

**North Carolina Superior Court  
Judges' Fall Conference**

**RECENT DECISIONS OF RELEVANCE**

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**PRETRIAL PROCEDURE**

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**Statute of Limitation**

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**McKinney v. Goins,  
N.C. App.  
appeal docketed (Oct. 2, 2023)  
(2)**

Issue:

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

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**Facts**

- In 2019, the General Assembly unanimously enacted the SAFE Child Act, which created a two-year revival window: Effective from January 1, 2020, until December 31, 2021, this section revives any civil action for child sexual abuse otherwise time-barred under G.S. 1-52 as it existed immediately before the enactment of this act.

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**Facts**

- Relying on the revival window, student victims of an abuser who had already been convicted of sexual abuse crimes filed a civil suit against the abuser and a county board of education.
- The board argued that the revival window in the SAFE Child Act was facially unconstitutional and moved to dismiss the complaint.
- A divided trial court granted the motion to dismiss.
- The students and the State—which had intervened to uphold the constitutionality of the SAFE Child Act—appealed.

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

- Opinion written by Judge Riggs.  
On review of the text of the North Carolina Constitution, its history, and our jurisprudence interpreting it, we hold that the Board has failed to show beyond a reasonable doubt that an express provision of that supreme document prohibits revivals of statutes of limitation. Similarly, we hold that, under even the highest level of scrutiny, the SAFE Child Act’s Revival Window passes constitutional muster. The divided order of the three-judge panel reaching the contrary conclusion is reversed, and this matter is remanded for further proceedings not inconsistent with this opinion.
- Judge Gore concurred in the result only.  
The divided order of the three-judge panel reaching the contrary conclusion is reversed, and this matter is remanded for further proceedings not inconsistent with this opinion.

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**Opinion of Judge Riggs**

- Review was limited to whether the Law of the Land Clause of the North Carolina Constitution provides protection from revival.
- Litigants who seek to invalidate legislation as unconstitutional face a steep hill to climb.
- Judge Riggs dove deeply into case law history. Citing various centuries- and decades-old cases, she explained that an overly broad prohibition on retrospective laws interferes with the ability of the legislature to effectively represent its people.
- Historical precedent establishes that revival statutes do not per se violate the North Carolina Constitution.

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**Judge Riggs (cont’d)**

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

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**Judge Riggs (cont'd)**

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

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**Dissent (Carpenter, J.)**

- The court's result overruled binding precedent, an authority reserved for the supreme court only.
- Wilkes applies to all statutes of limitations, not just in the context of real property.
- State courts, unlike federal courts, can issue advisory opinions.
- The Wilkes analysis addressing the general constitutionality of the revival statute at issue therein was thus not dicta but binding precedent.
- Vested rights are a special category of fundamental rights that are as tangible as property and are protected from any legislative attack.

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**Dissent (cont'd)**

- The supreme court is the ultimate arbiter as to whether the North Carolina Constitution is violated by legislation.
- Overruling Wilkes may undermine stability in our jurisprudence.
- The three-judge panel should have been affirmed.

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**Cohane v. Home Missioners of America,  
N.C. App. (7)**

Issue:

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

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**Facts**

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

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**Facts**

- The trial court concluded that the SAFE child act's use of the words "for child sexual abuse" in the revival window must be read narrowly, particularly as compared to a different provision that uses the term "related to child sexual abuse," which the trial court believed was broader than the phrase "for child sexual abuse."
- The plaintiff appealed.

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

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**Holding (cont'd)**

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**Dissent (Carpenter, J.)**

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**Rule 9(b)**

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**Value Health Solutions Inc. v. Pharmaceutical Research Associates, Inc.,**  
**N.C. (9)**

Issue:

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

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**Facts**

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

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

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

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**Dissent, in part (Earls, J.)**

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

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**Rule 41**

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Cowperthwait v. Salem Baptist Church, Inc.,  
N.C. App.  
appeal docketed (Oct. 09, 2023)  
 (13)

Issue:

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

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**Facts**

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

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**Facts**

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

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

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

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**Dissent, in part (Stroud, C.J.)**

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

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**Gantt v. City of Hickory,  
N.C. App. (19)**

Issue:

Whether the relation back doctrine applies where the initial action was initiated by a party that lacked standing.

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**Facts**

- A class action was filed against a city in North Carolina.
- The named plaintiff was a construction company in Texas.
- The action was voluntarily dismissed pursuant to Rule 41 and then refiled.
- The new complaint still named the Texas company as the named plaintiff.
- Because the Texas company lacked standing, the new complaint was eventually amended to replace the Texas company with a local company as the named plaintiff.

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**Facts (cont'd)**

- The parties each moved for summary judgment, which the trial court denied as to the local company but granted as to the city.
- The local company appealed, and the court of appeals affirmed the trial court.
- The local company petitioned for rehearing, and the court of appeals granted the petition.

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**Court of appeals affirmed**

- The local company argued that the first opinion filed by the court of appeals conflicted with existing precedent as to the relation back doctrine.
- The court of appeals found that the cases cited by the local company were distinct from the case at bar because those cases involved amendments to alter a party's legal capacity to sue, which was not at issue here.
- Rather, here, the complaint had been voluntarily dismissed pursuant to Rule 41.
- Thus the court of appeals did not violate existing precedent.

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**Holding (cont'd)**

- The local company also contended that notice is a necessary inquiry to an analysis of relation back.
- The court of appeals concluded that the local company erroneously conflated Rule 41 with Rules 15 and 17, the latter of which consider notice.
- An analysis of relation back under Rule 41 does not require an inquiry as to notice.
- The local company argued that under Rule 41 the second complaint related back to the initial complaint; the city argued that the second complaint could only relate back if it involved the same parties as the initial complaint.
- The court of appeals agreed with the city.

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**Holding (cont'd)**

- The initial complaint was rendered null by the fact that the named plaintiff—the Texas company—lacked standing.
- Additionally, the initial complaint and second complaint did not contain the same parties because the second complaint was amended to replace the local company as the named plaintiff.
- Though the initial complaint was timely filed, the local company was not the named plaintiff who filed it.
- Accordingly, the local company could not avail itself of the relation back doctrine under Rule 41.

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**Standing**

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**Edwards v. Town of Louisburg,  
N.C. App. (25)**

Issue:

Whether the trial court correctly entered summary judgment with prejudice against the plaintiffs for lack of standing.

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**Facts**

- This case involved the removal of a confederate statue.
- The town moved to dismiss under rules 12(b)(1) and (6), which the trial court denied.
- The town moved for summary judgment, which the trial court granted without stating the basis for its rationale.
- The citizens appealed.

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**Court of appeals affirmed (Gore, J.)**

- The North Carolina Constitution confers standing on those who suffer the infringement of a legal right.
- The mere request for declaratory judgment under the Declaratory Judgment Act is not sufficient to confer standing; a plaintiff must also show injury.
- Summary judgment against a plaintiff is proper if the plaintiff lacks standing.
- Because the citizens failed to show an interest in the monument, they lacked standing.
- Granting summary judgment gave the matter preclusive effect in any future action.

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**Dissent (Tyson, J.)**

- The supreme court established a two-step test to determine whether a plaintiff has standing to challenge legislative action: (1) whether the relevant statute confers a cause of action, and (2) whether the plaintiff satisfied the statutory requirements under the statute at issue to bring a claim.
- Applying this analysis, Judge Tyson would have come to the conclusion that the concerned citizens lacked standing to bring suit against the town.
- The trial court acted inconsistently by denying the town's motion to dismiss under Rule 12(b)(1) and (6) but then granting its motion for summary judgment.
- Standing relates to subject matter jurisdiction.

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**Dissent (cont'd)**

- The supreme court reviews challenges to subject matter jurisdiction through a Rule 12(b)(1) motion to dismiss, instead of under either a motion to dismiss under Rule 12(b)(6) or a motion for summary judgment under Rule 56.
- Dismissing a claim due to standing does not address its merits, and thus should be without prejudice.
- Judge Tyson would have reversed and remanded with instruction to enter dismissal of the complaint or to enter summary judgment for lack of standing without prejudice.

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**Sovereign Immunity**

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42

**Howell v. Cooper,**  
**N.C. App.**  
**appeal docketed & pet. for disc. rev. filed (Sept. 28,**  
**2023)**  
**(28)**

Issue:

Whether the doctrine of sovereign immunity requires a plaintiff to seek injunctive relief at the outset of a claim alleging constitutional violations.

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**Facts**

- In 2020, the Governor declared a state of emergency in response to the COVID-19 pandemic, which initially closed bars and repeatedly extended their closure.
- A group of barkeepers filed suit against the governor, and then amended their complaint to add two other politicians.
- The barkeepers alleged the three politicians were violating their constitutional rights.
- The politicians filed a motion to dismiss pursuant to Rules 12(b)(1), (2), and (6).
- The trial court denied the politicians' motion as to two of the barkeepers' causes of action.
- The politicians appealed.

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**Court of appeals affirmed**

- Generally, sovereign immunity applies to bar actions against state officials sued in their official capacity for the performance of governmental functions.
- However, sovereign immunity does not bar a North Carolina citizen's ability to seek remedy for violations of constitutional rights.
- In creating a common law remedy for constitutional violations, courts must seek the least intrusive remedy available and necessary to right the wrong.
- The politicians argued that sovereign immunity barred the barkeepers' claims because they sought monetary damages, which was not the least intrusive remedy.

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**Holding (cont'd)**

- The court of appeals concluded that it is the responsibility of the courts to create a remedy to constitutional claims, not of the plaintiff to seek injunctive relief at the outset of litigation before requesting damages.
- The barkeepers' failure to seek injunctive relief did not preclude their claims at the pleadings stage.

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**TRIAL**

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**Evidence: Attorney-Client Privilege**

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**Howard v. IOMAXIS, LLC,  
N.C. (34)**

Issue:

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

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**Facts**

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

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**Facts (cont'd)**

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

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**Supreme court affirmed**

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

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**Holding (cont'd)**

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

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**Holding (cont'd)**

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

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**Holding (cont'd)**

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

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**Evidence: Opening-the-Door Doctrine**

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**State v. McKoy,**  
**N.C. (38)**

Issue:

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

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**Facts**

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

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**Facts (cont'd)**

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

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**Facts (cont'd)**

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

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**Supreme court affirmed**

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

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**Damages**

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**Southland National Insurance Corp. v. Lindberg,**  
**N.C. App.**  
**pet. for disc. rev. filed (July 25, 2023)**  
**(41)**

Issue:

Whether a party who elected specific performance relief for breach of contract may also recover damages for fraud.

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**Facts**

- A business executive who owned several insurance companies invested much of their assets into his other businesses.
- When the new Commissioner of Insurance sought to put a cap on these investments, the business executive struggled to comply.
- The Commissioner, the insurance companies, the business executive, and the executive's private-equity firm first entered a consent order by which the investments would be reduced by a specific deadline.
- Then, the same parties entered a restructuring agreement, captured by a memorandum of understanding ("MOU"), establishing a new deadline.

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**Facts (cont'd)**

- In the MOU, the insurance companies elected specific performance as the relief for breach of contract.
- After the deadline passed, the insurance companies filed suit against the business executive and the private-equity firm for breach of contract.
- The relief sought was specific performance, monetary damages, and punitive damages.
- The trial court found in favor of the insurance companies, finding that the business executive and private-equity firm had committed breach of contract as well as fraud.
- However, because the insurance companies had elected specific performance relief, the trial court refused to award damages.

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**Court of appeals vacated and remanded in relevant part**

- Breach of contract and fraud can coexist and are not mutually exclusive.
- The fact that the insurance companies elected specific performance for breach of contract did not deny them the ability to recover damages for fraud.
- The breach of contract and fraud here were two separate harms:
  - The former occurred when the business executive and the private-equity firm failed to meet the MOU deadline.
  - The latter occurred when they originally entered the MOU.
- The court of appeals vacated and remanded with respect to damages, affirming the rest of the trial court's judgment.

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**Consent Orders**

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**Kassel v. Reinh,**  
**N.C. App. (43)**

Issue:

Whether a consent order that contains findings of facts and conclusions of law is enforceable as a court-approved contract or only through contempt as an order of the court.

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**Facts**

- A buyer and seller entered into a lease agreement that included an option to purchase.
- Before the time ran on the option to purchase, a hurricane damaged the home necessitating the replacement of the roof.
- Despite an unresolved dispute over who should pay for the roof, the buyers notified the sellers that the buyers were exercising their option to purchase.
- The buyers brought an action for breach once it became clear that the sellers refused to close.
- Disputes continued, and the buyer and seller ultimately agreed upon a consent order, which was presented to and the court.

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**Facts (cont'd)**

- The consent order included findings of fact and conclusions of law.
- The judge signed the order that the parties presented.
- The buyer did not close within 60 days of the entry of the consent order, as the consent order provided.
- Both sides filed claims against the other, and a different superior court judge entered an order to enforce the consent order.
- Because the judge construed the consent order as a standard real-estate contract, the judge found the order allowed the buyers to close in a reasonable time rather than requiring them to close in 60 days.

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**Court of appeals affirmed**

- On appeal, the sellers' first two issues were whether the trial court erred in (1) how it interpreted the consent order and (2) when it changed the deadline from a date certain to a flexible deadline that allowed the buyers "a reasonable time to perform."
- In order to address the issues, the court had to decide whether the consent order would be viewed as a court-approved contract (and thereby enforceable by a breach of contract action) or as an order of the court (and thereby enforceable by contempt of court).
- The court of appeals held that the consent order was a contract. Therefore, the trial court's interpretation was correct. The judgment was a reiteration of the private parties' agreement.

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**Holding (cont'd)**

- The court looked first at the language of the consent order for whether it "shows the court merely approved the agreement of the parties and set it out in the judgment."
- The court next considered whether the judge who signed the consent order made any determination of the respective rights of each party.
- Finally, the court considered whether "the judge essentially 'rubber stamped' the agreement reached by the parties."
- The judge did not make any modifications to the parties' agreement based on the judge's own interpretation of the parties' rights and obligations; instead, the consent order and the parties' agreement were essentially identical.

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72



**Jurors**

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**State v. Wiley,**  
**N.C. App. (30)**

Issue:

Whether the trial court abused its discretion in excusing a juror from service when the court learned that the juror was no longer a resident of the county where the trial took place.

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**Facts**

- A juror was late to the third day of trial in Person County.
- The trial court sent a sheriff to locate the juror.
- The sheriff notified the court that he had heard the juror had moved from Person County to Durham County.
- The juror explained that he was “living between both Durham and Person County” but insisted that he was still a resident of Person County.
- The trial court concluded that the juror was no longer a Person County resident and excused the juror.

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**Court of appeals affirmed**

- The trial court did not abuse its discretion in excusing the juror from jury service.
- It is within the trial court's discretion to excuse a juror from further jury service when the juror admits to moving to a different county prior to reporting to jury service.

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76

**Evidence: Rule 803**

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**State v. Hocutt,  
N.C. App. (32)**

Issue:

Whether a written statement is admissible under Rule 803(5) where the witness was not able to testify that the written statement was read back to him at a time when the facts were fresh in his memory.

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78

**Facts**

- A neighbor allegedly shot a dog.
- An illiterate father who was drunk at the time witnessed the neighbor walking away from the location of the shooting.
- The father's statement to investigators was transcribed by his son but not read back for verification.
- Nonetheless, the father signed the statement at the time of the transcription.
- The neighbor was charged with felony cruelty to animals.
- The father was called to testify against the neighbor but admitted that he could not recall what he saw because he was drunk at the time and had a short-term memory issue.

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**Facts (cont'd)**

- When the prosecution read the written statement to the father, he could not confirm that the written statement was what he stated at the time.
- The jury returned a guilty verdict.

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80

**Court of appeals found plain error and ordered a new trial**

- The trial court plainly erred in admitting the father's hearsay statement as substantive evidence without adequate foundation, and the neighbor was entitled to a new trial.
- Under Rule 805(3), a declarant's signed written statement is not admissible when (1) it was never read back to the declarant for adoption; (2) the in-court testimony contradicts the statements contained within the statement; and (3) the declarant cannot recall the events described.

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81

# ATTORNEY DISCIPLINE

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82

**In re Inhaber,**  
**N.C. App. (48)**

Issue:

Whether the trial court could discipline an attorney where there was no evidence the attorney had notice of the charge or potential for sanctions.

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83

**Facts**

- A licensed North Carolina attorney was in a district court representing several clients with traffic infractions.
- Due to the attorney's late appearance to the administrative court session, the ADA opposed the attorney's request to re-calendar several matters and withdraw orders for arrest.
- Two weeks later, the attorney got into an argument with the ADA and the attorney purportedly raised his voice and acted unprofessionally.
- The dispute allegedly created a delay of ten minutes to the court's proceedings.

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**Facts (cont'd)**

- Later that day, the attorney returned to the trial court for an afternoon session where he believed he would only be addressing a client's traffic citation.
- At the conclusion of the afternoon session, the trial court held a disciplinary hearing regarding the attorney's conduct that occurred in the morning session and earlier that month.
- The trial court suspended the attorney's license to practice in that judicial district for one year.

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**Court of appeals vacated**

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86

**PRETRIAL PROCEDURE**

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87

Personal Jurisdiction

Horizontal lines for notes

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Miller v. LG Chem, Ltd., N.C. (1)
Issue:
Whether the trial court erred in granting a motion to dismiss for lack of personal jurisdiction when a motion to compel was pending for jurisdictional discovery.

Horizontal lines for notes

89

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

Horizontal lines for notes

90

**Supreme court reversed (per curium)**

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

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91

**Rule 12**

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92

**Maynard v. Crook,**  
**N.C. App. (12)**

Issue:

Whether a trial court erred in granting a Rule 12(c) motion for judgment on a property owner's counterclaims where no motion was pending and no reply to the counterclaims had been filed.

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93

**Facts**

- A seller entered a contract with a buyer to purchase a tract of land.
- The seller represented that the tract of land was accessible by a 60 ft public right-of-way.
- The property owner of the adjacent tract of land claimed that the right of way, upon which her driveway was situated, was her property and prevented the buyer and seller from accessing the sale property from the right-of-way.
- The buyer and seller sued the property owner.

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94

**Facts (cont'd)**

- The property owner filed an answer and counterclaims in response.
- The buyer and seller moved for judgment on the pleadings pursuant to Rule 12(c) for the claims alleged in the complaint and for Rule 12(b)(6) dismissal of the property owner's counterclaims.
- The trial court entered an order dismissing the property owner's counterclaims pursuant to Rules 12(b)(6) and 12(c).

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**Court of appeals reversed in relevant part**

- The trial court erred in granting the Rule 12(c) motion on the property owner's counterclaims where no motion was pending and no reply to the counterclaims had been filed.
- Rule 7(a) defines what the courts should consider as pleadings and "[t]he rule's express provision that '[t]here shall be . . . a reply to a counterclaim' contemplates that the pleadings do not 'close' until a reply to a counterclaim is filed."

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**Business Court Rule 10.9**

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**Value Health Solutions Inc v. Pharmaceutical Research Associates, Inc., N.C. (17)**

Issue:

Whether the business court improperly converted a Rule 10.9 statement into a motion to compel.

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98

**Facts**

- Two companies negotiated an asset purchase agreement.
- Over time, negotiations on specific terms began to break down to the point where one filed suit against the other.
- During the discovery process, the plaintiff emailed a Rule 10.9 statement to the business court that the business court dismissed during a teleconference.

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**Supreme court affirmed in relevant part (Barringer, J.; Earls, J. concurred in relevant part)**

- The business court does not abuse its discretion where it denies a Rule 10.9 discovery request without prejudice even where it states in its order that it is inclined to deny a potential motion to compel.
- By doing so, the business court does not convert the statement into a motion to compel.

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100

**Rule 52**

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101

**Reints v. WB Towing Inc.,**  
**N.C. App. (22)**

Issue:

Whether the trial court abused its discretion in denying a Rule 52(b) motion where the motion was made to set aside a dismissal order devoid of findings of fact and would have the effect of amending the complaint after judgment was entered.

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102

**Facts**

- A sailor hired a towing company to help him unground a sailboat stuck in a marsh. A navigation company owned the sailboat.
- When the towing company unsuccessfully attempted to unground the sailboat, the mast broke.
- The sailor filed suit.
- The towing company filed a motion to dismiss pursuant to Rules 12(b)(6) and (7), noting that a necessary party to the litigation was absent (the owner of the sailboat).
- The trial court granted the towing company's motion to dismiss pursuant to Rule 12(b)(7) for failure to join a necessary party-in-interest.
- The sailor filed a Rule 52(b) motion requesting that the trial court set aside its dismissal order so that the sailor could file and serve ratification of the claim by the party-in-interest.
- The trial court dismissed the sailor's Rule 52(b) motion.
- The sailor appealed.

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103

**Court of appeals affirmed in relevant part**

- Rule 52(b) allows a party to request that the trial court amend its findings of fact or make additional findings of fact.
- An order dismissing a complaint for failure to join a necessary party, however, does not resolve the merits and the court is not required to make findings of fact.
- The sailor's Rule 52(b) motion requested that the court set aside the dismissal order so that the sailor could serve ratification of the claim by the true party-in-interest, which in essence would constitute an amendment to the complaint.
- It is established that a plaintiff may not amend a complaint following dismissal of the claim pursuant to Rule 12(b)(6).

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104

**Holding (cont'd)**

- By that logic, the same applied to claims dismissed pursuant to Rule 12(b)(7) for failure to join a necessary party-in-interest.
- There is no case law that supports setting aside an order pursuant to Rule 52(b) that dismisses a complaint for failure to join a necessary party and is devoid of any initial findings.
- Furthermore, the sailor's intent was to amend his complaint, which, as a general rule, is not allowed following judgment unless that same judgment is set aside or vacated under Rules 59 or 60.
- The trial court did not abuse its discretion in denying the sailor's Rule 52(b) motion.

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105

**Appellate Procedure**

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106

**Cryan v. National Council of YMCAs of the U.S., N.C. (46)**

Issues:

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

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

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107

**Facts**

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

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108

**Supreme court affirmed**

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

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109

**Holding (cont'd)**

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

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**THANK YOU!**

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