, 852 S.E.2d at 325, but here, the majority departed from that historical practice and failed to investigate other jurisdictions, id. at 335, 852 S.E.2d at 332. The result is "a rule that immunizes physicians from liability for their

negligent conduct any time they fail to administer a treatment that cannot be proven to be effective 50% of the time or more." Id.

For these reasons, and because Justice Earls believes that the precedents relied upon by the majority are inapposite, she "would recognize that when a physician's negligent conduct 'reduces or eliminates the patient's prospects for achieving a more favorable medical outcome, the physician has harmed the patient' by destroying 'something of value, even if the possibility of recovery was less than even prior to the physician's tortious conduct.'" Id. at 339, 852 S.E.2d at 334 (quoting Matsuyama v. Birnbaum, 452 Mass. 1, 3, 890 N.E.2d 819, 823 (2008)).

(3) Duty

In Mills for DeBlasio v. Durham Bulls Baseball Club, Inc., 275 N.C. App. 618, 854 S.E.2d 126 (2020), the court of appeals considered whether the common law Baseball Rule applied to a negligence claim brought by a girl who was injured by a baseball while sitting in the uncovered picnic area at Durham Bulls Athletic Park.

A girl and her family attended a picnic meet-and-greet at the Durham Bulls Athletic Park. Id. at ___, 854 S.E.2d at 128. The picnic had been arranged by the father's employer and took place in the uncovered "Bull Pen Picnic Area" ("Picnic Area"), during a baseball game. Id. The Picnic Area is located in the corner of the outfield at one of the furthest places in left field from home plate. Id. The Picnic Area is separated from the field by a low wall with three signs posted on it, warning spectators to beware objects leaving the playing field. Id. The Picnic Area is outside the 110 feet of protective netting which extends from home plate toward each team's dugout. Id.

During the game, the girl was seated in the Picnic Area facing the field and talking with her mother. Id. at ___, 854 S.E.2d at 129. A foul ball entered the Picnic Area and struck the girl in the face, causing serious injuries. Id. The girl sued the baseball stadium operator for negligence.

The trial court entered summary judgment in favor of the stadium operator based on the Baseball Rule.

On appeal, the court of appeals affirmed. At the outset, the court restated the long-held Baseball Rule, which is that "baseball field 'operators are held to have discharged their full duty to spectators in safeguarding them from the danger of being struck by thrown or batted balls by providing adequately screened seats for patrons who desire them and leaving the patrons to their choice between such screened seats and those unscreened.'" Id. (quoting Bryson v. Coastal Plain League, LLC, 221 N.C. App. 654, 657, 729 S.E.2d 107, 109 (2012)). The girl raised five arguments against the Baseball Rule's application. First, she claimed she did not have sufficient knowledge of the potential for injury, and that the Rule could not apply as a result. Id. at ___, 854 S.E.2d at 130. Second, she argued that she was not given the choice of sitting in the seats which were protected by netting. Id. Third, she argued that she was not a spectator. Id. Fourth, she claimed that the Picnic Area was negligently designed. Id. Fifth and finally, she argued that the Baseball Rule is outdated and should be abandoned. Id.

First, the court of appeals held that the girl had adequate knowledge of the potential for injury, even though she had never personally witnessed a foul ball enter the stands. Id. The girl's ordinary knowledge of baseball based on having played softball, watched games on television, and attended games in person, rendered her sufficiently familiar with the game to "comprehend the danger of balls fouled into the stands even if she had never witnessed such an event herself." Id.

Second, the court held that the girl did have the choice contemplated in the Baseball Rule. "The 'choice' embodied in the Rule is the choice on the part of the spectator to attend a baseball game in an unprotected seat when the ballpark operator has satisfied its duty to protect patrons by offering a reasonable number of protected seats." Id. (quoting Erickson v. Lexington Baseball

Club, 233 N.C. 627, 628, 65 S.E.2d 140, 140 (1951)). Thus, a baseball stadium operator must provide a reasonable number of screened seats to attendees generally, but their unavailability to particular individuals does not preclude the Baseball Rule's application.

Third, the court addressed the girl's argument that the Baseball Rule did not apply to her because she was not a baseball spectator – she was attending a company picnic. Id. at ___, 854 S.E.2d at 131. Because the girl's testimony revealed she knew she was in a baseball stadium at the time a game was underway, the court held the argument to be "one of semantics rather than law and [that] does not render the Baseball Rule inapplicable." Id.

Fourth, the girl argued that the Picnic Area had been negligently designed. But because she had not introduced evidence which demonstrated that any of the allegedly negligent design elements contributed to her injury, the court held that the Baseball Rule applied. Id. at ___, 854 S.E.2d at 131-32.

Finally, the girl asked the court of appeals to abandon the Baseball Rule because it is "archaic and out-of-step with the sport's arguably diminished place in popular culture." Id. at ___, 854 S.E.2d at 132. Noting that the Baseball Rule was announced by the Supreme Court and had not been disclaimed by that court, the court of appeals explained it was "without authority to set [the Rule] aside." Id.

For these reasons, the court of appeals affirmed the trial court's order granting summary judgment for the baseball stadium operator.

In Wright Construction Services, Inc. v. Hard Art Studio, PLLC, 275 N.C. App. 972, 853 S.E.2d 500 (2020), the court of appeals decided that the licensure defense does not bar negligence claims by an unlicensed general contractor against architects or engineers who breached their duty of care in their professional work on a construction project.

In 2014, a construction company contracted with a developer to build a retail and student housing complex in Raleigh, North Carolina by August of 2015. Id. at ___, 853 S.E.2d at 502. The construction company obtained a license to engage in general contracting in North Carolina a few months after it executed the contract. Id. The developer also contracted with the project's architect, and the architect then contracted with structural engineers. Id. The project suffered various delays and was not completed on time, and the developer terminated the contract with the construction company as a result. Id.

The construction company sued the architect and structural engineers for negligence arising from breaches of their professional duties. Id. The architect and engineers moved for summary judgment, asserting that the construction company's negligence claims were barred by its own failure to obtain a general contracting license before beginning work on the project. Id. The trial court granted summary judgment in favor of the architect and engineers. Id.

On appeal, the court of appeals reversed. The court discussed "the legal underpinning of the negligence claims . . . and the common law licensure defense." Id. at ___, 853 S.E.2d at 503. First, it noted that the negligence claims against the architect and structural engineer were based on breaches of "ordinary legal duties arising out of the need for architects and engineers to use due care in the exercise of their skills and abilities to avoid foreseeable harm to others." Id. An architect or engineer owes duties "to those who must reasonably rely upon his professional performance." Id. (quoting Shoffner Indus., Inc. v. W. B. Lloyd Constr. Co., 42 N.C. App. 259, 271-72, 257 S.E.2d 50, 59 (1979)). These "negligence claims are entirely separate from any rights or responsibilities that exist between the property owner and the builder under the construction contract." Id. Next, the court explained that the licensure defense was a common law doctrine created by the supreme court in recognition of statutory requirements, enacted "to 'protect the

public from incompetent builders,'" mandating that "a general contractor . . . obtain a general contracting license before bidding on or working on a construction project costing $30,000 or more." Id. (quoting Bryan Builders Supply v. Midyette, 274 N.C. 264, 270, 162 S.E.2d 507, 511 (1968) and citing N.C. Gen. Stat. § 87-1). The licensure defense holds that "a contractor who fails to secure the necessary license cannot recover from the property owner for breach of contract." Id. (citing Midyette, 274 N.C. at 270, 162 S.E.2d at 511).

After reviewing these principles, the court of appeals held that the licensure defense does not apply to negligence claims against professionals such as architects and structural engineers. Id. at ___, 853 S.E.2d at 504. First, the court reasoned that "[a]pplying the licensure defense to these types of tort claims would undermine this purpose" by merely "shield[ing] architects and engineers from legal responsibility for their failure to exercise due care in critical aspects of the construction process." Id. Thus, "only the tortfeasor benefits" if the licensure defense applied to these claims, and "[t]he public gains nothing." Id. The court also found no precedent justifying the licensure defense's application to these claims because all the relevant precedents dealt with contract claims. Id. Thus, the court concluded, architects and engineers performing professional work on construction projects are not "the public" whom the legislature sought to protect by the licensure requirement. Id.

Next, the court of appeals observed that its holding was consistent with previous cases that had "examin[ed] the licensure defense outside the context of the contract between the owner and the general contractor." Id. The court cited two cases that had not applied the licensure defense to a subcontractor or to negligence claims. Id. (citing Vogel v. Reed Supply Co., 277 N.C. 119, 133-34, 177 S.E.2d 273, 282 (1970) and RCDI Constr., Inc. v. Spaceplan/Architecture, Planning

& Interiors, P.A., 148 F. Supp. 2d 607, 612–17, 620–22 (W.D.N.C. 2001), aff'd 29 F. App'x 120 (4th Cir. 2002)).

Finally, the court rejected the argument that allowing these negligence claims was an impermissible end-run around the licensure defense because these were negligence claims against professionals rather than contract claims that could be brought against an owner. Id. The court of appeals clarified that its holding "does not address claims that could be 'brought as a contract claim against an owner,'" and instead applies only to common law claims. Id.

For these reasons, the court of appeals reversed the trial court's order granting summary judgment for the architect and structural engineers.

In Copeland v. Amward Homes of N.C., Inc., ___ N.C. ___, 2021-NCSC-118, the supreme court granted the defendants' petition for discretionary review and the plaintiffs' conditional petition for discretionary review of the court of appeals' decision in Copeland v. Amward Homes of N.C., Inc., 269 N.C. App. 143, 837 S.E.2d 903 (2020). The supreme court heard oral argument on September 1, 2021. Then, on October 29, 2021, the supreme court determined that discretionary review had been improvidently allowed, thus ending the appeal.

The court of appeals' decision addressed whether a residential developer owed a duty to routinely inspect construction performed in its subdivision, take precautions against negligent construction work, or sequence and manage the construction of homes on hilly terrain.

A residential developer purchased more than 100 acres of steep, hilly land on which to develop a community. 269 N.C. App. at 145, 837 S.E.2d at 905. The developer then sold the lots to builders. Id. Prior to selling the lots, the developer did not ensure that the earth on which the construction would take place was level or appropriately sloped for the necessary construction, a process called "grading," nor did the developer sequence the construction of the community so

that uphill lots were built before downhill lots. Id. As a result, a family and their child moved into a home in the community while some lots uphill had yet to be graded. Id. The child was playing outside the home when an overloaded dump truck rolled away from an uphill home construction project, striking and killing the child. Id. at 145–46, 837 S.E.2d at 905.

The child's estate brought negligence claims against the developer, claiming that it owed a duty to (1) routinely inspect the construction going on its community, including the unsafe grading work being done on the uphill lot; (2) take precautions against negligent construction work, a duty arising from the developer's undertaking and course of conduct in developing the community; and (3) sequence the construction or conduct mass grading to limit the risk that bystanders downhill might be harmed by foreseeable roll-away accidents. Id. at 146–50, 837 S.E.2d at 905–08. The trial court granted summary judgment for the developer, concluding that the developer owed no legal duty to the child. Id. at 146, 837 S.E.2d at 905.

The court of appeals reversed and remanded. The court of appeals concluded that the developer did not owe a duty to routinely inspect the construction occurring in its subdivision or a duty to take precautions against negligent construction work. Id. at 146–49, 837 S.E.2d at 906–08. However, the court of appeals held that a material question of fact existed as to whether the developer owed a duty to sequence the construction or conduct mass grading to limit the risk that bystanders downhill might be harmed by foreseeable roll-away accidents. Id. at 149–50, 837 S.E.2d at 908. Thus, summary judgment for the developer was not appropriate at this stage.

(4) Negligent Infliction of Emotional Distress

In Newman v. Stepp, 376 N.C. 300, 852 S.E.2d 104 (2020), the supreme court considered whether the parents of a two-year-old child who was killed at an unlicensed childcare facility had

properly pleaded the foreseeability element of their claim for negligent infliction of emotional distress ("NIED").

A man left a loaded shotgun in the kitchen of his home, which operated as an unlicensed childcare facility. Id. at 301, 852 S.E.2d at 106. Parents left their two-year-old girl at the facility, and the girl was accidentally shot by one of the other children. Id. The girl was transported to the hospital by ambulance. Id. at 302, 852 S.E.2d at 106. The girl's father heard about a shooting of an unnamed female child in critical condition over the radio, and when he heard the childcare facility's address as the location of the shooting, he attempted to drive there. Id. He also called his wife. Id. He saw the ambulance and followed it to the hospital. Id. He learned his daughter was still alive in the ambulance, and upon arrival, saw her being removed from the vehicle and taken into the hospital. Id. The girl's mother arrived shortly thereafter but was told that her daughter had died. Id.

The parents filed suit, alleging NIED among other claims. The trial court granted judgment on the pleadings as to the parents' NIED claims, and the parents appealed. Id. The parties and the court of appeals all agreed that the dispositive issue was whether the parents had sufficiently alleged the foreseeability element of their NIED claim. Id. The court of appeals issued a split decision reversing the trial court, in which the majority held that the parents had properly alleged foreseeability. Id. The dissent's view was that the only allegation supporting the foreseeability of severe emotional distress was the parent-child relationship, which was insufficient. Id. at 304, 852 S.E.2d at 108

The supreme court affirmed the court of appeals' reversal of the trial court's entry of judgment on the pleadings for the childcare providers and held that the parents had sufficiently alleged the foreseeability of their severe emotional distress. Because the only issue presented was

the sufficiency of the allegations regarding the element of foreseeability, the court discussed the law of NIED foreseeability. Id. at 305-06, 852 S.E.2d at 108-09. North Carolina courts analyzing foreseeability in NIED cases consider the Johnson factors, which "include the plaintiff's proximity to the negligent act, the relationship between the plaintiff and the other person for whose welfare the plaintiff is concerned, and whether the plaintiff personally observed the negligent act." Id. at 306, 852 S.E.2d at 109 (quoting Johnson v. Ruark Obstetrics & Gynecology Assocs., P.A., 327 N.C. 283, 305, 395 S.E.2d 85, 98 (1990)). Yet, the supreme court emphasized that those factors are "not mechanistic requirements" and their presence or absence "is not determinative in all cases." Id. (quoting Sorrells v. M.Y.B. Hosp. Ventures of Asheville, 334 N.C. 669, 672-73, 435 S.E.2d 320, 322 (1993)).

The childcare providers argued that the parents did not observe and were not in close proximity to the girl's shooting or death, and thus failed to plead foreseeability. Id. at 306-07, 852 S.E.2d at 109. They relied upon a series of cases that were similar, in some respects, to the instant facts. But the supreme court rejected the analogies and found none of the cases controlling:

> Although we held in the cited series of cases that the foreseeability factor of Johnson did not exist due to such circumstances as the defendant's lack of knowledge of plaintiff's existence, the prospect of parents suffering "severe emotional distress," and the inability of the defendant to know the identity of the fatally injured party, conversely we hold that the foreseeability factor of Johnson does exist in the case at bar because defendants have knowledge of plaintiffs' existence, there is the prospect of plaintiffs suffering severe emotional distress, and defendants were able to know the identity of the fatally injured [girl].

Id. at 312, 852 S.E.2d at 112. Thus, because the childcare providers knew of the parents, knew of the enormity of loss they would suffer in such a situation, and knew the identity of the girl, the supreme court held that the parents satisfied the requirements for pleading the foreseeability of

their severe emotional distress. In concluding, the court stressed that in the context of NIED, "foreseeability must be determined under all of the facts presented and should be resolved on a case-by-case basis instead of mechanistic requirement associated with the presence or absence of the Johnson factors." Id. at 313, 852 S.E.2d at 113.

For those reasons, the supreme court affirmed reversal of the trial court, which had entered judgment on the pleadings in favor of the childcare providers.

Justice Newby dissented. In the dissent's view, the majority failed to properly apply the foreseeability factors outlined in Johnson because the parents were neither present during the negligent act nor did they observe the injury. Id. at 314, 852 S.E.2d at 113 (Newby, J., dissenting). The dissent discussed the factual similarities between the case before the court and Gardner v. Gardner, 334 N.C. 662, 435 S.E.2d 324 (1993). In that case, a father drove a vehicle into a bridge abutment and ultimately caused the death of his thirteen-year-old child. See Newman, 376 N.C. at 314, 852 S.E.2d at 113 (Newby, J., dissenting). The mother learned of the accident over the phone, went to hospital, and saw her son being taken into the emergency room. See id. The Gardner court "found persuasive that the wife was not in close proximity to her husband's negligent act, nor did she observe the resulting wreck," and ultimately held the mother's severe emotional distress was not foreseeable to the father. Id. at 315, 852 S.E.2d at 114. The dissent's view is that Gardner is controlling and therefore would have held that the parents in this case failed to allege the necessary foreseeability. Id.

The dissent also questioned the distinction drawn by the majority between this case and Gardner regarding whether the negligent act is "egregious." Id. at 317, 852 S.E.2d at 115. Justice Newby characterizes this as a "new factor" in the NIED foreseeability analysis. Id. at 319, 852 S.E.2d at 116. Because, under his view, the proper remedy for the instant facts is a wrongful death

action and the Johnson foreseeability factors were well-established, he would reverse the court of appeals and affirm the trial court's award of judgment on the pleadings. Id.

(5) Constitutional Claims

In Cheryl Lloyd Humphrey Land Investment Co., LLC v. Resco Products, Inc., 377 N.C. 384, 2021-NCSC-56, the supreme court considered whether maliciously making false statements at public rezoning hearings is petitioning activity protected by the Noerr-Pennington doctrine under the United States Constitution and the North Carolina Constitution.

A land investment company sought to have the town where certain land was located rezone the land as residential. Id. at ¶ 3. The town held public hearings on the rezoning. Id. The land was adjacent to an active mine, and the mining company sent representatives to the hearings to oppose rezoning. Id. The mining company representatives intentionally and maliciously made misrepresentations in their opposition to rezoning at the hearings, stating that the mine would pose certain dangers to residents on the land if it were rezoned. Id. When they were questioned about those risks, the representatives admitted that mining operations could be conducted without endangering residents on the land. Id. The town rezoned the land as residential. Id. Nonetheless, citing the dangers that the mining company representatives reported at the hearing, a land purchaser declined to purchase the land. Id.

The land investment company sued the mining company, alleging that the misrepresentations at the rezoning hearings constituted tortious interference with prospective economic advantage. Id. at ¶ 5. The mining company moved to dismiss on the basis that the misrepresentations were constitutionally protected petitioning activity. Id. The trial court granted the motion, but the court of appeals reversed. Id. at ¶¶ 5-6.

On appeal, the supreme court reversed. First, the court remarked upon the foundational nature of the right to petition. It observed that the Noerr-Pennington doctrine, which originally recognized the right to petition as a defense to antitrust liability, has been applied by the Supreme Court of the United States outside the antitrust context. Id. at ¶ 10. Next, the supreme court explained that because a party's political motives are irrelevant to that party's right to petition, petitioning activity is protected regardless of the party's intent or purpose. Id. at ¶ 11. The court then explained that, because lawsuits that infringe on the right to petition chill that political activity, courts must dismiss them early in order to protect the right. Id. at ¶ 14.

The court applied these principles to the question before it: whether the mining company's speech constitutes protected petitioning activity. It held that neither the maliciousness nor the falsity of the statements had any bearing on the analysis because both the federal and North Carolina constitutions expressly protect the ability of citizens to petition their government. Id. at ¶ 15. The land investment company's remedy, the supreme court stated, was to expose the falsity of the mining company's statements. Id. The land investment did in fact do that, and the evidence at the hearing resulted in the town rezoning the land despite the mining company's arguments. Id.

For these reasons, the supreme court held that the trial court properly granted the motion to dismiss and reversed the court of appeals.

In Deminski ex rel. C.E.D. v. State Board of Education, 377 N.C. 406, 2021-NCSC-58, the supreme court considered whether an individual may bring a claim under the North Carolina Constitution for a school board's deliberate indifference to continual student harassment in the classroom.

During the fall semester of 2016, three elementary school students were repeatedly bullied and sexually harassed by several other students. Id. at ¶¶ 2-3. Although school personnel and the

school board had knowledge of the harassment, the bullying and harassment continued until the students were transferred to a new school in October of 2016. Id. at ¶¶ 4-5. The students' mother asserted a claim under Article I, Section 15 and Article IX, Section 2 of the North Carolina Constitution, alleging that the students had been denied their rights to an education. Id. at ¶¶ 2, 6. The school board moved to dismiss arguing the constitutional claim was barred by sovereign or governmental immunity; the trial court denied the school board's motion. Id. at ¶¶ 7-8. The court of appeals reversed finding that the was no claim on which relief could be granted because harassment does not violate a constitutional right to education. Id.

On appeal, the supreme court reversed the court of appeals. Because the appeal stemmed from a motion to dismiss, the court was asked whether the students' mother had sufficiently alleged a claim for relief under Article I, Section 15, and Article IX, Section 2, of the North Carolina Constitution. Id. at ¶ 16. To state a claim under the state constitution, the complaint must allege that a state actor violated constitutional rights, the claim must be colorable, and there must be no adequate state remedy. Id. at ¶¶ 16-18. The court held that each element was adequately pleaded here. Id. at ¶¶ 19-21. The students' mother had alleged that the deliberate indifference of the school board, a state actor, to the ongoing harassment of the students prevented them from accessing their right to an education. Id. at ¶ 23. The harassment therefore impacted the nature, extent, and quality of educational opportunities available to the students, and the students' allegations indicated that the school board failed to guard and maintain the right. Id. Thus, the school board's deliberate indifference was distinct from the facts of Doe v. Charlotte-Mecklenburg Bd. of Educ., 222 N.C. App. 359, 731 S.E.2d 245 (2012), where a teacher's sexual advances and conduct did not amount to a constitutional violation because they did not directly relate to the educational opportunities of the student. Deminski, 2021-NCSC-58 at ¶¶ 22-23.

For these reasons, the supreme court reversed the court of appeals and held that the students' mother stated a colorable constitutional claim by alleging the school board was deliberately indifferent to harassment of the minor students that affected the nature, extent, and quality of the educational opportunities made available to them. Id. at ¶21.

(6) Independent Contractor

In Osborne v. Yadkin Valley Economic Development District, Inc., ___ N.C. App. ___, 2021-NCCOA-454, the court of appeals considered whether a school board was liable for the actions of its independent contractor that provided busing services to special needs students.

A school board provided bus transportation, with safety monitors on board, to its special needs students for many years. Id. at ¶ 3. In 2013, the school board contracted with a transportation company to provide bus transportation for some of the school district's special needs students. Id. at ¶ 4. The contract did not include safety monitors. Id. at ¶ 5. The transportation company had its own procedures for vetting and training potential bus drivers. Id. at ¶ 6. On two separate days, a bus driver hired and trained by the transportation company, sexually assaulted one of the special needs students while she was riding the bus. Id. at ¶ 9. The bus was equipped with video cameras and the transportation company discovered the sexual assault, notified law enforcement, and terminated the bus driver's employment. Id. at ¶ 10. The special needs student, by and through her mother, filed suit against the school board, the transportation company, and others, alleging various negligence claims. Id. at ¶ 11. The trial court granted summary judgment to the school board on the student's claims and the student appealed. Id. at ¶ 13.

The court of appeals affirmed the trial court's ruling in an opinion written by Judge Wood.

First, the court of appeals found that while the school board was required to exercise a heightened duty of care in making decisions regarding special needs pupils, the school board

properly delegated its duty to safely transport these students under Section 115C-253 of the North Carolina General Statutes. Id. at ¶¶ 36-38. Section 115C-253 provides that school boards may contract "with any person, firm or corporation" to transport public school students. Id. at ¶ 38 (citing N.C. Gen. Stat. § 115C-253). Moreover, the court of appeals found "no evidence in the record to suggest the [school board] retained the right to control the manner in which [the transportation company] would transport students such as [the special needs student]." Id. at ¶ 38. Because the transportation company hired and controlled its drivers, owned its own vehicles, and set its own policies, the school board "did not exercise the degree of control over [the transportation company] necessary to convert [the transportation company] from an independent contractor to an employee." Id.

Next, the court of appeals found no support for the argument that the duty to transport students safely is nondelegable. Id. at ¶¶ 39-40. The court of appeals noted that while no North Carolina had considered the issue, other jurisdictions had done so and expressly declined such arguments. Id. at ¶ 40. Thus, the court of appeals held that, "[a]bsent guidance from our Supreme Court or our legislature," the school board was "not an 'insurer of student safety,'" because it delegated its duty to the transportation company. Id. "To hold otherwise," according to the court of appeals, "would be to ignore the independent contractor rule that states when an employer properly delegates a duty pursuant to a statutory authority, its duty ceases." Id. at ¶ 43.

Nevertheless, the court of appeals noted that there was no genuine dispute as to the foreseeability of the student's injury due to her special needs. Id. at ¶ 41. Accordingly, the student's injury "was one that could have been prevented" because the school board's "customary practice had been to provide transportation for [the special needs student] on a . . . bus staffed with a safety monitor." Id. at ¶ 42.

Judge Dietz concurred in a separate opinion. Judge Dietz doubted that "the felony sexual assault of a vulnerable special needs student is always foreseeable to school officials as a matter of law. Criminal acts ordinarily are not foreseeable under tort law principles." Id. at ¶ 51. Judge Dietz agreed that, under the independent contractor rule, the school board passed to the transportation company the duty to provide the same heightened level of protection the school board owed to the student. Id. at ¶ 52.

Judge Arrowood also concurred in a separate opinion, expressing "concerns with the interaction between the statutory scheme and our caselaw." Id. at ¶ 53. According to Judge Arrowood, Section 115C-253 "effectively permitted boards of education to contract out of the heightened standard of care that this Court has previously held them to." Id. Judge Arrowood argued that "together" Section 115C-253 and the "right to control" element of the independent contractor rule articulated in Woodson v. Rowland, 329 N.C. 330, 407 S.E.2d 222 (1991) "effectively eliminate the [school board's] duty to any public student unfortunate enough to find themselves in a vehicle operated by an independent contractor." Id. at ¶¶ 55-56. While Judge Arrowood questioned "whether this was the result that was intended when the statute was enacted," he saw "no avenue for relief from this conundrum absent legislative action or our Supreme Court's revisiting of the Woodson doctrine." Id. at ¶ 58.

B. Economic Loss Rule

In Crescent University City Venture, LLC v. Trussway Manufacturing, Inc., 376 N.C. 54, 852 S.E.2d 98 (2020), the supreme court considered whether a commercial property owner, who contracted for the construction of a building with a general contractor, may seek to recover for economic losses in tort from subcontractors, with whom the property owner does not have contractual privity.

A developer contracted with a general contractor for the construction of an apartment complex. Id. at 55, 852 S.E.2d at 99. The general contractor engaged subcontractors, including one for wood framing. Id. The wood framing subcontractor, in turn, executed a purchase order for support trusses from a truss manufacturer. Id. at 55-6, 852 S.E.2d at 99-100. The purchase order included an express warranty and other terms of the sale, including specifications. Id. at 56, 852 S.E.2d at 100. Shortly after the completed apartments were occupied, inspections revealed that the floor trusses were defective. Id. The developer engaged a different contractor to repair the trusses.

The general contractor sued the developer and the developer countersued for, among other things, a breach of contract claim regarding the defective trusses. Id. at 57, 852 S.E.2d at 100. The developer also sued the truss manufacturer, asserting that it negligently manufactured the trusses, and the actions were consolidated. Id. The truss manufacturer moved for summary judgment, arguing that the economic loss rule barred the negligence claim because the duties allegedly breached arose from a contractual relationship rather than by operation of law. Id. at 55, 852 S.E.2d at 101.

The trial court found that no extra-contractual duty had been breached. Id. at 58, 852 S.E.2d at 101. The court applied "the economic loss rule irrespective of the existence or lack of a contractual relationship" between the developer and truss manufacturer and granted summary judgment on the negligence claim in favor of the truss manufacturer. Id.

The supreme court affirmed the trial court's order granting summary judgment in favor of the truss manufacturer. First, the supreme court restated the economic loss rule, which "bars recovery in tort by a plaintiff 'against a promisor for his simple failure to perform his contract, even though such failure was due to negligence or lack of skill.'" Id. (quoting N.C. State Ports

Auth. v. Lloyd A. Fry Roofing Co., 294 N.C. 73, 240 S.E.2d 345 (1978), rejected in part on other grounds by Trs. of Rowan Technical Coll. v. J. Hyatt Hammond Assocs., Inc., 313 N.C. 230, 328 S.E.2d 274 (1985)). It observed that in "[a]pplying the economic loss rule, North Carolina courts have long refused to recognize claims for breach of contract disguised as the type of negligence claim that [the developer] asserted against [the truss manufacturer]." Id.

Next, the court addressed the discussion of the economic loss rule by the Supreme Court of the United States in East River S.S. Corp. v. Transamerica Delaval, Inc., 476 U.S. 858, 106 S. Ct. 2295 (1986). Crescent Univ. City Venture, 376 N.C. at 59, 852 S.E.2d at 102. The Court in East River recognized that commercial transactions do not generally involve disparities in bargaining power so saw no reason to alter the parties' allocation of risk in those situations. See id. (quoting East River, 476 U.S. at 873). The Court accordingly held that commercial manufacturers have no negligence-based or strict products liability-based duty "to prevent a product from injuring itself," and that remedies for such an occurrence instead lay in warranties. Id. (quoting East River, 476 U.S. at 871).

The developer had argued that, under Lord v. Customized Consulting Specialty, Inc., 182 N.C. App. 635, 643 S.E.2d 28 (2007), the economic loss rule may only apply where a plaintiff and defendant are in contractual privity. Crescent Univ. City Venture, 376 N.C. at 60, 852 S.E.2d at 102. The supreme court rejected this argument. Noting that Ports Authority itself involved an application of the economic loss rule despite a lack of privity, the court expressly held that a "lack of privity in the commercial context between a developer and a subcontractor, supplier, consultant, or other third party—the potential existence of which is readily known and assimilated in sophisticated construction contracts—is immaterial to the application of the economic loss rule." Id. at 60, 852 S.E.2d at 102-03.

Finally, the court distinguished Oates v. JAG, Inc., 314 N.C. 276, 333 S.E.2d 222 (1985), which held that subsequent home purchasers in the consumer context could recover against a home builder in negligence for later discovered latent defects, notwithstanding the lack of contractual privity. Crescent Univ. City Venture, 376 N.C. at 61, 852 S.E.2d at 103. The Oates holding, however, was a "fact-specific response" to a particular issue: "[t]he ordinary purchaser of a home is not qualified to determine when or where a defect exists." Id. at 62, 852 S.E.2d at 103-04 (quoting Oates, 314 N.C. at 280, 333 S.E.2d at 225). Thus, Oates revolved around public policy concerns applicable to consumer home buyers, but not implicated here. The supreme court therefore held it was "constrained by the well-established origins and ongoing application of the economic loss rule in North Carolina from affording [] a sophisticated, commercial developer, the same extra-contractual remedies afforded residential homeowners by reason of public policy." Id.

For these reasons, the supreme court affirmed summary judgment in favor of the truss manufacturer.

II. PRETRIAL PROCEDURE

A. Jurisdiction

In Cryan v. National Council of Young Men's Christian Associations of the United States of America, ___ N.C. App. ___, 2021-NCCOA-612, the court of appeals considered whether a trial court properly transferred a defendant's motion to dismiss to a three-judge panel tasked with resolving the defendant's constitutional challenge to section 1-17(e) of the General Statutes, which the General Assembly enacted in 2019 as part of the SAFE Child Act.

Several men alleged that they were sexually assaulted by an employee of a youth organization when the men were minors. Id. at ¶¶ 1, 4. Under the previously applicable statute of

limitations, the men's claims were time-barred as of 2015. Id. at ¶ 2. However, section 1-17(e) allows a plaintiff "to file a civil action within two years of the date of a criminal conviction for a related felony sexual offense against a defendant for claims related to sexual abuse suffered while the plaintiff was under 18 years of age." Relying on this statute, the men filed suit against the youth organization in 2020, within two years of the employee's alleged conviction for certain sex offenses. Id. at ¶ 3. The youth organization filed a Rule 12(b)(6) motion to dismiss, challenging the constitutionality of section 1-17(e). Id. at ¶¶ 3, 5. The men, in turn, filed a motion under section 1-267.1(a1) of the General Statutes and Rule 42(b)(4) of the North Carolina Rules of Civil Procedure, requesting that the youth organization's motion to dismiss be transferred from Forsyth County Superior Court (where the suit had been filed) to Wake County Superior Court, where a three-judge panel would determine the constitutionality of section 1-17(e). Id. at ¶¶ 6–7.

A Forsyth County Superior Court judge heard the two motions, deferred ruling on the youth organization's motion to dismiss, and granted the men's motion to transfer. Id. at ¶ 8. The youth organization appealed to the court of appeals. The court of appeals vacated the trial court's order granting the men's motion to transfer with Judge Gore writing the majority opinion.

As a threshold matter, the court of appeals addressed whether it had jurisdiction over the appeal. Id. at ¶¶ 9–10. The men argued that the trial court's order was an interlocutory order that did not affect a substantial right, and thus, the appeal should be dismissed. The youth organization countered that the order changed the venue of the case, which affected a substantial right conferred by statute. The youth organization also petitioned the court of appeals for a writ of certiorari under Rule 21 of the North Carolina Rules of Appellate Procedure.

The court of appeals noted that the right to venue created by statute is, in fact, a substantial right. Id. at ¶ 13. However, as the court of appeals explained, the trial court's order did not grant,

deny, change, or otherwise affect venue. Id. at ¶ 13. Instead, the order addressed a subject matter jurisdiction issue—whether a three-judge panel in Wake County Superior Court had the statutory right to decide the youth organization's constitutional challenge—and subject matter jurisdiction is legally distinct from venue. Id. at ¶¶ 13–14. Moreover, as reflected in the transcript of the hearing on the two motions and on the face of the trial court's order, the trial court only transferred the constitutional challenge to Wake County; Forsyth County remained the venue for the lawsuit. Id. at ¶¶ 15–16. As a result, the court of appeals held that the appeal was interlocutory and not immediately reviewable.

Nevertheless, the court of appeals granted the youth organization's petition for a writ of certiorari because this appeal raised a "significant" and "important" issue, namely, "what the appropriate requirements for a trial court are to transfer a case to be heard by a three-judge panel," and because granting the petition would "promote judicial economy" by giving trial courts "guidance on a novel and complex statutory scheme." Id. at ¶ 18 (citations omitted).

Having resolved the jurisdictional question, the court of appeals analyzed whether the trial court properly transferred the youth organization's motion to dismiss. The court of appeals first clarified that the statutory scheme under section 1-267.1 for transferring a constitutional challenge to a three-judge panel in Wake County Superior Court "only appl[ies] to 'facial challenges to the validity of an act of the General Assembly, not as applied challenges.'" Id. at ¶ 19 (citation omitted). Furthermore, under Rule 42(b)(4) of the North Carolina Rules of Civil Procedure, "the facial challenge must be raised by a claimant in the claimant's complaint or amended complaint or by the defendant in the defendant's answer, responsive pleading, or within 30 days of filing the defendant's answer or responsive pleading." Id. at ¶ 19.

Applying these principles to the record before it, the court of appeals determined that the youth organization had not raised a facial challenge to the constitutionality of section 1-17(e). Although both the trial court's order and the men asserted that the youth organization had made a facial challenge, the record reflected that the youth organization had specifically used as applied language in its motion to dismiss and that it had argued at the hearing on the motion that it was only raising an as applied challenge. Id. at ¶¶ 20–23. Moreover, the nature of the youth organization's challenge, i.e., whether section 1-17(e) can properly be applied to claims that were already time-barred when the statute was enacted, also demonstrated that the organization was only asserting an as applied challenge. Id. at ¶ 22. Accordingly, because no facial challenge was made in this case, the trial court improperly transferred the youth organization's motion to dismiss to a three-judge panel in Wake County Superior Court.

For these reasons, the court of appeals vacated the trial court's order and remanded for further proceedings.

Judge Carpenter, writing in dissent, would have denied the youth organization's petition for a writ of certiorari. Id. at ¶ 32. In Judge Carpenter's view, the issue of whether the youth organization had raised an as applied challenge or a facial challenge should have been decided by the trial court or the three-judge panel under the statutory scheme created by the General Assembly. Id. at ¶ 28. Judge Carpenter also believed that this issue was not "so pressing that the denial of [the youth organization's] petition would negatively affect the 'efficient administration of justice' or work against our judicial economy." Id. at ¶ 27. Finally, Judge Carpenter expressed concern that by granting the youth organization's writ of certiorari petition, the majority had created a precedent providing that the court of appeals would now be freely granting certiorari to review

challenges to trial court orders transferring constitutional challenges to three-judge panels. Id. at ¶ 31.

(1) Personal Jurisdiction

In Peter Millar, LLC v. Shaw's Menswear, Inc., 274 N.C. App. 383, 853 S.E.2d 16 (2020), the court of appeals considered whether North Carolina possessed personal jurisdiction over a Florida company based on that company's contract with a Georgia company to receive inventory shipped by a North Carolina company.

A wholesaler of men's clothing based in Georgia purchased inventory from a manufacturer based in North Carolina and shipped the inventory to a retailer based in Florida. Id. at 385, 853 S.E.2d at 19. The retailer did not pay the wholesaler, who accrued a debt to the manufacturer for inventory that the wholesaler shipped to the retailer. Id. The wholesaler filed a suit in Georgia against the retailer for this amount and for breach of its agreement, but it did not name the manufacturer as a party to the Georgia action. Id. The manufacturer then sued the wholesaler in North Carolina for breach of contract. Id. The wholesaler filed a third-party complaint in the North Carolina action against the Florida-based retailer. Id. at 386, 853 S.E.2d at 20. The retailer moved, inter alia, to dismiss the third-party complaint in the North Carolina action for lack of personal jurisdiction. Id. The trial court granted the retailer's motion. Id.

On appeal, Judge Berger, writing for the majority of the court of appeals panel, affirmed the trial court's order granting the motion to dismiss for lack of personal jurisdiction. Id. at 389, 853 S.E.2d at 21. The court observed that, when reviewing whether a North Carolina court has personal jurisdiction, the court will employ a two-step analysis: First, section 1-75.4 of the North Carolina General Statutes—the state's long-arm statute—must authorize jurisdiction. Id. at 392-93, 853 S.E.2d at 23. Second, the exercise of jurisdiction must not violate the Due Process Clause

of the Fourteenth Amendment to the United States Constitution. Id. The court stated that a North Carolina court has personal jurisdiction in any action which relates to goods, documents of title, or other things of value shipped from North Carolina by the plaintiff to the defendant "on his order or direction." Id. (quoting N.C. Gen. Stat. § 1-75.4(5)(d) (2019)).

Applying these principles to the facts, the court held that North Carolina's long-arm statute did not extend to the retailer because the North Carolina-based manufacturer did not ship inventory "at the order or direction" of the retailer. Id. at 393, 853 S.E.2d at 23-24. Rather, the manufacturer acted at the direction of the Georgia-based wholesaler. Id., 853 S.E.2d at 24. The court observed that the General Assembly could have imposed the long-arm statute's requirements on all transactions involving goods shipped from North Carolina, but instead chose narrower language focusing on the entity under whose "order or direction" the goods were shipped. Id. Because the wholesaler was a consignment intermediary between the manufacturer and retailer, the court ruled that insufficient evidence of a direct contact or contractual agreement between the manufacturer and retailer existed. Id. The court held that the retailer did not directly order the goods from the manufacturer, and therefore, the wholesaler failed to meet its burden of proving a statutory basis for personal jurisdiction. Id.

Judge Arrowood dissented on this issue of personal jurisdiction. Id. at 395, 853 S.E.2d at 25 (Arrowood, J., dissenting). The dissent stated that the majority was misinterpreting the long-arm statute and failed to adhere to the court's long-standing liberal construction of the long-arm statute. Id. at 398, 853 S.E.2d at 26. The dissent stated that "[b]y narrowly interpreting the long-arm statute, the majority opinion effectively creates a loophole to allow individuals and corporations to shield themselves from the exercise of personal jurisdiction in North Carolina by conducting business through an intermediary." Id. The dissent then determined that a single

contract could suffice to meet the requirements of the Due Process Clause's minimum-contacts test. Id. at 400, 853 S.E.2d at 28. The dissent would have held that although there was no written contract between the retailer and the manufacturer, the nature of the business transaction and the ongoing business relationship between the two companies that resulted in the debt constituted a "substantial connection" with North Carolina, as required by the Due Process Clause. Id.

In Ponder v. Been, 275 N.C. App. 626, 853 S.E.2d 302 (2020), the court of appeals considered whether a North Carolina court could exercise personal jurisdiction in an alienation of affection action over an out-of-state paramour based on his exchange of text messages with a married woman living in North Carolina.

When a North Carolina couple legally separated, the husband accused the wife of having an affair with a Florida resident. Id. at ___, 853 S.E.2d at 304. He alleged that the wife's paramour had sent her frequent communications by email, text message, and telephone, as well as airline tickets so that she could travel to Florida. Id. Following the separation, the wife moved with her children to Florida and began living with the paramour. Id. The husband filed an action for alienation of affection against the paramour in a North Carolina court. Id.

The paramour moved to dismiss the action for lack of personal jurisdiction. Id. at ___, 853 S.E.2d at 306. He argued that North Carolina's long-arm statute and the Due Process Clause of the Fourteenth Amendment did not permit North Carolina to exercise personal jurisdiction over him. Id. In opposition to the motion, the husband alleged that the wife and the paramour had communicated by telephone "476 times" during a six-month period. Id. The trial court held that these communications were "significant." Id. at ___, 853 S.E.2d at 308. Based on these communications, the trial court held that personal jurisdiction existed because the paramour had "availed himself to the laws of the State of North Carolina by actively communicating

electronically with [the wife] on or before the date she and [her husband] separated[.]" Id. Thus, the court denied the motion to dismiss. Id.

On appeal, Judge Bryant, writing the majority opinion for the court of appeals, reversed the order of the trial court and ruled that North Carolina could not exercise personal jurisdiction over the paramour. Id. The court observed that the long-arm statute provides for personal jurisdiction if a "solicitation" is carried on within the state by the defendant. Id. at ___, 853 S.E.2d at 305. However, the court ruled that no solicitation had occurred. See id. at ___, 853 S.E.2d at 308. Rather, the court held that the evidence did not support the trial court's finding that the paramour's communications with the wife were "significant." Id. Thus, the court held that the trial court's findings failed to meet the threshold for the exercise of personal jurisdiction over the defendant. Id. Judge Brook concurred in the result only. Id.

Judge Stroud dissented, stating that she would hold that the electronic communications with the wife were sufficient to establish personal jurisdiction. Id. at ___, 853 S.E.2d at 309 (Stroud, J., dissenting). The dissent would have found that, despite the paramour's argument that he did not initiate contact with the wife, the paramour's actions sufficiently established a "solicitation" of the wife, which would allow for an exercise of personal jurisdiction under the long-arm statute. Id. at ___, 853 S.E.2d at 313-14. The dissent observed that the plain language of the long-arm statute does not require a defendant to initiate contact in order to conclude that a solicitation occurred. Id. at ___, 853 S.E.2d at 315.

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

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

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

In Mucha v. Wagner, 378 N.C. 167, 2021-NCSC-82, the supreme court considered whether, and under what circumstances, a telephone call to a cell phone can subject the person who initiated the call to personal jurisdiction in the state where the recipient of the call happens to be when the phone is answered.

While attending college in South Carolina, a student ended her relationship with her home-town boyfriend, who lived in Connecticut. Id. at ¶ 3. On several occasions the student asked the ex-boyfriend not to contact her again. Id. After the college semester ended, the student moved to North Carolina, presumably without the ex-boyfriend's knowledge. Id. The evening of the move, the ex-boyfriend called the student's cellphone twenty-eight times from an unknown number. Id. After listening to a voicemail from the ex-boyfriend, the student had a panic attack. Id. The next day, the student filed a complaint and motion for a domestic violence protective order (DVPO) in North Carolina. Id. The ex-boyfriend moved to dismiss the complaint for lack of personal

jurisdiction. Id. at ¶ 4. The trial court denied the motion to dismiss and granted the protective order. Id. The boyfriend appealed. Id. at ¶ 5.

The court of appeals affirmed the trial court's decision. Because the ex-boyfriend knew that the college semester had ended and that the student may no longer be residing in South Carolina, the court found "'his conduct—purposefully directed at [the student]—was sufficient for him to reasonably anticipate being haled into court wherever [the student] resided when she received the calls.'" Id.

The supreme court granted certiorari, reversed the decision of the court of appeals, and vacated the trial court's order. The supreme court held that the trial court could not exercise personal jurisdiction over the ex-boyfriend consistent with the Due Process Clause of the Fourteenth Amendment because the ex-boyfriend did not have the requisite minimum contacts with North Carolina; he did not purposefully avail himself of the benefits and the protection of the state's laws. Id. at ¶ 2.

First, the supreme court found that the ex-boyfriend's calls did not satisfy the purposeful availment test because no evidence suggested that he had any reason to know that the student was in North Carolina when he called. Id. at ¶ 11. The awareness—whether actual or imputed—of establishing a connection with North Carlina "is what permits a court in North Carolina to exercise judicial authority over the nonresident defendant." Id. In so holding, the court relied on various personal jurisdiction cases, including J. McIntyre Machinery, Ltd. v. Nicastro, 564 U.S. 873 (2011), where Justice Breyer, in his concurrence, explained that personal jurisdiction in stream of commerce cases does not arise even when a defendant knows or reasonably should know that its products "'[we]re distributed through a nationwide distribution system that might lead to those products being sold in any of the fifty states.'" Mucha, 2021-NCSC-82 at ¶ 16 (citing J. McIntyre

Mach., Ltd., 564 U.S. at 891). Instead, the defendant must have targeted the forum state specifically. Id. The supreme court found that conduct directed at a person is not necessarily the same as conduct directed at a forum state. Id. at ¶ 17. Moreover, the supreme court found that a defendant's knowledge that a plaintiff could be somewhere other than the state in which the plaintiff typically resides is not sufficient to establish personal jurisdiction in any state where the plaintiff happens to be. Id. Because the ex-boyfriend did not purposefully avail himself of the laws of North Carolina, the ex-boyfriend did not have minimum contacts with North Carolina. Id.

Next, the supreme court rejected the student's argument that personal jurisdiction was established by the "purposeful direction" standard, rather than the purposeful availment test. Id. at ¶ 18. According to the student, under this test, the question is whether the ex-boyfriend "obstructed the forum state's laws by directing his tortious conduct at the forum." Id. The supreme court doubted the purposeful direction standard differed from the purposeful availment test, as the terms appear interchangeable in case law. Id. at ¶ 19. Regardless, the supreme court found that the standard articulated by the student ignored the requirement that the ex-boyfriend himself have established minimum contacts with the forum state. Id. "The act of calling a cell phone number registered in one state does not automatically vest jurisdiction in any state where the recipient of the call happens to be located at the time the call is made." Id. at ¶ 21.

The supreme court also rejected the student's contention that due process permits a lesser showing of minimum contacts to establish personal jurisdiction in domestic violence matters than in business disputes because of the state's significant interest in protecting its residents from domestic violence. Id. at ¶ 22. According to the supreme court, other state courts examining this question have not made such an exception. Id. Moreover, ignoring this rule would open the door to the abandonment of due process protections in other settings where the state's interest is

compelling. Id. at ¶ 24. Accordingly, the supreme court held that, despite the important governmental interest in preventing domestic violence, "minimum contacts are required for personal jurisdiction to vest over a nonresident defendant," at that requires proof that the defendant purposefully established a connection with the forum state. Id. at ¶ 23.

Finally, the supreme court rejected the student's argument that, even without minimum contacts, the trial court could bind the boyfriend to its order by applying the "status exception" doctrine. Id. at ¶ 27. This doctrine applies to cases involving the personal status of a plaintiff, such as divorce actions or parental rights proceedings that can be adjudicated in the plaintiff's home state even though personal jurisdiction over the defendant is not proper. Id. The supreme court held that the status exception did not apply in the domestic violence context because (1) the termination of a marriage or parental rights dissolves a legal identity and does not create new rights or duties, like a DVPO, and (2) the issuance of a DVPO implicates a defendant's substantial rights, such as imposing obligations on the defendant or prohibiting him from purchasing a firearm. Id. at ¶¶ 28-29. Moreover, the student may seek a DVPO in any other court with personal jurisdiction over the ex-boyfriend. Id. at ¶ 31.

For these reasons, the supreme court reversed the court of appeals and vacated the trial court's order for lack of personal jurisdiction.

In Cohen v. Continental Motors, Inc., ___ N.C. App. ___, 2021-NCCOA-449, the court of appeals considered whether a defendant waives the defense of lack of personal jurisdiction by participating in discovery and litigation for three years after raising the defense in its answer, and whether a forum state may exercise specific personal jurisdiction over a defendant that has contacts with the state that are indirectly related to the claims.

Two decedents died when their airplane crash landed after a mid-flight malfunction. Id. ¶ 2. The decedents' estates sued the manufacturer of the airplane engine. Id. ¶ 11.

The manufacturer, a Delaware corporation with its principal place of business in Alabama, designed and manufactured the engine in Alabama then sold and shipped the engine to a company in Oregon. Id. ¶¶ 3,7. While the manufacturer sold its products to distributors rather than to the general public, it marketed products to the general public and sold products in every state. Id. ¶¶ 3, 4. A North Carolina distributor made nearly 3,000 component part sales with a value of nearly $4,000,000 in an approximately three-year period preceding the decedents airplane crash. Id. ¶ 4. During the same time period, the manufacturer shipped twelve products directly to a distributor's customer in North Carolina. Id. ¶ 5. In addition, the manufacturer's subscription-based online library of instructions and technical documents relating to its products had fourteen North Carolina subscribers. Id. ¶ 6.

The manufacturer answered the complaint and asserted the affirmative defense of lack of personal jurisdiction. Id. ¶ 12. Over the next three years, the manufacturer participated in discovery before filing a motion to dismiss for lack of personal jurisdiction. Id. The trial court held the manufacturer did not waive its personal jurisdiction defense because it was raised in the answer and the manufacturer had participated in limited discovery without requesting relief. Id. ¶ 14. The trial court also concluded that the manufacturer's contacts with North Carolina were insufficient to confer specific personal jurisdiction. Id. ¶ 15.

On appeal, the court of appeals affirmed the finding no waiver of the personal jurisdiction defense and reversed the trial court's conclusion that it lacked personal jurisdiction over the manufacturer.

First, the court of appeals addressed whether the manufacturer waived its personal jurisdiction defense by participating in the litigation for three years. Id. ¶ 22. The court explained that, because the defense was raised in the manufacturer's answer in accordance with Rule 12(b) of the North Carolina Rules of Civil Procedure, Rule 12(h) provides that the defense was not waived. Thus, the trial court properly considered the motion to dismiss.

Second, the court of appeals addressed whether the manufacturer was subject to specific personal jurisdiction. It noted that after the trial court ruled, the Supreme Court of the United States issued Ford Motor Co. v. Montana Eighth Judicial Dist. Court, 141 S. Ct. 1017, ___ U.S.___ (2021) which clarified that a constitutional exercise of specific jurisdiction does not require the defendant's contacts with the forum state to have caused the plaintiff's claims. See Cohen, 2021-NCCOA-449 ¶ 28. The court of appeals held that the manufacturer here was analogous to the defendant in Ford, which the Supreme Court held was subject to personal jurisdiction, because the claims arose from its contacts with North Carolina, directly or indirectly, because the manufacturer served the North Carolina market. Id. ¶¶ 29-31. Among other things, the manufacturer marketed products to the public at large including in North Carolina, sold parts in North Carolina, and provided reference materials to North Carolina. Id. ¶ 29. Under Ford, the court of appeals held these contacts sufficient to confer specific jurisdiction.

For these reasons, the court of appeals affirmed the trial court's order to the extent it found the manufacturer did not waive its personal jurisdiction defense and reversed the order to the extent it found that personal jurisdiction did not exist.

Judge Tyson concurred with the analysis and result regarding waiver. Id. ¶ 33 (Tyson, J. concurring). He also concurred in the result that the manufacturer was subject to specific personal jurisdiction. Id. He wrote separately to delineate the manufacturer's contacts with North Carolina,

and to explain that those particular contacts—the sales into and revenue derived from the forum, and the subscription materials and North Carolina subscribers—conferred specific personal jurisdiction under North Carolina rather than its nationwide contacts or presence. Id. ¶ 56.

B. Failure to State a Claim

In Blue v. Bhiro, 275 N.C. App. 1, 853 S.E.2d 258 (2020), the court of appeals considered whether a motion to dismiss is converted into a motion for summary judgment when the trial court considers memoranda of law and arguments that contain facts outside the complaint but does not explicitly note, at argument or in its order, that it excluded or did not consider those extraneous facts.

The complaint alleged that in 2012 medical providers ordered a test for the patient that helps determine the likelihood of prostate cancer. Id. at 2, 853 S.E.2d at 259. The test results were abnormally high, but the providers did not provide follow-up care or a referral. Id. The patient received another test in 2018, and the results were even higher. Id. Later, the patient was diagnosed with metastatic prostate cancer. Id.

The patient sued the providers for failing to follow up or refer him to a specialist after receiving the original, abnormally high, test results in 2012. Id. The medical providers moved to dismiss, arguing that because the alleged negligence occurred in 2012, the suit was barred by the three-year statute of limitations. In his memorandum of law in opposition, the patient discussed facts not alleged in the complaint, including that he sought treatments between 1996 and 2019, that he lacked knowledge of his test results. He also made assertions as to what the evidence would later show. Id. At oral argument, the patient again discussed additional facts such as the number of times he visited the providers and his lack of knowledge about the test results. Id.

In response at oral argument, the medical providers brought to the court's attention that much of the patient's argument was not alleged in the complaint or raised his reply. Id. But the trial court did not exclude any facts, or state that it would not consider matters outside the pleadings at the argument. Id. Instead, the order granted the motion dismiss and stated that the court's findings occurred after "having heard arguments of parties and counsel for the parties and having reviewed the court file, pleadings, and memorandums of law." Id. The order did not affirmatively exclude any matters from consideration. Id.

On appeal, in an opinion written by Judge Murphy, the court of appeals reversed the trial court's order. The court observed that memoranda of law and arguments of counsel are not generally considered matters outside the pleadings for the purpose of converting a Rule 12 motion into a Rule 56 motion. Id. at 5, 853 S.E.2d at 261-62. Nonetheless, the court of appeals explained, a court's consideration of such memoranda and arguments "can" result in conversion when the materials contain factual matters that are outside the pleadings. Id. The trial court in this case did not indicate that it excluded from consideration facts beyond those in the pleadings. Id. To the contrary, the order indicated that the trial court did indeed consider the memoranda and arguments that contained facts outside the pleadings. Id. Moreover, this occurred despite the trial court being made aware that the patient had repeatedly presented new facts. Id.

Thus, the court of appeals held that the trial court's failure to exclude matters beyond the complaint and pleadings converted the motion into one for summary judgment. Id. Because the trial court did not recognize the conversion into a Rule 56 motion, it did not afford the parties the opportunity to gather and present evidence guaranteed by the Rules. Id. Accordingly, the factual record was incomplete, and the court of appeals declined to reach the statute of limitations issue. Id.

For these reasons, the court of appeals reversed the trial court's Rule 12 dismissal and remanded for the provision of an opportunity to gather and present evidence on a summary judgment motion. Id. at 7, 853 S.E.2d at 263.

Judge Hampson dissented from the majority opinion. He would have affirmed the trial court's dismissal primarily because no evidentiary materials, such as exhibits or affidavits, had been presented. Id. (Hampson, J., dissenting). According to the dissent, mere references to facts outside the pleadings should be considered argument and are not a basis for conversion. Additionally, the dissent would have found that there was no affirmative indication that the trial court considered anything beyond the allegations of the complaint. Id. Moreover, according to the dissent, the motion to dismiss was properly allowed because after the statute of limitations defense was raised, the plaintiff bore the burden of showing timeliness. Id.

C. Rule 3

In Lunsford v. Teasley, 276 N.C. App. 365, 2021-NCCOA-96, the court of appeals considered whether a civil action is commenced when a person makes application to the court requesting permission to file a complaint within 20 days, the permission is granted by the court, but no summons issues.

Plaintiff Lunsford voluntarily dismissed his original action in trial court on September 26, 2018. Id. at ¶ 2. Almost one year later, on September 24, 2019, he requested, and received, a 20-day order extending his time to refile a complaint. Id. However, Lunsford failed to have a summons issued and did not refile his complaint until October 9, 2019, outside the one-year window permitted under Rule 41(a)(1) of the North Carolina Rules of Civil Procedure. Id. The trial court dismissed the action. Id. at ¶ 1.

On appeal, the court of appeals affirmed the trial court's dismissal. Under Rule 3(a) of the Rules of Civil Procedure, a civil action may be commenced either by filing a complaint with the court or by the issuance of a summons and a trial court's grant of a 20-day extension to file the complaint. Id. at ¶ 4. Because no summons was issued within 20 days of the request to the trial court, the action was not commenced under the second method. Id. ¶ 5. Rather, by filing a complaint on October 9, 2019, the action commenced on that day, which was outside of the one-year period granted by Rule 41(a)(1). Id.

For these reasons, the court of appeals affirmed the trial court's dismissal of the action.

D. Statute of Limitations

In Chisum v. Campagna, 376 N.C. 680, 2021-NCSC-7, the supreme court considered whether a party must have notice of breach of contract for the statute of limitations to begin to run.

This case involved three individuals with membership interests in three different limited liability companies. Id. at ¶ 2. The three companies were formed for the purpose of developing commercial real estate in Wilmington, North Carolina. Id. at ¶ 2. Two members of the LLCs took actions over a period of several years that transferred control of the LLCs to the two members and diluted the membership interests of the third member, Chisum, to the point that they were extinguished. Id. at ¶ 6. Some time after the members' actions, Chisum visited a storage facility owned by one of the LLCs to access a complimentary owner's unit and was told by the facility's property manager that the LLC had sold the facility to a third-party buyer. Id. at ¶ 13. After receiving this information, Chisum searched the property records and discovered a recently recorded deed transferring ownership of the storage facility from the LLC to a new owner for a payment of $5.75 million. Id. at ¶ 13.

Shortly after discovering the existence of the recorded deed, Chisum filed suit alleging breach of contract, among other claims. Id. at ¶ 14. After a jury trial, the business court entered a final judgment that required the members to pay compensatory and punitive damages to Chisum. All parties ultimately appealed to the supreme court. Id. at ¶ 30.

On appeal, the supreme court considered the issue whether the trial court erred in submitting to the jury the issue of when Chisum had notice of the members' breach of the operating agreements for two of the LLCs.

The members contended that any potential breach of the operating agreements occurred outside of the three-year limitations period applicable to breach of contract-based declaratory judgment actions. Id. at ¶ 32. Essentially, the members argued that "the applicable statute of limitations began running at the moment of the breach regardless of the extent to which the injured party had notice that the breach had occurred." Id. at ¶ 32, 36. Chisum argued that he did not have actual or constructive notice of breach of the operating agreements because of various actions of the members within the three-year period before the lawsuit, including the members sending him documents showing he was a member of both entities, providing "Schedule 1s" showing his ownership interests, and informing Chisum that he was a member "to the extent shown on the Schedule 1s". Id. at ¶ 33.

The supreme court referenced the general proposition that "'a statute of limitations should not begin running against [a] plaintiff until [the] plaintiff has knowledge that a wrong has been inflicted upon him.'" Id. at ¶ 34 (quoting Black v. Littlejohn, 312 N.C. 626, 639 (1985)). However, as soon as the injury becomes apparent or should reasonably become apparent to the claimant, "the cause of action is complete and the limitation period begins to run." Id. at ¶ 34 (quoting Pembee Mfg. Corp. v. Cape Fear Constr. Co., Inc., 313 N.C. 488, 493 (1985)).

Based on these principals, the supreme court concluded that the members' argument was inconsistent with recent decisions of the court and "basic notions of fairness." Id. at ¶ 36. The court noted that the record contained sufficient evidence to suggest that actions of the members kept Chisum from becoming aware of the breach for several years. Id. at ¶ 36. Accordingly, "the statute of limitations applicable to [Chisum's] declaratory judgment claims . . . began running at the time that he became aware or should have become aware of the [two members'] breaches of the operating agreements[.]" Id. at ¶ 36. Thus, Chisum's declaratory judgment claims relating to two of the LLCs were not time-barred and the statute of limitations issue was properly submitted to the jury to determine when Chisum knew or should have known of the breach. Id. at ¶ 26.

In Wells Fargo Bank, N.A. v. Stocks, 378 N.C. 342, 2021-NCSC-90, the supreme court considered whether courts should look to the purpose of a cause of action to determine which competing statute of limitations applies to the action.

A property owner's father financed the purchase of the property owner's home and named himself on the promissory note as the borrower. Id. at ¶ 2. The property owner and her father then executed a deed of trust naming both the father and the property owner as the borrower. Id. The property owner then commenced payments to repay the loan. Id. In January 2005, the father refinanced the loan and executed a second promissory note only naming the father as the borrower. Id. at ¶ 3. Then, at her father's request, the property owner executed a second deed of trust, naming only the property owner as borrower, pledging the property as collateral securing the second promissory note. Id. at ¶ 4. Thus, while the second promissory note named the father as borrower, the second deed of trust named the property owner as the borrower. The father passed away and, in January 2015, the property owner defaulted on the loan. Id. at ¶ 16. The lender sought to commence non-judicial foreclosure proceedings. Id. In May 2017, the lender discovered the

mistake (i.e. that the names on the second promissory note and the second deed of trust did not match) and brought suit for reformation and judicial foreclosure. Id. The lender moved for summary judgment, and the court granted it. Id. at ¶¶ 8-9. The property owner appealed.

The court of appeals reversed the trial court. First, the court of appeals held that the ten-year statute of limitations found in Section 1-47(2) of the North Carolina General Statutes addressing documents executed under seal applied, and not the three-year statute of limitations found in Section 1-52(9) addressing actions based on fraud or mistake. Id. at ¶ 10. In so holding, the court of appeals relied on the rule that "where two statutes deal with the same subject matter, the more specific statute will prevail over the more general one." Id. (citing Fowler v. Valencourt, 334 N.C. 345, 349, 435 S.E.2d 530, 532 (1993)). Next, the court of appeals found that the statute of limitations began to run in January 2005 when the second deed of trust was executed. Id. at ¶ 11. Because the lender filed suit in May 2017, the court of appeals held that the statute of limitations barred the claim. Id.

The supreme court granted certiorari and reversed the decision of the court of appeals. First, the supreme court held that, to determine which statute of limitations applies, a court must look to the purpose of the cause of action. Id. at ¶ 15. Because the purpose of the lender's action was to reform an instrument due to mistake, and not to enforce a sealed instrument, the three-year statute of limitations in Section 1-52(9) applied. Id.

Next, the supreme court looked to the language of Section 1.52(9) providing that a cause of action does not accrue until "the discovery by the aggrieved party of the facts constituting the fraud or mistake." Id. at ¶ 16 (citing N.C. Gen. Stat. § 1-52(9)). Moreover, "a party 'discovers' the mistake when the 'mistake was known of should have been discovered in the exercise of ordinary diligence.'" Id. (citing Peacock v. Barnes, 142 N.C. 215, 218, 55 S.E. 99, 100 (1906)).

According to the supreme court, the original drafting error was not sufficient to place the drafter on notice because, if such were the rule, "the discovery rule would be unnecessary because the statute of limitations would always begin to run on the date of the original error." Id. Instead, the supreme court found that the earliest the lender "should have discovered the error in the loan documents" was in January 2015 when the lender commenced foreclosure proceedings. Id. at ¶ 19. The supreme court reasoned that the lender had no reason to investigate the loan documents before this time because the property owner made timely payments up to that point. Id. Because the cause of action did not accrue until January 2015, at the earliest, the action was not barred by the three-year statute of limitations. Id.

Finally, the supreme court rejected the property owner's argument that reformation could not occur because there was a genuine dispute of material fact as to whether the parties intended the second deed of trust to secure payment for the second promissory note. Id. at ¶ 20. Although the property owner had submitted an affidavit on appeal providing that she did not know about the second loan, she had previously admitted in a request for admission that she understood the purpose of the second deed of trust. Id. Under Rule 36(b) of the North Carolina Rules of Civil Procedure, facts admitted in a request for admissions are "conclusively established." Id. Thus, the property owner could not use her affidavit to contradict her binding admission. Id. at ¶ 21.

For these reasons, the supreme court reversed the decision of the court of appeals.

In Pedlow v. Kornegay, ___ N.C. App. ___, 2021-NCCOA-303, the court of appeals considered, in a matter of first impression, whether the statute of limitations on a promissory note begins to run on the date the note is signed or the date appearing on the face of the note.

A lender made several loans to a debtor that the parties sought to memorialize in a promissory note. On July 29, 2008, the lender's attorney emailed the promissory note, dated July

30, 2008, to the debtor. Id. at ¶ 2. The debtor disputed the amount owed and did not sign the note. Id. Finally, on July 2, 2009, the debtor signed the promissory note and a corresponding security agreement. Id. The last line of the promissory note stated it was executed "under seal" and the word "seal" appeared in parentheses next to the debtor's name. Id. The debtor never made any payments against the principle or interest on the loan. Id. On May 30, 2019, the lender filed a complaint against the debtor demanding payment of the entire balance. Id. at ¶ 3. The debtor filed a motion for summary judgment, asserting a statute of limitations defense. Id. The trial court granted the motion for summary judgment, finding that the action was barred by the six-year statute of limitations, and the creditor appealed. Id.

The court of appeals reversed the trial court's decision in an opinion written by Judge Gore. First, the court of appeals determined the applicable statute of limitations. The court of appeals observed that promissory notes are negotiable instruments governed by Article 3 of the Uniform Commercial Code (UCC). Id. at ¶ 5. Under the UCC, the statute of limitations for promissory notes payable on demand generally is six years from the date a demand for payment was made or, if no demand was made, and neither principal nor interest on the note has been paid for a continuous period of ten years, then an action to enforce the note is barred. Id. at ¶ 6. However, the UCC also provides that a "sealed instrument otherwise subject to this Article is governed by the time limits of N.C. Gen. Stat. § 1-47(2)." Id. (citing N.C. Ge. Stat. § 25-3-118(h)) (emphasis added). The court of appeals held that the ten-year statute of limitation in Section 1-47(2) displaces any other statute of limitations found in the UCC when a document is a "sealed instrument otherwise subject to this Article" because "§ 25-3-118(h) clearly dictates the statute of limitations when an instrument is executed under seal." Id. at ¶ 7. Here, the language in the promissory note

was sufficient to support a finding that the document was executed under seal. Id. at ¶ 6. Thus, the court of appeals found that the ten-year statute of limitations applied to the lender's claims. Id.

Next, the court of appeals addressed the date on which the statute of limitations accrued and began to run. If the statute of limitations accrued on the date the debtor signed the agreement, July 2, 2009, as the lender argued, the action was not barred. Id. at ¶ 8. If the statute of limitations accrued on the date appearing on the face of the promissory note, July 30, 2008, as the debtor argued, the action was barred. Id. The court of appeals found that the UCC provided no guidance on the issue. Id. at ¶ 9. Moreover, while North Carolina case law provides that the statute of limitations on an action on a promissory note payable on demand begins to run from the date of the execution of the note, the issue of whether a note is executed on the date signed or the date appearing on the face of the document was an issue of first impression in North Carolina. Id. Relying on "principles of law and equity to inform this analysis", the court of appeals found that the statute of limitations accrued on the date the debtor signed the agreement, July 2, 2009, because (1) "an action could not have been brought on the note until the document was signed" and (2) "the debt was not finalized and secured" until the debtor signed the note, rendering the lender unable to sue on the note until it was signed. Id. at ¶¶ 9-11.

Accordingly, the court of appeals held that the action was not barred by the ten-year statute of limitations. Id. at ¶ 12. The court of appeals reversed and remanded the case to the trial court. Id.

Judge Dillon wrote a concurrence. Judge Dillon stated that the lender had a cause of action based on the original debt that accrued before the execution of the promissory note because the parties disputed the amount owed by the lender before the promissory note was executed. Id. at ¶¶ 13-14. That cause of action was presumably subject to the three-year statute of limitation under

Section 1-52 of the North Carolina General Statutes. Id. at ¶ 15. However, "the execution of the promissory note created a new cause of action[.]" Id. at ¶ 13.

(1) Latent Defects

In Benigno v. Sumner Construction, Inc., ___ N.C. App. ___, 2021-NCCOA-265, the court of appeals decided whether the location of a fence is a latent defect that delays accrual of a negligent construction claim.

A home purchaser contracted for a newly constructed home. Id. at ¶ 3. The contractor agreed to add a fence surrounding the property lines, and the purchaser closed on the home on July 1, 2015. Id. The contract contained a clause providing that closing constituted acceptance of the property, as-is. Id. When the purchaser's neighbor added a fence along the neighbor's property line in 2019, the purchaser realized his own fence was not located properly. Id. at ¶ 4. The purchaser sued the contractor for, among other things, negligent construction. Id. at ¶ 5. The contractor moved for judgment on the pleadings, arguing that the negligent construction claim was barred by the statute of limitations. Id. The trial court granted the motion. Id.

On appeal, the court of appeals reversed the judgment on the negligent construction claim. Negligent construction claims are subject to a three-year statute of limitations, and the claims accrue when the damage either becomes apparent or ought reasonably have become apparent. Id. ¶ 16. Thus, where the injury is latent, the claim accrues upon discovery. Id.

Judge Murphy, writing for the court, held that the improper location of a fence may be a latent defect. Id. ¶ 19. The purchaser argued that the claim accrued when he received actual notice of the improper fence installation in 2019. Id. ¶ 15. The contractor argued the claim accrued at closing, because the improper installation reasonably should have been apparent at that time because it could be easily discovered by a routine property survey. Id. ¶¶ 15, 18. The court of

appeals ruled that the need for a land survey might affirmatively indicate that the fence location was a latent defect, and because the record was unclear as to whether the injury was patent or latent, the home purchaser's claims may have accrued in 2019. Id. ¶¶ 19-20. Because the pleadings raised issues of fact and the action might not be time-barred, judgment on the pleadings was inappropriate. Id. ¶ 24.

For these reasons, the court of appeals reversed the trial court's judgment on the pleadings as to the negligent construction claim.

Judge Hampson concurred and Judge Tyson concurred in part and dissented in part by separate opinion. Judge Tyson would have held that because the fence is clearly visible, any defect in location is easily discoverable. Id. ¶ 34 (Tyson, J. dissenting in part). Judge Tyson's partial dissent focused on the supreme court's articulation of a latent defect as one that is not ordinarily discovered during a reasonable inspection and went on to question how the neighbor's actions could trigger accrual of the claim when the actions have no impact on either the property line or the fence location. Id. ¶¶ 33, 36.

E. Res Judicata

In Fairley v. Patel, ___ N.C. App. ___, 2021-NCCOA-342, the court of appeals considered whether res judicata bars an action in district court when the same claim was previously pleaded in a small claims action that resulted in a judgment.

Three guests filed small actions against a hotel seeking medical costs, legal costs, and punitive damages. Id. at ¶ 2. A magistrate entered judgments in favor of the guests, awarding each guest less than $200 and taxing the costs against the hotel. Id. The guests did not appeal the magistrate's judgments but filed complaints in district court against the hotel for punitive damages. Id. at ¶¶ 2-3. The hotel moved to dismiss the complaints in district court based on res judicata. Id.

at ¶ 3. The district court held that res judicata only barred the subsequent actions if the magistrate had ruled upon the punitive damages claims in small claims court, and because the small claims judgments were silent on the issue, the hotel's motions (which were converted to motions for summary judgment) were denied. Id. at ¶¶ 4, 6-7.

On appeal, the court of appeals reversed the district court. Even though the small claims judgments did not include punitive damages, id. at ¶ 13, each small claims complaint pleaded a claim for punitive damages, and the small claims judgments each stated that the actions "on the cause stated" in the complaints were adjudicated, id. at ¶ 12. Regardless of the magistrate's intent, because the small claims judgments are final judgments on the claims in the complaint, and the guests did not appeal, the judgments had a res judicata effect. Id. at ¶ 14.

For these reasons, the court of appeals reversed the trial court's denial of the hotel's motions for summary judgment.

F. Collateral Estoppel

In Wells Fargo Bank, N.A. as Trustee of Jane Richardson McElhaney Revocable Trust v. Orsbon & Fenninger, LLP, ___ N.C. App. ___, 2021-NCCOA-315, the court of appeals considered whether an issue was actually and necessarily determined for purposes of asserting collateral estoppel in a later action, where the issue was raised and litigated in the prior action, conflicting evidence was submitted, and the trial court found there was no dispute of material fact.

A law firm assisted a settlor in amending the settlor's trust and estate planning documents. Id. at ¶¶ 6, 9-10. Neither the amended trust documents nor the settlor's will referred to a testamentary limited power of appointment that the settlor held, and the disposition of assets was unclear as a result. Id. at ¶¶ 10-11. The trustee sought a declaration that the settlor's will did not exercise the settlor's limited power of appointment, and the settlor's residuary beneficiaries sought

reformation of the trust. Id. at ¶¶ 12-13. The issue of the settlor's intent was extensively litigated, and the parties submitted conflicting evidence. Id. at ¶¶ 29, 31. The trial court found there was no dispute of material fact, dismissed the reformation claim, and granted the declaration requested by the trustee. Id. at ¶ 16. The trustee and the residuary beneficiaries then sued the law firm for malpractice. Id. at ¶ 17. The law firm asserted the defense of collateral estoppel, and the trial court entered partial summary judgment against the law firm and in favor of the trustee and residuary beneficiaries on that defense. Id. at ¶¶ 4-5

On appeal, the court of appeals affirmed. Collateral estoppel precludes relitigating issues that were necessary to, and actually decided in, a prior action, and a party asserting collateral estoppel must show each element with "clarity and certainty." Id. at ¶ 25 (quoting Miller Bldg. Corp. v. NBBJ N.C., Inc., 129 N.C. App. 97, 100, 497 S.E.2d 433, 435 (1998)). The elements are that the prior action resulted in a final judgment on the merits, the parties were parties to the earlier action or in privity with parties to the earlier action, and the issue in question is identical to an issue that was actually litigated and necessary to the judgment. Id. The court explained the law firm was unable to meet its burden of showing that the settlor's intent was actually and necessarily determined in the first action. Id. at ¶ 29.

When the trial court granted summary judgment in the first action, it orally stated at the hearing that there was no issue of material fact, and the written order also stated that no genuine issue of material fact existed. Id. at ¶ 30. Therefore, the court of appeals reasoned, the settlor's intent was not necessarily determined. The trial court "may have determined . . . it was required to disregard some . . . evidence," or "that the conflicting evidence . . . was immaterial as a matter of law," for example if the settlor had failed to substantially comply "with the requirements of her limited power of appointment, regardless of her intent." Id. at ¶ 32. Relatedly, because the

residuary beneficiaries did not cite authority for the proposition that a trust may be reformed based on the settlor's intent in this circumstance, "the trial court likely determined that [the settlor's] intent was immaterial" to the reformation claim. Id. at ¶ 33. Because the law firm did not show with clarity and certainty that the settlor's intent was actually and necessarily determined in the prior action, summary judgment was proper on the collateral estoppel defense. Id. at ¶ 34.

For these reasons, the court of appeals affirmed the trial court's entry of partial summary judgment against the law firm on its defense of collateral estoppel.

G. State Agency

In Southern Environmental Law Center v. North Carolina Railroad Co., 378 N.C. 202, 2021-NCSC-84, the supreme court considered whether a private railroad company with significant ties to the state is an "agency" or "subdivision" of the North Carolina government for purposes of the Public Records Act.

North Carolina's oldest existing corporation is a railroad company chartered by an act of the General Assembly in 1849. Id. at ¶ 2. Currently, the state is the railroad company's sole shareholder and the Governor appoints a majority of the members of the board of directors. Id. at ¶¶ 6-7. However, the board does not obtain approval from the Governor before taking actions. Id. at ¶ 8. The railroad company operates as a Chapter 55 corporation. Id. The railroad company owns real property and pays county property taxes and state franchise taxes however, it does not pay state or federal income tax, claiming an exemption. Id. at ¶¶ 9, 11. In 2018, a nonprofit organization was one of several organizations advocating for the construction of a light rail project connecting Durham and Chapel Hill. Id. at ¶ 13. In 2019, the railroad company and certain other entities declined to sign an agreement that would have allowed the light rail project to move forward. Id. The nonprofit organization submitted a request under the Public Records Act (the

Act) to the railroad company seeking to inspect records related to the light rail project. Id. The railroad company declined on the grounds that it was not subject to the Act and the nonprofit organization filed a complaint, claiming the railroad company was a state agency for purposes of the Act. Id. at ¶¶ 13-14. After the case was designated a mandatory complex business case, both parties moved for summary judgment. Id. at ¶ 15. The business court entered an order granting summary judgment to the railroad company. Id. The nonprofit organization appealed to the supreme court.

The supreme court affirmed the trial court's order with Justice Ervin writing the opinion.

First, the supreme court looked to two prior appellate cases addressing the question of whether a particular entity is an "agency" or "subdivision" under the Act: News & Observer Publishing Co. v. Wake County Hospital System, Inc., 55 N.C. App. 1, 284 S.E.2d 542 (1981) (holding a public health system was subject to the Act), and Chatfield v. Wilmington Housing Finance and Development, Inc., 166 N.C. App. 703, 603 S.E.2d 837 (2004) (holding a nonprofit organization formed by a city was not subject to the Act). S. Env't L. Ctr., 2021-NCSC-84 at ¶¶ 27-28. The supreme court found these cases established a "totality of the circumstances" approach where "all of the relevant facts and circumstances" are weighed to determine whether "the government exercised such substantial control over the operations of the relevant entity as to render it a governmental agency or subdivision." Id. at ¶ 29.

In applying the "totality of the circumstances" analysis, the court found that state legislation involving the railroad company suggested the company was a private corporate entity rather than an entity subject to the Act. Id. at ¶ 30. For instance, in 2013, the legislature instituted reporting requirements applicable to the railroad company after reviewing a comprehensive study of the railroad company. Id. at ¶ 31. The legislature noted that, for purposes of the study, the term

"state agency" or "agency" included the railroad company. Id. According to the supreme court, the inclusion of this language suggested that the legislature understood that the railroad company was not normally considered a state agency. Id. Moreover, the study emphasized that the railroad company was a private corporation, rather than a governmental agency, and noted that the process of transforming the company into a state agency would be a lengthy and complicated process. Id. at ¶ 32. Furthermore, the legislature passed a law affording the railroad company eminent domain authority under the statute authorizing this authority for private, rather than public, condemnors. Id. at ¶ 35. Additionally, in 2010, a state ethics commission voted that the railroad company's directors were not subject to the provisions of the State Government Ethics Act. Id. at ¶ 37. Thus, the supreme court found that relevant legislation indicated the legislature's intent that the railroad company not be subject to the Act. Id. at ¶ 37.

Next, the supreme court determined whether the state exercised substantial government control over the railroad company making it subject to the Act. Id. at ¶ 38. The supreme court found that while the railroad company has a close and beneficial relationship with the state, countervailing factors offset that relationship. Id. For instance, the supreme court found that the railroad company "has consistently maintained its separate corporate entity." Id. at ¶ 39. Although the railroad company is not required to pay state and federal income taxes, it does pay property taxes in the counties in which it operates, and it claims an exemption from income taxes based on a statutory provision irrelevant to government agencies. Id. at ¶ 39. Moreover, although the Governor has given the railroad directives in the past, the railroad company often has declined to follow these directives, making independent decisions. Id. Despite the state's ability, as the railroad company's sole shareholder, to indirectly control the railroad's day-to-day operations and to approve or disapprove certain corporate decisions, "those facts, standing alone, do not serve to

make the [railroad company] a state agency or subdivision." Id. at ¶ 40. Such circumstances "exist in all situations in which the corporation is owned by a single stockholder." Id. Therefore, the supreme court held that the railroad company was not a "state agency" or "subdivision" under the Act and need not share records with the nonprofit organization. Id. at ¶ 43.

Accordingly, the supreme court affirmed the trial court's order granting summary judgment to the railroad company.

Justice Earls authored a dissent, arguing that the majority's opinion ran contrary to the purpose of the Act. Id. at ¶ 44. According to Justice Earls, the railroad company and the state were sufficiently intertwined to find that the railroad company was subject to the Act, especially in that the state owned the railroad company, appointed its board, mandated its reporting, spent its revenue, and stood to receive the assets in the event of dissolution. Id. at ¶¶ 52-55. Justice Earls argued that the majority's decision would allow corporate entities "fully owned by" and "operationally intertwined with" the state to be shielded from public scrutiny of their records in connection with public business and risked the state using nominally private entities to sidestep complying with the Act. Id. at ¶ 47. Justice Earls also said that the purpose of the Act would be satisfied in finding the railroad fell under it, because the Act was created for the public to have access to records "in connection with the transaction of public business." Id. at ¶ 63.

H. Rule 9(j)

In Miller v. Carolina Coast Emergency Physicians, LLC, ___ N.C. App. ___, 2021-NCCOA-212, the court of appeals considered whether Rule 9(j) compliance is established at the time of filing and, therefore, cannot be upset by subsequent discovery.

On September 30, 2011, a widow filed a medical malpractice complaint against hospital and physician for her husband's death. Id. at ¶ 2. On February 8, 2013, the wife voluntarily

dismissed this complaint, but refiled the action on February 6, 2014. Id. at ¶¶ 2–3. The 2014 complaint included a Rule 9(j) certification, which stated that a "person who is reasonably expected to qualify as an expert witness" had reviewed the husband's medical care and medical records and who was "willing to testify" that the hospital and physician had breached the applicable standard of care and caused the husband's death. Id. at ¶ 7. The purported expert witness, an emergency room physician, also provided an affidavit stating as much. Id.

On March 13, 2014, the doctor filed an answer to the 2014 complaint, asserting that the wife had failed to pay costs after voluntarily dismissing the 2011 action, and filed a subsequent motion to tax costs. Id. at ¶ 9. On April 4, 2014, the doctor filed an amended answer as of right and included motions to dismiss for insufficient process, insufficient service of process, lack of personal jurisdiction, and statute of limitations. Id. at ¶ 9. The trial court denied these motions, finding that the previously filed motion to tax costs was a general appearance in the suit conferring personal jurisdiction and that the process, service of process, and personal jurisdiction defenses in the amended answer did not relate back to his original answer and were, therefore, waived. Id.

In 2015, the expert testified in deposition that he was not offering criticism specific to the hospital, he did not consider himself an expert in emergency nursing, and he had no opinions as to whether the hospital breached the standard of care. Id. at ¶ 8. The expert never made these facts known to the wife prior to her filing the 2014 complaint. Id.

On the basis of this testimony, the hospital filed a motion to dismiss pursuant to Rule 9(j). Id. at ¶ 12. The trial court denied the motion, concluding that the complaint "facially complied with Rule 9(j)" and that the wife had "'exercised reasonable care and diligence' in assuring her Rule 9(j) certification was true." Id.

The trial court did, however, grant the physician's Rule 9(j) motion to dismiss on the grounds that the expert witness had not reviewed all of the medical care and medical records reasonably available prior to the Rule 9(j) certification. Id. at ¶ 15. Specifically, the expert had reviewed neither the widow's handwritten notes from the time of the husband's death nor the EMT records and certain prior medical records regarding the husband's care. Id. The trial court granted both the doctor's and the hospital's motions to exclude the expert witness for the same reasons. Id. at ¶ 16.

Accordingly, with the expert testimony excluded, the trial court found "no genuine issues of material fact exist" and concluded that the doctor and hospital were entitled to judgment as a matter of law. Id. at ¶ 18.

On appeal, the court of appeals affirmed the trial court's denial of the doctor's motion to dismiss and the order granting the hospital's motion to exclude the expert's testimony against the hospital but reversed the orders granting the doctor's motions to exclude and both Rule 9(j) motions to dismiss and vacated the order granting summary judgment.

First, the court of appeals concluded that the doctor's motion to tax costs constituted a general appearance in the action, thereby waiving any defense of lack of personal jurisdiction. Id. at ¶ 38. The court also disagreed with the doctor's arguments that his defenses of process, service of process, and personal jurisdiction related back to his original answer, because that answer "did not allege any facts" regarding those defenses, so as to put the plaintiff on notice of them. Id. at ¶ 40. Thus, the trial court did not err in concluding that the doctor had waived these defenses. Id. at ¶ 41.

Second, the court of appeals addressed the key issue of whether the trial court erred in denying the hospital's motion to dismiss pursuant to Rule 9(j). When reviewing a Rule 9(j) motion

to dismiss, the appellate court "must view the relevant evidence in the light most favorable to the plaintiff." Id. at ¶ 45. The court of appeals found that the complaint "facially complied with Rule 9(j)(1)'s requirements" because the widow "asserted the medical care and all medical records pertaining to the alleged negligence had been review by a person reasonably expected to qualify as an expert." Id. at ¶ 47.

The hospital, however, argued that facts which came to light after filing the complaint established that the putative expert was not willing to specifically critique the hospital and was not an expert in emergency nursing. Id. at ¶ 50. The court of appeals disagreed, stating that the dispositive question was whether the widow, at the time of filing her complaint, reasonably believed that the emergency room doctor was willing and able to testify as an expert witness against the hospital. Id. at ¶ 51. Because the record was devoid of any indication that the widow knew of her putative expert's reservations, she met the Rule 9(j) pleading requirements. Id. at ¶¶ 51–52. However, the trial court correctly excluded the expert's testimony against the hospital on these grounds. Id. at ¶ 51, n. 9.

Next, the court of appeals addressed whether the widow's handwritten notes about her husband's death constituted "medical records" under Rule 9(j). Id. at ¶ 54. The trial court concluded that the expert witness had failed to review all pertinent medical records because he had not reviewed the handwritten notes. Id. at ¶ 56. Since there is no clear definition of what constitutes "medical records" under Rule 9(j), the court of appeals looked to the "common-sense definition" provided by the North Carolina Medico-Legal Guidelines—a framework created in collaboration between the North Carolina Medical Society and the Bar Association. Id. at ¶ 57, n. 10. The Guidelines define "medical records" as "a collection of Health Information … created by a physician or other health care provider[.]" Id. at ¶ 57.

Here, the widow's personal handwritten notes, "while certainly potentially relevant information," did not constitute medical records. Id. at ¶ 59. Accordingly, under the plain language of Rule 9(j), the expert was not required to review the notes. Id. at ¶ 60. Moreover, factual disputes over whether the expert reviewed the EMT records, whether prior medical records were relevant, and whether review of those materials would affect the expert's testimony were not proper grounds on which to grant a Rule 9(j) motion to dismiss. Id. at ¶ 63.

The court of appeals also disagreed with the trial court's determination that the expert doctor failed to review the relevant demographic information and, therefore, could not apply the proper standard of care. The trial court concluded that the widow could not have reasonably expected the doctor to qualify as an expert because he reviewed demographic data from 2013-2015, not 2009-2010. Id. at ¶ 65. However, where a proffered medical witness who has previously testified to a lack of familiarity with the relevant community later supplements his knowledge after deposition, that witness remains qualified to testify as an expert. Id. at ¶ 67. Applying that standard here, it was not unreasonable for the widow to expected that the putative expert witness would supplement any deficiency in his familiarity with the relevant community. Id.

In sum, the court of appeals established that the dispositive question for determining Rule 9(j) compliance is whether the plaintiff could reasonably conclude, as of the time of filing the complaint, that the putative expert witness had reviewed all relevant medical records and medical care and would qualify, and testify, as an expert witness.

For those reasons, the court of appeals reversed the trial court's order granting the motions to dismiss pursuant to Rule 9(j).

I. Standing

In Committee to Elect Dan Forest v. Employees Political Action Committee, 376 N.C. 558, 2021-NCSC-6, the supreme court considered whether the North Carolina Constitution requires a plaintiff to suffer both a factual injury and a legal injury for standing to maintain a lawsuit in state court.

During an election campaign for Lieutenant Governor, a political action committee ran television advertisements in support of a Democratic candidate. Id. at ¶ 2. The advertisements did not comply with disclosure requirements mandated by statute. Id. at ¶ 3. The disclosure statute set forth certain requirements, but also created a private cause of action for opposing candidates who complied with the statute's requirements. Id. at ¶ 6. The Republican candidate won the election. Id. at ¶ 4. Nonetheless, his political action committee sued that of the Democratic candidate based on the advertisements, asserting violations of the disclosure statute. Id. at ¶ 7. The trial court entered summary judgment in favor of the Democratic candidate's committee because the prevailing candidate failed to allege actual damages, and because the court found the disclosure statute was an unconstitutional content-based restraint on speech. Id. at ¶ 8.

The court of appeals reversed the trial court and held that the Republican candidate had standing to sue because a violation of the disclosure statute itself constitutes a sufficient injury, notwithstanding actual damages. Id. at ¶ 9. Chief Judge McGee dissented because in her view, since North Carolina appellate courts have previously applied the standing jurisprudence of the Supreme Court of the United States, the court of appeals was bound by Supreme Court decisions on standing issues. Id. at ¶ 10. The dissent relied on federal precedent holding that a mere statutory grant of standing is not necessarily sufficient to allow a party to sue. Id. Instead, the dissent

concluded, the North Carolina Constitution required parties to sustain an injury in fact, and no such injury was present. Id.

The supreme court affirmed the court of appeals, holding that standing to sue under the North Carolina Constitution depends only on a legal injury, and that an injury-in-fact is not required. Id. at ¶ 85.

The supreme court observed that whether the North Carolina Constitution requires litigants to have suffered an injury in fact was a question of first impression. Id. at ¶ 13. First, the court analyzed the text of the state constitution and held that the constitutional text does not clearly limit the exercise of judicial power in a manner analogous to the federal constitution's limitations on federal courts. Id. at ¶ 19. Second, the court examined the historical context that informed the framers of the state constitution. It observed that "the concept of 'standing,' as a personal stake, aggrievement, or injury as a prerequisite for litigation brought to vindicate public rights, was basically absent" from English common law. Id. at ¶ 27. Accordingly, the court concluded that the framers of the North Carolina Constitution "almost certainly" intended no "actual harm" or "injury in fact" requirement. Id. at ¶ 27.

Next, the court analyzed the historical evolution of standing jurisprudence. It noted that judicial writs were generally available to vindicate public rights without a showing of personal interest in a preponderance of states—including North Carolina—throughout the nineteenth century. Id. at ¶ 34. In contrast, the federal judiciary's concept of standing, "as a distinct constitutional requirement . . . first arose in the middle . . . of the twentieth century." Id. at ¶ 39. The first time the Supreme Court of the United States held that a federal statute expressly authorizing citizen lawsuits did not confer standing upon claimants who lack an injury in fact occurred in 1992, which is the same year that court required concrete and particularized, actual or

imminent injury in fact. Id. at ¶¶ 54-55. Thus, the supreme court explained that although the federal standing requirement is rooted in the United States Constitution, the injury in fact requirement is a recent development that restricts historically permissible lawsuits. Id. at ¶ 57.

Finally, the court analyzed whether the North Carolina Constitution imposes a requirement for standing and an injury in fact where the state legislature has created a cause of action. Because the North Carolina Constitution does not limit judicial power to certain cases and controversies, the court held that the state framer's "did not, by their plain words, incorporate the [] federal standing requirements" grounded in those federal limitations. Id. at ¶ 58. Moreover, North Carolina courts have recognized the legislature's ability to create causes of action to vindicate the public interest even where an injury in fact did not exist outside the statutory violation. Id. at ¶ 71. Thus, the supreme court held that the North Carolina Constitution does not include an injury in fact requirement. Id. at ¶ 72. Accordingly, a plaintiff has standing to sue even where he or she lacks a factual injury so long as he or she is within the class of persons upon whom a statute confers a cause of action.

For these reasons, the supreme court affirmed the reversal of summary judgment.

Chief Justice Newby concurred in the result because the legislature constitutionally exercised its ability to recognize a public injury, declare an appropriate plaintiff, and fashion a remedy in creating the cause of action at issue.

J. Immunity

(1) Sovereign

In Farmer v. Troy University, 276 N.C. App. 53, 2021-NCCOA-36, disc. rev. allowed in part and denied in part, ___ N.C. ___, 863 S.E.2d 775 (2021), the court of appeals considered

whether interstate sovereign immunity bars a suit against an out-of-state public university that is registered in North Carolina as a nonprofit corporation.

A former employee of Troy University, a public university incorporated and located in the State of Alabama, sued the university for wrongful discharge and negligence, and several of its employees for sexual harassment, all of which occurred at the university's recruiting center in North Carolina. Id. at ¶¶ 2–4. The university, including its employees, asserted a defense of sovereign immunity. Id. at ¶ 5. The trial court granted the university's motion to dismiss, citing to a recent Supreme Court of the United States ruling, Franchise Tax Board of California v. Hyatt ("Hyatt III"), which held that "States retain the sovereign immunity from private suits brought in the courts of other States." Farmer, 2021-NCCOA-36 at ¶ 14 (quoting Hyatt III, 139 S. Ct. 1485, 1492 (2019)).

On appeal, the court of appeals affirmed the trial court's ruling. At the outset, the court of appeals agreed with the trial court's interpretation of Hyatt III, explaining that the Constitution "embeds interstate sovereign immunity within the constitutional design." Id. (quoting Hyatt III, 139 S. Ct. at 1497). The court of appeals rejected the plaintiff's argument that Hyatt III was inapposite where "all the tortious conduct occurred within the sovereign boundaries of North Carolina." Id. at ¶ 15. Rather, "the dispositive issue is whether one state has been 'haled involuntarily' into the courts of another state." Id. at ¶ 16 (citing Hyatt III, 139 S. Ct. at 1494).

Next, the court of appeals addressed the employee's argument that the doctrine of interstate sovereign immunity did not apply because the university was acting in a corporate function, i.e., student recruitment, when the alleged tortious conduct occurred. The court of appeals rejected the argument that the university fell under a "business and commercial ventures" exception to Alabama's sovereign immunity, because the state had not "implicitly" waived its sovereign

immunity. Id. at ¶ 21. To find otherwise would conflate the doctrines of sovereign immunity—under which the State is immune from suit—and governmental immunity—under which a municipality is immune from suit for negligent conduct within governmental functions—and "[a]s an arm of the State of Alabama, Troy University is immune from suit under the doctrine of sovereign immunity, not governmental immunity." Id. at ¶¶ 22, 23. Thus, without an explicit waiver of its sovereign immunity, the university, as an arm of the state, could "not be 'haled involuntarily' into the courts" of North Carolina. Id. at ¶¶ 27, 28 (citing Hyatt III, 139 S. Ct. at 1497).

Moreover, the Hyatt III holding applies retroactively to bar the employee's claims even though the suit was filed prior to the Supreme Court's ruling. Id. at ¶ 35. The issue here is not one of intrastate sovereign immunity, which is a matter of state law. Id. at ¶¶ 35, 36. Here, the court of appeals distinguished Smith v. State, which refused to apply retroactively a holding that when the State enters into a valid contract, it implicitly waives its sovereign immunity vis-à-vis that contract. Id. at ¶ 36 (citing Smith, 289 N.C. 303, 320, 222 S.E.2d 412, 423–24 (1976)). Rather, Hyatt III "concerns the federal constitutional implications of interstate sovereign immunity…[and] 'is implied as an essential component of federalism.'" Id. at ¶ 137 (quoting Hyatt III, 139 S. Ct. at 1497). Regardless, courts do not create law: "the act of overruling is a confession that the prior ruling was erroneous and was never the law." Id. at ¶ 38 (quoting Cox v. Haworth, 304 N.C. 571, 573 284 S.E.2d 322, 324 (1981)). Thus, "retroactive application of Hyatt III is required to achieve the purpose of the Court's holding." Id. at ¶ 41.

Finally, the court of appeals rejected the employee's argument that the individual defendants, as residents and citizens of North Carolina, did not fall within the ambit of the university's sovereign immunity. In his complaint, the employee failed to specify that he was

suing either individual defendant in her personal capacity, and "[a] suit against a public official in her official capacity is a suit against the State." Id. at ¶ 50 (quoting White v. Trew, 366 N.C. 360, 363, 736 S.E.2d 166, 168 (2013)).

For these reasons, the court of appeals affirmed the trial court's grant of dismissal on the grounds of the university's interstate sovereign immunity.

In Estate of Long v. Fowler, 378 N.C. 138, 2021-NCSC-81, the supreme court decided whether actions against state employees for acts occurring in the scope of employment are necessarily actions against them in their official capacity.

Several state employees improperly performed maintenance on pipes during and in the scope of their employment, causing the pipes to become pressurized. Id. at ¶¶ 2-3, 6-7. Another person worked on the pipes at a later date and was killed after an object propelled by the pressure struck him. Id. at ¶¶ 2, 8. The man's estate sued the state employees for monetary damages, identified the employees by name and with the word "individually" in the caption of the complaint, and otherwise alleged in the complaint that the action was against the employees in their individual capacities. Id. ¶¶ 3, 14, 15. The trial court dismissed the action on the basis of sovereign immunity, and the court of appeals reversed in a split decision because the employees had been sued in their individual capacities. Id. at ¶ 10.

On appeal, the supreme court affirmed the court of appeals, holding that a suit against state employees in their individual capacities is not barred by sovereign immunity. First, the court held that the complaint clearly sued the employees in their individual capacities because it (i) sought monetary relief rather than some injunctive relief that implicated the government, (ii) identified the employees' capacities as individual in the caption of the complaint, and (iii) identified the employees' capacities as individual in the prayer for relief. Id. at ¶¶ 14, 15. Because the complaint

indicated the employees were being sued in their individual capacities, the court declined as unnecessary the employees' invitation to determine defendants' capacities by looking to the course of proceedings. Id. at ¶ 17.

The supreme court also expressly rejected the employees' argument that claims arising from actions performed in the scope and course of state employment are necessarily official-capacity suits. Id. ¶ 16. It held that both the statutory scheme of the State Tort Claims Act and the court's own prior decisions recognized the distinction between official capacity and individual capacity claims and that abolishing the distinction would contravene well-established precedent and the intent of the General Assembly. Id. at ¶¶ 22-24. This conclusion was reinforced by the State Tort Claims Act's grant of discretionary authority to the state as an employer to pay judgments or settlements on behalf of its employees when sued in their individual capacities and the fact that the discretionary authority provision by its own terms does not waive sovereign immunity. Id. at ¶¶ 21. 24

For these reasons, the supreme court affirmed the ruling of the court of appeals and held the trial court erred by granting the employees' motion to dismiss on the basis of sovereign immunity.

Justice Berger wrote a dissent in which Chief Justice Newby and Justice Barringer joined. The dissent would have held that state employees are subject to the protection of sovereign immunity in the performance of their official duties and would have abolished the distinction between official capacity and individual capacity suits. Id. at ¶¶ 40, 43 (Berger, J., dissenting). The dissent reasoned that the state can act only through officers and employees, so when the legislature vested exclusive jurisdiction over claims against the state in the Industrial Commission,

it also meant to give the Commission exclusive jurisdiction over claims against the state's officers and employees arising from the performance of their duties. Id. at ¶¶ 44-45 (Berger, J. dissenting).

(2) Governmental

In Baznik v. FCA US, LLC, ___ N.C. App. ___, ___ S.E.2d ___, 2021-NCCOA-583, the court of appeals considered whether engineers and supervisors with the North Carolina Department of Transportation should be entitled to public official immunity from individual liability for negligence in the construction of an intersection.

A minor child was traveling in a car on Fox Road in Wake County, which approached the intersection with U.S. Highway 401. Id. at ¶2. The intersection required vehicles traveling eastbound on Fox Road to cross seven lanes of traffic and a median divider to continue travel on the road. Id. Natural and manmade objects rendered such a vehicle's driver unable to see portions of U.S. Highway 401 from the intersection, in violation of federal and state sight distance standards. Id. While traveling through the intersection, the car carrying the minor child was struck by another vehicle. Id. The minor child survived; however, a manufacturing defect in the car in which he was riding caused fuel to ignite, resulting in severe injuries to the child and his eventual death. Id.

The child's father brought suit on behalf of the child's estate naming NCDOT engineers and a supervisor in their individual capacities. Id. at ¶ 3. Each of the NCDOT engineers and supervisor contributed to the construction of the intersection. Id. The NCDOT engineers and supervisor filed motions to dismiss, citing "public official immunity and/or qualified immunity, as well as the doctrine of sovereign immunity." Id. The trial court denied the motions but did not specify its reasoning. Id. The NCDOT engineers and supervisor appealed.

The court of appeals considered whether the engineers and supervisor were entitled to public official immunity through their employment with NCDOT. Id. at ¶ 6. The court noted that when a government worker is sued individually, North Carolina courts distinguish between public officers and public employees to determine negligence liability. Id. (citing Reid v. Roberts, 112 N.C. App. 222, 224, 435 S.E.2d 116, 119 (1990)). Public employees can be held individually liable for mere negligence in performing their duties, while public officials cannot be held liable for mere negligence in the performance of governmental or discretionary duties. Id. (citing Meyer v. Walls, 347 N.C. 97, 112, 489 S.E.2d 880, 888 (1997)).

The court relied on a three-part test to guide its analysis whether the engineers and supervisor were public employees or public officials: (1) whether the public office was created by the constitution or statute, (2) whether the public official exercises a portion of the state's sovereign power, and (3) whether the public official exercises discretion, while public employees perform ministerial duties. Id. (citing Isenhour v. Hutto, 350 N.C. 601, 610, 517 S.E.2d 121, 127 (1999)). A party asserting public official immunity must establish all three factors. Id. Additionally, the court observed that public officials generally take an oath of office, though such an oath is not dispositive. Id.

The engineers and supervisor argued they were public officials because their positions were created pursuant to sections 143B-345, 143B-346, and 136-18 of the North Carolina General Statutes. Id. at ¶ 7. The court disagreed. Id. The court observed that "[a] person occupies a positioned created by legislation if the position 'ha[s] a clear statutory basis or the officer ha[s] been delegate a statutory duty by a person or organization created by statute.'" Id. (quoting Fraley v. Griffin, 217 N.C. App. 624, 627, 720 S.E.2d 694, 696 (2011)). In reviewing Sections 143B-345 and 143B-346, the court noted that the statutes "are void of any created positions and only

speak to NCDOT as an entity in and of itself." Id. at ¶ 8. The court held that the engineers and supervisor could not rely on these statutes as creating their positions within NCDOT "as these statutes do not establish any position within NCDOT." Id. Turning to the remaining statute, the court of appeals identified this provision merely defined the powers allotted to NCDOT. "The existence within a statute of a 'statutory definition does not constitute [the] creating . . . [of a] position.'" Id. at 9 (citing Fraley, 217 N.C. App. at 627, 720 S.E.2d at 696.

The court held that none of statutes cited by the engineers and supervisor created their positions, or indeed any positions, within NCDOT. Id. "Thus, Defendants have not established a clear statutory basis for their positions within NCDOT and are considered public employees, not public officials." Id. at ¶ 10.

Due to the fact that no statute cited created the positions held by the engineers or supervisors, the court held the engineers and supervisors were NCDOT employees and not public officials. Id. at ¶ 11. Accordingly, the court of appeals affirmed the trial court's denial of the NCDOT employees' motions to dismiss. Id.

K. Rule 41

In Meabon v. Elliott, ___ N.C. App. ___, 2021-NCCOA-270, the court of appeals considered whether a trial court properly dismissed an action for failure to prosecute where the plaintiff served the complaint four years after filing only after the trial court entered an order directing some action in the case.

A debtor seeking to file for bankruptcy consulted an attorney, disclosed the existed of a trust account, and learned he would need to disclose that trust in his bankruptcy. See id. at ¶ 2. The debtor hired a different attorney to file for bankruptcy without disclosing the trust to that attorney. Id. The second attorney filed the bankruptcy petition on the debtor's behalf and did not

disclose the trust. Id. The previously consulted attorney notified the second attorney of the trust, and the second attorney demanded the debtor disclose the trust to the court. Id. at ¶ 3. The debtor disclosed the trust and then terminated the second attorney's representation. Id. The debtor then retained a new law firm in 2011. Id. at ¶ 4. A second undisclosed trust was discovered in the bankruptcy. Id. at ¶ 7. The bankruptcy court revoked the debtor's discharge, and criminal contempt charges were filed against him. Id. at ¶¶ 7-8.

The debtor commenced a legal malpractice action against the law firm hired in 2011 on January 20, 2015. Id. at ¶ 9. An alias and pluries summons issued on April 20, 2015, and the debtor continued to file alias and pluries summonses until February 8, 2019. Id. The debtor did not attempt to serve the law firm during that time, and the office and address of the law firm did not change. Id. at 11. On March 14, 2019, the trial court entered an order directing action and instructing the debtor to serve the law firm, and the debtor served the law firm on April 8, 2019. Id. at ¶ 10. During the four-year delay, the first attorney died, a fact witness moved away, and the law firm lost potential evidence – such as some time entries – by transitioning to new time entry software. Id. The law firm moved to dismiss the action for failure to prosecute under Rule 41(b). Id. ¶ 12. The trial court granted the motion after concluding the debtor had deliberately and unreasonably delayed the matter and prevented the preservation of relevant evidence. Id. at ¶ 13.

On appeal, the court of appeals affirmed. The debtor argued that the trial court erred in dismissing the action for failure to prosecute. Id. ¶ 15. The court of appeals first observed that trial courts must analyze three factors identified in Wilder v. Wilder, 146 N.C. App. 574, 553 S.E.2d 425 (2001) before dismissing a claim for failure to prosecute. Meabon, 2021-NCCOA-270 at ¶ 19. The factors are: 1) whether the plaintiff acted in a manner that deliberately or unreasonably delayed the matter, 2) the prejudice to the defendant, and 3) the reason that sanctions less severe

than dismissal would not suffice, assuming one exists. Id. The trial court had considered all three factors in this case, and the court of appeals discussed each factor. Id.

First, the court of appeals explained that the debtor's delay for over four years was unreasonable. Id. at 29. The court noted that, although alias and pluries summonses are available tools and may be used appropriately, even a delay of less than one year has been held to be deliberate and unreasonable. Id. at ¶ 21. Additionally, the debtor's delay prevented the law firm from preparing and preserving evidence. Id. at ¶ 24. During the delay, one witness died, and another moved out of state. Id. Further, service occurred only after the trial court directed it. Id. The court of appeals recognized that the debtor argued that the delay was not an attempt to gain an unfair advantage. Id. at ¶ 25. But while the debtor argued his delay resulted from waiting to identify the total damages of his malpractice claim, the court of appeals observed the damages from the alleged malpractice were apparent by September 28, 2017, at least eighteen months before he served the law firm. Id. at ¶ 28. The court held the delay was unreasonable for all of these reasons. Id. at ¶ 29.

Second, the court held that the debtor's delay prejudiced the law firm because of the death and move of witnesses. Id. at ¶ 30. Third and finally, the court held that dismissal was the appropriate sanction because the debtor offered no showing that a lesser sanction was appropriate under the circumstances. Id. at ¶ 32.

For these reasons, the court of appeals affirmed the trial court's dismissal for failure to prosecute.

L. Rule 45

In State v. Wendorf, 274 N.C. App. 480, 852 S.E.2d 898 (2020), the court of appeals considered whether the district court could hold in criminal contempt a woman who failed to appear at a district court trial after receiving a subpoena.

A man allegedly assaulted his girlfriend. Id. at 482, 852 S.E.2d at 901. Prior to the trial, the district attorney's victim's coordinator served a subpoena on the girlfriend, compelling her appearance at the man's trial. Id. The girlfriend did not appear. Id. Because she was the only witness, the assistant district attorney took a voluntary dismissal of the case. Id. The assistant district attorney moved for the district court to order the girlfriend to show cause why she should not be held in contempt for failing to appear. Id. The girlfriend was served with the show cause order, found in criminal contempt of court, and ordered to pay a fine of $250. Id. The girlfriend appealed from the district court's order of criminal contempt to the superior court. The superior court heard testimony from the district attorney's victim's coordinator and the district court judge who presided over the trial. Id. at 489, 852 S.E.2d at 906. Based on the witnesses' testimony, the superior court affirmed the district court's order. Id. at 482, 852 S.E.2d at 901-02.

On appeal, the court of appeals affirmed the superior court's criminal contempt order. Id. First, the girlfriend argued that failure to appear cannot be a basis for an order of criminal contempt. Id. at 483, 852 S.E.2d at 902. The court rejected this argument, holding that an individual who fails to appear after being subpoenaed can be held in criminal contempt of court. Id.

Second, the girlfriend argued the district court's show-cause order was defective because it did not comply with the statutory pleading requirements applicable to criminal cases in superior court. Id. at 485, 852 S.E.2d at 903. She argued that the defective nature of the show-cause order divested the district court of jurisdiction to enter the order of criminal contempt. Id. The court

observed that it did not have jurisdiction to review a district court's contempt order because the superior court possesses exclusive jurisdiction to hear appeals from orders in the district court. Id. However, the court held that since the superior court's appellate jurisdiction was derivative of the district court's jurisdiction, the court could consider whether the district court had jurisdiction to issue the order. Id. The court rejected the argument, holding that notice requirements in plenary proceedings for criminal contempt are much less demanding than notice requirements in ordinary criminal cases in superior court. Id. at 486, 852 S.E.2d at 904. As a result, the statutory pleading requirements for criminal cases in superior court do not apply to show cause orders in district court. Id. Thus, the court held that the show-cause order was not defective, and therefore, the district court had jurisdiction to enter the criminal-contempt order. Id.

Next, although the girlfriend did not object to the judge's testimony at the superior court level, she argued that the court committed plain error by allowing the district court judge to testify about her failure to appear. Id. at 487, 852 S.E.2d at 905. She argued this testimony was improper because (1) the district court judge could not be neutral and disinterested when testifying; and (2) his testimony violated Rule 605 of the North Carolina Rules of Evidence, which prohibits a judge from testifying in a proceeding over which he is presiding. Id. The majority agreed to review the argument for plain error. Id. As to the first argument, the court held that "witnesses who are not neutral or disinterested are not categorically prohibited from testifying." Id. at 489, 852 S.E.2d at 906. As to the second argument, the court held that the district court judge was not presiding over the superior court hearing, so there was no violation of Rule 605. Id. at 488, 852 S.E.2d at 905. Thus, the court found the superior court committed no error—let alone plain error—in permitting the district court judge to testify. Id. at 489, 852 S.E.2d at 906.

Finally, the girlfriend argued that competent evidence did not support the trial court's finding that she willfully failed to appear. Id. The court rejected this argument. Id. The court held that sufficient evidence supported that the girlfriend had properly been served with a subpoena and had willfully failed to appear based on testimony from the district attorney's victim's coordinator who served the subpoena and the district court judge who witnessed the girlfriend's failure to appear. Id. at 490-91, 852 S.E.2d at 906-07. Therefore, the court of appeals held that the superior court had properly affirmed the order of criminal contempt. Id. at 491, 852 S.E.2d at 907.

For these reasons, the court of appeals affirmed the superior court's order of criminal contempt. Id.

Judge Berger concurred by separate opinion with respect to the girlfriend's Rule 605 argument. Id. (Berger, J., concurring). He stated that the majority should not have engaged in plain error review because plain error review "is not available on appeal for unpreserved evidentiary issues that fall within a trial court's sound discretion." Id. at 492, 852 S.E.2d at 908 (quoting State v. Steen, 352 N.C. 227, 255-56, 536 S.E.2d 1, 18 (2000)). Thus, Judge Berger would not have addressed the girlfriend's argument about the district court judge's testimony because he would have found it unpreserved for appellate review. Id.

In State v. Gonzalez, ___ N.C. App. ___, 2021-NCCOA-309, the court of appeals considered whether a witness may be held in criminal contempt despite being served personally with a defective subpoena when the witness was also served properly by telephone.

A deputy with the Watauga County Sheriff's office personally served three subpoenas on a witness, one for the witness herself and one each for her two children, to appear and testify in court. Id. at ¶ 2. Prior to being personally served with the subpoenas, a member of the Watauga

County Sherriff's Office called the witness and served her via telephone by informing her of the relevant subpoena information. Id. The witness did not appear or bring her daughters to testify in accordance with the subpoenas. Id. at ¶ 3. Instead, the witness admitted to both a police officer and an assistant district attorney that she purposefully left her residence and turned off her cell phone so that she could not be contacted during the time of the trial. Id. The court issued an order to show cause, directing the witness to appear and show cause why she should not be held in criminal contempt. Id. The witness objected to jurisdiction, arguing that the subpoena only included the front page of the AOC Form G-100 and, therefore, without the back page, was insufficient to require her to appear. Id. at ¶ 4. The trial court rejected this argument and held the witness in criminal contempt. Id. at ¶ 5. The witness appealed. Id.

The court of appeals affirmed the trial court's order of contempt. First, the court of appeals addressed the witness's argument that the subpoena that was personally served lacked the elements required by Rule 45 of the North Carolina Rules of Civil Procedure in that it did not contain the second page containing the protections required by the Rule. Id. at ¶¶ 6-9. The court of appeals found that the subpoena was insufficient under Rule 45 because the Rule provides that every subpoena shall state the protection of persons subject to the subpoena and the requirements for responses to the subpoena. Id. at ¶ 10. However, the court of appeals found that Rule 45 also allows for "[s]ervice of a subpoena for the attendance of a witness" to be made "by telephone communication with the person named therein" when a sheriff or "sheriff's designee" conducts the telephone communication. Id. at ¶ 8. Because a member of the sheriff's office called the witness to inform her of the subpoena, the witness was properly served by telephone. Id. at ¶ 11. Thus, the trial court had jurisdiction over the witness to hold her in contempt. Id.

Accordingly, the court of appeals affirmed the trial court's order of contempt. Id. at ¶ 19.

M. Summary Judgment

In Curlee v. Johnson, 377 N.C. 97, 2021-NCSC-32, the supreme court considered whether a landlord met his burden of showing through discovery that there was no genuine issue of material fact as to whether he had knowledge that a dog owned by tenants occupying his rental property posed a danger to third parties.

A landlord leased a single-family residential property to two tenants. Id. at ¶ 2. The tenants owned a dog that lived with them on the property. Id. A child visiting the home was playing with the dog, and the dog "nicked" the top of the child's head, causing a minor cut. Id. Animal services investigated the incident and determined that the dog did not meet the definition of a "dangerous dog" or a "potentially dangerous dog" under section 67-4.1 of the North Carolina General Statutes. Id. at ¶ 3. Accordingly, animal services advised the tenants of voluntary steps they could take to minimize the risks of keeping the dog, including keeping the dog on a leash anytime children were present. Id. Neither animal services nor the tenants notified the landlord of the incident. Id. at ¶ 6.

Over six months later, another child was visiting the tenants' home while the dog was restrained with a chain on the property. Id. at ¶ 4. When the child walked within the radius of the chain, the dog bit the child on the cheek, causing severe injuries. Id. The child, through his parents, brought negligence and strict liability claims against the tenants and landlord. Id. at ¶ 5. Based on the lack of evidence showing that the landlord had been informed of the first incident with the dog, the trial court granted the landlord's motion for summary judgment.

The court of appeals, with Judge Tyson writing on behalf of the majority, affirmed the trial court's ruling that there was no genuine issue of material fact as to whether the landlord had prior knowledge that the dog posed a danger. Id. at ¶ 9; see also Curlee v. Johnson, 270 N.C. App. 657,

666, 842 S.E.2d 604, 611 (2020) (Brook, J., dissenting). Judge Brook dissented, arguing that the landlord had not met his burden of establishing that no genuine issue of material fact existed. Id. at ¶ 10. The child's guardian ad litem appealed to the supreme court on the child's behalf based on the dissenting opinion. Id. at ¶ 11.

The supreme court affirmed the court of appeals, finding that the landlord met his burden of showing through discovery that the child, by and through his guardian ad litem, failed to establish that the landlord had knowledge that the dog posed a danger prior to the incident. The court explained:

> A landlord has no duty to protect third parties from harm caused by a tenant's animal unless, prior to the harm, the landlord (1) "had knowledge that a tenant's dog posed a danger," and (2) "had control over the dangerous dog's presence on the property in order to be held liable for the dog attacking a third party."

Id. at ¶ 12 (quoting Stephens v. Covington, 232 N.C. App. 497, 500, 754 S.E.2d 253, 255 (2014)). In concluding that the record evidence "clearly and consistently indicate[d] that [the] landlord had no prior knowledge of the prior incident" or any information related to the dog's history of potentially dangerous behavior, the court referenced the landlord's testimony that he had no knowledge of the first incident, testimony from one of the tenants that she never told the landlord about the first incident, and testimony from the guardian ad litem that she did not have any information or evidence to suggest that the landlord was notified by the sheriff, Animal Control, or any other party about the prior incident. Id. at ¶ 15. The court found that evidence of precautions such as "Beware of Dog" signs was "not sufficient to give a reasonable landlord constructive notice that his tenant is harboring a dog with dangerous propensities." Id. at ¶ 16. The court also concluded that responses from the tenant to requests for admission which contradicted her sworn

testimony were inadmissible against landlord to establish a genuine issue of material fact. Id. at ¶ 15.

In Woody v. Vickrey, 276 N.C. App. 427, 2021-NCCOA-105, the court of appeals considered whether a superior court judge may enter summary judgment on an amended complaint where a different superior court judge denied summary judgment on the original complaint.

Residents filed a complaint against the trustee of a trust seeking to quiet title to real property that trustee had transferred to himself. Id. at ¶ 5. The trustee counterclaimed, seeking among other relief, declaratory judgment and cancellation or recission of the documents signed by the settlor due to duress, undue influence, and lack of capacity. Id.

The trustee filed a motion for summary judgment, which was denied by the superior court judge assigned to the case. Id. at ¶ 6. However, approximately ten days earlier, one of the residents was granted leave to file, and did in fact file, an amended and restated complaint against the trustee related to breach of fiduciary duty. Id. In response, the trustee answered the amended and restated complaint and amended his counterclaims. Id.

Several months later, the trustee filed a second motion for summary judgment before a different superior court judge. Id. at ¶ 7. In an order granting declaratory judgment, the second superior court judge granted the trustee's motion for summary judgment in favor of the trustee on the parties' claims for quiet title and conversion and the trustee's third-party claim for cancellation and recission of the instruments executed by the settlor. Id.

In considering whether the trial court properly granted summary judgment in favor of the trustee, the court of appeals specifically referenced the "well-established rule" that "'no appeal lies from one Superior Court judge to another; that one Superior Court judge may not correct another's errors of law; and that ordinarily one judge may not modify, overrule, or change the judgment of

another Superior Court judge previously made in the same action.'" Id. at ¶ 33 (quoting Calloway v. Ford Motor Co., 281 N.C. 496, 501, 189 S.E.2d 484, 488 (1972)). However, the court held that the trial court had jurisdiction to address the motion for summary judgment on the amended and restated complaint. Id. Specifically, the court of appeals reasoned that because an amended complaint has the effect of superseding the original complaint such that the filing of an amended and restated complaint renders any arguments regarding the original complaint moot, including the original motion for summary judgment, here the trial court had jurisdiction to address the subsequent motion for summary judgment. Id. (citing Houston v. Tillman, 234 N.C. App. 691, 695, 760 S.E.2d 18, 20 (2014)).

N. Discovery Sanctions

In Mace v. Utley, 275 N.C. App. 93, 853 S.E.2d 210 (2020), disc. rev. allowed, 377 N.C. 557, 858 S.E.2d 110 (2021), the court of appeals considered whether a court abuses its discretion by declining to impose discovery sanctions when the movant for sanctions failed to comply with the rules of discovery.

A site preparation company sued a fuel company after a commercial dispute. Id. at 95, 853 S.E.2d at 212. The parties were both aware that discovery would close on February 28, 2019. Id. Despite several communications between the parties over the next month, they were unable to agree upon a mutually acceptable date for depositions. Id. at 96, 853 S.E.2d at 212-13. On February 14, 2019, the site preparation company noticed the depositions of individuals related to the fuel company, to be held on February 28, 2019. Id. at 97, 853 S.E.2d at 213. The individuals were residents of Orange County, but the notice of deposition purported to require them to attend a deposition in Guilford County. Id. Counsel for those individuals informed counsel for the site

preparation company that the individuals would not attend the deposition, and the site preparation company moved to compel. Id. The trial court denied the motion. Id.

The court of appeals affirmed the trial court's order denying the motion to compel depositions. First, the court of appeals noted that the notice of deposition was defective. Id. Under Rule 30(b)(1), a North Carolina resident "may be required to attend for examination by deposition only in the county wherein he resides or is employed or transacts his business in person." Id. (quoting N.C.R. Civ. P. 30). The notice of deposition to the individuals in this case improperly purported to require them to appear in a different county, and therefore did not comply with the discovery rules. Id. Next, the court discussed that "Rule 37 of the North Carolina Rules of Civil Procedure allows for sanctions of a party who fails to appear for a deposition, after receiving proper notice, unless the party has filed for a protective order." Id. Since the notice was defective, the site preparation company failed to satisfy a predicate to sanctions. Id. Accordingly, the individuals were not required to move for a protective order to justify not appearing for depositions and sanctions were not available against them.

For these reasons, the court of appeals affirmed denial of the motion to compel depositions.

O. Dismissal

In TOG Properties, LLC v. Pugh, 276 N.C. App. 422, 2021-NCCOA-104, the court of appeals considered whether a notice of voluntary dismissal is rendered invalid if not served on the plaintiffs in a separate lawsuit where the two actions have been consolidated for trial.

This matter concerned two lawsuits: the "Sullivan Lawsuit," which involved the plaintiff Sullivan against Pugh, and the "TOG Lawsuit," which involved the plaintiff TOG against Pugh. Id. at ¶ 2. Upon motion, the trial court consolidated the two lawsuits for trial. Id. After significant motions practice, TOG filed a notice of voluntary dismissal with prejudice in the TOG Lawsuit.

Id. at ¶ 7. TOG did not serve the notice of dismissal on Sullivan. Id. at ¶ 8. Sullivan objected, asserting that he was denied due process because he was not served the notice. Id. The trial court denied Sullivan's objection and found that the voluntary dismissal of the TOG Lawsuit was proper. Id. at ¶ 9.

On appeal, the court of appeals affirmed the trial court's finding that the voluntary dismissal was valid. Sullivan argued that the voluntary dismissal was invalid because it was not served upon Sullivan. Id. at ¶ 12. Under North Carolina law, "when cases are consolidated for trial, although it becomes necessary to make only one record, the cases remain separate suits and retain their distinctiveness throughout the trial and appellate proceedings." Id. at ¶ 14 (quoting Kanoy v. Hinshaw, 273 N.C. 418, 424, 160 S.E.2d 296, 301 (1968)). Accordingly, despite the consolidation of the Sullivan Lawsuit and the TOG Lawsuit, "Sullivan was not a party to the TOG Lawsuit . . . and TOG was not required to serve its notice of Voluntary Dismissal upon Sullivan." Id. at ¶ 15.

For these reasons, the court of appeals affirmed the trial court's finding that the voluntary dismissal of the TOG Lawsuit was proper.

III. TRIAL

A. Jury Selection

In State v. Crump, 376 N.C. 375, 851 S.E.2d 904 (2020), the supreme court considered whether a trial court erred by prohibiting a criminal defense counsel from asking the jury certain questions about racial bias during voir dire.

Police officers received a call about three suspicious black men sitting with several weapons in a parked Mustang in a parking lot. Id. at 376-77, 851 S.E.2d at 907-08. The officers

arrived at the parking lot in four marked patrol vehicles, without lights or sirens activated. Id. at 377, 851 S.E.2d at 908. Two officers carrying weapons walked surreptitiously to the rear of the parking lot, to avoid being detected by the men sitting in the Mustang. Id. The officers did not identify themselves as police officers. Id. The driver of the Mustang noticed that men with guns were approaching his vehicle. Id. The men and the officers exchanged gunshots, though it was disputed which group fired their weapons first. Id.

The driver of the Mustang started the vehicle and exited the parking lot, driving near the area where the officers with weapons were standing. Id. The officers believed they were being ambushed and began shooting at the Mustang as it passed them. Id. Once the officers returned to their vehicles and turned on their lights and sirens, the driver realized he had been exchanging gunshots with law enforcement officers. Id. at 378, 851 S.E.2d at 908. The driver called 911 to explain the situation, in the hopes of being able to surrender without further gunshots. Id. Eventually, all three men in the vehicle were arrested. Id. The driver was charged with a previous robbery and kidnapping, as well as assault with a deadly weapon with intent to kill and assault on a law enforcement officer with a firearm. Id. at 378, 851 S.E.2d at 909.

During voir dire, defense counsel sought to pursue certain lines of inquiry into prospective jury members relating to racial bias and police-officer shootings of black civilians. Id. at 379, 851 S.E.2d at 909. The questions sought to elicit whether the prospective jurors harbored racial bias against black men. Id. at 382, 851 S.E.2d at 911. They also sought to determine the prospective jurors' awareness and opinions regarding police-officer shootings of black men. Id. The State objected to these lines of questioning, and the trial court sustained this objection. Id. at 382-83, 851 S.E.2d at 911.

The defendant appealed, and the court of appeals affirmed the trial court's ruling. Id. at 379-80, 851 S.E.2d at 909-10. The State argued that the trial court did not prohibit defense counsel from asking all questions about racial bias, but only sustained narrow objections to a limited number of improper questions. Id. at 384, 851 S.E.2d at 912. The court of appeals accepted this argument. Id. In ruling on the issue, the court did not explicitly address whether the trial court had erred by preventing the defense from asking certain questions of prospective jurors. Id. at 380, 851 S.E.2d at 910. The court did acknowledge, however, that questions about police-officer shootings of black men could be proper or necessary subjects of inquiry in cases where a black, male defendant was involved in a shooting with police officers. Id. However, the court reasoned that "[p]er defendant's own testimony, it was not until the car chase ensued that he was even aware the individuals he fired on were police officers." Id. (quoting State v. Crump, 259 N.C. App. 144, 156, 815 S.E.2d 415, 424 (2018)).

The supreme court reversed the decision of the court of appeals. Id. at 375, 851 S.E.2d at 907. In a decision authored by Justice Earls, the majority held that the trial court had abused its discretion in prohibiting defense counsel from asking the specific questions to the prospective jurors. Id. The court noted that a trial court has discretion to limit the extent and manner of counsel's examination of prospective jurors during voir dire. Id. at 380, 851 S.E.2d at 910. The court held that a trial court does not abuse its discretion when it prevents counsel from asking questions that are irrelevant, improper in form, or attempt to 'stake out' a juror. Id. at 382, 851 S.E.2d at 911. Moreover, the court held that the trial court is not prohibited from limiting questions to which the answer was admitted in response to another question or questions that contain an incomplete statement of law. Id. However, the court held that a crucial distinction exists between foreclosing entire lines of inquiry and rejecting specific inappropriate questions. Id. at 384, 851

S.E.2d at 912. While a trial court generally has the discretion to regulate the "manner and the extent of inquiries [during] voir dire" by rejecting improper questions, the trial court does not have discretion to entirely prevent a party from asking any questions at all about an appropriate and relevant subject. Id. (quoting State v. Allen, 322 N.C. 176, 189, 367 S.E.2d 626, 633 (1988)) (emphasis in original).

The court reviewed the voir dire questioning holistically and held that the trial court prevented the defendant from pursing any line of inquiry regarding racial bias, implicit or otherwise. Id. The court held that the trial court had foreclosed the defendant from approaching the same topic from a different angle because it forbade asking questions about the shooting of Michael Brown and riots in Ferguson, Missouri. Id. The court held that "the fact that the trial court rejected three questions in a row that related to the topic of racial bias is strong evidence that 'the trial court would have prohibited . . . further questions to the jurors' about racial bias, even if defense counsel did not return to the subject again after being repeatedly denied." Id. at 386, 851 S.E.2d at 913. In so holding, the court rejected the proposition that a trial court does not abuse its discretion so long as it never expressly states that a defendant is unallowed to inquire into a subject. Id. Because the court held that the questions about the shooting of black men by police officers constituted inquiry into a relevant topic, and not an impermissible stakeout question, the court held that the trial court abused its discretion in categorically denying the defendant the opportunity to ask prospective jurors about police-officer shootings of black men. Id.

Moreover, the court disagreed with the court of appeals' determination that the trial court's denial of defense counsel's voir dire questions did not prejudice the defendant because "he did not know the individuals he was shooting at were police officers at the time of the shooting." Id. at 390, 851 S.E.2d at 916. The court held that the defendant's lack of awareness that he was shooting

at police officers did not alter the possible relevance of any biases held by the jurors to their own resolution of the factual dispute. Id. The court ruled that a juror who harbored racial animus against black people, or who believed a police officer shooting an unarmed civilian was inevitably in the wrong, might struggle to fairly and impartially determine the defendant's guilt. Id. Furthermore, the court rejected the State's argument that no prejudicial error occurred simply because the trial court allowed the defendant to ask prospective jurors about their attitudes toward law enforcement officers. Id. at 391, 851 S.E.2d at 917. The court held that these questions were not a substitute for the questions which were denied by the trial court because none of those questions touched upon issues of race, and none elicited information about the prospective jurors' opinions of police-officer shootings of black men. Id. Thus, because there was a clear connection between the questions the defendant attempted to ask to prospective jurors and the meaningful factual disputes the jury was required to resolve, the court held that the trial court abused its discretion and prejudiced the defendant by restricting all inquiry into prospective jurors' racial biases and opinions regarding police-officer shootings of black men. Id.

Justice Davis dissented, and Justices Newby and Morgan signed onto his dissent. Id. at 393, 851 S.E.2d at 918 (Davis, J., dissenting). The dissent criticized the majority's opinion for two reasons: First, the dissent stated that the majority focused on questions that the defendant could have asked prospective jurors rather than the specific questions that the defendant actually sought to ask prospective jurors. Id. at 399, 851 S.E.2d at 921. Second, the dissent stated that the majority did not acknowledge the reasons that defense counsel articulated to the trial court as his purpose for asking those questions. Id. at 401-02, 851 S.E.2d at 923. The dissent observed that the trial court's rulings were narrow, and only prohibited defense counsel from asking three specific questions. Id. at 399, 851 S.E.2d at 921. The dissent stated that defense counsel never

actually asked prospective jurors non-objectionable questions about the general topic of racial bias, and that the trial court never ruled that the subject was an impermissible topic of questioning. Id. Moreover, the dissent noted that the defense counsel did not seek clarification as to the boundaries of the trial court's ruling or ask any other questions on race-related issues. Id. at 402, 851 S.E.2d at 923. The dissent also criticized the majority for not stating the actual arguments that the defense counsel put forward as his reasons for asking the objectionable questions. Id. at 401-02, 851 S.E.2d at 923. Rather, the dissent stated that the majority substituted more favorable arguments for the defendant than those actually made by defense counsel in the trial court. Id. The dissent accused the majority of being "complicit" in the defendant's attempts to "'swap horses' on appeal." Id. at 402, 851 S.E.2d at 923.

The dissent also would have held that the defendant failed to show prejudice by the trial court's decision not to allow the challenged lines of questioning. Id. The dissent observed that defense counsel asked a myriad of other questions regarding the prospective jurors' opinions regarding law enforcement officers. Id. Additionally, the defense counsel's proposed line of questioning was not relevant to his stated rationale for pursuing the line of inquiry, which was to show the defendant's state of mind at the time of the offense. Id.

The dissent noted that its agreement with the majority that the general issue of racial bias would have been a proper subject of inquiry during voir dire in this case, but that defense counsel had not asked non-objectionable questions on this topic. Id. at 406, 851 S.E.2d at 925-26. The dissent ultimately stated that "a trial court cannot be found to have abused its discretion during voir dire based on questions that defense counsel did not actually ask or based on rulings that the trial court did not actually render." Id.

In State v. Campbell, ___ N.C. App. ___, 2021-NCCOA-563, the court of appeals considered whether a trial court judge's statements about race and religion during jury selection created reversible error in a criminal trial. Judge Stroud authored the majority's opinion.

A man was indicted for several traffic-related offenses and attaining habitual felon status. Id. at ¶ 2. During jury selection for the man's criminal trial, the prosecutor asked the panel of potential jurors whether any held strong personal beliefs, potentially based in religion, ethics, or morals, that would render them unable deliver a verdict based on the evidence presented. Id. One juror raised his hand and stated that his religious beliefs would preclude him from determining whether the state had met its burden of proof. Id. The prosecutor moved to challenge the juror for cause. Id.

The judge asked the juror his religion. Id. at ¶ 3. The man stated he was "Non-denominational. A Baptist." Id. The juror then affirmed that he would not be able to decide whether the man was guilty or not guilty. Id. The judge then stated:

> [W]e're going to excuse him for cause, but let me just say this, and especially to African Americans: Everyday we are in the newspaper stating we don't get fairness in the judicial system. Every single day. But none of us—most African Americans do not want to serve on a jury. And 90 percent of the time, it's an African American defendant. So we walk off these juries and we leave open the opportunity for—for juries to exist with no African American sitting on them, to give an African American defendant a fair trial. So we cannot keep complaining if we're going to be part of the problem. Now I grew up Baptist, too. And there's nothing about a Baptist background that says we can't listen to the evidence and decide whether this gentleman, sitting over at this table, was treated the way he was supposed to be treated and was given—was charged the way he was supposed to be charged. But if your—your non-denomina[tional] Baptist tells you [that] you can't do that, you are now excused.

Id.

The jury was impaneled, the trial proceeded, and the man was found guilty of some of the traffic charges, pleaded guilty to attaining habitual sentence status, and was sentenced to more than seven years imprisonment. Id. at ¶¶ 3–4. The man appealed. Id. at ¶ 4.

The man argued that he "was denied a fair trial in an atmosphere of judicial calm before an impartial judge and a jury with free will in violation of his rights" because his due-process rights were violated, the judge intimated the jurors, and the judge "gratuitously interjected" race into the trial. Id. at ¶ 5. The court of appeals agreed, ordering a new trial. Id. at ¶ 5.

As a threshold consideration, the court noted that the man had not objected to the judge's statements during jury selection. Id. at ¶ 6. The man argued his appeal was preserved as a matter of law under section 15-1222 of the North Carolina General Statutes, which prohibits a trial judge from expressing opinion in the presence of the jury on facts to be decided by the jury. Id. Alternatively, the man asked the court of appeals to invoke Rule 2 of the North Carolina Rules of Appellate Procedure and review the appeal despite the lack of objection. Id. The court held that the trial judge's opinions on race and religion did not go to "fact[s] to be decided by the jury," leaving Rule 2 as the only viable vehicle for review. Id. at ¶ 7. The court held that the case presented the "exceptional circumstances" required to invoke Rule 2 and reviewed the merits of the man's arguments in the court's discretion. Id.

The court then considered whether the judge's statements to the jury on race and religion entitled the man to a new trial. Id. at ¶ 8. The state, as opposing party, conceded that the statements constituted structural error and the man was entitled to a new trial. Id. "Structural error is a rare form of constitutional error resulting from structural defects in the constitution of the trial mechanism which are so serious that a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence." State v. Garcia, 358 N.C. 382, 409, 597 S.E.2d 724, 744

(2004). The court observed that a biased trial judge creates a structural error entitling a defendant to a new trial because every person "has a right to a trial before an impartial judge and an unprejudiced jury in an atmosphere of judicial calm." Campbell, 2021-NCCOA-563 at ¶ 8 (citing State v. Cousin, 181 N.C. 461, 462, 233 S.E.2d 554, 556 (1997)).

The court of appeals noted that the trial court judge's comments appeared based in a desire to encourage juror participation, particularly amongst African Americans, to ensure that the man, who was also African American, would have a representative jury and fair trial. Id. at ¶ 9. Even so, the "probable effect or influence upon the jury, and not the motive of the judge" determines whether a defendant's right have been impaired. Id. (quoting State v. Bryant, 189 N.C. 112, 114, 126 S.E. 107, 108 (1925)). The court of appeals restated supreme court caution that "jurors must be engaged with the greatest of care and that the judge must be careful not to make any statement or suggestion likely to influence the decision of the jurors." Id. (quoting State v. Carriker, 287 N.C. 530, 533–34, 215 S.E.2d 134, 137–38 (1975)).

"Further, courts have cautioned that irrelevant references to religion, race, and other immutable characteristics can impede a defendant's right to equal protection and due process." Id. at ¶ 10. The court of appeals held that trial court judge's statements to the dismissed juror "negatively influenced" the other jurors because the panel as a whole may be reluctant to truthfully and openly respond to jury selection questions. Id. The court noted this silencing effect may be particularly heightened for African American jurors and those with religious concerns, based on the judge's statement. Id. Accordingly, the court ordered a new trial for the man. Id. at ¶ 11.

Judge Dillon dissented to the court's invocation of Rule 2 to reach the merits and the majority's holding that the judge's statements amounted to a structural error requiring a new trial for the man. Id. at ¶ 13 (Dillon, J., dissenting). Judge Dillon agreed with the majority that the trial

court judge's "word choice was inappropriate," but that identified a "low likelihood that the trial judge's comments caused prejudice" to the man. Id.

According to the dissent, constitutional errors are generally subject to harmless error analysis; however, structural errors "are reversible per se." Id. at ¶ 15. The man argued that a structural error was present because the trial court judge was biased. Id. at ¶ 16. However, according to the dissent, the Supreme Court of the United States has held bias is present when a judge "has a direct, personal, substantial, pecuniary interest in reaching a conclusion against [the defendant] in his case." Id. (quoting Tumey v. Ohio, 273 U.S. 510, 523 (1927)). As the man offered no argument that the trial court judge held any personal interest in the outcome of the case, the judge's statement would at most amount to constitutional error affecting the impartiality of the jury, according to the dissent. Id. at ¶¶ 17–18. As this type of constitutional error would not amount to structural error, "there must be analysis concerning prejudice caused by the comments." Id. at ¶ 18. According to the dissent, as the majority failed to conduct prejudicial analysis, its holding fell short of the analytical requirements identified in North Carolina jurisprudence. Id. (citing State v. Crump, 376 N.C. 375, 392, 851 S.E.2d 904, 917–18 (2020)).

Further, the dissent argued the man waived his right to assert that the trial court judge's statement constituted structural or constitutional error. Id. at ¶ 19. The man had opportunity to object to the judge's comments at the time they were made and request a new jury pool but failed to do so. Id. The man did not show that the trial court judge demonstrated or expressed any bias toward the man or that any juror was biased by the judge's statements. Id.

The dissent offered that "[t]hough the trial judge may have had good intentions . . . she did cross the line in her word choice during voir dire." Id. at ¶ 28. Even so, the trial court judge's statements did not amount to structural error, no objection was made, and the man did not show

the judge's comments were "egregiously prejudicial against [the man]" to warrant invocation of Rule 2. Id. Therefore, the dissent argued the court should not have reviewed the appeal on the merits, and that once it did so, the majority failed to apply the correct analytical framework. Id.

B. Evidence

In State v. Clemons, 274 N.C. App. 401 852 S.E.2d 671 (2020), the court of appeals considered whether Facebook comments introduced as evidence at trial must be authenticated as photographs or written statements.

A mother renewed her domestic violence protective order ("DVPO") against her daughter's father. Id. at 402, 852 S.E.2d at 673. The DVPO prohibited the father from initiating contact of any kind with the mother. Id. After the father was released from prison for violation of a previous DVPO, the mother began receiving harassing phone calls and voicemails from a restricted number. Id. She suspected the father was leaving these voicemails because a male voice mentioned a trip she and the father had made together. Id. Around the same time, comments originating from her daughter's Facebook account were posted on the mother's Facebook posts, but based on the language, the mother did not believe her daughter posted these comments. Id. The mother reported the phone calls and Facebook comments, and police arrested the father for violation of the DVPO. Id. After the arrest, the harassing phone calls and the comments originating from the daughter's Facebook account stopped. Id.

Before the trial on his violation, the father filed a motion in limine to exclude testimony regarding the Facebook comments, citing a lack of connection between him and his daughter's Facebook account. Id. The court denied the father's motion, holding that the mother's expected testimony would sufficiently authenticate the Facebook comments. Id. At trial, the State introduced screenshot photographs of Facebook posts and comments taken by the mother. Id. The

mother testified that she had captured these screenshot photographs from her own Facebook posts. Id. at 403-08, 852 S.E.2d at 674-76. The State asked why she took these photographs, and the mother stated that she did so because she knew her daughter would not post these types of comments on the mother's Facebook posts. Id. at 408, 852 S.E.2d at 676. The trial court allowed the authentication of these photographs over the father's objection. Id.

On appeal, the court of appeals held that the trial court did not commit error by admitting the Facebook comments. Judge Murphy authored the court's opinion. The court applied de novo review to determine whether the Facebook comments were properly authenticated. Id. at 411-12, 852 S.E.2d at 677-78. The court ruled that Facebook comments must be authenticated as both photographs and written statements. Id. at 412, 852 S.E.2d at 678. The court held that the mother sufficiently authenticated the Facebook comments as photographs by stating she had captured the screenshots because her testimony demonstrated that the photographs were what they purported to be. Id. The court held that sufficient circumstantial evidence authenticated the comments as written statements because (1) the father had previously violated a DVPO against the mother; (2) the father had just been released from prison; (3) the mother was receiving harassing voicemails for the mother from a restricted number that seemed to be coming from the father; (4) the harassing calls and Facebook comments ended when the father was arrested; and (5) the mother did not believe her daughter had written the Facebook comments. Id. at 415-16, 852 S.E.2d at 680. Thus, the court held that this evidence was sufficient to support the trial court's authentication and admission of the Facebook comments. Id. The court further ruled that the jury could determine the credibility of the evidence regarding the authenticity and credibility of the writing. Id.

For these reasons, the court of appeals found that the trial court made no error in admitting the Facebook comments as evidence. Id.

Judges Bryant and Berger concurred in the result only.

(1) Expert

In State v. Elder, ___ N.C. App. ___, 2021-NCCOA-350, temp. stay allowed, ___ N.C. ___, 860 S.E.2d 656 (2021) the court of appeals considered whether an experienced emergency department nurse may qualify as an expert in the collection of a sexual assault victim's kit.

A man forcibly entered a home where he raped and robbed a woman. Id. at ¶¶ 3-4. The woman was transported to a hospital where a Sexual Assault Nurse Examiner (SANE) administered a rape kit and provided that and other evidence to law enforcement. Id. at ¶ 7. The DNA collected from the rape kit eventually led to the man's identification and arrest. Id. at ¶¶ 8-11. At trial, a treating nurse other than the SANE qualified and testified as an expert in the process for collecting the sexual assault victim's kit collection process. Id. at ¶ 45. The jury found the man guilty of several charges, and the man appealed. Id. at ¶¶ 13-14.

On appeal, the court of appeals found the trial court did not err by permitting the nurse to testify as an expert.

The court addressed the nurse's expert qualifications. The man argued in part that the nurse was not sufficiently qualified as an expert regarding the collection of sexual assault victim's kits because she was not SANE-certified. Id. at ¶ 44. The court of appeals disagreed, citing the experience that the nurse established during voir dire. Id. at ¶ 52. The nurse held a nursing degree, had been SANE certified in North Carolina before the rape at issue and received her national SANE certification two years after. Id. In addition, she had collected approximately 150 sexual assault victim kits and trained about ten nurses in sexual assault victim kit evidence collection. Id. The court of appeals held the trial court did not abuse its discretion in determining the nurse had enough expertise to be in a better position than the jury to have an opinion on the process for collecting

the sexual assault victim's kit because the nurse had two decades of experience collecting those kits and had experience training others in that process. Id. at ¶ 53.

For these reasons, the court of appeals held that the trial court did not err in these evidentiary rulings. The supreme court allowed the state's motion for a temporary stay. 860 S.E.2d 656 (N.C. 2021) (mem.).

(2) Hearsay

(a) Business Records

In State v. Elder, ___ N.C. App. ___, 2021-NCCOA-350, temp. stay allowed, ___ N.C. ___, 860 S.E.2d 656 (2021), the court of appeals considered whether an experienced emergency department nurse may authenticate medical records under the business records exception to the hearsay rule.

A man forcibly entered a home where he raped and robbed a woman. Id. at ¶¶ 3-4. The woman was transported to a hospital where a Sexual Assault Nurse Examiner (SANE) administered a rape kit and provided that and other evidence to law enforcement. Id. at ¶ 7. The DNA collected from the rape kit eventually led to the man's identification and arrest. Id. at ¶¶ 8-11. The trial court allowed a treating nurse other than the SANE to authenticate the woman's medical records, id. at ¶ 57, and the trial court admitted the medical records into evidence under the business records exception to the hearsay rule, id. at ¶ 54. The jury found the man guilty of several charges, and the man appealed. Id. at ¶¶ 13-14.

On appeal, the court of appeals held that the woman's medical records were properly authenticated by the nurse as hospital business records. The business records exception to the hearsay rule, Rule 803(6), allows hospital records to be admitted when they are properly authenticated by the custodian of records or by a qualified witness. Id. at ¶ 57. The court held that

the nurse's testimony was sufficient to authenticate the medical records because she was a staff nurse in the emergency department at the time the woman was seen, was familiar with the hospital's recordkeeping procedures and with the woman's medical records in particular, provided care to the woman personally, and testified that the medical records were created contemporaneously with her care. Id. at ¶ 61. The court of appeals also observed that the trial court required legal conclusions within the medical records to be redacted before they were published to the jury. Id. It therefore found no error in admission of the medical records.

For these reasons, the court of appeals held that the trial court did not err in these evidentiary rulings. The supreme court allowed the State's motion for a temporary stay. 860 S.E.2d 656 (N.C. 2021) (mem.).

(b) Excited Utterance

In State v. Lowery, ___ N.C. App. ___, 2021-NCCOA-312, the court of appeals considered whether a declarant's statements, made an unknown amount of time after an assault and while the declarant appeared calm, fell within the excited utterance exception to the hearsay rule.

At 3:08 pm, a person left a store, and was subsequently attacked. Id. at ¶ 3. A friend was walking home after his shift ended at 4:30 pm and saw the victim bleeding nearby. Id. at ¶ 4. The victim identified his attacker. Id. at ¶ 5. EMTs and law enforcement began arriving around 5:00 pm. Id. at 7. The identified man was charged with the victim's murder, and he sought to exclude as hearsay the friend's testimony regarding the identification. Id. at ¶ 13-14. The trial court found that the statements made to the friend were admissible under the excited utterance exception to the hearsay rule. Id. at ¶ 14. The court admitted the statements over the man's objections, and he was found guilty of murder. Id. at ¶¶ 15, 17.

The court of appeals found no error on appeal. First, the court observed that an excited utterance is an admissible hearsay statement that relates to a startling condition or event when it is made while the declarant was under the stress of that condition or event. Id. at ¶ 20. The question posed here was whether the victim's statements made to the friend were so remote in time from the assault that the statements were not made while the victim was in a condition of excitement from the assault and were not a spontaneous reaction but instead resulted from reflection. Id. at ¶ 21. The court found that, although the victim appeared calm when he made the identifying statements and his injuries did not seem extreme, the statements were properly admitted as excited utterances because his injuries in fact made it difficult for him to breathe or move and contributed to his death, notwithstanding his appearance. Id. at ¶ 24. Similarly, the court of appeals rejected the identified man's argument that the identification was too remote in time from the assault to be an excited utterance, because up to 90 minutes may have elapsed between the assault and the statements. Id. at ¶ 21. While the identified man speculated that the assault occurred further in time from the statement, it was equally possible the attack happened just minutes before the friend arrived. Id.

For these reasons, the court of appeals held admission of the statements was proper. Id. at ¶ 24.

(3) Authentication

In Hill v. Boone, ___ N.C. App. ___, 2021-NCCOA-490, the court of appeals considered whether video surveillance of a patient relating to her current health condition was properly authenticated and admitted into evidence at a bifurcated trial on liability for the purpose of impeaching the patient's testimony about her alleged injury.

The patient sued a physician and his clinic for malpractice, alleging that the physician negligently performed surgery on her right foot. Id. at ¶¶ 2–3. The trial court granted the patient's motion to bifurcate the issues of liability and damages under Rule 42 of the North Carolina Rules of Civil Procedure. Id. at ¶ 4. During the bifurcated trial on liability, and over the patient's objection, the trial court admitted video surveillance introduced by the physician and the clinic, which showed the patient doing the types of activities she claimed she could longer do after her surgery, as impeachment evidence. Id. at ¶¶ 5–9. The jury found that the physician and the clinic were not liable, and the patient appealed the trial court's ruling on the admissibility of the video surveillance. Id. at ¶¶ 11–12.

On appeal, the court of appeals affirmed, holding that the trial court did not err in admitting the video surveillance as impeachment evidence.

As a threshold matter, the court of appeals applied a de novo standard of review, despite the parties' insistence that the court should apply an abuse of discretion standard. Id. at ¶¶ 14–18. In this case, the patient was not appealing the trial court's decision to bifurcate the issues of liability and damages, which would otherwise require an abuse of discretion review. Id. at ¶¶ 14–15. Instead, the patient was challenging whether the video surveillance was admitted for a relevant purpose (impeachment) and whether the video was properly authenticated, both of which required a de novo review. Id. at ¶¶ 15–17.

The court of appeals next addressed the patient's contention that the physician and the clinic did not properly authenticate the video surveillance. To begin, the court of appeals observed that the video surveillance "was not properly authenticated under typical requirements[,]" since the physician and the clinic "offered no testimony from the creator of the video to show that the

recording process was reliable and 'that the matter in question is what its proponent claim.'" Id. at ¶ 20 (citation omitted).

Further, the patient's admission alone on cross-examination that the video surveillance apparently showed her doing certain physical activities in late 2017 and early 2018 (based on the video's date and time stamps) did not sufficiently authenticate the video. Id. at ¶¶ 21–22. According to the court of appeals, however, that admission—together with the patient's additional testimony that the video showed the patient carrying her grandchild, who the patient testified was born in late 2017 and about six months old in early 2018—was enough to authenticate the video. Id. at ¶¶ 1, 21–23, 34.

Having determined that the video surveillance was properly authenticated, the court of appeals turned to whether the trial court properly admitted the video surveillance as impeachment evidence. Under Rule 42, evidence relating to damages, such as the video surveillance, is normally inadmissible during a bifurcated trial on liability. Id. at ¶ 19. However, a plaintiff may open the door to evidence that is otherwise inadmissible. Id. at ¶¶ 19, 26. Here, the court of appeals first concluded that the patient opened the door to questions on cross-examination about her current health condition upon giving testimony on direct examination about the nature of her allegedly injured right foot. Id. at ¶ 27. The court of appeals also determined that the patient opened the door to the video surveillance through her cross-examination testimony that her toes could not currently touch anything due to the surgery; the video impeached this testimony, given that the video showed her doing things like walking, lifting, and driving following the surgery. Id. at ¶ 28.

For these reasons, the court of appeals held that the trial court did not err in its ruling on the admissibility of the video surveillance.

(4) Burden of Proof

In Hicks v. KMD Investment Solutions LLC, 276 N.C. App. 78, 2021-NCCOA-39, the court of appeals considered whether there was sufficient constructive notice of a defective condition to support a jury finding of negligence where the defect was reasonably noticeable for six months.

A driver and her passenger were injured when an oncoming car hit black ice and spun out of control into them. Id. at ¶ 2. The ice had formed when water from burst pipes flowed into a ditch adjacent to the road. Id. at ¶ 3. The water hit a section of the ditch that was level with the surrounding land, which caused the water to flow into the road where it froze. Id. The driver sued the North Carolina Department of Transportation ("NCDOT") for negligence in failing to maintain the ditch in a manner that allowed water to flow freely through it. Id. at ¶ 4

At trial, several expert witnesses presented testimony regarding the visibility of the filled-in portion of the ditch and the time it would have taken to fill in. See id. at ¶¶ 5–9. In sum, the testimony indicated that the level spot was noticeable from the roadway, the level spot meant that the ditch required maintenance, and that the level spot had been noticeable for at least six months before the accident. Id. The trial court denied NCDOT's motion for directed verdict and based on the testimony, the jury found NCDOT liable for negligence. Id. at ¶ 10. The trial court also denied NCDOT's motion for judgment notwithstanding the verdict and NCDOT appealed. Id. Specifically, NCDOT argued that "Plaintiffs failed to adequately prove breach based upon a lack of actual or constructive notice of the dangerous condition." Id. at ¶ 11.

On appeal, the court of appeals affirmed the trial court's ruling on NCDOT's motion. The court of appeals first explained that notice may be "constructive, which is defined as information or knowledge of a fact imputed by law to a person (although he may not actually have it), because

he could have discovered the fact by proper diligence, and his situation was such as to cast upon him the duty of inquiring into it." Id. at ¶ 13 (quoting Phillips ex rel. Bates v. N.C. Dep't of Transp., 200 N.C. App. 550, 558, 684 S.E.2d 725, 731 (2009)). Constructive knowledge can be established by "circumstantial evidence from which the fact finder could infer that the dangerous condition existed for some time." Id. (quoting Thompson v. Wal-Mart Stores, Inc., 138 N.C. App. 651, 654, 547 S.E.2d 48, 50 (2000)).

NCDOT argued "it did not breach its duty under a theory of constructive notice because it exercised proper diligence and there was no evidence of how long the condition existed." Id. at ¶ 14. The court of appeals disagreed, finding that there "was more than a scintilla of evidence" to support the trial court's ruling. Id. Specifically, there were multiple witness who testified to seeing the ditch completely filled in shortly after the accident and "circumstantial evidence . . . from which the finder of fact could infer the dangerous condition existed for some time." Id.

Notably, expert testimony showed it would take "over a year" for such a ditch to fill up under normal circumstances and the ditch was completely filled in at the time of the accident. Id. at ¶¶ 15, 16. Thus, the "evidence show[ed] the ditch was in violation of NCDOT guidelines for at least six months" and "'evidence of a defendant violating its own voluntary safety standards constitutes some evidence of negligence.'" Id. (quoting Thompson, 138 N.C. App. at 656, 547 S.E.2d at 51). Moreover, that NCDOT had six months to discover the ditch was in violation of its guidelines "constitutes more than a scintilla of evidence NCDOT did not exercise due diligence." Id. at ¶ 17.

For these reasons, the court of appeals affirmed the trial court's order denying NCDOT's motions.

(5) Rule of Completeness

In Barrow v. Sargent, ___ N.C. App. ___, 2021-NCCOA-295, the court of appeals considered whether a trial court erred in requiring a bicyclist, who was hit by a motorist's vehicle at a crosswalk, to introduce additional portions of the motorist's deposition at trial for completeness under Rule 32(a)(5) of the North Carolina Rules of Civil Procedure.

A motorist and a bicyclist were involved in a collision when the motorist proceeded through a stop sign and crosswalk in Cornelius, North Carolina. Id. at ¶¶ 3-4. The bicyclist brought suit against the motorist for negligence. Id. at ¶ 5. At trial, the bicyclist sought to introduce portions of the motorist's deposition showing how long the motorist had lived in the neighborhood, that the area was mainly residential, that he often saw people using the sidewalks in the area, and that he did not recall looking right before pulling into the crosswalk. Id. at ¶¶ 21-23. Over the bicyclist's objection, and at the motorist's request, the trial court required the bicyclist to read additional portions of the deposition to the jury for completeness under Rule 32(a)(5). Id. at ¶¶ 5, 24. These portions included the motorist's driving experience, his detailed testimony regarding the events leading up to and after the collision, and the conditions at the time of the collision. Id. at ¶ 24. The jury returned a verdict that the bicyclist was not injured by the motorist's negligence. Id. at ¶ 7. The bicyclist appealed, alleging that the trial court erred by requiring the bicyclist to read the motorists' requested portions of the deposition. Id.

First, the court of appeals observed that Rule 32(a) of the North Carolina Rules of Civil Procedure allows "any part or all of a deposition, so far as admissible under the rules of evidence applied as though the witness were then present and testifying" to be used against any party present or represented at the deposition at issue. Id. at ¶ 22. Moreover, the court of appeals found that, under North Carolina law, a trial court may require a party to read a complete statement or other

relevant portions of evidence in order to provide context for the jury. Id. Such a decision by a trial court is given great deference and reviewed only for abuse of discretion. Id.

Here, the trial court reasoned that the motorist's requested deposition portions were relevant to those introduced by the bicyclist because "they further explained (1) the [motorist's] familiarity with the neighborhood, (2) what [the motorist] did at the time of the collision, and (3) what [the motorist] saw and what conditions were like at the time of the collision." Id. at ¶ 24. Thus, the court of appeals found that the trial court did not abuse its discretion by requiring the bicyclist to read portions of the motorist's deposition requested by the motorist. Id. For this reason, the court of appeals affirmed the trial court's decision. Id. at ¶ 25.

(6) Privilege

In Williams v. Allen, ___ N.C. App. ___, 2021-NCCOA-410, the court of appeals considered whether the trial court correctly compelled the production of a document submitted to a medical review committee.

A physician's assistant working at a hospital's emergency department treated a patient for back pain. Id. at ¶¶ 2-5. The patient returned to the hospital the next day complaining of back and abdominal pain and was diagnosed with an abdominal condition requiring immediate surgery. Id. at ¶¶ 7-9. The patient's wife made a statement to hospital staff that if anything should happen to her husband, she would file a claim against the personnel who treated him at the hospital the day before. Id. at ¶ 9. The patient was transported to the hospital's main branch for the surgery; the surgery was unsuccessful in saving his life. Id. at ¶ 8.

The next day, the physician's assistant was informed of the patient's death and of the patient's wife's statement that she intended to file suit against hospital personnel. Id. at ¶ 9. The

physician's assistant was instructed to memorialize her interactions with and treatment of the patient in a document that was submitted to risk management for the hospital. Id.

The patient's estate subsequently filed a wrongful death claim against the hospital and its personnel, and the patient's wife brought a claim for loss of consortium. Id. at ¶ 10. During discovery, the patient's wife requested production of documents relating to investigation of the patient's death by the hospital, and any information related to the hospital's interactions with and care provided to the patient. Id. at ¶¶ 10-11. In response, the physician's assistant submitted a privilege log identifying a four-page "diary" entry concerning the event, claiming that the document constituted work product prepared in anticipation of litigation. Id. at ¶ 11. The trial court granted the patient's wife's motion to compel production of the document, and the document was produced. Id.

At the physician's assistant's deposition, the existence of an additional document was discovered that was not included in the physician's assistant's privilege log and was withheld from disclosure under the physician's assistant's claim of the medical review committee privilege pursuant to Chapter 90 of the North Carolina General Statutes. Id. at ¶¶ 12-13. Upon discovering the additional document, the patient's wife filed a motion to enforce her previous motion to compel. Id. at ¶ 13. The trial court granted the motion but ordered the subject document to be filed under seal pending appellate review. Id.

As an initial matter, the court of appeals found that the issue was immediately appealable because orders compelling discovery of materials asserting protection by the medical review privilege affect a substantial right. Id. at ¶ 17.

The medical review committee privilege may be invoked to protect documents produced or presented to a committee "formed for the purpose of evaluating the quality of, cost of, or

necessity for healthcare services." Id. at ¶ 21 (citing N.C.G.S. § 90-21.22A). Under section 90-21.22A of the North Carolina General Statutes, all members of a medical review committee must be licensed under that Chapter in order for the privilege to apply. Id. at ¶¶ 21, 24 (citing N.C.G.S. § 90-21.22A). The court of appeals remanded the case, holding that it could not determine whether the medical review privilege applied absent additional factual findings and conclusions as to whether the medical review committee to which the document was submitted was composed exclusively of licensed providers as required under Chapter 90. Id. at ¶ 17.

The court of appeals found that the trial court was specifically asked by counsel to make findings of fact and conclusions of law regarding whether the peer review privilege applied. Id. at ¶ 23. According to the court of appeals, the trial court declined to make a ruling sufficiently detailed as to allow for meaningful appellate review. Id. at ¶¶ 22, 25. In the absence of such a ruling, the court of appeals could not determine whether the committee to which the document at issue was submitted was composed exclusively of providers licensed under Chapter 90, and therefore, whether the medical review privilege applied. Id. at ¶ 24. Thus, remand for the entry of factual findings and conclusions was warranted. Id. at ¶ 25.

The dissent, written by Judge Murphy, would have affirmed the trial court's order compelling production of the document for two reasons. Id. at ¶¶ 28, 36 (Murphy, J., dissenting). First, the dissent would have found that the physician's assistant did not meet her burden of production, and therefore was not entitled to the medical review privilege, because she failed to prove to the trial court's satisfaction that every member of the review committee was licensed under Chapter 90, which was a "plain[]" requirement for assertion of the privilege under the statute. Id. at ¶ 38. The affidavit submitted by the physician's assistant that described the medical

review committee should have named each committee member and included that person's status as a health care provider under Chapter 90 in order to satisfy this burden. Id.

Second, the dissent would have found that the physician's assistant failed to make a specific request to the trial court for findings of fact, and therefore the trial court was not required to provide such findings in its order. Id. at ¶ 41. The dissent opined that where the physician's assistant's counsel sought clarification of the trial court's ruling on the privilege by stating that he sought to "establish the parameters of the argument" for an appeal, and that he "[understood] the [c]ourt's ruling," but wanted "to put it in a box where [he could] explain it," these statements served only as a request that the court make detailed conclusions of law, not findings of fact. Id. at ¶¶ 44-45. The trial court, consequently, was under no obligation to make findings of fact under Rule 52, giving rise to a presumption that "the trial court on proper evidence found facts to support its judgment." Id. at ¶ 46. Under this presumption, the dissent reasoned that remand for further evidentiary findings was unnecessary. Id.

(7) Dead Man's Statute

In Gribble v. Bostian, ___ N.C. App. ___, 2021-NCCOA-423, the court of appeals considered whether a neighboring landowner violated the Dead Man's Statute during a trial regarding an easement dispute by introducing statements made by a deceased landowner.

A landowner conveyed a landlocked tract of land to a neighbor with a deed providing for an easement through the landowner's adjacent road-access tract. Id. at ¶ 2-4. The neighbor had used a dirt path through the road-access tract for years before the landowner died. Id. at ¶ 5. The deceased landowner's daughter inherited the road-access tract, and an easement dispute arose between the daughter and the neighbor. Id. at ¶¶ 6-8. The daughter filed suit against the neighbor. Id. at ¶ 8. Following a bench trial, where certain statements purportedly made by the deceased

landowner were introduced as evidence, the trial court entered an order determining the road-access tract was burdened by an appurtenant easement in favor of the landlocked tract. Both parties appealed. Id.

The court of appeals affirmed the trial court's order determining the existence of an easement and found that the trial court did not err in allowing statements of the deceased landowner into evidence.

The court of appeals rejected the daughter's claim that the trial court made evidentiary determinations in violation of the Dead Man's Statute by considering hearsay statements purportedly made by the deceased landowner. Id. at ¶ 18. The court of appeals specifically noted that its opinion did not rely on any such statements. Id. at ¶ 19. Instead, the opinion was supported by other evidence in the record. Id. Notwithstanding, the court of appeals addressed the substantive arguments.

The court concluded that the daughter waived the protections of the Dead Man's Statute, "by opening the door to the testimony regarding what [the deceased landowner] might have said." Id. Specifically, according to the court of appeals, the daughter's counsel "asked [the neighbor] repeatedly about conversations he had with [the deceased landowner.]" Id.

Moreover, the court of appeals found that the deceased landowner's statements fell within the hearsay exception for a witness who is "unavailable" because he is "unable to be present or to testify at the hearing because of death." Id. North Carolina courts have recognized an exception to the hearsay rule for "declarations against pecuniary or proprietary interest" of such witnesses. Id. Any statement that the deceased landowner made "which would tend to show that he acquiesced to the dirt path being the easement—a path that runs through the middle of the tract—

would have been against his pecuniary interests." Id. Accordingly, the court of appeals found such statements were admissible as an exception to the hearsay rule. Id.

C. Damages

In Chisum v. Campagna, 376 N.C. 680, 2021-NCSC-7, the supreme court considered whether an award for nominal damages can support an award of punitive damages for breach of fiduciary duty and constructive fraud.

This case involved three individuals with membership interests in three different limited liability companies. Id. at ¶ 2. The three companies were formed for the purpose of developing commercial real estate in Wilmington, North Carolina. Id. at ¶ 2. Two members of the LLCs took actions over a period of several years that transferred control of the LLCs to the two members and diluted the membership interests of the third member, Chisum, to the point that they were extinguished. Id. at ¶ 6. Chisum filed suit, among other things, for breach of fiduciary duty on his own behalf and on behalf of one of the LLCs. Id. at ¶ 16. At trial, the jury awarded $1.00 in nominal damages and awarded the LLC $250,000.00 in punitive damages for the claim for breach of fiduciary duty and constructive fraud. Id. at ¶ 25. All parties ultimately appealed to the supreme court. Id. at ¶ 30.

At the outset, the supreme court observed that although it had not previously addressed the issue of whether a plaintiff is required to prove actual damages in support of breach of fiduciary duty and constructive fraud claims, the court of appeals has addressed the issue on multiple occasions. Id. at ¶ 39. The supreme court discussed several court of appeals decisions, including: Mace v. Pyatt, 203 N.C. App. 245, 255-57, 691 S.E.2d 81, 89 (2010) ("merely nominal damages may support a substantial award of punitive damages"); Bogovich v. Embassy Club of Sedgefield, Inc., 211 N.C. App. 1, 12, 712 S.E.2d 257, 264 (2011) (finding that "the undisputed evidence

established the existence of all of the elements required for a finding of liability for constructive fraud" and that according to well-established law, "once a cause of action has been established, a plaintiff is entitled to recover nominal damages as a matter of law"); and Collier v. Bryant, 216 N.C. App. 419, 434, 719 S.E.2d 70, 82 (2011) (holding that although nominal damages must be recoverable in order to support a punitive damage award, there is no requirement that nominal damages actually be recovered).

The supreme court concluded that the court of appeals decisions referenced above were correctly decided and adopted the reasoning of the court of appeals, holding that "potential liability for nominal damages is sufficient to establish the validity of claims for breach of fiduciary duty and constructive fraud and can support an award of punitive damages." Chisum, at ¶ 44.

D. Attorneys' Fees

In Porters Neck Ltd., LLC v. Porters Neck Country Club, Inc., 276 N.C. App. 95, 2021-NCCOA-41, the court of appeals considered whether an award of attorneys' fees could be entered where the order was not supported by evidence in the record of comparable rates by other attorneys in the area with similar skills for like work.

The trial court granted sanctions for failure to comply with a production order and awarded over $48,000 in attorneys' fees under Rules 11 and 37 of the North Carolina Rules of Civil Procedure. Id. at ¶ 14. As relevant here, the award of attorneys' fees was appealed.

On appeal, the court of appeals remanded the award of attorneys' fees. Where attorneys' fees are awarded, "the record must contain findings of fact as to the time and labor expended, the skill required, the customary fee for like work, and the experience or ability of the attorney." Id. at ¶ 36. The sanctioned party argued that the trial court's findings regarding the award amount

were not supported by evidence because the court relied only upon counsel's "self-serving affidavits and conclusory statements." Id. at ¶ 39.

The court of appeals agreed, finding that "the affidavit does not state a comparable rate by other attorneys in the area with similar skills for like work." Id. at ¶ 41. Thus, because there was insufficient evidence to show "the customary fee for like work" by others in the legal market, the trial court erred by making a finding in that respect. Id. at ¶ 42. For these reasons, the court of appeals vacated and remanded the issue of the amount of the attorneys' fees award.

In Bandy v. A Perfect Fit for You, Inc., ___ N.C. ___, 864 S.E.2d 221, 2021-NCSC-117, the supreme court considered whether the business court erred in refusing to authorize a court-appointed receiver for a medical equipment company to pay a law firm for certain legal services that the firm's lawyers provided to the company.

In 2016, a superior court judge appointed the receiver to take possession of and manage the medical equipment company's property, and the case was then designated to the business court. Id. at ¶ 4. The receiver eventually became concerned that the medical equipment company may have fraudulently billed almost $12 million in Medicaid claims, so the receiver hired the law firm to audit the company's records. Id. at ¶ 5. For a period of time, the receiver paid the law firm's fees without seeking court approval, but in 2018, the business court entered an order directing the receiver to request authorization from the court before paying any additional legal fees. Id. at ¶ 6. The business court later clarified that the receiver, not the law firm, should submit the requests to authorize payment for the firm's fees. Id. at ¶ 6. Following a status conference in 2019, during which the business court asked why it had not received any invoices for the law firm's fees since 2018, the receiver submitted several late requests for authorization to pay the firm's fees. Id. at ¶¶ 8–9. The business court authorized payment for the fees except for those fees pertaining to services

that a specific lawyer had rendered. Id. at ¶ 9. The business court declined to authorize payment for these fees based on the receiver's and the lawyer's "flagrant disregard" for the procedure that the court had established for seeking authorization for fee payments. Id. at ¶ 9.

The medical equipment company, the receiver, and the law firm appealed to the supreme court. While this initial appeal was underway, the receiver submitted additional requests for authorization to pay the law firm for its work on the appeal. Id. at ¶¶ 10–11. The business court denied these requests as well, concluding that the fees connected to the appeal were for services rendered for the law firm's benefit, not for the company's benefit, since the appeal, if successful, would reduce the company's assets. Id. at ¶ 11. The company, the receiver, and the law firm appealed these additional rulings by the business court, which the supreme court consolidated with the initial appeal.

The supreme court reversed. The supreme court explained that a trial court's discretion to grant or deny a receiver's request for authorization to pay attorney's fees "is generally limited to (1) determining whether outside counsel rendered 'services which require legal knowledge and skill and which were rendered to the receiver for the benefit of the receivership' and (2) determining the amount which comprises 'reasonable and proper compensation for' the services outside counsel performed." Id. at ¶ 14 (citation omitted). The business court, however, did not make any findings addressing either of these two issues. Id. at ¶ 15. Instead, the business court denied the receiver's request for authorization to pay fees associated with a particular lawyer based solely on the court's finding that the receiver and the lawyer had flagrantly disregarded the applicable court procedure. Id. at ¶ 15. But the business court failed to explain how this finding related to the court's assessment of the services that the lawyer provided to the receiver or to the reasonableness and proper compensation for those services. Id. at ¶ 15. As a result, the business

court's order denying the request to authorize payment for the lawyer's services "was an abuse of discretion because it was based on a legally extraneous factual finding." Id. at ¶ 13.

In addition, the supreme court construed the business court's order denying authorization for fee payment as an order that improperly imposed sanctions against the law firm. Id. at ¶ 17. Before a party is sanctioned, the party "must be provided with notice of the basis upon which sanctions are being sought and an opportunity to be heard." Id. at ¶ 18. Also, a trial court's decision to sanction a party "must be 'supported by its findings of fact,'" and such "findings of fact [must be] supported by a sufficiency of the evidence." Id. at ¶ 18 (citation omitted). As the supreme court observed, the business court never provided the law firm or the lawyer with any notice that it was considering imposing sanctions, i.e., denial of authorization for fee payment, based on a failure to comply with a court order. Id. at ¶ 19. The most the business court did was express "frustration" with the receiver's and the lawyer's tardiness in submitting the requests for fee payment authorization. Id. at ¶ 19. Nor was there any evidence in the record that the lawyer engaged in conduct that violated a court order. Id. at ¶ 20. Although the business court apparently penalized the lawyer for not submitting the requests in a timely manner, the business court had previously entered an order that specifically prohibited the law firm and its lawyers from submitting such requests on the receiver's behalf. Id. at ¶ 20.

As for the business court's finding that authorizing payment for the law firm's fees relating to the appeal would deplete the medical equipment company's assets, the supreme court determined that this was not a sufficient basis for denying the receiver's request to authorize the payment. Id. at ¶ 26. The supreme court noted that it has "not previously considered whether outside counsel is entitled to compensation for work on litigation related to the fees originally incurred for legal services rendered to a receiver." Id. at ¶ 23. Nevertheless, the supreme court

has previously ruled that a receiver is only entitled to reasonable and proper compensation for legal services provided to the receiver for the benefit of the receivership. Therefore, "a trial court's decision to grant or deny a receiver's request to pay outside counsel's fee-litigation fees requires a fact-intensive inquiry. It is not susceptible to a per se rule." Id. at ¶ 23. Here, the business court did not perform the required analysis. Id. at ¶ 26. Moreover, the business court's finding that the appeal, if successful, would reduce the company's assets was based on the "erroneous presumption" that legal services that result in the diminution of a receivership's assets are always contrary to the receivership's interests. Id. at ¶ 24.

For these reasons, the supreme court reversed and remanded the case to the business court.

E. Jury Instructions

In State v. Garrett, ___ N.C. App. ___, 2021-NCCOA-214, the court of appeals considered the issue of whether the trial court improperly influenced a deadlocked jury.

During the course of a defendant's jury trial on drug-related charges, the jury remained deadlocked after approximately six and a half hours of deliberations spanning a two-day period. Id. at ¶ 6-7, 27. The jury foreperson sent a note to the judge stating that the jury was "not in agreement with guilty or not guilty" and was "undecided on all seven charges." Id. at ¶ 7, 27. In response, the trial court gave additional verbal instructions to the jurors regarding their duty to render a verdict. Id. at ¶ 7. The jury ultimately found defendant guilty of some of the charges and not guilty on some of the charges. Id. at ¶ 7.

On appeal, the defendant contended that the trial court committed plain error when it provided the additional instructions to the jury because it did not specifically recite the language set forth in section 15A-1235(b) of the North Carolina General Statutes, the statute that sets the

standard for charges to be given to a jury which is unable to agree upon a verdict. Id. at ¶ 28, 29 (citing State v. Easterling, 300 N.C. 594, 608 S.E.2d 800, 809 (1980)).

The court of appeals rejected defendant's argument, holding that the instructions were proper because they "communicated all of the core ideas contained in the statute and did not contain any misstatements of law." Id. at ¶ 28. In support of its holding, the court of appeals noted that the supreme court has previously upheld a trial court's instructions under section 15A-1235(b) when the trial court's instructions "'addressed all of the concerns set out in [the statute],' even though the trial court did not recite the statutory language verbatim." Id. at ¶ 30 (quoting State v. Aikens, 342 N.C. 567, 579, 467 S.E.2d 99, 107 (1996)). To further illustrate its analysis, the court of appeals provided the following chart showing a side-by-side comparison of the instructions given (shown in italics) with the text of section 15A-1235(b):

(1) Jurors have a duty to consult with one another and to deliberate with a view to reaching an agreement, if it can be done without violence to individual judgment;	*I want to remind you that it is your duty to do whatever you can without surrendering an honest conviction as to the effect or weight of the evidence to reach a unanimous decision.*
(2) Each juror must decide the case for himself, but only after an impartial consideration of the evidence with his fellow jurors;	*You should reason this over as reasonable men and women and do everything possible to reconcile your differences.*
(3) In the course of deliberations, a juror should not hesitate to reexamine his own views and change his opinion if convinced it is erroneous;	*[H]owever, do not hesitate to re-examine your own views and change your opinion, if you become convinced it is erroneous.*
(4) No juror should surrender his honest conviction as to the weight or effect of the evidence solely because of the opinion of his fellow jurors, or for the mere purpose of returning a verdict.	*In getting back to work, no juror should change his verdict simply to reach a verdict[.]*

Id. at ¶ 31. Based on the parallels in the statute and the trial court's instructions in the present case, the court of appeals reasoned that the trial court's instructions contained all of the key statutory elements. Id. at ¶ 30. Accordingly, the court concluded that the jury was properly instructed regarding their duty to deliberate and that defendant failed to establish plain error. Id. at ¶ 31.

F. Enforcement of Judgments

In Nielson v. Schmoke, ___ N.C. App. ___, 2021-NCCOA-400, the court of appeals considered whether the 10-year statutory enforcement period for judgments begins to run on the date foreign judgments are filed in North Carolina or the date the foreign court enters the judgment.

A Michigan court entered two civil judgments in favor of an ex-wife and against her ex-husband, with the later judgment entered on October 12, 2009. Id. at ¶ 2. The ex-wife registered the foreign judgments in North Carolina on June 28, 2013. Id. at ¶ 3. The North Carolina trial court entered a judgment in recognition of the foreign judgments, and the ex-wife sought to enforce the North Carolina judgment. Id. at ¶¶ 5-6. On October 29, 2019, the ex-husband moved to abate the post-judgment proceedings, contending that the 10-year statutory judgment enforcement period had expired because more than 10 years had passed since the Michigan court entered the last judgment. Id. at ¶ 7. The trial court denied the ex-husband's motion and held that the 10-year enforcement period began to run on the date the foreign judgments were filed in North Carolina. Id. at ¶ 8.

On appeal, the trial court's order was affirmed. The court of appeals explained that the relevant North Carolina foreign judgment enforcement statute was similar to 28 U.S.C. § 1963, which governs the registration of judgments from other federal districts. Id. at ¶ 22. It also agreed with the rationale of the Fourth Circuit Court of Appeals in Wells Fargo Equipment Finance, Inc.

v. Asterbadi, 841 F.3d 237 (4th Cir. 2016), which held that under 28 U.S.C. § 1963 – the federal statute governing the registration of judgments from other federal districts – a newly registered judgment is enforceable in the new district as though it were entered on the date of registration. See Nielsen, 2021-NCCOA-400 at ¶¶ 17-21. Applying that reasoning to the North Carolina statute, the court held that a foreign judgment that is filed in North Carolina in compliance with the foreign judgment statute has the effect of creating a new North Carolina judgment for purposes of the statutory enforcement period. Id. at 24. Although the ex-husband argued that North Carolina precedent held otherwise, the cited cases were distinguishable because the foreign judgments in this case were filed in North Carolina within the statute of limitations.

For these reasons, the court of appeals affirmed the trial court's denial of the motion to abate the post-judgment proceedings because the 10-year enforcement period in North Carolina began to run in 2013, when the foreign judgments were filed in North Carolina.

In Milone & MacBroom Inc. v. Corkum, ___ N.C. App. ___, 2021-NCCOA-526, the court of appeals considered whether a trial court had subject matter jurisdiction to issue orders in supplemental proceedings in aid of execution where "no writ of execution was issued or returned unsatisfied in whole or in part."

A corporation petitioned the Wake County clerk of court for entry of a confession of judgment against the manager of several limited liability companies for an unpaid debt. Id. at ¶ 3. The clerk entered judgment in the corporation's favor based on an affidavit from the corporation and a statement authorizing entry of judgment, agreed to by the manager of the LLCs. Id. However, no writ of execution was issued by or returned to the court, and no effort was made to execute on the judgment. Id. at ¶ 4.

Instead, six months later, the corporation served "interrogatories to supplemental proceedings" and a request for production of documents on attorneys that the corporation "believed were the [LLCs' manager's] counsel." Id. In response to a quickly withdrawn motion to compel filed in district court, the LLCs' manager filed a motion to dismiss and a motion for a protective order. Id. at ¶¶ 4–5. The corporation, in turn, filed a new motion to compel. Id. The district court granted the corporation's motion to compel and denied the LLCs' manager's motions. Id. at ¶ 6. The trial court also awarded attorneys' fees to the corporation as a Rule 11 sanction against the manager of the LLCs for seeking a protective order but did not set the amount for the fees. Id.

On appeal, the court of appeals vacated the trial court's order that granted the motion to compel and issued sanctions. The court of appeals held that the trial court lacked subject matter jurisdiction for the supplemental proceedings. Id. at ¶ 16.

Initially, the court noted that the award of attorneys' fees was interlocutory, and therefore not appealable, as no amount for the fees had been set. Id. at ¶ 9 (citing In re Cranor, 247 N.C. App. 565, 569, 786 S.E.2d 379, 382 (2016)). Further, the LLCs' manager failed to file a separate writ for certiorari. Id. at ¶ 10. However, the court of appeals elected to "treat [the] appeal as a writ for certiorari" and consider de novo the motion to compel, and the supplemental proceedings as a whole. Id. at ¶¶ 10–11 (citing State v. Grundler, 251 N.C. 177, 189, 111 S.E.2d 1, 9 (1959); N.C.R. App. P. 2, 21). The court of appeals heard the appeal "because this case raises serious questions of how and when a trial court may exercise jurisdiction in supplemental proceedings that may otherwise escape review leading to manifest injustice to a party subjected to supplemental proceedings improperly instituted contrary to the express statutory requirements." Id. at ¶ 10.

Subject matter jurisdiction may only be conferred to a North Carolina court by the state constitution or by statute. Id. at ¶ 11 (citing Burgess v. Burgess, 205 N.C. App. 325, 327-28, 698

S.E.2d 666, 668 (2010)). While the parties did not raise subject matter jurisdiction, the court raised the issue sua sponte because it "discern[ed] a fundamental jurisdictional defect in the institution of the supplemental proceedings." Id. at ¶ 12.

The court looked to Article 31 of the North Carolina General Statutes to determine whether the trial court had subject matter jurisdiction for the supplemental proceedings. Id. at ¶¶ 14–15. The court found it "apparent from both the plain language of the statutes and our prior case law" that a writ of execution must be issued or returned unsatisfied for a court to have subject matter jurisdiction to issue orders in supplemental proceedings of an unsatisfied judgment. Id. at ¶ 15.

The court of appeals found that by the plain text of the statute, a judgment creditor may seek supplemental proceedings only when an execution is issued and "returned wholly or partially unsatisfied." Id. at ¶ 14 (quoting N.C. Gen. Stat. § 1-352). A creditor may only seek supplemental proceedings, issue interrogatories, or conduct other discovery "within three years from the time of issuing [the] execution." Id. (quoting N.C. Gen. Stat. §§ 1-352–52.2) (emphasis in the original) (the text of the three quoted statutes varies in the use of "the" execution or "an" execution). Further, the court of appeals noted that the North Carolina supreme court has previously construed a prior version of the statutes and held that supplemental proceedings may only be brought after issuance of an execution. Id. at ¶ 15 (citing Int'l Harvester Co. of Am. v. Brockwell, 202 N.C. 805, 806, 164 S.E. 322, 322 (1932). Here, the court of appeals recognized that nothing in the record reflected a writ of execution was ever issued or returned unsatisfied. Id. at ¶ 16. Therefore, the court of appeals found the trial court lacked subject matter jurisdiction for the supplemental proceedings as the statutory requirements for the proceedings were not met. Id.

Because the trial court lacked subject matter jurisdiction, the court of appeals vacated the trial court's order granting the corporation's motion to compel and awarding attorneys' fees. Id. at ¶ 17.

G. Appeals

(1) Violation of the Rules

In Mughal v. Mesbahi, ___ N.C. App. ___, 2021-NCCOA-615, the court of appeals considered whether sanctions were appropriate for substantial failure to follow or gross violation of the North Carolina Rules of Appellate Procedure when the parties repeatedly included unredacted confidential information in filings made via the court's publicly accessible online filing system.

A couple with three minor children divorced in 2019. Id. at ¶ 2. The trial court entered a permanent child support order based on the North Carolina Child Support Guidelines and the parents' incomes, with the father required to pay approximately $600 per month. Id. at ¶ 3. The mother appealed, arguing that the trial court erred in calculating the father's monthly income. Id.

The mother served her proposed record on appeal on the father, and the father served amendments to the record on the mother. Id. at ¶ 4. The mother did not request judicial settlement of the proposed record on appeal. Id. Instead, a few days before proposed record would have been deemed settled as a matter of law pursuant to Rule 11 of the North Carolina Rules of Appellate Procedure, the mother filed the record with the court omitting the father's amendments and documentary exhibits. Id. at ¶¶ 4–5. The father filed a motion for leave to amend the record and requested inclusion of the document exhibits, and the mother subsequently filed an amended record and her opening brief. Id. at ¶ 5.

The court of appeals entered an order sua sponte striking the documents in the amended record and the mother's brief for "inclusion of unredacted identification numbers" in violation of Rule 42 of the Rules of Appellate Procedure. Id. at ¶ 6. The court identified that the documents submitted and the mother's opening brief contained unredacted confidential information, including the parties' social security numbers, bank account information, credit card numbers, employer identification numbers, and the three children's social security numbers. Id. The court determined these violations "constitute both substantial failures and gross violations" of Rule 42 because of the "exposure to public inspection" identification numbers related to the parties and their minor children. Id. The court further ordered the mother to show cause as to appropriate sanctions. Id. The mother argued that the unredacted documents were all supplied by the father but admitted that the mother's counsel "did not conduct a thorough search" of the documents to ensure proper redaction. Id. at ¶ 7. The mother suggested "both [the mother's and father's] attorneys are responsible for the nonredacted information" and conceded that "[m]onetary damages may be appropriate." Id.

The court of appeals determined that the appropriate sanctions were to dismiss the appeal and tax double costs, with one-half of the costs taxed each to the mother's and father's attorneys, individually. Id. The court observed that ordinarily if a party defaults under the rules, then it has forfeited right to review on the merits; however, "noncompliance with the appellate rules does not, ipso facto, mandate dismissal of the appeal." Id. at ¶¶ 8–9 (quoting Dogwood Dev. & Mgmt. Co. v. White Oak Transp. Co., 362 N.C. 191, 194, 657 S.E.2d 361, 363 (2008)). The court identified a three-part test from Dogwood to determine when a nonjurisdictional default, such as a Rule 42 violation, warranted dismissal: (1) "whether the noncompliance is substantial or gross under Rules 25 and 34," (2) whether any sanction under Rule 34(b) should be imposed, and (3) if the court

determines dismissal is the appropriate sanction, whether the circumstances justify invoking Rule 2 to reach the merits despite. Id. at ¶ 9 (quoting Dogwood, 362 N.C. at 201, 657 S.E.2d at 367.

The court held that the first element of the test was satisfied, as the court's prior order identified the violations related to the unredacted information "constituted[d] both substantial failures and gross violations of a nonjurisdictional rule." Id. at ¶ 10. The court then noted that Rule 34(b)'s enumerated possible sanctions include dismissal, monetary damages, and any other sanction the court deems just and proper. Id. The court then considered whether dismissal was "appropriate and justified" based on the circumstances present. Id. at ¶ 11. The court held that dismissal was appropriate because even though the father was in position to protect his own information, the minor children "were not in a position to protect themselves from [the harm associated with identify theft], and it was the parties' duty to shield this confidential information from public disclosure." Id.

Accordingly, the court reasoned that dismissal was appropriate "[d]ue to the severity of this violation and to 'promote compliance with the appellate rules.'" Id. (quoting Dogwood, 362 N.C. at 199, 657 S.E.2d at 366). Further, the court held that "both parties' attorneys [we]re at fault for the violations," rendering a tax of double costs imposed individually on both the father's and mother's attorneys an appropriate additional sanction. Id. Finally, the court considered whether to invoke Rule 2 to review the merits of the review despite the dismissal. Id. at ¶ 12. The court declined to invoke Rule 2 noting nothing in the circumstances that indicated exceptional or manifest injustice. Id.

Due to the severity of the "substantial failures and gross violations" of Rule 42, the court of appeals dismissed the mother's appeal. Id. at ¶ 13. The court declined to invoke review under

Rule 2 and found the "attorneys for both parties" responsible for the violations, warranting both the father's and mother's attorneys liable for the double costs taxed. Id.

(2) Interlocutory Appeals

In Greenbrier Place, LLC v. Baldwin Design Consultants, P.A., ___ N.C. App. ___, 2021-NCCOA-584, the court of appeals considered whether a trial court's grant of summary judgment against a plaintiff's unfair and deceptive trade practices and fraud claims affected a substantial right and created a possibility of inconsistent verdicts, warranting interlocutory review, when plaintiff's claims of negligence, negligent misrepresentation, and breach of contract remained.

A limited liability company obtained a cost estimate to develop a residential neighborhood from a design consultation firm in August 2015. Id. at ¶ 2. The limited liability company purchased the property to develop the neighborhood, then some months later the design consultation firm provided an updated estimate allegedly reflecting a significant increase in estimated costs. Id.

The limited liability company filed suit in 2017 asserting claims of negligence, negligent misrepresentation, breach of contract, unfair and deceptive trade practices, fraud, and constructive fraud. Id. In 2019, the trial court heard competing claims for summary judgment, partially granting summary judgment in favor of the design consultation firm, disposing of the limited liability company's unfair and deceptive trade practices and fraud claims. Id. at ¶¶ 5–7. The trial court order did not provide certification for appeal. Id. at ¶ 7. The limited liability company filed written notice of appeal, asserting the trial court erred in granting partial summary judgment, and the design consultation firm moved to dismiss the appeal as interlocutory. Id. at ¶¶ 7–9.

The court of appeals noted that before addressing the limited liability company's appeal, it must first consider the motion to dismiss the appeal as interlocutory. Id. at ¶ 10. The court

observed that review of an interlocutory appeal is proper if the trial court certifies the case pursuant to Rule 54(b) of the North Carolina Rules of Civil Procedure or if the ruling deprives the appellant of a substantial right that is lost without immediate review. Id. (citing N.C. Gen. Stat. §§ 1-277(a), 7A-27(b)(3). The burden is on the appellant to "demonstrate why the order affects a substantial right." Id. (quoting Hoke Cnty. Bd. of Educ. v. State, 198 N.C. App. 274, 277–78, 679 S.E.2d 512, 516 (2009)). A "substantial right is a legal right affecting or involving a matter of substance as distinguished from matters of form: a right materially affecting those interests which [one] is entitled to have preserved and protected by law: a material right." Id. at ¶ 11 (quoting Gilbert v. N.C. State Bar, 363 N.C. 70, 75, 678 S.E.2d 602, 605 (2009)).

The court recognized that the "inconsistent verdicts doctrine is a subset of the substantial rights doctrine and is "often misunderstood." Id. at ¶ 12 (quoting Shearon Farms Townhome Owners Ass'n II, Inc. v. Shearon Farms Dev., LLC, 272 N.C. App. 643, 646, 847 S.E.2d 229, 233 (2020), disc. rev. denied, 377 N.C. 566, 858 S.E.2d 284 (2021)). Under the inconsistent verdicts doctrine, the appellant must show that the same factual issues are present in both trials and that the appellant faces prejudice by risk of inconsistent verdicts. Id. The fact that multiple claims arise from a single event, transaction, or occurrence does not, without more, rise to the level of a threat of inconsistent verdicts. Id.

The limited liability company argued that the summary judgment affected a substantial right because of common factual issues to all claims, including injury causation and certain facts related to code requirements, the exclusion of disclaimers, and whether the firm should have obtained updated subcontractor estimates. Id. at ¶ 15. The design consultation firm argued that the unfair and deceptive trade practices and fraud claims disposed of by the trial court required

different proof than the negligence, negligent misrepresentation, and breach of contract claims remaining, therefore no substantial right was affected. Id. at ¶ 16.

The court of appeals recognized that prior holdings indicated negligence claims require different proof than unfair and deceptive trade practices or fraud claims. Id. Likewise, the court had also previously held that "actions for unfair or deceptive trade practices are distinct from actions for breach of contract and that a mere breach of contract, even if intentional, is not sufficiently unfair or deceptive to sustain an action under N.C. [Gen. Stat.] § 75-1.1." Id. (quoting Branch Banking & Tr. Co. v. Thompson, 107 N.C. App. 53, 62, 418 S.E.2d 694, 700 (1992)). Finally, the court noted that breach of contract does not "standing alone" provide a basis for a fraud claim. Id.

The court of appeals held that the limited liability company's identification of an overlap of facts, alone, "failed to carry the burden of showing that the inconsistent verdict doctrine applies." Id. at ¶ 17. The court reasoned that the remaining claims required different proof than those disposed by the trial court in granting partial summary judgment, and accordingly the limited liability company failed to demonstrate that a substantial right had been affected. Id. As the limited liability company failed to show a substantial right was affected, the court granted the design consultation firm's motion to dismiss the appeal as interlocutory. Id.

IV. INSURANCE

In North Carolina Farm Bureau Mutual Insurance Co., Inc. v. Lanier Law Group, P.A., ___ N.C. App. ___, 2021-NCCOA-233, the court of appeals considered whether, in the context of determining coverage obligations under an insurance policy, allegations of "knowingly" violating a statute has the same meaning as "willfully" doing so.

The insured, a law firm, was sued in the underlying suit for obtaining and using individuals' "protected personal information" in a manner violating the Driver's Privacy Protection Act of 1994, 18 U.S.C. § 2721 et seq. ("DPPA"). Id. at ¶¶ 4–5. Specifically, the underlying complaint alleged that the insured "knowingly" obtained, disclosed, and used the protected personal information for advertisement purposes. Id. at ¶ 7. The insurer defended the action under a reservation of rights. Id. at ¶ 12. After summary judgment was granted for the insured in the underlying suit, the insurer commenced this coverage action seeking a declaratory judgment on its obligations. Id. at ¶¶ 8, 13. The trial court ruled in favor of the insurer, finding that the underlying suit did not trigger the insurer's obligations under the policy. Id. at ¶ 13.

On appeal, the court of appeals affirmed the trial court's order in favor of the insurer. First, the court of appeals reviewed the legal precedent surrounding questions of coverage. An insurer owes two independent duties to the insured: the duty to defend and the duty to indemnify. Id. at ¶ 26 (citing Harleysville Mut. Ins. Co. v. Buzz Off Insect Shield, L.L.C., 364 N.C. 1, 6–7, 692 S.E.2d 605. 610–11 (2010)). The duty to defend is broader than the duty to indemnify, such that "[a]n insurer is excused from its duty to defend when 'the facts are not even arguably covered by the policy.'" Id. at ¶ 28 (quoting Harleysville at 692, 340 S.E.2d at 378). When analyzing whether a complaint trigger's the duty to defend, courts utilize a "comparison tests" wherein the complaint, taking the facts alleged as true, is read "side by side" with the policies at issue to determine coverage obligations. Id. at ¶ 30. Moreover, the facts to consider include facts learned from the insured and facts discoverable by reasonable investigation. Id. at ¶ 31 (quoting Duke Univ. v. St. Paul Fire & Marine Ins. Co., 96 N.C. App. 635, 638, 386 S.E.2d 762, 764 (1990)).

With that framework established, the court of appeals looked to the policy language at issue, specifically the policy's exclusion for injuries "[a]rising out of the willful violation of a

penal statute." Id. at ¶ 33. The insurer argued this exclusion applied to preclude coverage because the underlying complaint alleged the insured "knowingly obtained, disclosed and used" personal information in violation of the DPPA, a penal statute. Id. at ¶ 34. The court of appeals agreed, noting that a violation of the DPPA is also a violation of a penal criminal provision and concluding that "the words 'willful' and 'knowing' carry essentially the same or equivalent meaning," i.e. "deliberate." Id. at ¶¶ 39–40. Thus, "[a]n allegation of a 'knowing' violation of the DPPA is an allegation of a 'willful' violation." Id. at ¶ 40.

For these reasons, the court of appeals affirmed the trial court's finding that the policy excludes coverage for the underlying dispute.

A. UIM

In North Carolina Farm Bureau Mutual Insurance Co., Inc. v. Martin ex rel. Martin, 376 N.C. 280, 851 S.E.2d 891 (2020), the supreme court considered whether underinsured motorist insurance in an insurance policy that covered any relatives living in the policyholder's household extended to relatives who lived in the policyholder's guest house on her farm.

A mother and daughter lived in the guest house of a farm owned by the daughter's paternal grandmother, who lived in the main house on the farm. Id. at 284, 851 S.E.2d at 894. The mother and daughter were injured in a car accident while driving a Ford automobile. Id. at 281, 851 S.E.2d at 892-93. The other driver's insurance company agreed to pay them the maximum liability coverage of $25,000. Id.

The mother and daughter also asserted that they were entitled to medical payments and underinsured motorist coverage under an insurance policy issued to the grandmother. Id. at 282, 851 S.E.2d at 893. The grandmother's policy designated the grandmother as the named insured and covered the grandmother and her late husband. Id. It did not cover the Ford automobile. Id.

The policy provided, however, that an insured meant "you or any family member" and defined "family member" as any person "who was related to you by blood, marriage, or adoption who is a resident of your household." Id. Because the mother and daughter were related to the grandmother and were "residents" of her "household," they claimed to the insurance company that they were covered under the grandmother's policy. Id.

The insurance company filed a declaratory judgment disputing coverage under the grandmother's policy. Id. at 283, 851 S.E.2d at 894. The trial court entered summary judgment in favor of the insurance company, concluding that the grandmother's policy did not cover the mother and daughter. Id. The mother and daughter appealed to the court of appeals, which affirmed the trial court's order in a divided decision. Id. at 285, 851 S.E.2d at 895. The majority concluded that the defendants did not qualify as residents, but the dissent stated that the mother and daughter were all part of the same household, and therefore, covered under the policy. Id.

On appeal, the supreme court affirmed the majority opinion from the court of appeals. The court held that the insurance policy's plain language controlled its decision. Id. at 286, 851 S.E.2d at 895. The court initially observed that neither party disputed that the mother and daughter were "related" to the grandmother by "blood, marriage, or adoption." Id. at 287, 851 S.E.2d at 896. However, because the policy did not define the key terms "resident" or "household," the court interpreted these terms. Id. The court defined a resident as "[o]ne who resides in a place" and, in turn, defined "reside" as "[t]o dwell permanently or continuously." Id. (quoting resident and reside, Merriam-Webster Collegiate Dictionary (11th ed. 2007)). The court defined household as "[t]hose who dwell under the same roof and compose a family" or "a social unit composed of those living together in the same dwelling." Id. (quoting household, Merriam-Webster Collegiate Dictionary (11th ed. 2007)).

The court then reviewed previous decisions to determine which individuals are considered residents of a household. Id. at 287-91, 851 S.E.2d at 896-99. The court held that this inquiry requires a "particularized, fact-intensive inquiry into the circumstances of the parties' current and prior living arrangements." Id. at 291, 851 S.E.2d at 899. The court synthesized its previous cases and found a common basic prerequisite: parties seeking coverage as "residents" must show they actually lived in the same dwelling as the insured relative for a meaningful period of time. Id.

Applying this principle to the facts, the court observed that the mother and daughter had never actually lived in the same residence as the grandmother. Id. at 292, 851 S.E.2d at 899. Their houses were separated by a three to five-minute walk, and the houses had separate addresses and separate post office boxes. Id. The court expressed disapproval with the reasoning of a previous court of appeals' decision, in which the court of appeals stated that relatives "need not have ever actually lived in the same dwelling to be considered residents of the same household." Id. at 294, 851 S.E.2d at 900. (emphasis in original). Rather, the court held that "in order to be deemed residents of the same household, parties must have lived in the same dwelling for some meaningful period of time under circumstances demonstrating an intent to form a common household—regardless of where in this state they happen to live." Id. at 295, 851 S.E.2d at 901. In so holding, the court stated that its decision did not manufacture an "urban versus rural" dynamic, but rather, was applying a longstanding requirement of its precedent. Id.

Justice Earls dissented, stating that the majority imposed an "unduly restrictive frame of reference that ignores the realities of rural life . . . ." Id. at 296, 851 S.E.2d at 901 (Earls, J., dissenting). The dissent stated that the type of living arrangement presented in this case is common in rural areas and is commonly understood to be a family household. Id. The dissent noted that the court should "apply the same fact-intensive, contextual approach to resolve a claim arising

from Knotts Island as we would to a claim arising from Raleigh." Id. at 298, 851 S.E.2d at 903. The dissent remarked that the majority failed to account for and give legal recognition to the residential patterns that many rural families experience. Id.

In North Carolina Farm Bureau Mutual Insurance Co., Inc. v. Lunsford, ___ N.C. ___, 2021-NCSC-83, the supreme court considered whether a driver's UIM coverage limits were "applicable" within the meaning of North Carolina's Financial Responsibility Act (FRA), when a passenger who had UIM coverage pursuant to a North Carolina contract executed in North Carolina is injured while travelling in another state in a vehicle driven by a Tennessee resident and insured under a Tennessee contract and injury results from that driver's tortious conduct.

A passenger was involved in an accident when the driver of the vehicle veered into oncoming traffic. Id. at ¶ 2. The driver was a Tennessee resident with a Tennessee insurance policy of $50,000 bodily injury coverage per person and $50,000 underinsured motorist coverage (UIM). Id. at ¶¶ 3-7. The passenger was a North Carolina resident with a North Carolina insurance policy with the same limits. Id. The passenger obtained the bodily injury limits from the driver's insurer and then sought UIM coverage from the passenger's insurer. Id. at ¶ 7. The passenger's insurer denied the claim and brought a declaratory judgment action to establish that the UIM coverage did not apply. Id. at ¶ 8. The passenger argued that she was entitled to stack her UIM coverage limit with the driver's UIM coverage limit for the purposes of determining whether "the applicable limits of underinsured motorist coverage for the vehicle involved in the accident and insured under the owner's policy" exceeded "the sum of the limits of liability under all bodily injury liability bonds and insurance policies applicable at the time of the accident." Id. (quoting N.C. Gen. Stat. § 20-279.21(b)(4)).

The trial court ruled in favor of passenger's insurer and held that the vehicle in which the passenger was traveling was not an "underinsured vehicle." Id. at ¶ 9. In so holding, the trial court looked to Tennessee law, reasoning that the driver's insurance contract was executed in Tennessee. Id. The trial court held that no benefits were available under the passenger's UIM policy because that coverage equaled the liability coverage under the Tennessee insurance policy. Id.

The court of appeals affirmed the trial court, in a 2-1 opinion, but analyzed the issue under North Carolina law, despite the passenger's insurer's contention that Tennessee law controlled the interpretation of the Tennessee policy. Id. at ¶ 10. The court of appeals held that because the passenger was a "Class II insured" (e.g., occupant of the vehicle) of the vehicle, she was not allowed to stack UIM benefits under the vehicle's policy in order to access her own UIM benefits under her insurance policy. Id. However, the court of appeals found that had the passenger been a "Class I insured" (e.g., named insured or resident relative of the named insured), she would have been allowed to stack UIM benefits under the vehicle's policy and thus receive UIM benefits under her insurance policy. Id.

The supreme court reversed and Justice Earls wrote the majority opinion. The supreme court began by noting that the court must interpret the passenger's insurance contract to resolve the dispute and not the driver's Tennessee insurance contract incorporating Tennessee law. Id. at ¶ 19. According to the supreme court, "[we] must apply North Carolina law to interpret the terms of a contract executed in North Carolina that necessarily incorporates North Carolina's FRA." Id.

Next, the supreme court found "no reason to look to another state's law in defining the circumstances under which a North Carolina insured can access UIM coverage under his or her own insurance policy." Id. at ¶ 26. In fact, the supreme court found that North Carolina places great interest in protecting insureds from underinsured motorists, which "in no way depends upon

the state in which the tortfeasor executed his or her insurance contract." Id. Thus, the supreme court held that the availability of UIM coverage to the insured, which hinges upon the determination of whether a vehicle is underinsured, "should be dictated by the terms of the bargain struck by the insured and the insurer, not by the terms of the bargain struck by the tortfeasor with his or her insurer." Id. at ¶ 27.

Finally, applying North Carolina law, the supreme court held that the driver's car was an "underinsured motor vehicle" as defined by the FRA because the amount of the stacked UIM coverage limits exceeded the sum of the applicable bodily injury coverage limits. Id. at ¶ 30. For this reason, the driver's UIM coverage limits were "applicable" within the meaning of the FRA. Id. Accordingly, the supreme court reversed the decision of the court of appeals and remanded to the trial court for entry of an order granting declaratory judgment in favor of the passenger. Id.

Justice Barringer, joined by Chief Justice Newby and Justice Berger, dissented. Justice Barringer would have affirmed the trial court's ruling. He argued that the majority ignored "well-established principles for the construction of insurance policies" regarding the applicable law. Id. at ¶ 31. Additionally, Justice Barringer argued that the majority's analysis would also result in the driver's vehicle being deemed an underinsured highway vehicle when the driver's vehicle had the same liability coverage amounts as the passenger's policy amounts for underinsurance. Id. at ¶ 42. For this reason, the majority's decision providing the passenger with compensation exceeding her purchase as an insured could negatively impact the options available to North Carolina residents for UIM coverage by increasing the costs of UIM coverage. Id.

V. WORKERS' COMPENSATION

In West v. Hoyle's Tire & Axle, LLC, 277 N.C. App. 196, 2021-NCCOA-151, the court of appeals considered whether the industrial commission properly denied the claim of a woman who sought death benefits in a workers' compensation action where the woman was in a romantic relationship with, but was not married to, the decedent.

The decedent was employed by a company in the automotive industry and was killed in a work-related accident. Id. at ¶ 1. Decedent's adult daughter, adult son, and estranged wife (collectively, the "family"), and his girlfriend all asserted death benefit claims under the North Carolina Workers' Compensation Act. Id. The girlfriend asserted that she was entitled to benefits because she was cohabiting with the decedent and was partially dependent on him for certain expenses. Id. Decedent's employer and his insurance carrier admitted compensability for the death benefits and filed a request for hearing with the industrial commission to determine the proper beneficiaries. Id. at ¶ 1, 2. The family members filed a motion to dismiss the girlfriend's claim and motion for attorneys' fees and sanctions, which was granted by the deputy commissioner. Id. at ¶ 1. The full commission ultimately upheld the dismissal of girlfriend's claim, concluding that as a matter of law, she could not be a dependent of the decedent under section 97-39 of the North Carolina General Statutes. Id. at ¶ 8.

The court of appeals affirmed the ruling of the full commission, concluding that although the plain text of section 97-39 of the North Carolina General Statutes did not alone warrant dismissal of the girlfriend's claim, the supreme court's holding in Fields v. Hollowell & Hollowell, 238 N.C. 614, 78 S.E.2d 740 (1953), prohibited the claim. West, 2021-NCCOA-151 at ¶ 23. Specifically, the girlfriend argued that her claim could potentially fall within the scope of "all other cases" in the text of the statute at issue:

> A widow, a widower, and/or a child shall be conclusively presumed to be wholly dependent for support upon the deceased employee. In all other cases questions of dependency, in whole or in part shall be determined in accordance with the facts as they may be at the time of the accident.

N.C. Gen. Stat. § 97-39 (emphasis added). The court noted that the supreme court's holding in Fields expressly prohibited an unmarried romantic partner from being entitled to a decedent's death benefits; however, it held that the girlfriend's argument that the precedent set in Fields should not have barred her claim for benefits was "a good faith argument for . . . reversal of [] existing law" and thus the commission did not err in refusing to order sanctions against her. Id. ¶ 23.

The court of appeals also considered the girlfriend's argument that the commission's dismissal of her claim denied her equal protection of the law because it relied on precedent set in Fields, which the girlfriend contended impermissibly delineated between classes of individuals based on their marital status. Id. at ¶ 25 (citing Fields, 238 N.C. at 614, 78 S.E.2d at 740). On this point, the court of appeals concluded that it was bound by the supreme court's holding in Fields that "disallow[s] an unmarried romantic partner of a decedent the opportunity to establish entitlement to the decedent's death benefits." Id. at ¶ 29.

VI. ETHICS

In In re Clontz, 376 N.C. 128, 852 S.E.2d 614 (2020), the supreme court publicly reprimanded a judge for violating Canons 2A and 3A(4) of the North Carolina Code of Judicial Conduct for holding a probable cause hearing for a criminal defendant without his court-appointed counsel present.

A judge presided over a probable cause hearing for a criminal defendant represented by court-appointed counsel. Id. at 129, 852 S.E.2d at 617. The State moved to continue the case, and

defense counsel objected and demanded a probable cause hearing on behalf of his client. Id. The judge held the matter open for the parties to confer and instructed them to return to court at 2:00 p.m. that day. Id. at 130, 852 S.E.2d at 617. At 2:00 p.m., defense counsel did not reappear in the courtroom. Id. The judge had previous experiences where this defense counsel had not appeared in a timely manner for court appearances. Id. The judge proceeded with the remainder of his calendar. Id. At 2:50 p.m., defense counsel had still not appeared. Id. Without defense counsel present, the judge instructed the State to call the defendant's case for hearing. Id. During the hearing, the judge advised the defendant that he would not be permitted to speak because he may incriminate himself. Id. The defendant cross-examined witnesses from behind bars while handcuffed and without access to pen and paper. Id. At the close of the hearing and without giving the defendant any opportunity to be heard or make any arguments, the judge immediately ruled in favor of the State. Id. The judge later explained that he allowed the proceeding to move forward without defense counsel present in order to "make a point" to counsel about appearing to court on time. Id. at 132, 852 S.E.2d at 618.

The Judicial Standards Commission investigated the judge's conduct. Id. at 133-38, 852 S.E.2d at 619-22. The Commission recommended that the judge be publicly reprimanded for violations of Canons 2A and 3A(4) of the Code of Judicial Conduct. Id. at 138-9, 852 S.E.2d at 621-22.

The supreme court reviewed and adopted the Commission's recommendation. Id. at 140-43, 852 S.E.2d at 623-24. The court ruled that the Commission's findings of fact were supported by clear, cogent, and convincing evidence, and adopted those findings. Id. at 140, 852 S.E.2d at 622. The court rejected the judge's argument that his conduct was the result of an objectively reasonably interpretation of the statutes governing probable cause proceedings. Id. (citing N.C.

Gen. Stat. § 15A-606(e)-(f) (2019)). Rather, the court held that the judge's conduct did not objectively comply with the pertinent statutes. Id. The court further noted that the judge had "rushed to hold a hearing without counsel present," "failed to explore other options regarding counsel prior to commencing the proceeding," and "made comments about 'making a point' after the proceeding." Id. In light of this evidence, the majority held that the recommendation of a public reprimand was appropriate. Id. The court stated that, in reaching this decision, it had considered additional mitigating factors that had been presented to the Commission: multiple affidavits submitted on the judge's behalf that attested to his fairness and the fact that the judge had never been disciplined by the court. Id. at 143, 852 S.E.2d at 624.

Justice Earls dissented, and Justices Newby and Davis signed onto her dissent. The dissent stated that despite the judge's egregious conduct, the facts did not demonstrate the level of conduct warranting a public reprimand. Id. at 144, 852 S.E.2d at 624-25 (Earls, J., dissenting). Rather, the dissent stated that a private letter of caution would have been the more appropriate sanction. Id.

In In re Murphy, 376 N.C. 219, 852 S.E.2d 599 (2020), the supreme court censured a judge, holding that he violated Canons 1, 2B, 3A(3), and 3B(2) of the North Carolina Code of Judicial Conduct when he hired and condoned his executive assistant's harassment toward his law clerks.

A judge hired his personal friend to serve as both an executive assistant and permanent law clerk in his chambers. Id. at 221, 852 S.E.2d at 602. The judge's chambers also had two term law clerk positions, which were continuously filled. Id. The judge gave the assistant express and implied authority to supervise the term law clerks and the operations of his chambers. Id.

In this role, the assistant exhibited unprofessional behavior: He was dishonest and did not diligently perform his duties. Id. at 223-24, 852 S.E.2d at 603-04. During the workday, he would regularly use profanity, as well as "fear and intimidation while interacting with and supervising

the law clerks," including violent and angry outbursts while the judge was present in the chambers. Id. at 222, 852 S.E.2d at 602. On one occasion, the assistant slammed his fist so hard onto his desk that he activated an attached panic alarm. Id. at 225, 852 S.E.2d at 604. The assistant repeatedly made lewd, sexually suggestive, and harassing remarks to the female law clerks on multiple occasions. Id. at 223-24, 852 S.E.2d at 603-04. For instance, on one occasion, he made an inappropriate comment about a female intern applicant's body in front of two female law clerks. Id. at 224, 852 S.E.2d at 603. On another occasion, he told a law clerk on a cold day that "he would like to see her in a 'wife beater' tank top and shorts on a cold day." Id. at 223, 852 S.E.2d at 603.

Two months after the judge began his term, one of the law clerks suddenly resigned. Id. at 221, 852 S.E.2d at 602. The judge reacted to this resignation with a "great deal of animosity," and he and the assistant made "belittling comments or jokes about [the former law clerk] to the other law clerks." Id. at 222, 852 S.E.2d at 602. When a second law clerk resigned four months later, she informed the judge of the assistant's dishonest behavior. Id. at 223, 852 S.E.2d at 603. She also warned the judge that he would "burn through law clerks" because of the assistant. Id. After each of these law clerks resigned, the judge replaced them with new law clerks. Id. at 221, 852 S.E.2d at 602.

Five months after his second law clerk resigned, an incident occurred in front of the judge during an internal chambers meeting. Id. at 225, 852 S.E.2d at 604. The assistant became angry with one of the law clerks, slammed his fist on his chair, used profanity toward the law clerk, and belittled and threatened the law clerk. Id. The judge did not take any action to correct or admonish the behavior. Id. The following week, the assistant offered a "non-apology" to the law clerk, but also threatened her by stating that "he influences the hiring and firing in the office." Id. Two

weeks after this incident, the law clerk informed the judge that the assistant was dishonest and was lying to other employees at the court. Id. The judge still took no immediate action. Id. By the end of that month, another judge at the court had learned about concerns of potential sexual harassment in the chambers and reported his concerns. Id. at 226, 852 S.E.2d at 604.

The Judicial Standards Commission commenced an investigation of the judge and the assistant upon learning of the alleged sexual harassment. Id. The report alleged that the assistant had made a profane and sexually suggestive remark that he had always wanted to have sexual relations with "a red head"—a reference to one of the judge's former law clerks. Id. The judge met with an HR employee of the Administrative Office of the Courts, but he "lacked candor" when speaking with the HR employee. Id. at 227, 852 S.E.2d at 605. He did not disclose the extent of the complaints that his law clerks had previously raised. Id. Rather, he downplayed the assistant's unprofessional conduct. Id. In response to the judge's statements to the HR employee, she advised the judge to remind his staff that "all concerns of sexual harassment would be taken seriously" and that his employees should "review the judicial branch's workplace conduct policy." Id. The HR employee then advised the judge to reach out to the former law clerk to determine if the assistant had made the alleged sexually suggestive remark. Id.

After meeting with the HR employee, the judge met with each of his law clerks, the former law clerk referenced in the allegation, and the assistant. Id. Prior to these meetings, the judge assured the assistant that his job was secure. Id. During his meeting with the former law clerk, the judge asked her about any sexually suggestive remarks the assistant had made to her. Id. She responded that the assistant had made the "wife beater" remark and had never apologized for the remark. Id. The former law clerk denied knowing about any "red head" comment. Id. at 228, 852 S.E.2d at 605. During the judge's conversations with them, the current law clerks told the judge

that the assistant had angry and profane outbursts, exhibited dishonest behavior, and threatened their jobs. Id. at 228, 852 S.E.2d at 606. When the judge met with the assistant, the assistant denied making any sexually inappropriate comments to the former law clerk. Id.

After meeting with his employees, the judge sent an email to the Judicial Standards Commission that any rumor of sexual harassment had been "debunked" and that "there was not even a whiff of a complaint of a sexual or sexual harassment nature." Id. at 229-30, 852 S.E.2d at 606. He downplayed the current law clerks' other extensive complaints about the assistant's workplace misconduct and threatening behavior, dismissing those comments as concerns about "how things are handled" inside and outside of chambers. Id.

Three days later, the law clerks contacted the HR employee directly to express their concerns about the assistant. Id. Upon learning of these concerns from the law clerks directly, the HR employee placed the assistant on immediate investigatory leave pending the conclusion of an internal investigation. Id. at 230-31, 852 S.E.2d at 607. By the end of that week, one of the law clerks had resigned. Id. at 232, 852 S.E.2d at 608. The next month, after the judge learned that the other law clerk had interviewed for another job, he asked for the assistant's resignation. Id.

The Judicial Standards Commission completed its investigation of the judge and found that he had violated multiple Canons of the Code of Judicial Conduct: First, it determined he violated Canon 1, which imposes an affirmative duty on judges to "establish, maintain, and enforce appropriate standards of conduct in the judiciary." Id. Second, it determined he violated Canon 2B, which provides that judges must not allow "social or other relationships to influence [their] judicial conduct or judgment." Id. Third, it found he violated Canon 3B(3), which imposes a duty on judges to ensure the highest degree of professionalism among attorneys, fellow judges, and any judicial branch employees or court officials subject to their direction and control. Id. at 233, 852

S.E.2d at 608. Fourth, it determined he and his assistant violated Canon 3B(2), which both law clerks and judges to ensure that law clerks adhere to the standards of conduct set forth in the Law Clerk Code of Conduct. Id. Fifth, the Commission found that the assistant had violated Canon 3A(3), which required him to engage in patient, dignified, and courteous conduct to others. Id. Additionally, the Commission observed that judges have a compelling interest to ensure that young lawyers maintain their integrity and moral character. Id. The Commission concluded that the judge's violations of the Code amounted to conduct "prejudicial to the administration of justice that brings the judicial office into disrepute." Id. at 234, 852 S.E.2d at 609. The Commission observed that the judge's lack of candor and reckless disregard for the truth, as well as his willful pattern of misrepresenting or downplaying the assistant's workplace misconduct, undermined the judiciary's ability to enforce appropriate standards of professional conduct. Id. Based on these findings and conclusions, the Commission unanimously recommend that the judge be censured. Id. at 235, 852 S.E.2d at 609.

In a unanimous opinion, the supreme court adopted the recommendation of the Judicial Standards Commission to censure the judge. Id. at 235-42, 852 S.E.2d at 609-14. The court observed that it reviews the Commission's recommendation as "a court of original jurisdiction, rather than in its typical capacity as an appellate court." Id. at 235, 852 S.E.2d at 609. Although the judge argued that his due process rights had been violated based on the Commission's "prosecution, rather than investigation" of him, the court rejected this argument as without merit. Id. The court also rejected the judge's argument that the Commission's findings were conclusory or over-exaggerated statements of witnesses, and instead held that "there was no reason for the Commission panel to believe that the clerks' testimony was anything less than truthful." Id. at

236, 852 S.E.2d at 610. The court concluded that the Commission's findings were supported by clear and convincing evidence and adopted those findings. Id.

The court held that the judge had violated Canons 1, 2B, 3B(2), and 3B(3) of the Code of Judicial Conduct. Id. at 238-40, 852 S.E.2d at 611-13. It rejected the judge's argument that he could not be held liable for his assistant's violations of the Code. Id. at 240, 852 S.E.2d at 613. Rather, the court held that judges must require "dignified and courteous" behavior of their staff members. Id. The court further observed that judges must understand the magnitude of their influence and that a judge's title alone "carries a presumption that the individual possesses the ability to ensure order and fairness." Id. at 42, 852 S.E.2d at 613. The court held that the judge had fallen short of those expectations. Id. Based on the totality of the circumstances, the court held that the judge's conduct brought the judicial office into disrepute and was prejudicial to the administration of justice. Id. at 42, 852 S.E.2d at 614. The court ruled, however, that the conduct did not rise to the level of incurring suspension or removal. Id. Therefore, the court ordered that the judge be censured for violation of these Canons of the Code of Judicial Conduct. Id. at 243, 852 S.E.2d at 614.

In In re Brooks, 377 N.C. 146, 2021-NCSC-36 (2021), the supreme court considered whether censure was the proper penalty for a district judge's violations of Canons 1, 2A, 5D, and 6C of the Code of Judicial Conduct and section 7A-376 of the North Carolina General Statutes.

The Judicial Standards Commission charged a judge with ethics violations for serving as executor for the estates of two former clients who were not members of the judge's family, collecting substantial fees or commissions for such service, and failing to properly report that income. Id. at ¶ 2. The judge admitted to the charges and the parties agreed to the following stipulated facts: the judge was compensated nearly $90,000 for serving as executor of the two

estates not of the judge's family; the judge failed to disclose this extra-judicial income; and the judge knew or should have known that he was required to report this income. Id. at ¶ 3.

The judge and commission also stipulated that the judge had violated the Code of Judicial Conduct and the General Statutes by: failing to observe the appropriate standards of conduct to ensure the integrity of the judiciary is preserved in violation of Canon 1; failing to conduct himself in a manner that promotes public confidence in the integrity and impartiality of the judiciary in violation of Canon 2A; serving as executor for estates of non-family members in violation of Canon 5D; failing to report extra-judicial income in violation of Canon 6C; and willful misconduct in office and prejudicial to the administration of justice in violation of section 7A-376 of the North Carolina General Statutes. Id. For these violations, the commission unanimously recommended that the supreme court censure the judge. Id. at ¶ 6.

In reaching its recommendation for censure, the commission found, as mitigating factors, that the judge cooperated, admitted error, and showed remorse, and that the conduct at issue was limited to a single event rather than pattern of misconduct. Id. As aggravating factors, the commission found that the amount of outside income was large, and the failure to disclose it egregious for that reason, and that the income came from activity expressly prohibited under the Code. Id.

The supreme court, exercising its original jurisdiction over the matter, first concluded that the commission's findings of fact and conclusions of law were supported by clear and convincing evidence. Id. at ¶¶ 7, 8. The supreme court also agreed with the commission that the judge's misconduct in this matter was not "minor" and, therefore, required more than a public reprimand. Id. at ¶ 9.

However, the supreme court disagreed with the commission's decision only to censure the judge, because a censure would not keep with the purpose of the Code of Judicial Conduct to uphold an "independent and honorable judiciary." Id. at ¶ 10. Importantly, the court noted how this matter departed from previous cases resulting in censure, because the activity giving rise to the unreported, extra-judicial income was itself prohibited by the Code. Id. at ¶ 10. Moreover, the prohibited conduct, i.e., acting as executor of a non-family member's estate, occurred in the judge's own judicial district. Id. These additional aggravating factors "created an appearance of a lack of judicial independence." Id. In sum, the judge's conduct "was a willful violation prejudicial to the administration of justice and brought the judicial office into disrepute." Id.

For these reasons, the supreme court imposed a one-month suspension of the judge for his violations of Canons 1, 2A, 5D, and 6C of the Code of Judicial Conduct and section 7A-376 of the North Carolina General Statutes. Id. at ¶ 13.

In In re Inquiry Concerning a Judge, Nos. 19-136 & 19-242, 377 N.C. 442, 2021-NCSC-61, the supreme court decided whether censure was appropriate for a former judge who had engaged in willful misconduct in office and conduct prejudicial to the administration of justice that brings the judicial office into disrepute.

The North Carolina Judicial Standards Commission charged a judge with violations of the North Carolina Code of Judicial Conduct by engaging in sexual misconduct, exploiting his position as Chief Judge of a judicial district by making predatory sexual advances, and failing to discharge his judicial duties at least between 2016 and 2019. Id. at ¶¶ 1-2. The judge stipulated that he used a single Facebook account for both his personal and campaign purposes. Id. at ¶ 3. He stipulated to knowingly and willfully initiating and engaging in conversations ranging from inappropriate to sexually explicit with dozens of women, and to using his Facebook account to regularly arrange

personal meetings—some of which were sexual encounters—during breaks and recesses, and before and after court. Id. at ¶ 3. In 2020, while investigation into these allegations was ongoing, the judge received certain medical testing and was diagnosed with Frontotemporal Dementia, a disease that can manifest in lack of sexual impulse control. Id. at ¶ 3. After about 18 years in office, the judge retired and agreed not to serve as a judge in the future, not to seek commission as an emergency judge or retired recall judge, and not to attend judicial conferences or continuing judicial education programs. Id. at ¶¶ 3, 7. Based on these stipulations of fact, the commission recommended that the judge be censured. Id. at ¶ 7.

The supreme court, a court of original jurisdiction in this instance, agreed that censure was appropriate. Id. at ¶¶ 8, 10. The court held that clear and convincing evidence supported the commission's factual findings, and thus adopted the commission's conclusions of law. Id. at ¶ 9. The supreme court also agreed that the stipulated conduct amounted to willful misconduct in office and conduct that was prejudicial to the administration of justice and which brought the office into disrepute. Id. Considering the judge's inappropriate communications and behavior, as well as the mitigating factors of his long service and contributions to the bench and State, the supreme court determined censure was appropriate. Id. at ¶¶ 10-11.

For these reasons, the supreme court censured the judge.