CIVIL LAW UPDATE
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2023 Appellate Training: New & Emerging Legal Issues

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I. LIABILITY

A. Negligence

(1) Doctrine of Sudden Emergency

In Chahdi v. Mack, 288 N.C. App. 520, 886 S.E.2d 900 (2023), the court of appeals considered whether the trial court erred in instructing the jury on the doctrine of sudden emergency when a driver drove into a convenience store after experiencing brake failure several miles earlier. Id. at 521, 886 S.E.2d at 903.

The driver, who was operating her grandmother's vehicle, experienced brake failure. Id. She continued to drive for several miles until she approached a red light. Id. The driver turned into the parking lot of a convenience store and drove into the store while traveling approximately ten miles per hour. Id. As a result of the collision, an indoor display fell on a store employee's arm, injuring her. Id.

The store employee filed suit in district court alleging that the driver negligently operated the vehicle. Id. at 522, 886 S.E.2d at 903. At trial, the jury was instructed on the doctrine of sudden emergency. Id. The jury found for the driver. Id., 886 S.E.2d at 903-904 The store employee appealed, arguing the trial court erred in instructing the jury on the doctrine of sudden emergency because "(1) there was not an emergency requiring immediate action to avoid injury, and (2) assuming there was an emergency, [the driver]'s negligence created the emergency." Id. at 522, 886 S.E.2d at 904.

The doctrine of sudden emergency applies "when a defendant is confronted by an emergency situation not of his own making" and requires the defendant to act only as a reasonable person would react in similar circumstances. Id. (quoting Massengill v. Starling, 87 N.C. App. 233, 236, 360 S.E.2d 512, 514 (1987)). The trial court must find substantial evidence of two

essential elements in order to instruct the jury on the doctrine: (1) an emergency situation exists that requires "immediate action to avoid injury," and (2) the emergency was not created by "the negligence of the party seeking the protection" afforded by the doctrine. Id. (quoting Allen v. Efird, 123 N.C. App. 701, 703, 474 S.E.2d 141, 142–43 (1996)).

The court of appeals held that sudden brake failure is an emergency In which the sudden emergency doctrine may apply. Id. at 523, 886 S.E.2d at 904. The store employee argued that the driver failed to present substantial evidence that she was confronted with an emergency requiring immediate action because she continued to drive for several miles and spoke with the owner of the vehicle for one-to-two minutes following the discovery and before the collision. Id. The court of appeals reasoned that the store employee's argument confused "immediate action with immediate resolution" and failed "to recognize that a brake failure will generally, inevitably end in an unavoidable accident, in spite of a defendant acting immediately to avoid injury." Id.

The court of appeals explained that "application of the doctrine does not focus on the instant in which the defendant was able to resolve the emergency, but rather on whether, taking the emergency into account, the defendant acted as a reasonable person would, given similar circumstances." Id. Further, the court of appeals held that whether the driver acted reasonably under the circumstances was a question for the jury. Id. at 524, 886 S.E.2d at 905.

The court of appeals concluded that the trial court did not abuse its discretion and properly instructed the jury on the doctrine of sudden emergency. Id. at 528, 886 S.E.2d at 908.

B. Constitutional Claims

In Kelly v. State, 286 N.C. App. 23, 878 S.E.2d 841 (2022), the court of appeals considered how to evaluate whether a challenge to a statute is facial or as-applied for purposes of applying section 1-267.1 of the North Carolina General Statutes and Rule 42(b)(4) of the North Carolina

Rules of Civil Procedure, which require trial court judges to transfer facial constitutional challenges to a three-judge panel.

Plaintiffs brought action against the State of North Carolina and the North Carolina State Educational Assistance Authority ("SEAA") alleging that an educational program operated by the defendants violated several sections of the North Carolina Constitution. Id. at 25, 878 S.E.2d at 845. This case arose from the general assembly's enactment of a scholarship program that sought to enable a "small number of students in low-income families to receive scholarships from the State to attend private school." Id. at 24, 878 S.E.2d at 844. Each year, the SEAA makes available applications for "eligible students" to aid them in attending any "nonpublic school." Id. The act defines a "nonpublic school" as "a school that meets the requirements of Part 1 [private church schools and schools of religious charter] or Part 2 [qualified nonpublic schools] of [section 115C-562.1 of the North Carolina General Statutes]." Id.

Plaintiffs first contended that this program violated their state constitutional rights under Article I, Sections 13 and 19 of the North Carolina Constitution by: (1) funding a program based on an individual's religious faith and sexual orientation, (2) creating a program limiting a student's choice in schools by his or her religious beliefs, (3) funding schools that condition enrollment on adopting religious belief that condemn homosexuality, (4) directing taxpayers' dollars to institutions that discriminate against persons of the plaintiffs' religious faiths, (5) dividing communities by religion, and (6) denying plaintiffs the ability to live in a community without state-supported discrimination. Id. at 25, 878 S.E.2d at 845. Separately, plaintiffs also contended that the program violated their constitutional rights under Article I, Sections 13, 14, and 19 and Article V, Sections 2(1) and 2(7) of the North Carolina Constitution by funding schools that prejudice and discipline students whose beliefs do not conform to the school's doctrine, require conformity with

religious beliefs, mandate religious services as a part of the curriculum, and condemn homosexuality and LGBTQ rights. Id. at 26, 878 S.E.2d at 845. Lastly, plaintiffs contended that the program violated Article 1, Section 15 and Article V, Sections 2(1) and 2(7) of the North Carolina Constitution by transferring taxpayer funds to private schools "without any accountability or requirements ensuring that students will actually receive an education." Id. at 27, 878 S.E.2d at 845-46. Defendants filed a motion to transfer the case to a three-judge panel, arguing that the plaintiffs' complaint "clearly asserts a facial constitutional challenge" and thus "must be heard by a three-judge panel of the Superior Court of Wake County" as required by Section 1-267.1 of the North Carolina General Statutes and Rule 42(b)(4) of the North Carolina Rules of Civil Procedure. Id. The trial court denied this motion and found that the complaint "presents an as-applied challenge to the Program." Id. Defendants filed an appeal to the court of appeals. Id.

In an opinion by Judge Wood writing for the majority, the court of appeals reversed the trial court's order and found that the case should have been transferred to a three-judge panel. Id. at 36, 878 S.E.2d at 851-52. Section 1-267.1 of the North Carolina General Statutes provides that:

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

Id. at 30, 878 S.E.2d at 847.

Separately, Rule 42(b)(4) complements section 1-267.1:

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

> defendant's answer, responsive pleading, or within 30 days of filing the defendant's answer or responsive pleading.

Id. at 30, 878 S.E.2d at 847-848.

The court explained that an as-applied challenge considers whether a statute "can be constitutionally applied to a particular defendant, even if the statute is otherwise generally enforceable." Id. at 31, 878 S.E.2d at 848 (quoting State v. Packingham, 368 N.C. 380, 383 (2015)). By contrast, a facial challenge "is an attack on the statute itself," rather than an attack on its application. Id. (quoting State v. Grady, 372 N.C. 509, 522 (2019)). "When determining whether a challenge is as-applied or facial, the court must look at the breadth of the remedy requested." Id. at 32, 878 S.E.2d at 849 (citing Doe v. Reed, 561 U.S. 186, 194 (2010)). A facial challenge exists if the remedy sought reaches beyond the circumstances of the adjudicating plaintiffs. Id. Alternatively, an as-applied challenge exists if the remedy is "limited to a plaintiff's particular case." Id. (quoting Libertarian Party v. Cuomo, 300 F. Supp. 3d 424, 439 (W.D.N.Y. 2018)).

Here, the court found that the remedy the plaintiffs sought was to void the statute in its entirety. Id. at 33, 878 S.E.2d at 849. This remedy reaches beyond just the plaintiffs' particular circumstances. Id. The conclusion that the attack is a facial challenge is supported by case law, which indicates that when relief "is not limited to defendant's particular case but enjoins application . . . to other . . . individuals," the challenge is facial. Id. Additionally, the court explained that a "trial court's ability to examine an as-applied challenge is predicated upon the existence of facts specific to a defendant from which to determine whether the statute is unconstitutional as applied." Id. at 34, 878 S.E.2d at 850. Here, no plaintiff had applied for a scholarship under the program's terms. Id. Rather, plaintiffs only attacked the fact that a portion of the program has religious characteristics. Id. Since the plaintiffs failed to plead facts sufficient

to assert an as-applied challenge, and because the plaintiffs' claims effectively would preclude enforcement of any portion of the statute, the court concluded that the action was a facial challenge that required the court to transfer the matter to a three-judge panel. Id. at 35-36, 878 S.E.2d at 850-51.

Judge Hampson, writing for the dissent, found that it was premature and contrary to statutory procedure to decide at such a preliminary stage whether the plaintiffs' asserted as-applied challenge was a facial challenge required to be heard by a three-judge panel. Id. at 37, 878 S.E.2d at 852. He explained that the statutory scheme requires the trial court to decide if and when to transfer the matter. Id. Judge Hampson conceded in part that the plaintiffs' complaint sought broad relief; however, he contended that this factor is not dispositive. Id. at 38, 878 S.E.2d at 852-53. He highlighted the difference between as-applied and facial challenges as "not about what must be pleaded in a complaint," but rather about the ultimate relief imposed. Id. However, an "inexact prayer for relief does not preclude proper relief from being granted." Id.

Furthermore, the dissent observed that if during litigation it becomes evident that relief cannot be granted without a determination as to the facial constitutionality of the statute, the transfer statutes provide an answer for such circumstance. Id. at 40, 878 S.E.2d at 854. Specifically, the dissent highlighted that under section 1A-1, Rule 42(b)(4) and section 1-81.1(a1) of the North Carolina General Statutes, such determination is a bifurcated process where the court should decide the matters it can, and if the facial validity of the act remains at issue, then the trial court should transfer the case to a three-judge panel. Id. Thus, Judge Hampson concluded that the correct interpretation of the transfer statutes provides that trial courts can transfer a case after resolving all issues the courts have authority to decide. Id. (citing Holdstock v. Duke Univ. Health Sys., Inc., 270 N.C. App. 267, 281 (2020)). Judge Hampson also discussed his concern that by

granting certiorari in this case, the court ratified a process that any decision related to transferring a case to a three-judge panel may become immediately appealable, and its decision "forces Plaintiffs to make facial challenges contrary to the precedent of this Court." Id. at 43-44, 878 S.E.2d at 856.

C. Woodson Claims

In Estate of Stephens v. ADP Totalsource DE IV, Inc., 288 N.C. App. 208, 886 S.E.2d 537 (2023), the court of appeals considered whether an employee alleged facts sufficient to establish an exception to the North Carolina Industrial Commission's exclusive jurisdiction under Woodson and Pleasant.

An employee was crushed to death at his workplace when part of a two-thousand-pound metal tire mold—which was elevated by a forklift that had been modified without manufacturer approval—fell onto his chest. Id. at 209, 886 S.E.2d at 540. At the time of the incident, the employee had been working as a general laborer for approximately three weeks. Id. Prior to this employment, the employee had never worked in a factory or manufacturing facility, never repaired or repurposed tire molds, and never received training for the proper method of repairing and repurposing tire molds. Id. at 210, 886 S.E.2d at 541.

The employee's estate filed a willful negligence claim against his employer and the employee's on-site supervisor. Id. at 211, 886 S.E.2d at 541. Both the employer and the on-site supervisor moved to dismiss the estate's claims under Rules 12(b)(1) and 12(b)(6) of the North Carolina Rules of Civil Procedure, arguing both that the Industrial Commission has exclusive jurisdiction over workplace injuries and that the estate failed to allege facts sufficient to establish an exception to that jurisdiction. Id. The trial court denied the motions, and the employer and supervisor appealed. Id.

The estate alleged that the employer knew that the employee was not trained, qualified, or experienced to work with tire molds. Id. at 210, 886 S.E.2d at 541. Nevertheless, the employer pulled the employee from another part of the manufacturing plant and instructed him to detach bolts from below a two-piece tire mold that weighed approximately two thousand pounds and was elevated by a forklift. Id. The employee was neither supervised nor provided with adequate personal protective equipment. Id. Shortly after the employee began working on the tire mold, a bolt snapped, causing part of the mold to fall onto the employee's chest, killing him. Id.

After the employee's death, the North Carolina Occupational Safety and Health Division of the North Carolina Department of Labor ("NCOSH") investigated the worksite and concluded that the employer "committed a 'Willful Serious' violation of 29 CFR 1910.178(m)(2), whereby employees stood under or passed under the elevated portions of a [forklift] [,] . . . while unbolting metal plates weight [sic] approximately 1,705 pounds." Id. (alterations in original). NCOSH also concluded that the employer "committed a violation of 29 CFR 1910.178(a)(4) and 29 CFR 1910.178(a)(5)" by modifying its forklifts "without manufacturer approval. . . ." Id.

The court of appeals, in an opinion by Judge Collins, affirmed the trial court's decision to deny the employer's motion to dismiss because the employee alleged facts sufficient to establish exceptions to the Commission's exclusive jurisdiction under Woodson and Pleasant. Id. at 228, 886 S.E.2d at 551-52. The court acknowledged that the North Carolina Workers' Compensation Act ("the Act") provides as follows:

> [T]he Act provides an avenue for injured employees to receive "sure and certain recovery for their work-related injuries without having to prove negligence on the part of the employer or defend against charges of contributory negligence." Whitaker v. Town of Scotland Neck, 357 N.C. 552, 556, 597 S.E.2d 665, 667 (2003). "In return, the Act limits the amount the employee's right to pursue potentially larger damages awards in civil action." Woodson v. Rowland, 329 N.C. 330, 338, 407 S.E.2d 222, 227 (1991) (citation omitted). The

> exclusivity provision generally precludes common law negligence actions against employers and co-employees whose negligence caused the injury. Pleasant v. Johnson, 312 N.C. 710, 713, 325 S.E.2d 244, 247 (1985).

Id. at 215, 886 S.E.2d at 544 (citations in original). However, the court identified two exceptions to the "exclusivity provision." Id. First, "an employee may pursue a civil action against an employer when the employer 'intentionally engages in misconduct knowing it is substantially certain to cause injury or death to employees and an employee is injured or killed by that conduct[.]'" Id. (quoting Woodson, 329 N.C. at 340-41, 407 S.E.2d at 228). Second, "an employee may pursue a civil action against a co-employee for their willful, wanton, and reckless negligence." Id. (citing Pleasant, 312 N.C. at 717, 325 S.E.2d at 250).

Here, the court first considered the Woodson claim. Id. at 215-223, 886 S.E.2d at 544-49. The employer argued that the estate "failed to allege facts sufficient to establish an exception to the Commission's exclusive jurisdiction under Woodson." Id. at 215, 886 S.E.2d at 544. To state a Woodson claim, the estate was required to allege that "the employer intentionally engaged in misconduct knowing that such conduct was substantially certain to cause injury or death." Id. (citing Woodson, 329 N.C. at 340-41, 407 S.E.2d at 228). Under Woodson, "substantial certainty" of injury or death is more than a "mere possibility" or "substantial probability." Id. (citing Arroyo v. Scottie's Prof. Window Cleaning, Inc., 120 N.C. App. 154, 159, 461 S.E.2d 13, 16 (1995). When analyzing the validity of a Woodson claim under the "substantial certainty" standard, the court considers "all of the facts taken together," and "[n]o one factor is determinative." Id. (citing Arroyo, 120 N.C. App. at 159, 461 S.E.2d at 16).

When the court of appeals examined the Woodson exception in Arroyo, it reversed a trial court's dismissal of the plaintiff's complaint, "holding that plaintiff's allegations were 'sufficient to state a legally cognizable claim under Woodson that defendant intentionally engaged in conduct

that it knew was substantially certain to cause serious injury or death'" when the defendant knew the danger of requiring the plaintiff to "work from a great height" without safety training or equipment. Id. at 218, 886 S.E.2d at 546 (quoting Arroyo, 120 N.C. App. at 159-60, 461 S.E.2d at 17). By contrast, in Vaughn, the court of appeals reversed a trial court's denial of a motion to dismiss, holding that the "plaintiff was unable to articulate specific facts indicating that the employer knew of and disregarded safety procedures, and his conclusory allegations were discordant with the employer's published safety policies." Id. at 219, 886 S.E.2d at 546 (citing Est. of Vaughn v. Pike Elec., LLC, 230 N.C. App. 485, 498-99, 751 S.E.2d 227, 236-37 (2013)).

Here, the court found that the estate's allegations more closely resembled those in Arroyo than those in Vaughn. Id. at 221, 886 S.E.2d at 547. Notably, the employee alleged that his employer "knew [that] working under heavy loads without proper support or using proper equipment was certain to result in death or serious injury[,] that NCOSH concluded [the employer] had committed a "Willful Serious" violation of [OSHA], whereby employees stood under or passed under the elevated portion of a [forklift] while unbolting metal plates weigh[ing] approximately 1,705 pounds," and NCOSH concluded the employer "modified their [forklifts] without manufacturer approval to facilitate this process." Id. As was the case in Arroyo, the employee "alleged facts that, taken as true, establish that [the employer] was both aware of and encouraged the misconduct that resulted in [the employee's] death." Id. Moreover, the employee "alleged facts that, taken as true, establish that [the employer's] conduct was 'substantially certain to cause injury or death'":

> In Woodson, our Supreme Court held that directing employees to dig a trench without a trench box was substantially certain to result in the trench caving in. In Arroyo, this Court held that directing employees to clean high-rise windows with no fall protection was substantially certain to result in an employee falling from the building. Here, directing employees to stand beneath and

> disassemble 2,000-pound metal tire molds—suspended by forklifts that had been modified without manufacturer approval—without the proper supports necessary to prevent a crushing-type incident is substantially certain to result in the tire mold falling on and crushing the employee.

Id. at 221, 886 S.E.2d at 548

Based on the foregoing, the court held that the employee's allegations were sufficient to state a legally cognizable claim under Woodson. Id. at 223, 886 S.E.2d at 549.

The court also considered whether the employee alleged "facts sufficient to establish an exception to the Commission's exclusive jurisdiction under Pleasant." Id. at 224-28, 886 S.E.2d at 549-51. "To state a Pleasant claim, a plaintiff must allege that a co-employee acted with willful, wanton, and reckless negligence; and that the co-employee's negligence resulted in plaintiff's injury." Id. at 224, 886 S.E.2d at 549 (citing Pleasant, 312 N.C. at 717-18, 325 S.E.2d at 250). "In Pleasant, plaintiff's co-employee on a construction site attempted to drive a truck as close to plaintiff as possible without striking him, but miscalculated and struck plaintiff, seriously injuring him." Id. (citing Pleasant, 312 N.C. at 711, 325 S.E.2d at 246). There, the supreme court found that the allegations about the co-employee's driving sufficiently evinced recklessness to establish a claim. Elsewhere, however, the supreme court held that two co-employees' alleged conduct was not negligent when the facts did not support an inference that the co-employees intended to injure the plaintiff or were "manifestly indifferent to the consequences" of injuring him. Id. (citing Pendergrass v. Card Care Inc., 333 N.C. 233, 238, 424 S.E.2d 391, 394 (1993)). "More recently, in Vaughn, [the court of appeals] held that the plaintiff had alleged facts sufficient to state a Pleasant claim against his supervisor." Id. There, an insufficiently trained employee was electrocuted while following his supervisor's order to work on live power lines. Id. Here, the court considered the estate's allegations similar to those in Vaughn because the decedent employee

was killed while following his supervisor's order to work on a heavy tire mold despite not receiving any training to do the work safely. Id. at 227, 886 S.E.2d at 551. The estate's allegations were thus "sufficient to state a legally cognizable claim under Pleasant." Id.

Judge Dillon concurred in part and dissented in part. Id. at 228, 886 S.E.2d at 552. Judge Dillon contended that the alleged facts more closely resembled the facts in Whitaker than those in Woodson. Id. at 231, 886 S.E.2d at 553. He acknowledged that the supreme court had reversed the court of appeals' Whitaker decision and emphasized the narrowness of Woodson exceptions:

> Our Supreme Court reiterated that Woodson provided a "narrow exception to the general exclusivity of the [Act]" by allowing an employee or his estate to sue the employer in tort "only in the most egregious cases of employer misconduct" where said conduct is intentional and "where such misconduct is substantially certain to lead to the employee's serious injury or death."

Id. at 230, 886 S.E.2d at 553 (quoting Whitaker v. Town of Scotland Neck, 357 N.C. 552, 557, 597 S.E.2d 665, 668 (2003)). Nevertheless, Judge Dillon maintained that the similarity between the factual allegations in Whitaker, where the failure of a latching mechanism caused a dumpster to hit an employee, and the present case, where the failure of a bolt—rather than any inexperience on the decedent employee's part—caused the tire mold to fall on the employee, indicated that the employer was not "substantially certain" the injury would occur. Id. at 231, 886 S.E.2d at 553. Consequently, Judge Dillon would have found that the factual allegations showed, at most, "willful negligence" on the part of the employer and supervisor. Id.

In Estate of Baker v. Reinhardt, 288 N.C. App. 529, 887 S.E.2d 437 (2023), the court of appeals considered whether the forecast of evidence presented to the trial court failed "to show the requisite degree of negligence to establish a valid Pleasant claim."

A worker at a wood furniture manufacturer "died tragically in a workplace accident without any eyewitnesses." Id. at 530, 887 S.E.2d at 439. The worker, "without direction or instruction

from anyone, was cleaning around [a bandsaw machine] when he stepped into a partially-enclosed area to its rear." Id. at 532, 887 S.E.2d at 441. "Nearby employees heard a strange noise from the machine before observing [the worker] laying on his back in a semi-conscious state." Id. After the worker died from his injuries, his estate filed suit against the president and plant manager of the wood furniture manufacturer for willful, wanton or reckless negligence under Pleasant v. Johnson, 312 N.C. 710, 325 S.E.2d 244 (1985). Id. at 530, 887 S.E.2d at 440. Pleasant "allows recovery for workplace accidents, independent of the Workers' Compensation Act's ("the Act") exclusivity provision, that arise out of the 'willful, wanton and reckless negligence' of co-employees." Id. at 533, 887 S.E.2d at 442 (citations omitted). Both the president and plant manager moved to dismiss the complaint under Rule 12(b)(1) and for summary judgment under Rule 56(b). Id. The trial court granted the motions as to the president but denied the motions as to the plant manager. Id. at 534, 887 S.E.2d at 442.

On appeal, the court considered whether the trial court lacked subject matter jurisdiction over the deceased worker's claim because the forecast of evidence presented to the trial court failed to establish a Pleasant exception to the Act's exclusivity provision. Id. at 533-43, 887 S.E.2d at 442-47. Ultimately, the court of appeals held that the evidence forecasted by the deceased worker's estate could not meet the "high bar necessary to establish a Pleasant claim." Id. at 540, 887 S.E.2d at 446. The Act "ordinarily provides 'the exclusive remedy in the event of an employee's injury by accident in connection with their employment, . . . and the injured employee may not elect to maintain a suit for recovery of damages for their injuries, but must proceed under the Act.'" Id. at 535, 887 S.E.2d at 443. "This rule is one of subject matter jurisdiction, as 'such cases are within the exclusive jurisdiction of the Industrial Commission; the superior court has been divested of jurisdiction by statute.'" Id. "It is not, however, absolute." Id. In Pleasant, the supreme court

"held that an injured employee may sue a co-employee for workplace injuries caused by the latter's 'willful, wanton and reckless negligence.'" Id. (quoting Pleasant, 312 N.C. at 717, 325 S.E.2d at 250). The exception to this rule "is based on a recognition that 'wanton and reckless behavior may be equated with an intentional act,' and therefore, 'injury to another resulting from willful, wanton and reckless negligence [by a co-employee] should also be treated an intentional injury' that falls outside the exclusive jurisdiction of the Industrial Commission." Id. at 536, 887 S.E.2d at 443 (quoting Pleasant, 312 N.C. at 715, 325 S.E.2d at 248.). Ultimately, the plaintiff "must clear a high bar in alleging and proving such a claim" because prior supreme court and court of appeals cases indicate that a plaintiff who seeks to recover under Pleasant has a heavy burden of proof. Id. (citing Trivette v. Yount, 366 N.C. 303, 310, 735 S.E.2d 306, 311 (2012)). Moreover, "[k]nowledge of a dangerous hazard, standing alone, does not establish a viable claim under Pleasant." Id. at 542, 887 S.E.2d at 447.

Here, the uncontroverted evidence established that the wood furniture manufacturer "operated an award-wining safety program, which included quarterly safety briefings." Id. at 540, 887 S.E.2d at 446. The deceased worker attended that program in the weeks before the accident and was trained on the machine and its predecessor. Id. All evidence in the record indicated, without dispute, that the president and plant manager did not request or instruct the deceased worker to clean around the machine. Id. Furthermore, during a combined fifteen years of operation, all of which occurred during the deceased worker's employment: "(1) nobody was injured on the bandsaw machine; (2) OSHA issued no violations related to the bandsaw machine; [and] (3) the wood furniture manufacturer received no safety complaints from staff about the bandsaws." Id. At no point did the wood furniture manufacturer undercut the precautions and training. Id. at 541, 887 S.E.2d at 447.

For the foregoing reasons, the court of appeals concluded that the binding precedents applying Pleasant discussed above precluded the court from recognizing such a claim on the facts presented. Id. at 542-43, 887 S.E.2d at 447. Consequently, the court reversed the trial court's order denying summary judgment for the plant operations manager and remanded for entry of judgment consistent with the opinion of the court of appeals. Id.

II. PRETRIAL PROCEDURE

A. Jurisdiction

(1) Personal Jurisdiction

In State of North Carolina ex rel Stein v. E.I. DuPont de Nemours and Company, 382 N.C. 549, 879 S.E.2d 537 (2022), the supreme court considered whether the Due Process Clause allows North Carolina courts to exercise personal jurisdiction over companies that receive assets from another company, even though the receiving companies do not have any contacts of their own with the state. Id. at 550-51, 878 S.E.2d at 539.

The state brought suit against numerous corporate entities, all of which had a relationship to a predecessor entity, and alleged that the predecessor entity knowingly operated a plant in North Carolina that released harmful chemicals into the environment for many years. Id. at 551, 878 S.E.2d at 539-40. The state further alleged that the predecessor entity chose to restructure its business to limit future liability and protect its remaining assets after it recognized the scope of potential liability related to the release of chemicals. Id. at 552, 878 S.E.2d at 540. During the restructure, the pertinent successor entities executed separation agreements with the predecessor entity agreeing to assume the predecessor entity's liabilities. Id. at 554, 878 S.E.2d at 541.

The successor entities moved to dismiss the action on the grounds that the trial court could not exercise personal jurisdiction over them because they are merely Delaware holding companies that do not conduct business in North Carolina. Id. In denying the motion to dismiss, the business court held that "the Due Process Clause permits jurisdiction to be exercised over a corporate successor when (1) the predecessor is subject to the jurisdiction in the forum; and (2) state law subjects the successor to liability." Id. at 554, 878 S.E.2d at 542. No one disputed the state's jurisdiction over the original entity. Id. Accordingly, the court analyzed whether state law imputes liability to the successor entities in the case at bar. Id.

The supreme court explained that generally a corporation that purchases substantially all of another corporation's assets is not liable for the predecessor's debts or liabilities. Id. However, relying on two of four exceptions set forth in Budd Tire Corp. v. Pierce Tire Co., 90 N.C. App. 684, 370 S.E.2d 267 (1988), the supreme court concluded that North Carolina can exercise personal jurisdiction over the new entities in this case. DuPont de Nemours, 382 N.C. at 554-55, 878 S.E.2d at 542.

The supreme court recognized that the jurisdictional inquiry requires a two-part analysis: first, it must determine whether the long-arm statute permits the exercise of jurisdiction; second, it must determine whether exercise of jurisdiction would violate the Due Process Clause of the Fourteenth Amendment of the United States Constitution. Id. at 556, 878 S.E.2d at 543. The supreme court acknowledged that in circumstances like these, the "successor likely has or should have notice of the liabilities of its predecessor in a given jurisdiction." Id. at 559, 878 S.E.2d at 545. In this case, the supreme court concluded that due process allows North Carolina courts to exercise jurisdiction over the new entities because: "(1) the parties expressly agreed to assume [the predecessor entity's] liabilities in the April 2019 Separation Agreement . . . ; and (2) the State

alleged sufficient facts at the motion to dismiss stage to support the claim that [the predecessor entity] transferred its assets to [the successor entities] in an attempt to defraud the State in its position as a creditor." Id. The court cautioned: "[a] company cannot expressly assume liabilities from its predecessor, fail to limit those liabilities geographically, and then disclaim liability based on the notion that it did not expect to be brought to court in a particular forum." Id. at 562, 878 S.E.2d at 547. It further explained that successor liability is permitted where:

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

Id. at 565, 878 S.E.2d at 549.

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

In Schaeffer v. SingleCare Holdings, LLC, 384 N.C. 102, 884 S.E.2d 698 (2023), the supreme court considered activities of foreign corporations and non-resident individuals sufficient to confer personal jurisdiction.

A former employee sued employer corporations and individual officers in tort and contract claims arising from his termination. Id. at 104, 884 S.E.2d at 702. During employment negotiations, the former employee lived in California. Id. With approval, the former employee relocated to North Carolina, where he continued to work remotely. Id. at 104, 884 S.E.2d at 703. The employer corporations were Delaware limited liability companies with principal places of business in Massachusetts. Id., 884 S.E.2d at 702. The individual officers were residents of Minnesota and Massachusetts. Id.

While in North Carolina, the former employee continued to substantially perform his work, and the corporations made efforts to expand their business in North Carolina. Id. at 105, 884 S.E.2d at 703. While the former employee was working in North Carolina, the corporations

> employed at least three other individuals in North Carolina, solicited applicants for business development positions in various cities within the state through LinkedIn posts that highlight [their] goal of hiring sales representatives in 'all major cities,' and provided North Carolina consumers with pharmacy discounts . . . [as well as] paid state taxes based on [former employee's] employment, and mailed tax documents to his North Carolina address.

Id.

The corporations and officers moved to dismiss the former employee's complaint for lack of personal jurisdiction. Id. They argued that only their conduct that occurred before the relevant agreements were executed should be considered in determining whether North Carolina courts could exercise specific jurisdiction over them. Id. at 103, 884 S.E.2d at 702. The trial court denied their motions, and they appealed. Id. at 105, 884 S.E.2d at 703.

In an unpublished opinion, the court of appeals unanimously reversed the trial court's denial of the motion to dismiss. Id. Although the court of appeals recognized that some of the corporations' contacts with North Carolina weighed in favor of finding specific jurisdiction, it concluded that the activities alone were insufficient to establish specific jurisdiction when the former employee's claims "did not arise out of, or even relate to, the alleged contacts between Defendants and North Carolina." Id. (quoting Schaeffer v. SingleCare Holdings, LLC, No. COA20-427, 2021 WL 2426202, at *5 (N.C. Ct. App. June 15, 2021)).

On discretionary review, the supreme court concluded that specific jurisdiction exists over the corporations "because they purposefully availed themselves of the privileges of conducting various business-related activities in North Carolina, and [former employee's] claims arise out of

or are related to those activities." Id. at 108, 884 S.E.2d at 705. On the other hand, as to the individual officers, the supreme court concluded that the former employee failed "to demonstrate that their conduct directed at North Carolina was sufficient to permit the trial court to exercise specific jurisdiction over them in this litigation." Id.

The employer corporations argued that (1) the former employee's move to North Carolina was a unilateral choice and their acquiescence and subsequent communication did not confer personal jurisdiction, and (2) the only relevant activities that gave rise to the former employee's cause of action were those that took place before his move to North Carolina. Id. "In short, [they] argue[d] that they did not voluntarily reach out to North Carolina to conduct suit-related activities here." Id.

The supreme court acknowledged that one party's unilateral activity is "not an appropriate consideration when determining whether a defendant has sufficient contacts with a forum State to justify an assertion of jurisdiction." Id. However, it concluded "there is no legal basis for hinging the whole analysis on the forum in which the relationship was established (i.e., California) to the exclusion of the forum in which [corporations] perpetuated the relationship." Id. at 109, 884 S.E.2d at 706.

Reviewing United States Supreme Court case law, the supreme court articulated that "the purposeful availment inquiry is a 'flexible' one." Id. (citing Universal Leather, LLC v. Koro AR, S.A., 773 F.3d 553, 560 (4th Cir. 2014)); Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472, 105 S. Ct. 2174 (1985)). "The crux of the purposeful availment analysis is whether a defendant reached out beyond its home—by, for example, exploiting a market in the forum State or entering a contractual relationship there." Id. at 111, 884 S.E.2d at 707 (quoting Ford Motor Co. v. Montana Eighth Jud. Dist. Ct., ___ U.S. ___, 141 S. Ct. 1017, 1025 (2021)).

Reviewing the corporations' actions in this case, the supreme court concluded that they "voluntarily and knowingly engaged with a North Carolina-based employee to support and expand his work in the state," and such engagement was sufficient to confer jurisdiction. Id. As to the officers, the supreme court concluded that the former employer failed to "provide a factual basis to conclude [they] engaged in sufficient activities giving rise to or related to the subject matter of the claims to be subjected to jurisdiction in North Carolina courts." Id. at 116, 884 S.E.2d at 710. Accordingly, the supreme court reversed the decision of the court of appeals as to the corporations, affirmed it as to the officers, and remanded the case to the trial court for further proceedings consistent with its opinion. Id. at 117, 884 S.E.2d at 711.

In Miller v. LG Chem, Ltd., 384 N.C. 632, 887 S.E.2d 844 (2023) (per curiam), the supreme court considered whether the trial court erred in granting a motion to dismiss for lack of personal jurisdiction without articulating reasons for not allowing jurisdictional discovery.

A consumer brought action against a foreign lithium-ion battery manufacturer. Id. at 632, 887 S.E.2d at 845. The trial court entered an order dismissing the consumer's claims against the lithium-ion battery manufacturer for lack of personal jurisdiction. Id. The trial court entered the dismissal order without ruling on the consumer's motion to compel, which sought responses to multiple discovery requests concerning the manufacturer's contacts with North Carolina. Id. The consumer appealed this order to the court of appeals, and the majority affirmed the trial court's decision. The dissent asserted that the court should remand the matter to the trial court to consider whether further jurisdictional discovery was warranted in light of Ford Motor Co. v. Montana Eighth Judicial District Court, ___ U.S. ___, 141 S. Ct. 1017 (2021). Miller, ___ N.C. at ___, 890 S.E.2d at 846.

On appeal, the supreme court acknowledged that Ford clarified the proper standard for the "relating to" prong of the specific personal jurisdiction analysis employed by the trial court in this case. Id. Thus, to engage in meaningful appellate review of this discretionary decision, the appellate court must be confident that the trial court applied the appropriate legal standard in the exercise of that discretion. Id. Here, the supreme court held that it could not be certain that the trial court applied an analysis consistent with Ford and that it was possible that additional discovery would lead the trial court to make new or additional findings of fact that could bear on the court's jurisdictional analysis and the appellate court's review. Id.

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

(2) Subject Matter Jurisdiction

In Bassiri v. Pilling, 287 N.C. App. 538, 884 S.E.2d 165 (2023), the court of appeals addressed whether a North Carolina trial court had subject matter jurisdiction to hear a claim for alienation of affections where some of the alleged conduct at issue may have occurred outside of North Carolina.

Several years into a husband and wife's marriage, the wife commenced an extramarital affair. Id. at 539, 884 S.E.2d at 167. The husband and wife eventually separated. Id. The husband filed a complaint against the paramour for alienation of affections, criminal conversation, and intentional infliction of emotional distress. Id. The paramour moved to dismiss the husband's complaint for lack of subject matter jurisdiction and lack of personal jurisdiction. Id. When the paramour filed a response to the husband's interrogatories, he asserted that he and the wife had, over the course of a few months, "engaged in some intimate activity" in California, Nevada, and Utah. Id. The paramour further asserted that these were the only three instances in which he had met with the wife in person. Id. at 540, 884 S.E.2d at 167 "Most other contact between them

occurred via email, text messages, and social media . . . ." Id. Some of the social media interactions allegedly occurred while the wife was living in North Carolina. Id., 884 S.E.2d at 167-68.

On the paramour's motion to dismiss, the trial court determined it lacked subject matter jurisdiction over the husband's claims for alienation of affections and criminal conversation, and it granted the paramour's motion as to those two claims. Id. at 541, 884 S.E.2d at 168. The husband appealed, arguing that the trial court erred in concluding it lacked subject matter jurisdiction. Id. The court of appeals agreed, resolving the issue based on "the broad grant of general jurisdiction" belonging to trial courts. Id. at 543, 884 S.E.2d at 169.

The court of appeals opened its analysis by comparing subject matter jurisdiction and personal jurisdiction. Id. at 542-53, 884 S.E.2d at 168-69. Subject matter jurisdiction is "the indispensable foundation upon which valid judicial decisions rest," without which "a court has no power to act." Id. at 544, 884 S.E.2d at 169-70 (quotation marks omitted) (quoting Lakins v. W. N.C. Conf. of United Methodist Church, 283 N.C. App. 385, 397–98, 873 S.E.2d 667, 677 (2022)). By contrast, personal jurisdiction is "the power to bring [a defendant] before the court so as to give him an opportunity to be heard." Id., 884 S.E.2d at 170 (quotation marks omitted) (quoting Balcon, Inc. v. Sadler, 36 N.C. App. 322, 324, 244 S.E.2d 164, 165 (1978)). In other words, subject matter jurisdiction concerns the "the kind of action in question," whereas personal jurisdiction concerns "the person affected by the action." Id. Accordingly, "subject-matter jurisdiction often exists where personal jurisdiction does not." Id. (citing High v. Pearce, 220 N.C. 266, 271, 17 S.E.2d 108, 112 (1941)).

Turning to the husband's claims, the court of appeals stated that it was essential to establish whether the infringing conduct occurred in a state that recognized the tort of alienation of affections, as "most jurisdictions have abolished [it]." Id. at 545, 884 S.E.2d at 171 (quotation

marks omitted) (quoting Hayes v. Waltz, 246 N.C. App. 438, 443, 784 S.E.2d 607, 613 (2016)). This analysis, however, did not require that the alleged conduct between the wife and the paramour have occurred in North Carolina for the husband to raise a valid claim. Id. Rather, the conduct must have occurred within any state recognizing the tort. Id. (quoting Hayes, 246 N.C. App. at 443, 784 S.E.2d at 613). In this case, there were two states at play where the alleged conduct might have occurred that recognize the tort: Utah and North Carolina. Id. The court of appeals addressed the fact that it had previously heard cases where alienation of affections was alleged to have occurred across multiple states; however, those cases were distinct in that, there, "North Carolina was the only jurisdiction involved that recognized the claim of alienation of affections." Id. In those other cases, unlike the husband's claim here, the outcome turned on whether the alleged conduct had occurred in North Carolina specifically. Id. (collecting cases).

The court of appeals explained that, historically, the issue of subject matter jurisdiction as to alienation of affections claims has gotten confused; namely, the question "is frequently conflated with the question of where the alleged alienating conduct and injury occurred because North Carolina is often the only jurisdiction involved that recognizes the claim." Id. However, in the case at bar, the issue of subject matter jurisdiction was "deceptively simple." Id. Because North Carolina recognizes the tort of alienation of affections, the trial court "indisputably" possessed subject matter jurisdiction. Id. Accordingly, rather than calling for a complex conflict of laws analysis, the question of law posed by the husband's claim was "straightforward." Id. The court distinguished between a motion to dismiss for lack of subject matter jurisdiction and a motion to dismiss for failure to state a claim by saying, "Whether [the husband] has successfully stated a claim for which relief may be granted under the substantive law applicable to his claim consistent

with our conflict-of-laws rules is downstream of and irrelevant to the resolution of this straightforward question of law." Id.

For these reasons, the court of appeals reversed the trial court's order granting the paramour's motion to dismiss for lack of subject matter jurisdiction and remanded the husband's claim for alienation of affections for further proceedings. Id.

B. Statute of Limitation

In McKinney v. Goins, ___ N.C. App. ___, 892 S.E.2d 460 (2023), a divided court of appeals addressed whether the provision in the SAFE Child Act that revives a civil claim arising out of child sexual abuse previously barred by a statute of limitations runs afoul of the North Carolina Constitution.

A wrestling coach at a high school sexually abused multiple underage students throughout the 1990s and 2000s, facing criminal convictions as a result. Id. at ___, 892 S.E.2d at 464. At the time, the statute of limitations gave the students three years from their eighteenth birthdays to bring civil suits for torts arising out of child sexual abuse. Id. (citing N.C. Gen. Stat. §§ 1-17 (2007), 1-52 (2007)). In 2019, the General Assembly unanimously passed the SAFE Child Act, "reviv[ing] 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." Id. ___, 892 S.E.2d at 464-65 (citation and quotation marks omitted). "Relying on the SAFE Child Act's Revival Window," the students filed a civil suit against the coach and the county board of education (the "board") in 2020. Id. ___, 892 S.E.2d at 465.

The board argued that "the complaint must be dismissed because the Revival Window 'is facially unconstitutional' and the claims were time-barred by the applicable statute of limitations." Id.

The board moved to transfer the action to a three-judge panel of the superior court due to its facial constitutional challenge to the validity of this portion of the SAFE Child Act. Id. The motion was granted, and shortly thereafter the State intervened to defend the constitutionality of the act. Id. A divided panel granted the board's motion to dismiss "on the basis that the Revival Window facially violated due process protections" provided by the North Carolina Constitution. Id. ___, 892 S.E.2d at 466. The dissent concluded that "laws are presumed constitutional and are not to be invalidated unless the reviewing court determines that it is unconstitutional beyond reasonable doubt." Id. (alteration omitted) (citations and quotation marks omitted). The students and the State appealed. Id.

Because the Supreme Court of the United States "has held that the Fourteenth Amendment's Due Process Clause does not prohibit states from reviving civil claims otherwise barred by a lapsed statute of limitations," the court of appeals addressed the narrow issue of "whether the Law of the Land Clause [in the North Carolina Constitution] provides such protection above and beyond the Fourteenth Amendment." Id. at ___, 892 S.E.2d at 468.

A majority of the court of appeals reversed the three-judge panel, with Judge Riggs writing an opinion for the court and Judge Gore concurring only in the holding. Judge Riggs saw the board's argument as an attempt "to elevate a purely procedural statute of limitations defense into an inviolable constitutional right to be free from any civil liability for whatever misdeeds would be provable at trial." Id. at ___, 892 S.E.2d at 464.

Judge Riggs stated that the supreme court has "recently reiterated both the difficulty faced by and the high burden imposed upon litigants asserting that a legislative enactment plainly and clearly violates an express provision of the [North Carolina] Constitution." Id. at ___, 892 S.E.2d at 468 (citing Harper v. Hall, ___ N.C. ___, 886 S.E.2d 393 (2023)). Then, in her analysis, she

dove deeply into case law history to address "the jurisprudence on the Law of the Land Clause and retrospective laws." Id.

In State v. –, 2 N.C. 28 (1794), the supreme court suggested that an "Attorney General's actions to enforce a retrospective law were constitutional." Id. at ___, 892 S.E.2d at 469. The understanding "that an overly broad prohibition on retrospective laws interferes with the ability of a legislative body to effectively represent its people in a changing era" endured for decades to come, "as evidenced by State v. Bell, 61 N.C. 76 . . . (1867)" and Hinton v. Hinton, 61 N.C. 410 (1868). Id. In Hinton, in particular, "the [s]upreme [c]ourt noted that revival of a claim barred by the statute of limitations does not inherently affect any particular property of the defendant, and thus does not necessarily implicate any vested rights[.]" Id. at *8. Hinton held that:

> (1) a statute of limitations only inherently affects the availability of a plaintiff's remedy . . . ; (2) the procedural bar imposed by a lapsed statute of limitations does not intrinsically or inevitably create a vested right in the defendant, as it does not eliminate liability for the underlying claim or otherwise necessarily implicate property rights . . . ; and (3) the General Assembly is not constitutionally constrained from lifting such a procedural bar in these circumstances . . . .

Id. at ___, 892 S.E.2d at 471 (citations omitted). "In brief, under Hinton, revival of a statute of limitations does not per se violate the North Carolina Constitution, as the procedural bar created by those statutes is not a vested claim to land, goods, currency, or any incorporeal interest in the same." Id. (citation omitted). The stakes were abundantly clear and, "[w]ithin a year of both Bell and Hinton, the people of North Carolina saw fit to further restrict the ability of the General Assembly to pass retrospective laws when they ratified a new constitution in 1868." Id.

According to Judge Riggs, "[t]his history plainly demonstrates that retroactive civil laws, including ones reviving statutes of limitation, are not inherently unconstitutional; they do not unerringly violate either the Law of the Land Clause or the express provisions of the Ex Post Facto

Clause of our state Constitution as understood and enacted from the Founding through Reconstruction." Id. (citations omitted).

Judge Riggs then addressed the board's argument that subsequent case law rendered Hinton unusable. Id. at ___, 892 S.E.2d at 473. She concluded that the cases cited by the board, however, were distinguishable and thus did not affect Hinton. Id. Specifically, the case law cited by the board reflected a "pattern of discussing statutes of limitation as vested rights in dicta," as exemplified by Wilkes County v. Forester, 204 N.C. 163, 167 S.E. 691 (1933). Id. Additionally, these cases dealt with "expired statutes of limitations affect[ing] vested property rights, not a procedural defense" such as the statute of limitations. Id. at ___, 892 S.E.2d at 475 (emphasis in original). Furthermore, the holding in Wilkes "did not turn on the question of whether revival of a statute of limitations violates the [North Carolina] Constitution," because the revival statute at issue did not apply to the action therein. Id. at ___, 892 S.E.2d at 476. "Hinton thus resolves—with more direct applicability than Wilkes—whether the Revival Window is per se unconstitutional." Id.

Judge Riggs noted that Hinton is also aligned with the Supreme Court's decision in Campbell v. Holt, 115 U.S. 620 (1885), as both opinions "recognized that the expiration of a statute of limitations bars a right of action and thus affects the remedy and not the right of property." Id. at ___, 892 S.E.2d at 477 (emphasis in original) (citation and quotation marks omitted).

"This understanding of statutes of limitation as bars to remedies—not underlying claims—persists in our modern jurisprudence." Id. (citing Christie v. Hartley Constr., Inc., 3678 N.C. 534, 538, 766 S.E.2d 283, 286 (2014)). In sum, Judge Riggs concluded that the Law of the Land Clause of the North Carolina Constitution does not "limit legislative power" to pass the Revival Window

of the SAFE Child Act. Id. (quotation marks omitted) (quoting Harper, ___ N.C. at ___, 886 S.E.2d at 414).

Having concluded that the board failed to show beyond a reasonable doubt, based on historical precedent, that reviving claims previously barred by the statute of limitations is per se violative of the Law of the Land Clause, Judge Riggs "turn[ed] to whether the Revival Window violates constitutional due process under the present law of this State, i.e., the modern substantive due process analysis." Id. at ___, 892 S.E.2d at 468(citations omitted).

"Assuming, arguendo, that an affirmative defense based on a statute of limitations implicates a fundamental right," Judge Riggs concluded "that the Revival Window passe[d] constitutional muster even under the more stringent strict scrutiny test." Id. at ___, 892 S.E.2d at 479. "[T]he SAFE Child Act's Revival Window is . . . so narrowly tailored as to satisfy strict scrutiny review." Id. Namely, the only claims the act revived were specifically civil actions for child sexual abuse, limited to a narrow window of time—January 2020 through December 2021—which long expired by the time this matter came before the court of appeals. Id.

Judge Riggs also rejected the board's policy arguments that the Revival Window was "ineffective to accomplish its goals" because it was undermined by the criminal case against the coach. Id. at ___, 892 S.E.2d at 480. Indeed, "there is no statute of limitations for felony child sex abuse, and the State, facing the highest possible burden of proof, was nonetheless able to convict" him in a criminal setting. Id. Clearly, "any staleness of evidence was not so significant as to interfere with the ability of a trial court to accept a child sex abuser's guilty plea . . . ." Id. (citations omitted).

In summary, Judge Riggs concluded that the board failed to show beyond a reasonable doubt that any portion of the North Carolina Constitution "prohibits revivals of statutes of

limitations," and, in any case, the SAFE Child Act's Revival Window "passes constitutional muster." Id. Based on the opinion written by Judge Riggs with Judge Gore concurring only in the result, the majority reversed and remanded the superior court. Id.

Judge Carpenter, dissenting, contended that binding precedent dictated affirming the three-judge panel. Id. In his view, the majority erroneously overruled appellate precedent, which only the supreme court has the power to do. Id. at ___, 892 S.E.2d at 481.

Judge Carpenter stated that Wilkes "applies to all statute of limitations, not merely those relating to real property," a position he found was supported by various appellate precedent. Id. at ___, 892 S.E.2d at 483. Judge Carpenter explained how state courts, unlike federal courts, "are not bound to live cases or controversies" and thus "can issue advisory opinions." Id. The Wilkes court was faced with two questions: whether the plaintiff was barred by the statute of limitations, and whether the challenged revival provision was constitutional. Id. According to Judge Carpenter, Judge Riggs was wrong to characterize the Wilkes court's answer to the second question as dicta just because it was unnecessary to answer the first question. Id. at ___, 892 S.E.2d at 484. Rather, the Wilkes court was exercising its inherent ability, as a state court, to issue advisory opinions, rendering its reasoning binding and not dicta. Id.

Next, Judge Carpenter addressed vested rights. Id. at ___, 892 S.E.2d at 486. "[V]ested rights are a special species of fundamental rights" that are as tangible as real property. Id. Accordingly, they "are paramount—protected from any legislative attack." Id. Under Judge Riggs's approach, vested rights would lose their distinct nature bolstered by years of precedent and get "swallow[ed]" by fundamental rights. Id. Additionally, the majority's "tiers-of-scrutiny" approach was ill-fitted, because the vested rights at bar are at the center of a state constitutional issue and the supreme court "is the final arbiter of the North Carolina Constitution." Id.

In summary, Judge Carpenter concluded that overruling Wilkes would "undermine a hallmark of our justice system—stability in our jurisprudence." Id. Thus, Judge Carpenter would have affirmed the three-judge panel. Id.

In Cohane v. Home Missioners of America, ___ N.C. App. ___, ___ S.E.2d ___, 2023 WL 5925593 (2023), the court of appeals addressed whether the provision of the SAFE Child Act reviving civil claims "for child sexual abuse" includes claims brought not just against the alleged abusers themselves but also against separate entities.

In 2019, the General Assembly unanimously passed the SAFE Child Act "to protect children from sexual abuse and to strengthen and modernize sexual assault laws." Id. at *2. The act amended section 1-17 of the North Carolina General Statutes, allowing plaintiffs to "file a civil action against a defendant for claims related to sexual abuse suffered while the plaintiff was under 18 years of age until the plaintiff attains 28 years of age." Id. (citation and quotation marks omitted) (emphasis added). The act also amended section 1-52, "reviv[ing] any civil action for child sexual abuse otherwise time-barred under [the same statute] as it existed immediately before the enactment of [the SAFE Child Act]." Id. (emphasis added).

Relying on the SAFE Child Act's revival provision, an adult plaintiff filed a civil suit grounded in tort against a minister whom the plaintiff alleged sexually abused him when he was still a child over several years beginning in the 1970s. Id. at *1. The plaintiff also filed a civil suit against the religious organization and the diocese that managed the minister "for negligence, negligent assignment, supervision, and retention." Id.

The organization and the diocese filed motions to dismiss pursuant to Rules 12(b)(1), (6) and Rule 9(k), arguing that the plaintiff's claims were time-barred because the SAFE Child Act did not apply to them. Id. The organization and diocese also argued that the SAFE Child Act was

facially unconstitutional, and thus the plaintiff moved to transfer the matter to a three-judge superior court panel. Id.

The trial court concluded that the plaintiff's lawsuit did not fall within the scope of the SAFE Child Act's revival provision. Id. at *2. Specifically, the trial court reasoned that section 4.2(b) of the SAFE Child Act, which states "any civil action for child sexual abuse," only applied to claims against alleged abusers themselves, not against other entities. Id. (emphasis added) (quotation marks omitted). The trial court reasoned that in another section of the SAFE Child Act the General Assembly used the term "related to," which in the trial court's view was "broader" than the word "for," used in section 4.2(b). Id. (quotation marks omitted). Accordingly, the trial court granted the organization's and diocese's motions to dismiss in part on the basis that the plaintiff's suit was time-barred, denied their motions in part for lack of subject matter jurisdiction, and denied the plaintiff's motion to transfer as moot. Id. The plaintiff appealed. Id.

The majority of the court of appeals, in an opinion written by Judge Gore, stated that in its previous opinions it had already subtly recognized that the SAFE Child Act was unambiguous, adding that there was no reason to distinguish the words "related to" and "for." Id. at *3 (quotation marks omitted). Rather, by ignoring the plain language of the act, the trial court had gone "beyond the well-trodden path of methodical statutory interpretation," which "lead[] to such tortured results." Id. In summary, the trial court erred in applying its narrow reading of the SAFE Child Act. Id.

The majority concluded that the plain language of section 4.2(b) of the SAFE Child Act includes the plaintiff's civil claims against the organization and the diocese resulting from child sexual abuse allegations. Id. at *4. The majority thus reversed and remanded the trial court. Id.

Judge Carpenter wrote a brief dissent, stating only that, for the reasons he provided in his dissent in McKinney v. Goins, ___ N.C. App. ___, ___ S.E.2d ___, 2023 WL 5925674 (2023), he would find the revival provision of the SAFE Child Act unconstitutional. Id.

C. Service of Process

In Yves v. Tolentino, 287 N.C. App. 688, 884 S.E.2d 70 (2023), the court of appeals considered whether a car driver met his burden to overcome the presumption of effective service of process in a negligence suit.

A driver of a car drove through an intersection and ran into a cyclist. Id. at 688, 884 S.E.2d at 71. The cyclist filed a lawsuit asserting negligence against the driver. Id. at 689, 884 S.E.2d at 71. The cyclist filed his complaint a few days before the statute of limitations expired. Id. The cyclist used the United Parcel Service ("UPS") to attempt to serve the driver. Id. UPS had temporarily adjusted its delivery guidelines for packages requiring a signature to a no-contact policy because of restrictions from the COVID-19 pandemic. Id. According to the UPS website, UPS delivery people were still required to make contact with the consignee, and the consignee was required to acknowledge that UPS was making a delivery and, if applicable, show government-issued photo ID. Id. The driver's proof of delivery receipt indicated that the package was delivered and received a signature. Id. The UPS delivery person signed "COVID-19" in the space designated for a consignee's signature to indicate compliance with the COVID-19 no-contact signature protocols. Id. The cyclist's lawyer signed an Affidavit of Service on April 22, 2021, which provided that a certified copy of the Affidavit of Service was mailed to the same address using the United States Postal Service ("USPS"). Id.

The driver moved to dismiss pursuant to Rules 4, 12(b)(2), 12(b)(4), 12(b)(5), and 12(b)(6) of the North Carolina Rules of Civil Procedure. Id. The driver's motion to dismiss included two

affidavits: (1) an affidavit from the driver, stating that he had moved and had not been personally served with a copy of the Summons or Complaint, and (2) an affidavit from the person currently living at the driver's former address, stating that he resided at that address on the day the Summons and Complaint were sent. Id.

After hearing the motion, the trial court found that the Summons did not contain the driver's correct address and the driver had not been personally served with the lawsuit, pursuant to Rule 4 of the North Carolina Rules of Civil Procedure. Id. The trial court then granted the driver's motion to dismiss. Id. The cyclist filed a timely notice of appeal. Id., 884 S.E.2d at 72.

On appeal, the court of appeals affirmed the trial court's decision to grant the motion to dismiss with prejudice. Id. at 693, 884 S.E.2d at 73. The court of appeals held that the two affidavits, taken together, provided sufficient evidence for the trial court to find and conclude that the driver was not timely served according to statute. Id. at 692, 884 S.E.2d at 73. The court acknowledged the rule that a person relying on the service of a notice by mail must show strict compliance with the requirements of the statute. Id. at 691, 884 S.E.2d at 72 (citing In re Appeal of Harris, 273 N.C. 20, 24, 159 S.E.2d 539, 543 (1968)). It further explained that Rule 4 provides for several options for the acceptable manner of service of process. Id. "One option for serving a 'natural person' is to 'deposit [] with a designated delivery service . . . a copy of the summons and complaint, addressed to the party to be served, delivering to the addressee, and obtaining a delivery receipt.'" Id. (quoting N.C. Gen. Stat. § 1A-1, Rule 4(j)(1)(d)). If the record demonstrates compliance with the statutory requirements for service of process, such compliance raises a rebuttable presumption that the service is valid. Id. (citing Patton v. Vogel, 267 N.C. App. 254, 258, 833 S.E.2d 198, 202 (2019)).

In the present case, the court of appeals noted that the driver produced two sworn affidavits that provided sufficient evidence for the trial court. Id. at 692, 884 S.E.2d at 73. One averred that the driver did not live in the address at the time the complaint and summons were delivered and attached paystubs indicating his current address, and the other from the current occupant averred that the driver did not live at the address listed on the UPS delivery receipt on the date the summons and complaint were delivered. Id.

For these reasons, the court of appeals affirmed the trial court's order granting the motion to dismiss. Id.

D. Res Judicata

In Bartels v. Franklin Operations, LLC, 288 N.C. App. 193, 885 S.E.2d 357 (2023), the court of appeals considered whether it had jurisdiction to review an interlocutory appeal of the trial court's denial of a motion for summary judgment based on res judicata when the appealing party's opening brief failed to explain the risk of different verdicts based on the facts of the cases.

Decedent was a resident of the Alzheimer's Dementia special care unit at an assisted living facility ("ALF"). Id. at 194, 885 S.E.2d at 358. During the two weeks that she resided at ALF, she fell three times. Id. She died within two years of her discharge from ALF. Id.

Approximately six months after her discharge from ALF, decedent's representative and two others filed a class action complaint against ALF alleging breach of contract. Id., 885 S.E.2d at 358–59. ALF removed the action from superior court to the United States District Court for the Eastern District of North Carolina. Id. The federal court denied class certification, but it proceeded on the individual claims of decedent's representative and other plaintiffs. Id. at 195, 885 S.E.2d at 359. The federal court granted ALF's motion for summary judgment. Id.

The administrator of decedent's estate filed an action in superior court seeking damages for ordinary negligence, corporate negligence, and medical malpractice while the federal action was still pending. Id. The federal suit resolved, and the time to appeal expired. Id. ALF moved for summary judgment in this action, arguing that the administrator's recovery was barred under the doctrines of res judicata and collateral estoppel. Id.

The trial court denied ALF's motion. Id. ALF timely appealed. Id.

Generally, parties are not entitled to immediate appeal from interlocutory orders unless the order affects a substantial right. Id. at 196, 885 S.E.2d at 359. "An interlocutory appeal of the 'denial of a motion to dismiss premised on res judicata and collateral estoppel does not automatically affect a substantial right; the burden is on the party seeking review of the interlocutory order to show how it will affect a substantial right absent immediate review.'" Id. (quoting Whitehurst Inv. Properties, LLC v. NewBridge Bank, 237 N.C. App. 92, 95, 764 S.E.2d 487, 489 (2014)). "[T]he appealing party must show that (1) the same factual issues would be present in both trials and (2) the possibility of inconsistent verdicts on those issues exists." Id. (quoting Whitehurst, 237 N.C. App. at 96, 764 S.E.2d at 490).

Evaluating precedent, the court of appeals concluded that "the denial of summary judgment based on a defense of res judicata may affect a substantial right." Id. at 196, 885 S.E.2d at 360 (quoting Brown v. Thomson, 264 N.C. App. 137, 140, 825 S.E.2d 271, 273 (2019) (emphasis original)) (citing Bockweg v. Anderson, 333 N.C. 486, 491, 428 S.E.2d 157, 161 (1993)). However, the court of appeals held that such an interlocutory appeal is "limited to the situation when the rejection of defenses based upon res judicata and collateral estoppel gives rise to a risk of two actual trials resulting in two different verdicts." Id. at 197, 885 S.E.2d at 360 quoting Smith v. Polsky, 251 N.C. App. 589, 596, 796 S.E.2d 354, 359–60 (2017).

In this case, ALF conceded that it was not "categorically entitled" to an interlocutory appeal. Id. 199, 885 S.E.2d at 361-62. However, ALF failed to explain in its opening brief how the trial court's denial of its motion for summary judgment in this case "create[d] a risk of inconsistent verdicts or [would] otherwise affect a substantial right based on the particular facts of this case," as is required by precedent. Id. (emphasis original).

The court of appeals dismissed the interlocutory appeal for lack of appellate jurisdiction. Id. at 201, 885 S.E.2d at 363.

E. Notice of Motion

In Janu Inc. v. Mega Hospitality, LLC, 287 N.C. App. 582, 884 S.E.2d 50 (2023), petition for rehearing filed (Mar. 13, 2023), the court of appeals considered whether defendant, a company that owns and operates hotels ("hotel owner-operator"), provided prior notice regarding its intent to have its motion to dismiss for lack of personal jurisdiction heard, as required under Rule 6(d) of the North Carolina Rules of Civil Procedure.

Plaintiff, a remodeling company, filed a breach of contract claim asserting unjust enrichment against numerous related entities regarding the remodeling of a hotel. Id. at 583, 884 S.E.2d at 51. The remodeling company remodels hotels and supplies hotel furniture, fixtures, carpet, and craft stonework. Id. The remodeling company and the hotel owner-operator allegedly reached an agreement for the remodeling company to remodel a hotel and to also supply hotel furnishings and fixtures. Id. at 583-84, 884 S.E.2d at 51-52. The hotel owner-operator was displeased with the remodeling company's finished work. Id. The remodeling company alleged that the hotel owner-operator failed to pay for the services according to the terms of their agreement. Id. at 584, 884 S.E.2d at 52.

After some discovery, the hotel owner-operator moved to dismiss the remodeling company's amended complaint for failure to state a claim and lack of personal jurisdiction. Id. at 585-86, 884 S.E.2d at 53. The hotel owner-operator attempted to calendar a hearing on its motion to dismiss. Id. The remodeling company consented to a hearing on the Rule 12(b)(6) motion but refused as to the Rule 12(b)(2) motion because it had not received outstanding discovery responses from the hotel owner-operator that were relevant to the Rule 12(b)(2) motion. Id.

The hotel owner-operator attempted once more to schedule a hearing on both motions and the remodeling company again refused to agree to a hearing on the Rule 12(b)(2) motion because it still had not received some outstanding discovery responses related to personal jurisdiction. Id. at *3. The parties eventually agreed to calendar the remaining Rule 12(b)(6) motion for a hearing; at that hearing, the hotel owner-operator raised the Rule 12(b)(2) motion with the trial court prior to discussing the Rule 12(b)(6) motion. Id. at 586, 884 S.E.2d at 53. The remodeling company immediately objected and stated to the trial court that it was still awaiting outstanding responses for the jurisdictional discovery. Id. Five hundred and seventy-four days after the hearing, the trial court entered an order granting hotel owner-operator's motion to dismiss for failure to state a claim and motion to dismiss for lack of personal jurisdiction. Id. The remodeling company timely appealed. Id. at 587, 884 S.E.2d at 53.

On appeal, the court of appeals vacated the trial court's decision to grant the motion to dismiss for lack of personal jurisdiction. Id. at 591, 884 S.E.2d at 56. The court of appeals held that the hotel owner-operator failed to properly notify the remodeling company of its intention for the trial court to hear its motion to dismiss for lack of personal jurisdiction. Id. The court acknowledged the rule that "[a]n irregular judgment is one entered contrary to the usual course and practice of the court." Id. at 589, 884 S.E.2d at 55 (citing Everett v. Johnson, 219 N.C. 540,

542, 14 S.E.2d 520, 521 (1941)). Thus, "[i]f a party has no prior required notice of a hearing on a motion, judgment on the motion is irregular, and action thereon is not binding." Id.

In the present case, the hotel owner-operator failed to provide proper notice regarding its intention for the court to hear its motion regarding lack of personal jurisdiction at the hearing, as required under Rule 6(d) of the North Carolina Rules of Civil Procedure and the local rules of that judicial district. Id. Furthermore, the remodeling company did not waive the lack of notice defect by participating in the hearing because the remodeling company immediately notified the trial court that the motion for lack of personal jurisdiction was not calendared before the court. Id. at 590, 884 S.E.2d at 55.

For these reasons, the court of appeals vacated the trial court's order granting the motion to dismiss for lack of personal jurisdiction. Id.

F. Rule 9(b)

In Value Health Solutions Inc v. Pharmaceutical Research Associates, Inc., 385 N.C. 250, 891 S.E.2d 100 (2023), the supreme court considered whether a claim for negligent misrepresentation must meet the heightened pleading standard of Rule 9(b) in order to withstand a motion to dismiss.

A contract research company that provides clinical trial services to pharmaceutical and biotechnology companies wanted to acquire a suite of software applications created by a software company. Id. at 254, 891 S.E.2d at 106. The contract research company entered into an asset purchase agreement with the software company whereby the contract research company would purchase the software applications created by the software company in exchange for company stock and cash payments. Id. at 256, 891 S.E.2d at 107. The asset purchase agreement required a

series of milestone payments as additional consideration after certain events occurred. Id. Negotiations broke down regarding the terms of the milestone payments. Id.

The software company filed a complaint in the business court. Id. at 262, 891 S.E.2d at 110. The business court later granted the software company leave to file an amended complaint in which the software company alleged a number of claims, including a claim for negligent misrepresentation. Id.

The contract research company moved to dismiss the negligent misrepresentation claim, among other claims. Id. The business court granted the motion to dismiss the negligent misrepresentation claim based on insufficient pleading. Id., 891 S.E.2d at 111.

On appeal, the supreme court in a majority opinion written by Justice Barringer held that claims for negligent misrepresentation must satisfy the heightened pleading standard of Rule 9(b) of the North Carolina Rules of Civil Procedure, explaining the following:

> A claim of negligent misrepresentation is "closely akin to fraud, differing primarily in the requisite state of mind of the purported actor." Similar to a claim for fraud or mistake, negligent misrepresentation is based upon some confusion or delusion of a party such as by some misrepresentation. The similarity of the claims supports the extension of Rule 9(b) to all cases where the gravamen of the claim is fraud even though the theory supporting the claim is not technically termed fraud.
>
> The key distinction between negligent misrepresentation claims and ordinary negligence claims is that the former requires proof not merely of a breach of duty, but also the additional requirement that the claimant justifiably relied to his detriment on the information communicated without reasonable care. As in a fraud case, we require the plaintiff to identify this alleged negligent misrepresentation with particularity so that the defendant can understand the time, place, and content of the representation, the identity of the person making the representation, and how the plaintiff justifiably relied on that information.

Id. at 266, 891 S.E.2d at 113 (citations omitted). Here, the supreme court found that the Rule 9(b) heightened standard of pleading with particularity had not been met. Id. The amended complaint, in pertinent part, contained the following reference to negligent misrepresentation:

> [d]uring a yearlong due diligence period and negotiations, [the contract research company] represented to [the software company] that in addition to using the [software applications] to provide services to [the contract research company's] customers, [the contract research company] also would sell or license [the software applications] to other [contract research company] customers, and, with few exceptions, to any customers [the software company] had developed relationships with prior to the acquisition.

Id., 891 S.E.2d at 114. Based on this excerpt, the supreme court found that the amended complaint contained only one reference to any misrepresentation and that single statement did not identify any details about who made the representation, when it was made, where it was made, or the specific nature of the misrepresentation. Id.

For these reasons, the supreme court affirmed the trial court's order in relevant part. Id. at 283, 891 S.E.2d at 124.

Justice Earls concurred in the result on the motion to dismiss but dissented with respect to how the majority defined the pleading standard for negligent misrepresentation. Id. Justice Earls contended that negligent misrepresentation is properly pleaded under Rule 8's notice pleading standard because the language of Rule 9(b) does not include negligent misrepresentation in an enumeration of the claims to which it applies; Rule 9(b) states that "in all averments of fraud, duress or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." Id. at 284, 891 S.E.2d at 125 (citing N.C. Gen. Stat. § 1A-1, Rule 9(b)). Justice Earls would have found that the amended complaint failed to allege the duty required for a negligent misrepresentation claim under the Rule 8 pleading standard. Id. at 295, 891 S.E.2d at

132. In order to allege a negligent misrepresentation claim, the plaintiff must allege that a duty of care existed. Id. at 284, 891 S.E.2d at 125. Here, the transaction between the software company and the contract research company was "an arm's-length transaction" where no fiduciary duty existed between them. Id. Thus, according to Justice Earls, the software company could not show in its complaint that the contract research company violated any duty. Id.

G. Rule 12

In Maynard v. Crook, ___ N.C. App. ___, 890 S.E.2d 164 (2023), the court of appeals considered whether a trial court erred in dismissing a property owner's counterclaims where no motion was pending and no reply to the counterclaims had been filed.

A property seller entered a contract with a buyer to purchase a tract of land. Id. at ___, 890 S.E.2d at 167. The seller represented that the property was accessible from a 60-foot public right-of-way. Id. However, the property owner of an 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 property from the right-of-way. Id. The buyer and seller filed suit against the property owner, seeking a temporary restraining order, preliminary injunction, and permanent injunction to prevent the property owner from impeding their access to the right-of-way. Id. The property owner filed an answer and counterclaims. Id. The buyer and seller moved for judgment on the pleadings pursuant to Rule 12(c) as to the relief sought in their complaint and for dismissal of the property owner's counterclaims pursuant to Rule 12(b)(6). Id. The trial court entered an order dismissing the property owner's counterclaims pursuant to Rules 12(b)(6) and 12(c). Id. at ___, 890 S.E.2d at 168.

On appeal, the court of appeals held that the trial court properly dismissed the counterclaim pursuant to Rule 12(b)(6) but erroneously dismissed the property owner's counterclaims pursuant

to Rule 12(c). Id. at ___, 890 S.E.2d at 171. The court of appeals recognized that Rule 7(a) defines what 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." Id. (quoting N.C. Gen. Stat. § 1A-1, Rule 7(a)). Here, the buyer and seller moved for judgment on the pleadings pursuant to Rule 12(c) as to their own claims but did not move for judgment on the pleadings as to the property owner's counterclaims. Id. The trial court's order, however, dismissed the property owner's counterclaims under Rules 12(b)(6) and 12(c). Id. The court of appeals posited that even if the buyer and seller's Rule 12(c) motion purported to move for judgment on the pleadings as to the property owner's counterclaims, dismissing the counterclaims was improper because the buyer and seller had not replied to the property owner's counterclaims, and the pleadings had not yet closed. Id. Thus, the court of appeals held that the trial court erred by dismissing the property owner's counterclaims under Rule 12(c). Id.

For these and other reasons, the court of appeals reversed in relevant part and remanded to the trial court.

In Clapper v. Press Ganey Associates, LLC, ___ N.C. App. ___, ___ S.E.2d ___, 2023 WL 7312523 (2023), the court of appeals considered whether a forum selection clause that specified the parties' disputes arising from a contract must be litigated in another state's court was enforceable in North Carolina.

A consultant entered into an employment agreement with a healthcare company. Id. at *1. The employment agreement contained a section stating that any disputes or controversies arising out of the employment agreement would be brought in Delaware and that the parties submitted to the exclusive jurisdiction of federal and state courts in Delaware. Id. A holding company sought to amend its limited partnership agreement to admit additional limited partners, which would

include the consultant. Id. The amended limited partnership agreement incorporated the consultant's employment agreement and also contained a jury trial waiver and provisions specifying choice of law and venue and requiring submission to the jurisdiction of Delaware courts. Id. The consultant signed the amended limited partnership agreement on July 23, 2019, while he purportedly resided in North Carolina. Id. Other limited partners also signed the amended limited partnership agreement. Id. The holding company's general partner signed the amended limited partnership agreement on July 25, 2021, while in Delaware. Id.

Sometime thereafter, the healthcare company decided to terminate the consultant's employment. Id. at *2. The holding company decided to exercise a call right to stock owned by the consultant pursuant to terms in both the employment agreement and the amended limited partnership agreement. Id. This decision caused the consultant to file a lawsuit against the healthcare company and the holding company alleging breach of contract, breach of the covenant of good faith and fair dealing, fraud, and violation of the North Carolina Wage and Hour Act. Id. The healthcare company and the holding company moved to dismiss the consultant's claims pursuant to, among other things, Rule 12(b)(3), asserting that the consultant brought his claims in an improper venue. Id. The trial court denied the Rule 12(b)(3) motion. Id. The healthcare company and the holding company filed a timely notice of appeal seeking review. Id.

On appeal, the court of appeals considered its jurisdiction over the interlocutory appeal and subsequently whether the trial court improperly denied the healthcare company's and holding company's 12(b)(3) motion to dismiss for improper venue. Id. at *3-*5.

First, the court of appeals held that this appeal involved a substantial right and that the court maintained appellate jurisdiction to review the trial court's Rule 12(b)(3) motion to dismiss. Id. at *3. The court acknowledged that even though appeal from the denial of a motion to dismiss is an

interlocutory appeal, when the issue involves applying a forum selection clause, North Carolina case law establishes that a "defendant may . . . immediately appeal the order because to hold otherwise would deprive the defendant of a substantial right." Id. (quoting Hickox v. R&G Grp. Int'l, Inc., 161 N.C. App. 510, 511, 588 S.E.2d 566, 567 (2003)).

Second, the court of appeals held that the trial court erred by denying the healthcare company's and holding company's Rule 12(b)(3) motion to dismiss. Id. at *5. The court acknowledged that the enforceability of forum selection clauses has varied in North Carolina law with respect to forum selection clauses that require disputes between parties to be litigated in other state courts. Id. at *4 (citing Cable Tel Servs., Inc. v. Overland Contr'g., Inc., 154 N.C. App. 639, 642, 574 S.E.2d 31, 33 (2002)). The court of appeals outlined the relevant standard from Perkins v. CCH Computax, Inc.:

> [F]orum selection clauses are "prima facie valid and should be enforced unless enforcement is shown by the resisting party to be unreasonable under the circumstances." [T]he forum selection clause in the contract should be enforced "absent a strong showing that it should be set aside . . . [, a] show[ing] that enforcement would be unreasonable and unjust, or that the clause was invalid for such reasons as fraud or overreaching." [A] forum selection clause should be invalid if enforcement would "contravene a strong public policy of the forum in which suit is brought."

Id. (citing Perkins v. CCH Computax, Inc., 333 N.C. 140, 144, 4232 S.E.2d 780, 783 (1992) (internal citations omitted)). The North Carolina legislature has also enacted legislation on foreign selection clauses, stating the following:

> Any provision in a contract entered into in North Carolina that requires the prosecution of any action or the arbitration of any dispute that arises from the contract to be instituted or heard in another state is against public policy and is void and unenforceable.

Id. (quoting N.C. Gen. Stat. § 22B-3). Furthermore, the court of appeals in prior cases has reconciled the Perkins standard with the subsequent enactment of section 22B-3 of the North

Carolina General Statutes by acknowledging that where a party seeks to avoid enforcement of a forum selection clause entered into outside of North Carolina, the party must demonstrate at least one of two things: (1) that the clause was the product of fraud or unequal bargaining power or (2) that enforcement of the clause would be unfair or unreasonable. Id. (citing Parsons v. Oasis Legal Fin., LLC, 214 N.C. App. 125, 135, 715 S.E.2d 240, 246 (2011)). Thus, in order to determine whether the Perkins standard or section 22B-3 applies to a forum selection clause, the court must first look at where the parties entered into the contract. Id. (citing Szymczyk v. Signs Now Corp., 168 N.C. App. 182, 187, 606 S.E.2d 728, 733 (2005)). A contract takes place where "'the last act was done by either of the parties essential to a meeting of minds.'" Id. at *5 (quoting Bundy v. Commercial Credit Co., 200 N.C. 511, 515, 157 S.E. 860, 862 (1931)).

Here, the court of appeals found the last act occurred in Delaware. Id. As noted above, the consultant signed the amended limited partnership agreement on July 23, 2019, while residing in North Carolina, but the holding company's general partner did not sign the agreement until July 25, 2021, while located in Delaware. Id. This amended limited partnership agreement contained the provisions identifying Delaware as its designated forum for choice of law, venue, and jurisdiction. Id. Consequently, the court of appeals held that the trial court should have granted the healthcare company's and the holding company's rule 12(b)(3) motion to dismiss for improper venue. Id. at *6.

For the foregoing reasons, the court of appeals reversed the trial court's order and remanded for entry of an order granting the Rule 12(b)(3) motion to dismiss. Id.

H. Dismissals

In Cowperthwait v. Salem Baptist Church, Inc., ___ N.C. App. ___, ___ S.E.2d ___, 2023 WL 5688789 (2023), the court of appeals considered 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.

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. Id. at *1. Two weeks before filing the lawsuit, the camper's counsel had assured the church's liability insurance carrier that he would produce copies of the camper's medical records but failed to do so. Id. The church reached out multiple times to obtain the camper's medical records after the lawsuit was filed. Id. Six months later, the church filed its answer and served a request for statement of monetary relief sought, interrogatories, and requests for production of documents. Id. at *2. Two months later, the camper had not provided any discovery responses and the church warned that it would consider filing a motion to compel and possibly seeking additional relief if it did not receive any responses in one week. Id. Three months later, the church had still not received any responses to discovery and proceeded to file a motion to dismiss the case for failure to prosecute or, in the alternative, to compel discovery responses. Id.

The trial court heard the motion. Id. During the hearing, the camper offered to take a voluntary dismissal without prejudice if the trial court was inclined to grant the motion to dismiss; the trial court did not comment on the offer. Id. At the close of the hearing, the judge orally granted the motion and asked the church's counsel to prepare a proposed order. Id. The camper filed a notice of voluntary dismissal without prejudice after the hearing and before the written order was entered. Id. The church then moved to set aside the voluntary dismissal. Id. 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. Id. The camper timely appealed. Id.

On appeal, the court of appeals considered two issues: (1) whether the trial court erred in vacating the camper's voluntary dismissal and (2) whether the trial court abused its discretion when it decided to impose an involuntary dismissal with prejudice as the camper's sanction for failing to prosecute the case. Id.

For the first issue, the court of appeals affirmed the trial court's decision to vacate the camper's voluntary dismissal. Id. at *3. The court acknowledged that "Rule 41(a) generally allows a plaintiff to take voluntary dismissal 'without order of court [ ] by filing a notice of dismissal at any time before the plaintiff rests his case . . . ." Id. (quoting N.C. Gen. Stat. § 1A-1, Rule 41(a)(1)). However, the plaintiff must refrain from dismissing the case in bad faith and must file any such voluntary dismissal "'prior to a trial court's ruling dismissing [the] plaintiff's claim . . . .'" Id. (quoting Brisson v. Santoriello, 351 N.C. 589, 597, 528 S.E.2d 568 (2000)). Here, if the camper had any concerns about an adverse outcome from the motion to dismiss, the camper was entitled to take a voluntary dismissal before the trial court granted the motion to dismiss. Id. at *3. However, the camper could not use the voluntary dismissal "as a proverbial escape hatch" after the trial court made its decision. Id.

On the second issue, the court of appeals concluded that the trial court abused its discretion when it dismissed the suit with prejudice as its sanction pursuant to Rule 41(b). Id. The court of appeals acknowledged that because Rule 41(b) enables the court to impose a severe sanction, the court must use three factors to inform its decision to impose dismissal or some other sanction under Rule 41(b): "'(1) whether the plaintiff acted in a manner which deliberately or unreasonably delayed the matter; (2) the amount of prejudice, if any, to the defendant; and (3) the reason, if one exists, that sanctions short of dismissal would not suffice.'" Id. at *4 (quoting Wilder v. Wilder, 164 N.C. App. 574, 578, 553 S.E.2d 425 (2001)). Here, the trial court reasoned that the camper's

delay prejudiced the church because it was already an old case. Id. The incident that served as the basis for the suit occurred more than ten years ago. Id. Even though the statute of limitations had not yet run, the year-long delay exacerbated the problem caused by the amount of time since the incident because "witnesses have moved and witness memories have inevitably faded." Id. The court of appeals found that the reasons noted by the trial court were insufficient. Id. at *4. The trial court failed to explain why the witnesses' availability and memory was significant relative to the filing of the complaint. Id. Moreover, the court of appeals was not persuaded that the case's age with respect to the date of the original incident should factor into the year-long delay caused by the camper. Id.

For these reasons, the court of appeals affirmed in part and reversed and remanded in part the trial court's order. Id. at *5.

Chief Judge Stroud concurred in result only in part and dissented in part. She explained that while she agreed that the trial court did not err in vacating the camper's notice of voluntary dismissal, she would have found that the trial court did not abuse its discretion by dismissing the camper's claim with prejudice under Rule 41(b). Id. Chief Judge Stroud contended that the majority opinion overlooked a significant amount of detailed findings of fact regarding the relevant procedural history of the case that would warrant a different ruling. Id. For example, the camper had made numerous promises to produce medical records that were never delivered before and during the litigation. Id. In particular, "the trial court found [that the church] had been attempting to obtain the medical records for over seven years as of the date of the first hearing." Id. (emphasis in original).

Chief Judge Stroud also disagreed with the conclusions of the Rule 41(b) analysis by the majority. Id. at *6. She would have found that the trial court's order clearly and sufficiently

addressed all the factors. Id. Contrary to the majority opinion, Chief Judge Stroud would have found that the trial court's conclusions of law established that there was an unreasonable delay because the camper never gave any explanation for why the camper took so long to respond to the church after suit was filed. Id. Moreover, Chief Judge Stroud also would have found that the trial court's findings of fact satisfied all factors which were in the court's discretion. Id. She contended that while the majority, in the place of the trial court, would have come to a different conclusion, reversing the trial court's decision amounts to evaluating the order under de novo review instead of a review for abuse of discretion. Id.

I. Business Court Rule 10.9

In Value Health Solutions Inc v. Pharmaceutical Research Associates, Inc., 385 N.C. 250, 891 S.E.2d 100 (2023), the supreme court considered whether the business court improperly converted a Rule 10.9 request into a motion to compel.

A contract research company that provides clinical trial services to pharmaceutical and biotechnology companies wanted to acquire a suite of software applications created by a software company. Id. at 254, 891 S.E.2d at 106. The contract research company entered into an asset purchase agreement with the software company whereby the contract research company would purchase the software applications created by the software company in exchange for company stock and cash payments. Id. at 256, 891 S.E.2d at 107. The asset purchase agreement arranged for a series of milestone payments as additional consideration after certain events occurred. Id. Negotiations broke down regarding the terms of the milestone payments. Id.

The software company filed a complaint in the business court. Id. at 261, 891 S.E.2d at 110. In due course, the software company emailed a Business Court Rule 10.9 statement of dispute, regarding a dispute about whether certain documents were necessary to resolve disputes

related to the complaint. Id. The business court informed the parties that the dispute was not "sufficiently ripe." Id.

The contract research company filed a motion to dismiss the amended complaint a few months later. Id. The software company renewed its previously emailed Rule 10.9 statement, to which the contract research company objected and argued that complying with the discovery request at issue would require the contract research company to sift through hundreds of customer agreements and alert customers before producing the contents of any of its agreements. Id. at 281, 891 S.E.2d at 123. After hearing arguments, the business court denied the software company's Rule 10.9 discovery request. Id. at 262, 891 S.E.2d at 111. The business court eventually either dismissed the software company's claims or granted the contract research company's motion for summary judgment on the software company's claims. Id. The software company appealed.

On appeal, the supreme court held that the business court did not abuse its discretion when it denied the software company's Rule 10.9 discovery request. Id. at 282, 891 S.E.2d at 124. The supreme court first explained that "[a]s a pre-filing requirement to a discovery motion, Rule 10.9 mandates that the parties 'engage in a thorough, good faith attempt to resolve or narrow the dispute. If the dispute remains unresolved, then the party seeking relief must e-mail a summary of the dispute' to the trial court." Id. at 281, 891 S.E.2d at 123 (quoting Business Court Rule 10.9(b)(1)). The supreme court further elaborated that "Rule 10.9 provides that the court may 'order the parties to file a motion and brief regarding the dispute . . . or issue an order that decides the issues raised or that provides the parties with further instructions.'" Id. (quoting Business Court Rule 10.9(b)(3)).

Here, the software company emailed its Rule 10.9 statement and the business court advised the parties, by email, that the dispute was not "sufficiently ripe" for the business court to offer

further instruction. Id. When it was clear that the parties would remain at an impasse, the business court scheduled a telephone conference and denied the request during the conference. Id. On appeal, the software company argued that the business court abused its discretion by converting the Rule 10.9 discovery request into a motion to compel. Id. The supreme court disagreed. Id. The supreme court reasoned that the business court adequately explained its decision in its order, which stated in pertinent part:

> [D]ue to the late stage of discovery in this case and its concern that requiring [the contract research company] to produce the requested documents would be unduly burdensome and could unnecessarily cause a lengthy delay in resolving this case, the Court was inclined to deny a motion to compel [the contract research company] to respond to the [Rule 10.9 discovery request].

Id. (quoting Bus. Ct. Order) (emphasis in original).

The supreme court construed this statement to contemplate a future motion to compel rather than a conversion of the Rule 10.9 discovery request into a motion to compel. Id. Moreover, the supreme court also reasoned that the Rule 10.9 discovery request was not converted because the business court denied the Rule 10.9 discovery request without prejudice, which permitted the court to issue a later order on the same issue. Id.

For this and other reasons, the supreme court affirmed the business court's denial of the Rule 10.9 discovery request. Id.

J. Rule 26

In Aman v. Nicholson, 288 N.C. App. 1, 885 S.E.2d 100 (2023), the court of appeals provided additional clarity to Rule 26(b) of the North Carolina Rules of Civil Procedure ("North Carolina Rule 26"), relying on its previous decision in Myers v. Myers, 269 N.C. App. 237, 837 S.E.2d 443 (2020).

Following the trial court's child custody order and order excluding expert testimony and witness reports, a father appealed, arguing that the trial court erred under North Carolina Rule 26(b) in excluding all of his expert testimony. Id. at 2, 885 S.E.2d at 103.

The court of appeals noted that it had previously decided a similar issue in Myers, where the trial court excluded expert testimony due to the party's failure to disclose the identity of his expert witnesses "sufficiently in advance of trial." Id. at 13, 885 S.E.2d at 109 (quoting Myers, 269 N.C. App. at 240, 837 S.E.2d at 447–48). The court of appeals also noted, as it did in Myers, that North Carolina Rule 26 "is clear as mud," and thus did not fault the father for citing it incorrectly in his brief. Id. at 17, 885 S.E.2d at 111 (quotation marks omitted) (quoting Myers, 269 N.C. App. at 247, 837 S.E.2d at 451–52).

The father cited Myers in support of his argument that the court of appeals had "already held that [North Carolina] Rule 26 has no explicit time frame by which a party must give advance notice of a party's expert witnesses." Id. at 15, 885 S.E.2d at 111 (quotation marks omitted). The court of appeals conceded that was true, adding that "this lack of an explicit time frame is the source of the problem." Id. Indeed, the Federal Rules of Civil Procedure have been amended to clarify "this and other issues" under Federal Rule 26. Id. Although the North Carolina Rules of Civil Procedure are based upon the Federal Rules, North Carolina Rule 26 now "no longer mirrors Federal Rule 26." Id.

The court of appeals addressed the changes the general assembly made in 2015 to North Carolina Rule 26 "in detail" in Myers, explaining that the amendments made the rule more similar to its federal counterpart, but only in a "superficial" way. Id. (quoting Myers, 269 N.C. App. at 243, 837 S.E.2d at 449). "Because the 2015 Amendments to [North Carolina] Rule 26 incorporated the concept of required disclosure of expert witnesses but set no procedure or timing

for the disclosure," North Carolina Rule 26(b) is "ambiguous." Id. (quoting Myers, 269 N.C. App. at 247, 837 S.E.2d at 451–52).

The court of appeals explained that it had concluded in Myers that, although North Carolina Rule 26 sets no time frame for disclosure of expert witnesses, it does require advance disclosure, even without a discovery request. Id. This was of particular importance in the case at bar, as neither party had served any written discovery or discovery requests on the other. Id. (quoting Myers, 269 N.C. App. at 256, 837 S.E.2d at 456–57). The court of appeals also noted, per Myers, that trial courts possess the "inherent authority to impose a sanction for failure to disclose sufficiently in advance of trial," as well as the "discretion to allow or to exclude" an expert witness's evidence "or to impose another sanction for failure to disclose." Id. (alterations omitted) (quoting Myers, 269 N.C. App. at 256, 837 S.E.2d at 457). The guiding purpose of Rule 26(b) is "to provide openness and avoid unfair tactical advantage in the presentation of a case at trial." Id. (quoting Myers, 269 N.C. App. at 255, 837 S.E.2d at 456). Thus, a trial court must, in its discretion, determine whether a party's failure to disclose an expert witness sufficiently in advance created an "unfair tactical advantage." Id. (quoting Myers, 269 N.C. App. at 255, 837 S.E.2d at 456). A trial court is not required to exclude evidence if a party fails to disclose expert witnesses sufficiently in advance, but it is certainly allowed to do so. Id.

Next, the court of appeals addressed the "'important exception' carved out of Rule 26(b)(4)(a)(1) by subdivision 26(b)(4)(f)." Id. Subsection (4)(f) "sets a time for disclosure of testifying expert witnesses" if the parties have agreed to submit written reports pursuant to specific subsections of the rule. Id. (quoting Myers, 269 N.C. App. at 249 n.7, 837 S.E.2d at 452 n.7). In the case at bar, the parties had no such agreement—nor a "stipulation, discovery plan, or order

setting disclosure timelines"—and thus subsection (4)(f) did not apply. Id. (citing Myers, 269 N.C. App. at 249, 837 S.E.2d at 453).

Accordingly, the trial court had discretion to exclude the father's expert testimony and reports, and to impose any appropriate sanctions for failure to comply with North Carolina Rule 26. Id. In so doing, the trial court was only required to determine whether the father's delay in disclosure gave him an unfair tactical advantage at trial. Id. (quoting Myers, 269 N.C. App. at 255, 837 S.E.2d at 456). The court of appeals affirmed the trial court. Id. at 29, 885 S.E.2d at 118.

K. Rule 37

In Abdo v. Jones, 286 N.C. App. 382, 881 S.E.2d 726 (2022), the court of appeals addressed whether the trial court properly dismissed a complaint with prejudice as a Rule 37 sanction.

Following an automobile accident, a motorist filed an action against two insurers (respectively, the "first insurer" and the "second insurer"), among others, seeking underinsured motorist coverage. Id. at 383, 881 S.E.2d at 727. The first insurer answered and served a request for discovery. Id. The motorist responded "but failed to provide all the requested documents." Id. The first insurer notified the motorist that his responses were deficient and requested supplemental discovery responses. Id. The motorist failed to respond. Id.

The first insurer filed a motion to compel. Id. The trial court issued a consent order, signed by the respective attorneys of the motorist and the first insurer only, requiring the motorist to produce all the requested documents. Id. at 382, 881 S.E.2d at 727-728. The motorist again failed to comply. Id.

The first insurer filed an amended motion for sanctions, or, in the alternative, a motion to dismiss for failure to prosecute, "pursuant to Rules 26, 33, 34, 37, and 41 of the North Carolina

Rules of Civil Procedure." Id. The trial court issued an order dismissing the motorist's complaint with prejudice as to both the first insurer and the second insurer. Id. at 383-84, 881 S.E.2d at 728. The motorist appealed. Id.

On appeal, the court of appeals affirmed in part, reversed in part, and remanded. Id. at 383, 881 S.E.2d at 727. The court of appeals found that the trial court had not abused its discretion in dismissing the motorist's complaint with prejudice under Rule 37 as to the first insurer due to the motorist's repeated failures to comply with the first insurer's discovery requests. Id. at 386, 881 S.E.2d at 729. Because the court of appeals found the trial court's order permissible under Rule 37, it did not address whether it was permissible under Rule 41. Id. The court of appeals thus affirmed this portion of the trial court's order. Id. at 385-86, 881 S.E.2d at 729.

The court of appeals found that the trial court had, however, abused its discretion in dismissing the motorist's complaint with prejudice as to the second insurer. Id. at 386, 881 S.E.2d at 729. The court of appeals found that the second insurer was not involved in the events leading up to the trial court's sanctions: it did not seek discovery or supplemental discovery from the motorist, it did not file a motion to compel, it was not a party to the consent order filed by the trial court, it did not file a motion for sanctions, and it did not attend the hearing on the first insurer's motion for sanctions. Id.

For these reasons, the court of appeals affirmed the trial court's order in part as to the first insurer and reversed and remanded as to the second insurer. Id. at 387, 881 S.E.2d at 730.

L. Rule 41

In Gantt v. City of Hickory, ___ N.C. App. ___, 892 S.E.2d 223 (2023), the court of appeals determined whether a plaintiff may benefit from the doctrine of relation back when an action is initiated under the name of a different plaintiff who lacked standing.

The procedural posture here is complex. A company organized under the laws of Texas and located in Texas ("TX company") filed an action against a city located in North Carolina (the "original complaint"). Id. at ___, 892 S.E.2d at 225. The complaint was filed within three years of the date that the alleged injuries occurred and was thus timely. Id. Thirteen months later, the TX company voluntarily dismissed the complaint without prejudice pursuant to Rule 41. Id. The TX company then refiled the complaint a few months later asserting the same claims (the "second complaint"). Id.

As litigation progressed, it became apparent that the Texas company was not involved in the injury alleged. Id. The second complaint was amended to substitute the name of the TX company with that of a construction company based in North Carolina (the "local company"), whose name was nearly identical to that of the TX company. Id.

The local company filed a motion for summary judgment, which the city opposed while also moving that judgment be entered in the city's favor as the non-moving party pursuant to Rule 56(c). Id. The trial court entered an order granting summary judgment in favor of the city. Id. The local company appealed, and the court of appeals affirmed (the "first opinion"). Id. The local company filed a petition for rehearing. Id. Due to "the dearth of binding precedent concerning whether a plaintiff may benefit from the doctrine of relation back when an action is initiated under the name of a different, out-of-state entity that had no interest in the subject matter, and therefore lacked standing to bring the lawsuit," the court of appeals granted the petition. Id.

The local company argued that the first opinion conflicted with precedent as to "established principles regarding the doctrine of relation back." Id. However, the court of appeals concluded that the precedent in question was distinct from the case at bar. Id. In the cases cited by the local company, the cases involved "amendments to alter a party's legal capacity to sue," whereas here

the court was faced with a voluntary dismissal pursuant to Rule 41. Id. "Rule 41 does not pertain to amendments but instead concerns new filings of pleadings that have been voluntarily dismissed." Id. (citation omitted). Accordingly, the first opinion did not conflict with any precedent. Id. at ___, 892 S.E.2d at 229.

The local company also contended that notice "is the determinative inquiry" when analyzing the relation back doctrine under Rule 41. Id. at ___, 892 S.E.2d at 226. The court of appeals concluded that the local company conflated Rule 41 with Rules 15 and 17. Id. Although notice is relevant under Rules 15 and 17, notice is not relevant to Rule 41. Id. at ___, 892 S.E.2d at 226-27.

Next, the court of appeals determined whether the local company was entitled to relation back under Rule 41. Id. at ___, 892 S.E.2d at 226. "To benefit from the Rule 41 extension, the initial complaint must conform in all respects to the rules of pleading contained in Rules 8, 9, 10, and 11 . . . ." Id. n.1 (citation and quotation marks omitted). "Because a separate and distinct legal entity filed the initial pleadings as the named plaintiff in this case, the [o]riginal [c]omplaint did not 'conform in all respects' to the rules of pleading." Id.

The court of appeals recounted the procedural background of this case:

- The original complaint was filed with the TX company as the named plaintiff.
- When the second complaint was filed, the same Texas corporation was the named plaintiff in the action.
- The local company's first appearance in the action came after the original complaint was dismissed, the second complaint was filed, and the motion to amend the second complaint was granted.

Id. at ___, 892 S.E.2d at 228.

The local company claimed that under Rule 41 the second complaint related back to the original complaint, whereas the city argued that Rule 41 may only be invoked "if the second action involves the same parties." Id. The court of appeals agreed with the city. Id.

"It is well established under the law that to benefit from the one-year extension provided by Rule 41, following the first and only voluntary dismissal, the refiled suit must involve the same parties[.]" Id. (brackets in original) (citation and quotation marks omitted). "[W]here an initial action, as here, involves a plaintiff who lacked standing to bring suit, the initial complaint is a nullity, and thus, there is no valid complaint to which an amended complaint may relate back." Id. at ___, 892 S.E.2d at 227.

In the original complaint as well as the second complaint before it was amended, the TX company was the named plaintiff—"a wholly distinct, disinterested, and incorrect entity." Id. Thus, the local company "is not the entity that timely filed suit" at the time of the original complaint. Id. Furthermore, as established, the original complaint was rendered null by the fact that the named plaintiff was the TX company. Id. Therefore, "there is no valid action to which [the] [a]mended [second] [c]omplaint could relate back under Rule 41(a)." Id.

In summary, the local company could not avail itself of relation back under Rule 41 because the second amended complaint did not involve the same parties as the original complaint, and the TX company, as the named plaintiff in the original complaint, lacked standing to bring suit against the city thus rendering the original complaint null. Id.

Accordingly, the court of appeals affirmed the trial court. Id. at ___, 892 S.E.2d at 229.

M. Rule 52

In Taylor v. Bank of America, N.A., 382 N.C. 677, 878 S.E.2d 798 (2022), the supreme court considered whether the court of appeals erred by remanding a case to the trial court to make

findings of fact and conclusions of law in its order granting defendant's Rule 12(b)(6) motion to dismiss. Id. at 677-78, 878 S.E.2d at 799.

Customers filed suit against the bank, alleging fraud and other claims arising out of the bank's Home Affordable Modification Program. Id. at 678, 878 S.E.2d at 799. The bank moved to dismiss the complaint pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. Id. The trial court granted the bank's motion, concluding that the applicable statute of limitations or doctrines of res judicata and collateral estoppel barred all claims. Id. Because the trial court's order did not include findings of fact, the court of appeals concluded that it could not conduct a meaningful review of the conclusions of law. Id.

The supreme court held that, because the order granted a Rule 12(b)(6) motion to dismiss, and the record did not reflect that any party requested findings of fact and conclusions of law under Rule 52(a)(2), the court of appeals erred. Id. at 679, 878 S.E.2d at 800. The supreme court reviewed the meaning of de novo, explaining that when an appellate court undertakes a de novo review of a Rule 12(b)(6) motion, it considers whether a complaint states a claim just as the trial court does and "[i]t freely substitutes its own assessment . . . for the trial court's assessment." Id. The review "does not involve an assessment or review of the trial court's reasoning." Id. Further, pursuant to Rule 52(a)(2), the "trial court is not required to make factual findings and conclusions of law to support Its order unless requested by a party." Id. at 680, 878 S.E.2d at 800.

Accordingly, the supreme court vacated the court of appeals' decision and remanded for the court of appeals to perform a de novo review to determine whether the allegations of the complaint stated a claim. Id. at 680, 878 S.E.2d at 800-01.

In Haidar v. Moore, 286 N.C. App. 415, 881 S.E.2d 634 (2022), the court of appeals considered whether a trial court must issue findings of fact when granting a Rule 12(b)(6) motion.

This case arises from the parties' sexual relationship, which plaintiff claims was, at least in part, nonconsensual. Id. at 416, 881 S.E.2d at 635. Plaintiff filed a complaint against the defendant requesting a no-contact order for stalking or nonconsensual sexual contact. Id. The plaintiff sought a no-contact order pursuant to section 50C of the North Carolina General Statutes. Id. In response to plaintiff's complaint, the defendant filed a motion to dismiss under Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. Id. At the motion hearing, the trial court concluded in open court that the "[p]laintiff had failed to prove grounds for issuance of a no-contact order." Id. As a result, the trial court dismissed the plaintiff's complaint by written order. Id.

On appeal, the court of appeals vacated the trial court's ruling on the no-contact order. The court applied Rule 52(a)(1) of the North Carolina Rules of Civil Procedure and said that when a court tries an action without a jury or advisory jury, the "court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment." Id. at 417, 881 S.E.2d at 635. In these instances, the judge acts as the trier of fact and must "(1) find the facts on all issues joined in the pleadings; (2) declare the conclusions of law arising on the facts found; and (3) enter judgment accordingly." Id. (quoting Gilbert Eng'g Co. v. City of Asheville, 74 N.C. App. 350, 364, 328 S.E.2d 849, 857 (1985)). The trial court's failure to make these findings prevented the court of appeals from conducting meaningful appellate review. Id. (citing D.C. v. D.C., 279 N.C. App. 371, 2021-NCCOA-493, ¶ 12). As a result, the court of appeals held that it must "vacate the orders and remand to the trial court for the entry of orders that comply with the North Carolina Rules of Civil Procedure and . . . case law." Id.

For these reasons, the court of appeals vacated the trial court's dismissal of plaintiff's complaint requesting a no-contact order.

In Williams v. Marchelle Isyk Allen, P.A., 383 N.C. 664, 881 S.E.2d 117 (2022), the supreme court considered whether a trial court judge must make findings of fact when issuing an order compelling discovery.

A widow filed a wrongful death and loss of consortium action against several medical professionals and entities following the death of her husband. Id. at 666, 881 S.E.2d at 119. The decedent visited a medical center's emergency department upon suffering pain in his stomach, back, and hip. Id. at 665, 881 S.E.2d at 118. The facility conducted testing but ultimately sent the decedent home with medication. Id. at 665-66, 881 S.E.2d at 118. A little more than twenty-four hours later, the decedent arrived back at the emergency department with exacerbated abdominal pain. Id. at 666, 881 S.E.2d at 118-19. Shortly thereafter, the emergency department discovered a ruptured abdominal aortic Aneurism in need of immediate surgical repair. Id. at 666, 881 S.E.2d at 119. The decedent was transported to another facility for surgery. Id. However, the surgery did not save the decedent's life. Id. The following day, a doctor from the initial facility the decedent had visited requested a physician assistant to memorialize her interactions and treatment of the decedent on a report provided by her employer. Id.

The widow filed a lawsuit filed and submitted interrogatories and requests for production of documents to all defendants. Id. at 666-67, 881 S.E.2d at 119. At issue was the portion of these requests that sought documents relating to any investigation conducted by medical personnel regarding the decedent's death and information related to the care provided. Id. The physician assistant, in responding to these requests, claimed that she never participated in any investigation or peer review process with her employer. Id. Nevertheless, during the physician assistant's deposition, counsel for the widow realized that a report to the risk management department that employed the physician assistant was never produced. Id. at 668, 881 S.E.2d at 120. Subsequently,

the widow filed a motion to compel the production of the report. Id. In defense of the motion, the medical professionals and entities asserted the medical review privilege pursuant to section 90-21.22A of the North Carolina General Statutes. Id. The trial court, without including findings of fact, granted the decedent's wife's motion and issued a written order for the report's disclosure. Id.

In a divided opinion, the court of appeals reversed the trial court's order finding that the medical professionals and entities appropriately requested findings of fact and conclusions of law in reference to the statutory elements of the medical review committee privilege codified in section 90-21.22A of the North Carolina General Statutes. Id. at 669, 881 S.E.2d at 121. On the contrary, the dissent would have found that the medical professionals and entities did not appropriately request the trial court to make findings of fact as required by Rule 52. Id. at 669-70, 881 S.E.2d at 121. Subsequently, the widow appealed to the supreme court. Id.

The supreme court reversed the determination by the court of appeals and concluded that the medical professionals and entities did not request findings of facts regarding the elements of the medical review privilege and that the trial court was not obligated to make such findings in its order. Id. at 670, 881 S.E.2d at 121. Generally, a trial court's responsibility to make findings of fact depends on whether a statute or rule imposes such a requirement. Id. at 670-71, 881 S.E.2d at 121-22. Some statutes explicitly require that the trial court make findings of fact; however, the medical review committee privilege does not expressly state this requirement. Id. Further, while Rule 52 imposes a requirement that in a bench trial the court must "find the facts specially and state separately its conclusions of law [before] direct[ing] entry of the appropriate judgment," this matter concerned only an interlocutory order compelling discovery. Id. at 671, 881 S.E.2d at 122 (quoting N.C. Gen. Stat. § 1A-1, Rule 52(a)(1)). Thus, to receive findings of fact on the trial

court's order compelling discovery, the medical professionals and entities would have had to request such findings. Under the circumstances presented, the medical professionals and entities never made such a request. Id. at 672, 881 S.E.2d at 122.

In contending that they did make such a request, the medical professionals and entities directed the court to a discussion whereby counsel asked the trial court judge "whether [it was] ruling [that] the privilege was waived, the privilege doesn't apply, [or that] the privilege is . . . somehow defeated . . . ." Id. However, the court found the argument that this question was evidence of their request "unavailing" because a determination of whether the privilege is "waived," "defeated," or "doesn't apply" is a legal conclusion as opposed to a factual determination. Id. "Whether a privilege . . . applies or has been waived is a legal conclusion which is in turn based upon a trial court's evaluation of the evidence presented by the parties." Id.

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

In Reints v. WB Towing Inc., ___ N.C. App. ___, 890 S.E.2d 817 (2023), the issues before the court of appeals were: (1) whether a Rule 52(b) motion, originally designed to address issues as to findings of fact, was proper such that it tolled the timeframe to notice appeal, where the motion requested to set aside a dismissal order devoid of findings of fact; and (2) whether the trial court abused its discretion in denying the Rule 52(b) motion.

A sailboat owned by a navigation society ran aground in a marsh during a hurricane. Id. at ___, 890 S.E.2d at 819. A member of the navigation society (the "sailor") discovered the sailboat a few days later and hired a towing company to unground it. Id. While the towing company attempted to pull the sailboat into deeper water, the mast broke. Id. The towing company ultimately was unable to move the sailboat. Id.

The sailor filed suit in small claims court alleging that the towing company negligently broke the mast of the sailboat; the magistrate entered an order in favor of the towing company. Id. The sailor appealed to the district court and then filed an amended complaint. Id. The towing company filed a motion to dismiss under Rules 12(b)(6) and (7), arguing that the sailor was not the real party-in-interest because he did not own the sailboat; the society did. Id. at ___, 890 S.E.2d at 820. The district court granted the towing company's motion to dismiss the complaint without prejudice pursuant to Rule 12(b)(7) for failure to join a necessary party (the "dismissal order"). Id.

The sailor filed an "objection" with the trial court, arguing that he had not Been allowed reasonable time for ratification of the action or joinder of the party-in-interest. Id. at *2. He also filed a motion to amend the dismissal order pursuant to Rule 52(b) of the North Carolina Rules of Civil Procedure, requesting that the trial court set aside its dismissal order to allow the sailor additional time to file and serve ratification of the claim by the party-in-interest. Id. The trial court entered an order dismissing the sailor's Rule 52(b) motion and objection (the "post-dismissal order"). Id. The sailor then filed a motion to reconsider, which the trial court denied via a new order nunc pro tunc amending the post-dismissal order (the "amended post-dismissal order"). Id. The sailor noticed appeal from the dismissal order, the post-dismissal order, and the amended post-dismissal order over thirty days after the dismissal order was entered. Id. at ___, 890 S.E.2d at 820-21.

The court of appeals first considered whether it had jurisdiction over the dismissal order due to the timing of the appeal. Id. at ___, 890 S.E.2d at 821. The sailor argued his Rule 52(b) motion tolled the time for filing a notice of appeal until the trial court entered the post-dismissal

order. Id. The court of appeals, however, concluded that the sailor's Rule 52(b) motion was improper. Id.

"Rule 52(b) allows a party to make a motion, not later than ten days after entry of judgment for the court, to request that the trial court amend its findings or make additional findings." Id. (citing N.C. R. Civ. P. 52(b)). However, an order dismissing a complaint "is not an adjudication on the merits, and thus findings of fact are not necessary or even warranted." Id. (citing N.C. R. Civ. P. 41(b)). It follows that, when a trial court dismisses a complaint for failure to join a necessary party, the trial court is not resolving the dispute but merely stating that not all parties necessary to the litigation have been added to the litigation yet. Id.

The court of appeals concluded that the sailor's Rule 52(b) motion had two defects: (1) it did not request that the trial court make additional findings or amend the order based upon additional or amended findings, and; (2) it requested that the trial court set aside the dismissal order so that he could file ratification by the necessary party-in-interest—which, as the court of appeals characterized, essentially would have been an amendment to the complaint. Id. Because prior court decisions established that amending a complaint after a dismissal pursuant to Rule 12(b)(6) is not allowed, the court appeals reasoned that the same must apply to a dismissal made pursuant to Rule 12(b)(7). Id. Accordingly, at the outset, the sailor was not allowed to amend his complaint following the trial court's dismissal order. Id. The court of appeals dismissed as untimely the sailor's issues on appeal that specifically arose out of the dismissal order. Id. at *4.

Next, the court of appeals addressed whether the trial court abused its discretion in denying the sailor's Rule 52(b) motion to amend the dismissal order. Id. When a trial court is not required to make findings of fact and indeed does not do so, "it is presumed that the court relied upon proper evidence to support its judgment." Id. (citation omitted). Here, the sailor did not provide, and nor

did the court of appeals find, case law where a trial court set aside its order that dismisses a complaint for failure to join a necessary party and is devoid of any initial findings of fact pursuant to Rule 52(b). Id. As established, the sailor's intent in filing the Rule 52(b) motion 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 Rule 59 or 60." Id. (citation omitted). In other words, the sailor had filed a Rule 52(b) motion that was not authorized under Rule 52(b) and sought relief not available under the procedural posture of the litigation. Id. at ___, 890 S.E.2d at 823. Accordingly, the trial court had not abused its discretion. Id.

The court of appeals dismissed in part and affirmed in part. Id.

N. Standing

In United Daughters of the Confederacy v. City of Winston-Salem by and through Joines, 383 N.C. 612, 881 S.E.2d 32 (2022), the supreme court addressed whether a local chapter of a women's heritage association had standing to file a declaratory action against a city and a county challenging the city's removal of a confederate statue from the grounds of a former county courthouse.

Following political protests, the city declared the statue a "public nuisance" and removed it from the grounds of a private entity, formerly a county courthouse, believing the statue posed a threat to public health and safety. Id. at 614-18, 881 S.E.2d at 37-39. In response, the association filed suit against the city and the county seeking to enjoin them from relocating the statue "prior to a full adjudication of the respective rights and obligations of the [p]arties." Id. at 619, 881 S.E.2d at 40. The city and county moved to dismiss the complaint for lack of subject matter jurisdiction under Rule 12(b)(1) of the North Carolina Rules of Civil Procedure and for failure to state a claim under Rule 12(b)(6). Id. The trial court granted these motions and dismissed the

association's complaint with prejudice. Id. The association appealed. Id. at 620, 881 S.E.2d at 41.

A divided panel of the court of appeals affirmed the trial court's order, with the majority agreeing with the trial court that the association had "failed to establish the standing" and "concluding that dismissal of the . . . complaint with prejudice was proper." Id. at 620-21, 881 S.E.2d at 41. The association appealed based upon the dissent. Id. at 624, 881 S.E.2d at 43.

The supreme court, in an opinion authored by Justice Ervin, agreed that the association lacked standing to bring its complaint and properly granted the Rule 12(b)(1) motion; however, the trial court erred in granting the Rule 12(b)(6) motion and dismissing the association's complaint with prejudice. Id. at 614, 881 S.E.2d at 37.

On the issue of standing, the supreme court said that since "the North Carolina Constitution confers standing on those who suffer harm," the association's standing in this case depended on whether the association had "alleged such a personal stake in the outcome." Id. at 625, 881 S.E.2d at 44 (citation and quotation marks omitted). The supreme court also observed that the court of appeals had previously "consistently held that North Carolina's standing requirements were identical to those enforced in the federal courts," thus requiring a showing of: (1) an injury-in-fact that is (2) "fairly traceable to the challenged action of the defendant" and (3) "is likely, as opposed to merely speculative, . . . [to] be redressed by a favorable decision." Id. (citation and quotation marks omitted).

However, in the recent decision in Committee to Elect Dan Forest v. Employee Political Action Committee, which was filed after the trial court's order and the opinion from the court of appeals in the immediate case, the supreme court held that, "since the North Carolina Constitution does not contain the same 'case-or-controversy' provision that appears in the United States

Constitution, it does not require the existence of 'injury-in-fact' to establish standing," thus making a "legal injury" sufficient. Id. at 625-26, 881 S.E.2d at 44-45 (quoting Comm. to Elect Dan Forest, 376 N.C. 558, 853 S.E.2d 698).

Accordingly, the supreme court concluded that "to the extent that the lower courts relied upon" the association's failure to allege an "injury-in-fact" in their determinations in this case, "any such determination constituted error." Id. at 626, 881 S.E.2d at 45. Nevertheless, this error "d[id] not change the fact that [the association] . . . failed to establish standing"; thus, the supreme court affirmed the court of appeals on the issue of standing. Id.

The supreme court found that the association's argument—that "simply filing a declaratory action and asserting that there was an 'actual controversy between the parties'" suffices to establish standing— "rest[ed] upon a fundamental misunderstanding of the law of standing." Id. at 629, 881 S.E.2d at 46. In fact, establishing standing must happen as a "prerequisite for the assertion of a declaratory judgment claim." Id. (citations omitted). Thus, the association was required to demonstrate legal or factual injury arising from the city's actions "as a prerequisite for maintaining the present declaratory judgment action." Id. (citations omitted). Instead, the association failed to show deprivation of any identifiable legal right. Id. at 629, 881 S.E.2d at 47.

The association also argued that the trial court erred by dismissing its claim with prejudice because "[a] dismissal for want of jurisdiction under Rule 12(b)(1) does not constitute an adjudication on the merits of the case' and 'is without prejudice to a plaintiff's ability to bring a second action . . . sufficient to establish jurisdiction." Id. at 649 (first alteration in original).

The supreme court observed that both state appellate courts had held that "the absence of standing can be raised in a motion to dismiss for failure to state a claim" under Rule 12(b)(6). Id., 881 S.E.2d at 59 (citations omitted). Moreover, both courts had "consistently recognized that

standing is a necessary prerequisite to a court's proper exercise of subject matter jurisdiction." Id. (citations and quotation marks omitted). Additionally, these previous opinions relied on the since-rejected notion that a plaintiff must allege an injury-in-fact to establish standing. Id., 881 S.E.2d at 60 (citing Comm. to Elect Dan Forest, 376 N.C. at 596, 853 S.E.2d 725-26).

Here, the supreme court concluded that, "[a]lthough the practical consequence of a dismissal of a complaint under Rule 12(b)(6) or 12(b)(1) is the same—the case is dismissed—the legal effect is quite different." Id. at 650, 881 S.E.2d at 60 (quoting Cline v. Teich for Cline, 92 N.C. App. 257, 263, 374 S.E.2d 462, 466 (1988)). Dismissing an action for failure to state a claim constitutes a final judgment on the merits— "unless the court specifies that the dismissal is without prejudice"—and bars the plaintiff from filing another action on the basis of the same claim. Id. (citing Rest. (Second) of Judgments § 19 cmt. d. (1982); Clancy v. Onslow Cty., 151 N.C. App. 269, 272, 564 S.E.2d 920, 923 (2002)). Conversely, dismissing an action for lack of subject matter jurisdiction "does not result in a final judgment on the merits and does not bar further action by the plaintiff on the same claim." Id. (emphasis in original) (citing Rest. (Second) of Judgments § 20 cmt. e.; Street v. Smart Corp., 157 N.C. App. 303, 305, 578 S.E.2d 695, 698 (2003)).

The supreme court reiterated that the trial court properly dismissed the association's claim for lack of subject matter jurisdiction due to its lack of standing. Id. By that same token, however, the trial court erred by dismissing the complaint for failure to state a claim (and the court of appeals also erred by affirming the same). Id. (citation omitted). Accordingly, the court of appeals should have vacated and remanded this portion of the trial court's order. Id.

For these reasons, the supreme court affirmed the court of appeals' opinion in part, reversed it in part, and remanded. Id. at 651, 881 S.E.2d at 60.

Chief Justice Newby wrote separately, concurring in the result only, and was joined by Justices Berger and Barringer. Id. at 651-53, 881 S.E.2d at 61-62. Chief Justice Newby would have found no standing because,

> [w]ithout more information regarding the membership of the organization and where its members reside, plaintiff has failed to demonstrate that its organization or its members have any interest in the monument that is the subject of this case. . . . Further, plaintiff does not allege ownership or a legal interest in the monument.

Id. at 652-53, 881 S.E.2d at 62. He agreed that the association's "bare allegations" did not establish standing. Thus, "[the supreme court] lack[ed] subject matter jurisdiction over [the association]'s claims" and "dismissal . . . without prejudice [was] proper." Id.

In Edwards v. Town of Louisburg, ___ N.C. App. ___, 892 S.E.2d 76 (2023), a divided court of appeals determined whether standing could be determined at summary judgment, thus dismissing a matter with prejudice.

In 2020, amid "[r]ising tensions and demonstrations" surrounding confederate monuments in North Carolina and across the United States, a town's council held an emergency meeting and decided to move a confederate monument from a main street to a temporary placement in a storage facility; the monument was eventually moved to a cemetery. Id. at ___, 892 S.E.2d at 79.

A group of concerned citizens commenced an action against the town, seeking a declaratory judgment (among other things) "declaring that the actions of the [t]own . . . ordering the removal or relocation of the . . . [m]onument be declared void and of no effect.'" Id. (first alteration in original). The citizens claimed that the town failed to comply with state statutes governing protection of monuments and meetings of public bodies. Id.

The town filed a Rule 12(b)(1) and (6) motion to dismiss, which the trial court denied. Id. The town then filed a Rule 56 motion for summary judgment, which the trial court granted without stating the basis for its rationale. Id. The citizens timely appealed. Id.

The court of appeals addressed, among other things, whether to affirm the trial court's summary judgment for the citizens' lack of standing to pursue a claim for declaratory judgment. Id. A majority of the court of appeals in an opinion written by Judge Gore stated that standing:

- "[I]s a necessary prerequisite to a court's proper exercise of subject matter jurisdiction," id. (quotation marks omitted) (quoting United Daughters v. City of Winston-Salem, 338 N.C. 612, 652, 881 S.E.2d 32, 61 (2022) (Newby, C.J., concurring));

- "[I]s required to seek a declaratory judgment," id. (quotation marks omitted) (quoting United Daughters, 338 N.C. at 652, 881 S.E.2d at 61 (Newby, C.J., concurring)); and

- Is conferred by the North Carolina Constitution "on those who suffer the infringement of a legal right," id. (quotation marks omitted) (quoting Comm. to Elect Dan Forest v. Emps. Pol. Action Comm., 376 N.C. 558, 608, 853 S.E.2d 698, 733 (2021)).

The majority further stated that, "[u]nder North Carolina's Uniform Declaratory Judgment Act, . . . an action is maintainable . . . only in so far as it affects the civil rights, status and other relations in the present actual controversy between parties." Id. at ___, 892 S.E.2d at 80 (second alteration in original) (citation and quotation marks omitted). "However, '[t]he mere filing of a declaratory judgment is not sufficient, on its own, to grant a plaintiff standing.'" Id. (alteration in original) (quoting United Daughters, 338 N.C. at 629, 881 S.E.2d at 46). "In other words, plaintiff is still required to demonstrate that it has sustained a legal or factual injury arising from defendants' actions as a prerequisite for maintaining the present declaratory judgment action." Id. (quotation marks omitted) (quoting United Daughters, 338 N.C. at 629, 881 S.E.2d at 46–47).

The majority concluded that the citizens failed to show a proprietary or contractual interest in the monument and thus lacked standing. Id. Although the standing analysis relied in great part on the supreme court's opinion in United Daughters, in which the appeal arose from an order granting a motion to dismiss for lack of subject matter jurisdiction rather than summary judgment, the majority averred that previous precedent established that "[s]ummary judgment is proper if the plaintiff lacks standing to bring suit." Id. (citation and quotation marks omitted). Accordingly, the majority affirmed the trial court. Id. at ___, 892 S.E.2d at 82. Additionally, by its nature, the trial court's summary judgment gave the matter preclusive effect, turning it into res judicata with respect to any future action; this aspect differed from the United Daughters opinion, where the trial court's dismissal for lack of subject matter jurisdiction did not, by its nature, confer preclusive effect. Id. at ___, 892 S.E.2d at 81.

Judge Tyson dissented; though he also found a lack of standing, he would have analyzed the question differently. See id. at ___, 892 S.E.2d at 82-86. Judge Tyson stated that the supreme court's opinion in Dan Forest "extensively discussed the development of our State's standing doctrine as it applies to statutorily-granted rights." Id. at ___, 892 S.E.2d at 82. He asserted that, with Dan Forest and United Daughters, the supreme court established that "a two-step test is used to determine whether a plaintiff has standing to challenge a legislative action." Id. at ___, 892 S.E.2d at 84. First, the court must determine "if the relevant statute, here the Declaratory Judgment Act . . . , confers on [the citizens] a cause of action." Id. "The second question becomes whether [the citizens] . . . satisfied the statutory requirements under the [Declaratory Judgment Act] to bring a claim." Id. (citation omitted). According to Judge Tyson, "[a]ny alleged infringement of a legal right is sufficient to establish standing," without need to allege an injury in fact. Id.

Judge Tyson also observed that the trial court "entered conflicting orders in initially denying [the town's] Rule 12(b)(1) motion where [the citizens] had maintained the burden to establish standing, while later allowing [the town's] Rule 56 motion for summary judgment presumably for lack of jurisdictional standing." Id. at ___, 892 S.E.2d at 85. Judge Tyson conceded that "there may be purported conflicting caselaw from [the court of appeals] regarding issues of jurisdictional or subject matter standing being disposed of by summary judgment"; however, he averred that the supreme court "reviews challenges to subject matter jurisdiction through a Rule 12(b)(1) motion to dismiss" rather than a Rule 12(b)(6) motion or motion for summary judgment. Id.

Judge Tyson also disagreed with the fact that the trial court had given the matter preclusive effect by virtue of entering summary judgment. See id. at ___, 892 S.E.2d at 86. Judge Tyson's position was that the supreme court had established that standing is a "perquisite to a court's exercise of subject matter jurisdiction, . . . not a merits adjudication." Id. (citation and quotation marks omitted).

Accordingly, Judge Tyson would have reversed and remanded with instructions to enter dismissal of the citizens' complaint or summary judgment for lack of standing without prejudice. Id.

O. Immunity

(1) Sovereign

In Farmer v. Troy University, 382 N.C. 366, 879 S.E.2d 124 (2022), the supreme court considered whether state tort claims against an out-of-state public university are barred in North Carolina under the doctrine of sovereign immunity. Id. at 367, 879 S.E.2d at 125.

An out-of-state public university opened an office in Fayetteville, North Carolina for the purpose of recruiting military students for its online programs. Id. An employee who worked in the Fayetteville office sued the university, alleging sexual harassment, wrongful termination, intentional infliction of emotional distress, tortious interference with contractual rights, negligent retention and/or supervision, and an equal protection violation under the North Carolina Constitution. Id. at 367-68, 879 S.E.2d at 125-26. The university filed a motion to dismiss pursuant to Rules 12(b)(2) and 12(b)(6), asserting that sovereign immunity barred the former employee's suit based on the United States Supreme Court's decision in Franchise Tax Board of California v. Hyatt, 139 S. Ct. 1485 (2019) ("Hyatt III"). Id. at 368-69, 879 S.E.2d at 126-27.

The trial court granted the university's motion to dismiss. Id. at 369, 879 S.E.2d at 126-27. The court of appeals affirmed. Id. The supreme court granted discretionary review. Id. Reviewing the issues de novo, the majority, in an opinion authored by Justice Earls, held that the university's "actions in registering as a non-profit corporation in North Carolina and engaging in business here subject to the sue and be sued clause of the North Carolina Nonprofit Corporation Act . . . constituted an explicit waiver of its sovereign immunity." Id. at 367, 879 S.E.2d at 125.

The supreme court acknowledged that the public university is deemed to be an arm of the state and protected by sovereign immunity by the state's constitution. Id. at 370, 879 S.E.2d at 127-28. It went on to explain that the United States Constitution requires states to afford each other sovereign immunity from private suits brought in other states unless the privilege is explicitly waived. Id. at 371, 879 S.E.2d at 128 (citing Hyatt III, 139 S. Ct. at 1490, 1499).

The supreme court recognized that a state can waive its right to sovereign immunity and may be sued in a sister state when it has availed itself of a "sue and be sued" clause. Id. at 371-72, 879 S.E.2d at 128-29 (citing Thacker v. Tennessee Valley Auth., 139 S. Ct. 1435 (2019)).

Noting that the "sue and be sued" clause is not without its limits, the supreme court clarified: "In cases involving governmental activities in which a sue and be sued clause is present, immunity will only apply 'if it is clearly shown that prohibiting the type of suit at issue is necessary to avoid grave interference with a governmental function's performance.'" Id. at 372, 879 S.E.2d at 129 (quoting Thacker, 139 S. Ct. at 1443). In this case, the university registered under the North Carolina Nonprofit Corporation Act, which includes a "sue and be sued clause." Id. at 372, 879 S.E.2d at 128. Further, it engaged in business or commercial—rather than governmental—activities, including marketing services and recruiting students. Id. at 373, 879 S.E.2d at 129.

In sum, when the out-of-state public university entered and conducted business in North Carolina subject to the North Carolina Nonprofit Corporation Act, which includes a sue and be sued clause, it explicitly waived its sovereign immunity. Id. Accordingly, the supreme court remanded the case for further proceedings. Id. at 376, 879 S.E.2d at 131.

Justice Berger wrote a concurring opinion. Id. at 377-78, 879 S.E.2d at 131-33. He explained that he would have reached the same result but would have decided that immunity was waived with greater emphasis on the proprietary actions taken by the university that were commercial—as opposed to governmental—in function. Id. at 376-77, 879 S.E.2d at 131-32. He explained that, "[h]aving affirmatively acted to obtain the benefit of conducting business in North Carolina, and operating pursuant to the North Carolina Nonprofit Corporation Act, [the university] has consented to suit in this state for its commercial activities." Id. at 379, 879 S.E.2d at 133.

Justice Barringer authored a dissenting opinion, which Chief Justice Newby joined. Id. at 379-86, 879 S.E.2d at 133-38. The dissent opined that Hyatt III should control the outcome and that the university should be afforded sovereign immunity. Id. at 381, 879 S.E.2d at 134-35. The dissent found no clear indication that the sister state consented to be sued in North Carolina courts.

Id. at 384, 879 S.E.2d at 136. Further, North Carolina courts have refused to infer a waiver of immunity in circumstances involving a "sue and be sued" clause, opting instead to strictly construe statutes conferring immunity. Id. at 384, 879 S.E.2d at 137. Accordingly, the dissent concluded that denying sovereign immunity violates the United States Constitution and North Carolina's own standard for waiver of sovereign immunity. Id. at 386, 879 S.E.2d at 137-38.

In Lannan v. Board of Governors of the University of North Carolina, 285 N.C. App. 574, 879 S.E.2d 290 (2022), petition for disc. rev. allowed, 883 S.E.2d 449 (Mar. 01, 2023), the court of appeals court considered whether a valid implied-in-fact contract—as opposed to an express contract—can waive sovereign immunity. Id. at 587, 879 S.E.2d at 301.

Students who paid fees for student services filed a breach of contract claim against two universities that suspended campus activities during the COVID-19 pandemic. Id. at 577-78, 879 S.E.2d at 295. The students paid fees to register, remain in good standing, receive credit, and obtain transcripts for the fall 2020 semester. Id. at 576, 879 S.E.2d at 294. The universities earmarked the fees for specific services, including, among others, health services, library services, campus activities, use of campus facilities, and transportation. Id. at 577, 879 S.E.2d at 294-95. Some students also purchased optional parking permits. Id. In August 2020, the universities shut down campuses, evicted students from on-campus housing, instructed students to seek health services elsewhere, closed libraries, discontinued student activities, closed facilities, and restricted transportation. Id.

The students filed suit, alleging that the universities entered an implied-in-fact contract with the students when the universities offered the services and the students accepted the offer by paying the fees. Id. at 578, 879 S.E.2d at 295. The students claimed they did not receive the services, benefits, or opportunities for which they paid, nor did they receive a refund following the

shutdowns. Id. at 579, 879 S.E.2d at 296. The universities asserted sovereign immunity and moved to dismiss the students' claims. Id. at 580, 879 S.E.2d at 296. The trial court denied the motion to dismiss, and the universities appealed. Id. at 580, 879 S.E.2d at 297.

Reviewing the trial court's order de novo, the court of appeals concluded that the universities waived sovereign immunity by entering an implied-in-fact contract with the students. Id. at 595, 879 S.E.2d at 306. The court explained that the state waives sovereign immunity by entering a valid contract. Id. at 588, 879 S.E.2d at 301. Thus, it analyzed whether the state waives its sovereign immunity by entering an implied-in-fact contract, which is "an actual contract inferred from the circumstances, conduct, acts or relations of the parties, showing a tacit understanding." Id. at 591, 879 S.E.2d at 304. The court concluded that the universities agreed to accept and enroll the students, and the students agreed to pay and did pay certain fees, supporting the existence of an implied-in-fact contract. Id. at 593, 879 S.E.2d at 305. Further, the court noted that the general assembly must have envisioned that the universities could be sued for this type of claim because it explicitly passed a statute granting immunity to claims related to tuition or fees paid for the spring 2020 semester, which would not have been necessary if it believed sovereign immunity already protected the state from these claims. Id. at 595, 879 S.E.2d at 306.

Accordingly, the court of appeals concluded that a contract implied-in-fact can waive sovereign immunity and that the students adequately pleaded a breach of implied contract claim. Id. at 600, 879 S.E.2d at 309. The court affirmed the trial court's denial of the universities' motion to dismiss. Id. at 603, 879 S.E.2d at 311.

In Howell v. Cooper, ___ N.C. App. ___, 892 S.E.2d 445 (2023), a divided court of appeals addressed whether the doctrine of sovereign immunity requires a plaintiff to seek injunctive relief at the outset of a claim alleging constitutional violations.

In 2020, the Governor declared a state of emergency in response to the COVID-19 pandemic and "issued a series of executive orders initially closing bars and repeatedly extending the closure." Id. at ___, 892 S.E.2d at 448. A group of barkeepers filed suit against the Governor, alleging that "the executive orders made their businesses unprofitable to operate and caused financial damages." Id. (quotation marks omitted). Id. In the complaint the barkeepers raised several constitutional arguments. The barkeepers eventually amended their complaint to add as defendants two additional politicians (collectively, with the Governor, the "politicians").

The Governor and State filed a motion to dismiss the amended complaint pursuant to Rules 12(b)(1), (2), and (6). Id. at ___, 892 S.E.2d at 449. This motion did not mention sovereign immunity; the politicians raised sovereign immunity during the hearing on the motion to dismiss, indicating that the Rule 12(b)(6) motion was based, "at least partially, on a sovereign immunity defense." Id. The trial court denied the motion as to some of the barkeepers' causes of action. Id. The politicians appealed. Id.

A majority of the court of appeals in an opinion written by Judge Wood stated that, as a general rule, "sovereign immunity bars actions against, inter alia, the state, its counties, and its public officials sued in their official capacity. The doctrine applies when the entity is being sued for the performance of a governmental function." Id. at ___, 892 S.E.2d at 450 (citation omitted). However, "[t]he doctrine of sovereign immunity cannot stand as a barrier to North Carolina citizens who seek to remedy violations of their rights guaranteed by the Declaration of Rights." Id. (quotation marks omitted) (quoting Corum v. Univ. of N.C. Through Bd. of Governors, 330 N.C. 761, 785–86, 413 S.E.2d 276, 291 (1992)). When there is a clash between constitutional rights and sovereign immunity, "the constitutional rights must prevail." Id. (quotation marks omitted) (quoting Corum, 330 N.C. at 786, 413 S.E.2d at 292).

The majority relied on supreme court precedent:

> When called upon to exercise its inherent constitutional power to fashion a common law remedy for a violation of a particular constitutional right, . . . the judiciary must recognize two critical limitations. First, it must bow to established claims and remedies where these provide an alternative to the extraordinary exercise of its inherent constitutional power. Second, in exercising that power, the judiciary must minimize the encroachment upon other branches of government—in appearance and in fact—by seeking the least intrusive remedy available and necessary to right the wrong.

Id. at ___, 892 S.E.2d at 450-51 (alteration and emphasis in original) (quoting Corum, 330 N.C. at 784, 413 S.E.2d at 291).

The politicians argued that sovereign immunity barred the barkeepers' claims because, "in seeking monetary damages, [the barkeepers] did not seek the least intrusive remedy." Id. at ___, 892 S.E.2d at 451. The politicians asserted that "the mandate to 'seek the least intrusive remedy available' applies at the pleading stage, and therefore requires a plaintiff to seek injunctive relief before the party may state a claim for damages." Id. The majority disagreed.

The majority concluded that the supreme court had established that, when constitutional violations are alleged, it is the judiciary's responsibility to fashion a remedy thereto, and not the plaintiff's responsibility to request injunctive relief at the pleadings stage "as a prerequisite to reaching trial." Id. The majority further concluded that, under the doctrine of sovereign immunity, the barkeepers' failure to seek injunctive relief prior to damages did not bar their claim for damages at the pleadings stage. Id.; see also id. at ___, 892 S.E.2d at 454.

Accordingly, the majority affirmed the trial court. Id. at ___, 892 S.E.2d at 454. (The dissent, written by Judge Arrowood, did not address sovereign immunity.)

(2) Public Official

In Petrillo v. Barnes-Jones, ___ N.C. App. ___, ___ S.E.2d ___, 2023 WL 6814407 (2023), the court of appeals considered whether a high school principal properly asserted public official immunity as an absolute defense to a negligence claim.

A trainee for a summer camp program filed a complaint against a principal after severely injuring herself on the premises of the principal's high school. Id. at *1. The trainee alleged that the uneven and raised concrete on a pathway between two buildings at the school campus caused her to fall to the ground and severely injure herself. Id. The trainee alleged that she was suing the principal solely in her individual capacity for negligence while the principal was acting in the course and scope of her employment. Id. The trainee further alleged that the principal "operated, managed, maintained, and supervised the property and premises of the high school." Id. The trainee also cited the principal's duty to "exercise ordinary and reasonable care in the maintenance of the property and premises of [the high school,]" and claimed her injuries were "proximately caused by the careless, negligent[,] and unlawful conduct" of the principal. Id.

The principal filed an initial motion to dismiss that the trial court denied because the trainee sued the principal in her individual capacity. The principal filed a second motion to dismiss where she contended that the suit should be dismissed pursuant to the doctrine of public official immunity. Id. The trial court denied the second motion to dismiss. Id. The principal filed a notice of appeal shortly thereafter. Id.

On appeal, the court of appeals considered its jurisdiction over the interlocutory appeal and, subsequently, whether the trial court erred in denying the principal's motion to dismiss based on the doctrine of public official immunity. Id. at *1-*4.

First, the court of appeals held that it maintained appellate jurisdiction to review the principal's appeal. Id. at * 1-*3. Although the principal's appeal was interlocutory, her appeal involved a substantial right. "Orders denying dispositive motions based on the defenses of governmental and public official's immunity affect a substantial right and are immediately appealable." Id. at *2 (quoting Thompson v. Town of Dallas, 142 N.C. App. 651, 653, 543 S.E.2d 901, 903 (2001)).

Second, the court of appeals held that the trial court erred in denying the principal's motions to dismiss because the principal was entitled to assert public official immunity as an absolute defense. Id. at *3-*4. The court first clarified the distinction between governmental immunity and public official immunity:

> Public official immunity is derived and stems from both sovereign immunity and governmental immunity, and its applicability depends upon whether the public official's employment and authority flows from the state or from a city or county. If the public employee works for a city or county, their individual immunity for acts committed within their scope of employment arises under and from the city or county's governmental immunity.

Id. at *3 (citing Fullwood v. Barnes, 250 N.C. App. 31, 38, 792 S.E.2d 545, 550 (2016)) (emphasis in original). The court of appeals then acknowledged how public official immunity works as a defense:

> Public official immunity shields individuals, while serving as "public officials", from individual liability for negligence, "[a]s long as a public officer lawfully exercises the judgment and discretion with which he is invested by virtue of his office, keeps within the scope of his official authority, and acts without malice or corruption.[.]

Id. at *4 (quoting Smith v. State, 289 N.C. 303, 331, 222 S.E.2d 412, 430 (1976)) (emphasis in original). Moreover, the question of whether a public official may assert public official immunity

turns on the capacity in which the public official is being sued. Id. (citing Patrick v. N. Carolina Dep't of Health and Hum. Servs., 192 N.C. App. 713, 716, 666 S.E.2d 171, 173 (2008)).

Here, the trainee's complaint specifically alleged in her negligence claim that she was suing the principal solely in her individual capacity as a public employee of the board of education for the local city-county municipality. Id. However, the principal's employment as a high school principal qualified her as a public official, and the trainee's complaint failed to allege that the principal acted with malice. Id. Thus, the court of appeals found that the principal may assert public official immunity as an absolute defense to the trainee's negligence claim. Id.

For these reasons, the court of appeals reversed the trial court's order denying the principal's motion to dismiss and remanded for entry of an order granting the principal's motion to dismiss. Id. at *5.

(3) Immunity Under Section 122C-210.1 of the North Carolina General Statutes

In Kirkman v. Rowan Regional Medical Center, Inc., ___ N.C. App. ___, ___ S.E.2d ___, 2023 WL 7312541 (2023), the court of appeals considered whether a nursing student's wife in a malpractice case must allege gross negligence by a regional hospital and emergency room doctor in order to overcome the immunity from liability established by the legislature in section 122C-210.1 of the North Carolina General Statutes.

A nursing student was attending clinical instruction at a regional hospital when he engaged in an unprovoked outburst. Id. at *1. During this outburst, the nursing student accused the nursing instructor of being the devil, pulled out a cross he wore around his neck, and touched the instructor's face and arm with the cross. Id. The nursing instructor later reported that the nursing student began speaking some sort of unintelligible language and that his eyes were dilated as he prevented her from leaving the room. Id. Fearing for her and the other students' safety, the nursing

instructor immediately filed an Affidavit and Petition for Involuntary Commitment for the nursing student. Id. Later that day, a county magistrate issued a custody order for the involuntary commitment of the nursing student on the basis that the nursing student was likely mentally ill and in need of treatment. Id. The nursing student and the nursing instructor went to the emergency room of the regional hospital. Id. There, the nursing student was admitted and examined by an emergency room doctor. Id.

The nursing student remained calm and compliant throughout the majority of his emergency room stay. Id. at *2. After an examination, the emergency room doctor medically cleared the nursing student for a psychiatric evaluation. Id. at *1. A licensed professional counselor conducted a telehealth behavioral health assessment of the nursing student, which was typical for mental health assessments conducted at that regional hospital. Id. The nursing student's wife was also present in the room while the assessment took place. Id. The counselor's assessment involved a number of questions, one of which was whether the nursing student had any firearms in the home. Id. He answered in the negative even though he had access to a number of hunting rifles, shotguns, and handguns in his home. Id. The nursing student's wife also knew this and did not amend or correct the nursing student's response to the question about having any firearms in the home. Id.

After her evaluation of the nursing student, the counselor determined that there was no indication that the nursing student was a current threat to himself or anyone else and concluded that the student suffered from anxiety. Id. at *2. The counselor reported these findings to the emergency room doctor. Id. The emergency room doctor then diagnosed the nursing student with behavioral outburst and determined that he was not mentally ill or a danger to himself. Id. The emergency room doctor made this determination based on her own observations of the nursing

student, the results of the medical examination, and the counselor's telehealth behavioral health assessment. Id. After staying at the regional hospital for less than twenty-four hours, the nursing student was discharged by the emergency room doctor. Id. Two days later, the nursing student died from a self-inflicted gunshot wound. Id.

The wife filed a complaint against the regional hospital, the emergency room doctor, the counselor, and other entities. Id. She alleged that during the nursing student's hospital stay in the regional hospital's emergency room department, each defendant was negligent and deviated from the applicable standard of care, thereby causing the injuries and subsequent death of the nursing student. Id. The wife later voluntarily dismissed all defendants except for the regional hospital and the emergency room doctor. Id. The regional hospital and emergency room doctor then filed a motion for summary judgment. Id.

The trial court entered an order granting the motion for summary judgment on the grounds that both the regional hospital and the emergency room doctor were entitled to qualified immunity pursuant to section 122C-210.1 of the North Carolina General Statutes and, alternatively, that the wife presented no forecast of evidence in support of the existence of the essential element of proximate cause. Id. The wife timely appealed the trial court's order granting summary judgment. Id.

On appeal, the court of appeals considered whether the trial court erred in entering summary judgment pursuant to the qualified immunity provided under section 122C-210.1. Id.

The court of appeals first acknowledged the relevant statute which defined the qualified immunity invoked by the regional hospital and the emergency room doctor:

> No facility or any of its officials, staff, or employees, or any physician or other individual who is responsible for the custody, examination, management, supervision, treatment, or release of a client and who follows accepted professional judgment, practice,

> and standards is civilly liable, personally or otherwise, for actions arising from these responsibilities or for the actions of the client. This immunity is in addition to any other legal immunity from liability to which these facilities or individuals may be entitled and applies to action performed in connection with, or arising out of, the admission or commitment of any individual pursuant to this Article.

Id. at *3 (citing N.C. Gen. Stat. § 122C-210.1). Among other things, the wife asserted that section 122C-210.1 did not apply to medical malpractice actions. Id. In support of her argument, the wife referred to Ali v. Parker, which stated that "a defendant is entitled to immunity under section 122C-210.1 if the challenged act or omission was a professionally acceptable choice." Id. at *3 (quoting Ali v. Parker, 112 N.C. App. 766, 442 S.E.2d 507 (1994)). Id. The court of appeals inferred that the wife invoked Ali to argue that section 122C-210.1 "only provides immunity for claims other than medical malpractice or where a claim for medical malpractice would already fail based upon a plaintiff's failure to establish negligence under the standard of care [pursuant to North Carolina's general medical malpractice statute.]" Id. The court of appeals disagreed with this argument and determined that Ali did not create any relationship between section 122C-210.1 and North Carolina's general medical malpractice statute. Id. at *4.

Instead, the court of appeals turned to relevant case law that explained section 122C-210.1 in the context of medical malpractice and negligence:

> [T]his Court has held, in applying the pertinent version of the statute in a medical malpractice case, that "[q]ualified immunity, if applicable, is sufficient to grant a defendant's motion for summary judgment," and moreover, in the specific context of [section] 122C-210.1, that "gross negligence must be alleged to overcome the statutory immunity once it attaches."

Id. (quoting Boryla-Lett v. Psychiatric Sols. of N.C., Inc., 200 N.C. App. 529, 533, 685 S.E.2d 14, 18 (2009)). Moreover, the decision in Boryla-Lett relied significantly on a negligence case where the court of appeals also held that "under North Carolina law, '[c]laims based ordinary negligence

do not overcome . . . statutory immunity' pursuant to Section 122C-210.1; a plaintiff must allege gross or intentional negligence." Id. (quoting Snyder v. Learning Servs. Corp., 187 N.C. App. 480, 484, 653 S.E.2d 548, 551 (2007)).

Thus, the court of appeals found that the rule controlling this issue states that the qualified immunity from liability pursuant to section 122C-210.1 can only be overcome by an allegation that a covered defendant committed gross negligence. Id. Here, the nursing student's wife failed to include an allegation of gross negligence in her complaint. Id. Consequently, the court of appeals held that the trial court did not err in granting summary judgment in favor of the regional hospital and the emergency room doctor. Id.

For the foregoing reasons, the court of appeals found that the trial court did not err in granting the motion for summary judgment. Id.

P. Summary Judgment

In Watson v. Watson, 288 N.C. App. 265, 885 S.E.2d 858 (2023), the court of appeals considered whether the trial court abused its discretion in granting a husband summary judgment on his wife's alimony claim.

The wife commenced a domestic action against her husband in 2020, requesting alimony and other relief. Id. at 266, 885 S.E.2d at 859. The husband moved for summary judgment on the wife's alimony claim on the basis that the wife had engaged in illicit sexual behavior during the marriage, prior to the date of separation. Id. at 268, 885 S.E.2d at 861. The husband produced sworn statements from alleged paramours of his wife that each had engaged in adultery with the wife during her marriage with her husband. Id. The wife also conceded to engaging in at least one affair. Id.

After a hearing on the matter in July 2021, the trial court granted the husband partial summary judgment on his wife's claim for alimony. Id. at 266, 885 S.E.2d at 860. Later that month, the wife moved for the judgment to be amended or, in the alternative, for relief from the judgment. Id. On December 2, 2021, the trial court denied the wife's motion. Id. On December 7, 2021, the wife filed her written notice of appeal from both the July 2021 partial summary judgment order and the December 2021 order denying her subsequent motion. Id.

On appeal, the court of appeals vacated the trial court's order and remanded for further proceedings, instructing the trial court to consider the husband's motion after resolution of a discovery issue. Id. at 270, 885 S.E.2d at 862. The court of appeals held that the trial court abused its discretion in granting the husband summary judgment on his wife's alimony claim. Id. The wife argued that the trial court should not have ruled on her husband's motion while he had not yet turned over discovery that the trial court had ordered him to produce and which could show that the husband had an inclination and opportunity to commit illicit sexual acts during the marriage. Id. at 269, 885 S.E.2d at 861. The court of appeals acknowledged that "ordinarily it is error for a court to hear and rule on a motion for summary judgment when discovery procedures, which might lead to the production of evidence relevant to the motion, are still pending and the party seeking discovery has not been dilatory in doing so." Id. (citing Conover v. Newton, 297 N.C. 506, 512, 256 S.E.2d 216, 220 (1979)). However, this rule is not absolute, and a trial court's decision to grant summary judgment with discovery pending is within the discretion of the trial court. Id. (citing Conover v. Newton, 297 N.C. 506, 512, 256 S.E.2d 216, 220 (1979)).

In the present case, the court of appeals noted that the wife had knowledge of several suspicious texts between her husband and a co-worker and that she had sought from the husband, among other documents, his Facebook messages and travel records during the time she suspected

her husband to have engaged in an illicit affair. Id. The record showed that the wife filed a motion to compel discovery of these documents when her husband failed to timely respond, that the trial court granted the wife's motion to compel as to these and other documents, and that the husband still had not complied at the time of the hearing on the husband's summary judgment motion. Id.

For these reasons, the court of appeals vacated the trial court's summary judgment order and remanded for further proceedings so that the trial court may consider the husband's motion after resolution of the discovery issue. Id. 270, 885 S.E.2d at 862.

In JDG Environmental, LLC v. BJ & Associates, Inc., ___ N.C. App. ___, ___ S.E.2d ___, 2023 WL 6814402 (2023), the court of appeals considered whether the superior court prematurely granted summary judgment because a subcontractor maintained an opportunity to obtain a certificate of authority until the beginning of trial.

A construction company hired an Oklahoma based subcontractor for a project that involved repairing the damage incurred by a residential community after a hurricane. Id. at *1. A dispute arose between the construction company and the subcontractor regarding payment and the subcontractor initiated this case, alleging claims for breach of contract and unjust enrichment. Id.

The subcontractor later filed a motion for summary judgment in superior court. Id. During a hearing on this summary judgment motion, the construction company orally moved for summary judgment against the subcontractor. Id. The construction company asserted that summary judgment should be granted in its favor because the subcontractor did not obtain a certificate of authority in North Carolina. Id. At the time of the hearing, it was true that the subcontractor had not obtained a certificate of authority. Id. However, less than a month later and before the superior court entered judgment on the motions for summary judgment, the subcontractor obtained a certificate of authority. Id.

The superior court eventually entered an order granting the construction company's motion for summary judgment against the subcontractor and the subcontractor timely appealed this order. Id. The subcontractor did not challenge whether it was required to register as a foreign entity based on the facts of this case. Id.

On appeal, the court of appeals considered whether the superior court prematurely granted the construction company's summary judgment motion. Id. The court of appeals began the analysis by reconciling the statutory interpretation of section 57D-7-02(a) of the North Carolina General Statutes, with the procedural nature of a motion for summary judgment. Id. at *2. Under North Carolina law,

> [n]o foreign LLC transacting business in this State without permission obtained through a certificate of authority may maintain any proceeding in any court of this State unless the foreign LLC has obtained a certificate of authority prior to trial. An issue arising under this subsection must be raised by motion and determined by the trial judge prior to trial.

Id. (quoting N.C. Gen. Stat. § 57D-7-02(a)). This obligation is statutory and the court of appeals interpreted the statute according to its common and ordinary meaning. Id. (citing Pratt v. Bishop, 257 N.C. 486, 504, 126 S.E.2d 597, 610 (1962)). In North Carolina, a judge who hears a summary judgment motion may not be the judge who presides over the trial. Id. at *3. It follows that the reference to a "trial judge" in section 57D-7-02(a) refers to the judge presiding over the trial and not the judge hearing a summary judgment motion. Id. "[P]rior to trial" means any time before the trial commences or when a jury is empaneled. Id. at *2. Moreover, granting summary judgment has the same effect as winning at trial for the party that moves for summary judgment. Id. (citing Kessing v. Nat'l Mortg. Corp., 278 N.C. 523, 533, 180 S.E.2d 823, 829 (1971)).

Therefore, the plain language of section 57D-7-02 requires that the issue of whether a non-moving party obtained a certificate of authority be brought up with the judge presiding over trial

and that doing so in a summary judgment proceeding would be improper. Id. at *3 (citing Harold Lang Jewelers, Inc. v. Johnson, 156 N.C. App. 187, 188, 576 S.E.2d 360, 361 (2003)). Holding otherwise allows the superior court to prematurely assume before trial that the non-moving party would not satisfy section 57D-7-02. Id. at *4 (citing Leasecomm Corp. v. Renaissance Auto Care, Inc., 122 N.C. App. 119, 122, 468 S.E.2d 562, 564 (1996)). The court of appeals further explained that even though the court in Leasecomm did not directly address the issue in this present case, its holding was based on the premise that a court that grants summary judgment to a moving party that lacks a certificate of authority prematurely assumes that the party will gain a certificate before trial. Id. at *3-*4 (citing Leasecomm, 122 N.C. App. at 122, 468 S.E.2d at 564). "[I]t follows that if a lower court grants summary judgment because the non-moving party lacks a certificate of authority, the court also prematurely assumes the non-moving party will not gain one before trial." Id. at *4 (citing Leasecomm, 122 N.C. App. at 122, 468 S.E.2d at 564) (emphasis in original).

Here, the subcontractor was in fact a foreign LLC transacting business in North Carolina and was required to obtain a certificate of authority prior to trial. Id. at *2. The superior court granted the construction company's motion for summary judgment on the basis of its lack of a certificate of authority, which ended the litigation. Id. Despite the adverse ruling, the subcontractor obtained a certificate of authority before a jury was empaneled for this case. Id. at *3. Under North Carolina law, the subcontractor was entitled to obtain a certificate any time before the trial court empaneled a jury, which included time after the summary judgment stage. Id.

For these reasons, the court of appeals vacated the trial court's order and remanded the case to the lower court. Id. at *4.

Judge Murphy dissented from the majority opinion, stating that he would reverse the order of the trial court, but disagreed with the majority's interpretation of section 57D-7-02(a). Id. at

*4-*10. He contended that the majority's interpretation of section 57D-7-02(a) was "impossible to reconcile with the plain text of the whole statute[. . .]." Id. at *5. By the majority's interpretation of the statute, a foreign LLC is statutorily entitled to obtain a certificate of authority within a certain period prior to when the jury is empaneled. Id. However, the same statute requires that an issue pertaining to the status of a certificate of authority must be raised by motion and determined by the trial judge prior to trial, effectively prohibiting a trial judge from rendering a judgment on this issue once a jury is empaneled. Id. Thus, the majority's interpretation makes it "impermissible for the trial court to ever rule on a motion concerning a business plaintiff's lack of certification." Id. (emphasis in original).

Judge Murphy also asserted that prior case law has permitted trial courts to enter summary judgment against an uncertified business plaintiff prior to trial in order to reconcile the "absurdity" of this reading of the statute. Id. However, he noted that the majority's attempt to "harmonize" Harold Lang and Leasecomm with its holding here "misses the forest for the trees, passing over core procedures and applications of law that contradict its interpretation of N.C. Gen. Stat. § 57D-7-02 in favor of magnifying minutiae." Id. at *6.

Finally, Judge Murphy took issue with the distinction the majority made regarding a trial court deciding a summary judgment motion and a judge that presides over trial as a trial judge. Id. at *7-*8. His reading of case law indicated that "trial court" and "trial judge" were generally synonymous unless the authority made it contextually clear that the title of judge refers to the particular official presiding over the court. Id. at *8. Moreover, his view was that North Carolina has rejected the majority's understanding of the term "trial judge." Id.

Based on this reasoning, Judge Murphy agreed with the majority that the trial court's order should be reversed but on other grounds; those grounds being that the record did not support a determination that that the subcontractor was transacting business in North Carolina. Id. at *9.

III. TRIAL

A. Jurors

In State v. Wiley, ___ N.C. App. ___, 892 S.E.2d 86 (2023), the court of appeals considered whether the trial court abused its discretion in excusing a juror from service who had moved to a different county from where the trial took place.

A man was on trial for first-degree murder in Person County. Id. at ___, 892 S.E.2d at 87. On the third day of trial, a juror notified the clerk of court that he was going to be late to the trial because of car trouble. Id. The trial court directed the sheriff to go to the juror's self-reported address in Person County and bring the juror to the trial court. Id. The sheriff returned to tell the court that the juror was not at his self-reported address and that people who were at the location revealed that the juror actually lived in Durham County. Id.

Eventually, the juror arrived and confirmed that he had moved to Durham County about a week before trial. Id. The trial court conducted a bench conference to hear from counsel for the parties and ultimately decided to excuse the juror. Id. at ___, 892 S.E.2d at 88. In due course, the man who was on trial was found guilty of first-degree murder and sentenced to life imprisonment without parole. Id. The man timely filed a written notice of appeal. Id.

On appeal, the court of appeals held that the trial court did not abuse its discretion in excusing the juror from service when the court learned that the juror was no longer a resident of the county where the criminal trial took place. Id. The court of appeals relied on precedent holding

that a trial court properly executed its authority to excuse a juror with cause under section 15A-1211 of the North Carolina General Statutes. Id. (citing State v. Tirado, 358 N.C. 551, 574, 599 S.E.2d 515, 531 (2004)). There, the prospective juror explained to a trial court in Cumberland County that even though she had recently moved to Wake County, she considered her permanent address to be her former address in Cumberland County with her mother. Id. at *2 (citing Tirado, 358 N.C. at 574, 599 S.E.2d at 531).

Similarly, the juror here admitted that he moved from Person County to Durham County a few days before trial. Id. Even though the juror claimed that he didn't "stay all the way" in Durham and that he had not fully moved out of his former Person County residence, the trial court concluded that the juror was no longer a Person County resident. Id. Specifically, the trial court stated in its colloquy with the juror that the finding was "based on the fact that [the juror] was never a proper juror for Person County because he moved to Durham." Id. The trial court excused the juror because living between the two counties caused him to fail to meet the statutory residency requirements of jury service. Id. at ___, 892 S.E.2d at 89.

For this reason, the court of appeals concluded that the trial court did not abuse its discretion and that there was no error at trial. Id.

(1) Jury Selection – Batson Challenge

In State v. Campbell, 384 N.C. 126, 884 S.E.2d 674 (2023), the supreme court heard an appeal from a divided court of appeals decision that concluded that the trial court did not err in finding that the defendant had failed to make a prima facie showing of race-based discrimination during jury voir dire as required by Batson v. Kentucky, 476 U.S. 79 (1986).

In 2015, defendant was indicted on charges of murder and kidnapping. Id. at 127, 884 S.E.2d at 677. At trial, defendant's counsel filed a motion for complete recordation; however, she

specified that she was not requesting that jury selection be recorded. Id. As a result, jury selection was not recorded, and there was no transcript of jury voir dire. Id. However, the record on appeal was sufficient for appellate review to the extent that "the trial court's care in ensuring that exchanges between counsel and the trial court relevant to Batson were put on the record." Id. at n.1.

During initial jury selection, the state exercised two peremptory challenges, and defendant did not object. Id. Then, while selecting alternate jurors, the state exercised two more peremptory challenges. Id. at 128, 884 S.E.2d at 677. In response, the defendant raised a Batson objection, arguing that the state had exercised three out of four challenges to strike black jurors and had otherwise "tried extremely hard" to exclude for cause "every African-American." Id. (quotation marks omitted). Furthermore, the defendant contended, neither stricken alternate juror had indicated an inability to perform juror duties. Id. The state responded, noting that although it had race-neutral reasons to exclude both jurors, "the trial court was first required to determine that defendant had made a prima facie showing under Batson," to which the defendant agreed. Id.

The trial court denied the Batson challenge, concluding that the defendant had failed to make a prima facie showing, "even though such a showing 'is a very low hurdle.'" Id. at 128, 884 S.E.2d at 678. The trial court asked the state if it wished to offer a racially neutral basis for its peremptory strikes, and the state declined, reasoning that such an offer "could be viewed as a stipulation that there was a prima facie showing." Id. (quotation marks omitted). The trial court reiterated that no such showing had been made and that it denied the Batson challenge. Id. The trial court then ordered the state to "proceed as to stating a racially-neutral basis for the exercise of the peremptory challenges." Id. (quotation marks omitted). The state complied. Id. At the

conclusion of the trial, the defendant was found guilty and was sentenced to life without parole. Defendant appealed. Id. at 131, 884 S.E.2d at 679.

The defendant argued before the court of appeals that "the trial court erred in concluding that he failed to establish a prima facie case of impermissible racial discrimination during jury selection." Id. at 131, 884 S.E.2d at 679. The court of appeals majority found no error. Id. The defendant petitioned the supreme court for a writ of certiorari, and the supreme court remanded the case to the court of appeals for reconsideration in light of State v. Hobbs, 374 N.C. 345, 841 S.E.2d 492 (2020). Id. On remand, a court of appeals majority "once again found no error, and, once again, there was a dissent urging remand to the trial court for additional findings of fact." Id. The defendant appealed to the supreme court. Id.

In an opinion authored by Justice Berger, the supreme court stated that a trial court "must engage in a three-step inquiry to evaluate the merits of" a Batson objection, and that the first step entailed determining whether the defendant met the burden of establishing a prima facie case that the peremptory challenge was exercised on the basis of race. Id. at 133, 884 S.E.2d at 680 (quoting State v. Cummings, 346 N.C. 291, 307–08, 488 S.E.2d 550, 560 (1997)). The supreme court noted that there are a number of factors trial courts may evaluate in considering a Batson objection, including, but not limited to, "the race of the defendant, the race of the victim, the race of the key witnesses, repeated use of peremptory challenges demonstrating a pattern of strikes against black prospective jurors in the venire, disproportionate strikes against black prospective jurors in a single case, and the State's acceptance rate of black potential jurors." Id. at 134, 884 S.E.2d at 681 (citing State v. Hobbs, 374 N.C. 345, 350, 841 S.E.2d 492, 497–98 (2020)).

The defendant argued that the state's "use of three out of four of its peremptory strikes against black jurors was sufficient to establish a prima facie case." Id. at 135, 884 S.E.2d at 682.

However, because the defendant did not move to record jury voir dire, the record that the supreme court reviewed did not "contain the intimate details of the interaction between counsel and prospective jurors." Id.

Next, the supreme court concluded that the state was correct in objecting to the trial court's attempt to skip the first step in the three-step inquiry. Id. Indeed, if a trial court rules there has been no prima facie showing before the state articulated racially-neutral reasons for excluding a prospective juror, the supreme court does not consider whether the state's reasons were proper. Id. Accordingly, the supreme court would only review whether the trial court erred in determining that the defendant failed to make a prima facie showing of racial discrimination during jury voir dire. Id.

The defendant argued that the court's prior opinion in State v. Barden, 456 N.C. 316, 572 S.E.2d 108 (2002), could be read to mean that "a 71.4% strike rate . . . establishes a prima facie case," and thus the "75% strike ratio in this case therefore compels reversal." Id. The supreme court was unpersuaded. Id. Although a numerical analysis may be used in determining whether a prima facie case has been established, "such an analysis is not dispositive when reviewing the totality of the relevant facts available to a trial court." Id. at 137, 884 S.E.2d at 683 (citing Barden, 456 N.C. at 344, 572 S.E.2d at 127).

Because appellate courts should not assume error by the trial court where none appears on the record before them, a majority of the supreme court affirmed the court of appeals. Id. at 139, 884 S.E.2d at 684.

In dissent, Justice Earls stated that the majority refused to acknowledge "what is in plain sight and turn[ed] a blind eye to evidence of racial discrimination in jury selection," turning the Batson test "into an impossible hurdle." Id. Justice Earls pointed out that among the state's

reasons for its peremptory strikes was the fact that one of the prospective jurors was "a participant, if not an organizer, for Black Lives Matter at her current college." Id. (quotation marks omitted). Thus, the state's reason indicated racial bias, stating "precisely that which was the defendant's burden to demonstrate at Batson Step 1." Id. Furthermore, the prospective juror's involvement in Black Lives Matter was revealed after the trial court ruled that the defendant failed to make a prima facie showing; thus, the defendant had no way of knowing this information while attempting to meet his burden as to the first Batson step. Id. at 142, 884 S.E.2d at 686. "It is a troubling and illogical proposition to assert that it is race-neutral for a prosecutor to excuse a Black woman as a prospective juror on the grounds that she cannot be unbiased due to her association with a predominately Black organization that brings to light what it means to be Black in this country." Id. (alterations omitted) (citation and quotation marks omitted). "The majority's only way to overcome the natural force of this race-conscious rationale is to pretend it did not happen." Id.

In State v. Hobbs, 384 N.C. 144, 884 S.E.2d 639 (2023), the supreme court, reviewing the underlying case for a second time, in an opinion authored by Chief Justice Newby, addressed whether the trial court erred in concluding there was no violation of Batson v. Kentucky, 476 U.S. 79 (1986), during jury selection.

Under Batson, courts must engage in a three-pronged test to determine whether a prosecutor improperly sought to strike a prospective juror on the basis of the juror's race. Id. at 147, 884 S.E.2d at 642. First, the defendant must make a prima facie showing of purposeful discrimination. Second, the state must provide a race-neutral reason for its peremptory strike. Third, the trial court must determine whether the defendant established that the prosecutor acted with purposeful discrimination. Id. The supreme court adopts this test to review peremptory

challenges under the North Carolina Constitution. Id. On appeal, a trial court's ruling on a Batson challenge will be sustained unless it is clearly erroneous. Id.

When the matter originally came before the supreme court in State v. Hobbs, 374 N.C. 345, 841 S.E.2d 492 (2020) ("Hobbs I"), it remanded the case to the trial court to conduct a hearing and make findings of fact under the third Batson step: namely, whether the defendant in question proved that the state engaged in purposeful discrimination in peremptorily striking three black prospective jurors. Id. at 145, 884 S.E.2d at 641. Specifically, the supreme court instructed the trial court to consider whether the primary reason given by the state for excluding one of the three jurors was pretextual. Id.

The ultimate determination under step three of a Batson challenge analysis is "whether the prosecutor's peremptory strike was 'motivated in substantial part by discriminatory intent.'" Id. at 148, 884 S.E.2d at 643 (quoting Snyder v. Louisiana, 552 U.S. 472, 477 (2008)). Thus, the trial court must evaluate the prosecutor's credibility. Id. (quoting Snyder, 552 U.S. at 477). Often, the best evidence thereof will be the prosecutor's demeanor. Id. (quoting Hernandez v. New York, 500 U.S. 352, 359 (1991)). Because the trial court is in the best position to determine the prosecutor's demeanor and credibility, appellate courts will give this determination great deference, "overturning it only if it is clearly erroneous." Id. (quoting Hobbs I, 374 N.C. at 349, 841 S.E.2d at 497).

In Hobbs I, the supreme court instructed the trial court "to consider whether the State's reasons for its strikes were pretextual, the history of peremptory strikes in that county, the comparison between the three excused jurors and any similarly situated white prospective jurors, and the statistical comparison between the State's number of peremptory strikes used on white jurors versus black jurors." Id. On remand, the trial court followed the supreme court's instruction

and made findings of fact, based on which it concluded that there was no Batson violation as to any of the three prospective black jurors. Id. at 149, 884 S.E.2d at 643-44.

The supreme court concluded that, on remand, the trial court was not clearly erroneous. Id. The trial court had "fully complied with . . . remand instructions in Hobbs I by extensively 'considering the evidence in its totality' and making findings of fact based on that evidence." Id. at 156, 884 S.E.2d at 648 (quoting Hobbs I, 374 N.C. at 360, 841 S.E.2d at 503). The trial court had carefully weighed the evidence, and the supreme court concluded that its conclusions were supported by its findings of fact. Id. Accordingly, the supreme court affirmed the trial court's decision. Id., 884 S.E.2d at 649.

Writing in dissent, Justice Earls, joined by Justice Morgan, concluded that the defendant had presented evidence that supported a finding of racial discrimination in the jury selection process and that the trial court had misapplied "the Batson standard." Id.

Justice Earls disagreed that the case at bar was not susceptible to racial discrimination, as the defendant was black and his four victims were white. Id. at 159, 884 S.E.2d at 650. "[C]ases involving interracial violence are particularly susceptible to racial discrimination." Id. (citing Rosales-Lopez v. United States, 451 U.S. 182, 192 (1981)).

Justice Earls concluded that the trial court erred in its findings relating to "the Michigan State University (MSU) study." Id. at 160, 884 S.E.2d at 651. The defendant had "presented evidence from a study by scholars at MSU, who reviewed data in Cumberland County from 1990 to 2010." Id. "[T]his data showed that 'prosecutors in 11 cases struck qualified Black venire members at an average rate of 52.3% but struck qualified non-Black venire members at an average rate of only 20.8%.'" Id. at 161, 884 S.E.2d at 651. Rather than consider the study, the trial court

"chose to discount it as 'potentially flawed,'" and criticized it "for employing 'unqualified' recent law school graduates to conduct the study." Id.

Justice Earls then stated that the statistics in the defendant's case "raise suspicion about whether the State struck prospective jurors . . . because of their races." Id. at 162, 884 S.E.2d at 652. "Ultimately, the State's strike pattern caused a jury pool composed of roughly 50% Black and 50% non-Black prospective jurors, to become a jury of twelve that was 83% non-Black." Id.

Justice Earls then considered "side-by-side" comparisons of black jurors who were struck versus non-black jurors who were allowed to serve. Id. at 163, 884 S.E.2d at 653. "[T]he State passed twenty-one non-Black prospective jurors who matched at least one of the reasons" for which the State struck black prospective jurors. Id. Furthermore, many of the non-black prospective jurors who were allowed to serve shared more than one attribute with the three stricken prospective jurors at issue in the defendant's appeal. Id.

Accordingly, Justice Earls stated that she would conclude that the state "impermissibly used race" to strike prospective jurors and that the trial court committed "several factual and legal errors in concluding otherwise." Id. at 170, 884 S.E.2d at 657.

In State v. Wilson, ___ N.C. App. ___, ___ S.E.2d ___, 2023 WL 7312716, temp. stay allowed, ___ S.E.2d ___, 2023 WL 7548103 (Nov. 14, 2023), the court of appeals addressed whether the trial court made inadequate Batson findings in light of State v. Hobbs, 374 N.C. 345, 841 S.E.2d 492 (2020).

At the outset of a murderer's trial, the State exercised two peremptory challenges to excuse two black prospective jurors; by then, the State had already removed another prospective juror for cause. Id. *2. The murderer raised a Batson objection. Id. The trial court asked the State to explain its choices, to which the State responded that it exercised the peremptory challenges

because one prospective juror personally knew a witness and the other was "not paying attention." Id. The trial court concluded that there had not been a "prima facie case for a Batson challenge." Id. The murderer was eventually found guilty on all charges. Id. at *1–2. The murderer appealed. Id. at *2. On appeal, the murderer argued that the trial court made inadequate Batson findings in light of the supreme court's opinion in State v. Hobbs, 374 N.C. 345, 841 S.E.2d 492 (2020). Id. at *6.

Under Batson, trial courts must engage in a three-step process: first, the defendant must make a prima facie showing that the State exercised a race-based peremptory challenge; if the first step is successful, then, second, the State must offer a facially valid, race-neutral explanation of its peremptory challenge; lastly, the trial court must decide whether the defendant has proved purposeful discrimination. Id. at *7.

In Hobbs, the supreme court concluded that a trial court must consider "on the record factors weighing for and against findings of discrimination in order to sufficiently respond to a Batson challenge." Id. (citing Hobbs, 374 N.C. at 360, 841 S.E.2d at 503). In Hobbs, the trial court had skipped to the second step in Batson "without ruling on the defendant's prima facie case." Id. (citing Hobbs, 374 N.C. at 360, 841 S.E.2d at 503). This year, the supreme court further elaborated on that notion in State v. Campbell, 384 N.C. 126, 884 S.E.2d 674 (2023), explaining the circumstances under which a trial court's analysis of the first Batson step becomes moot. Id.

In Campbell, "the trial court sought, purportedly during the first step of Batson, race-neutral reasons from the State for its peremptory challenges." Id. (citing Campbell, 384 N.C. at 127, 884 S.E.2d at 677). The trial court ruled on the Batson objection and the State cautioned the trial court that "offering race-neutral reasons at that stage in the proceedings 'could be viewed as a stipulation that there was a prima facie showing.'" Id. (quoting Campbell, 384 N.C. at 128, 884

S.E.2d at 678). Nevertheless, "the trial court 'ordered the State to proceed as to stating a racially-neutral basis for the exercise of the peremptory challenges.'" Id. (quoting Campbell, 384 N.C. at 128, 884 S.E.2d at 678). After hearing the State's race-neutral reasons, the trial court stated that it still found that the defendant had not made a prima facie showing of purposeful discrimination. Id. (quoting Campbell, 384 N.C. at 130, 884 S.E.2d at 679).

Conversely, in the case at bar, the trial court immediately sought the State's input upon hearing the murderer's argument under the first Batson step, without concluding whether he had made a prima facie case. Id. at *9. When the trial court did make a ruling as to the murderer's prima facie showing, it did so after hearing the State's race-neutral reasons; in other words, the trial court did so at the third Batson stage. Id. Under Hobbs, when the State provides race-neutral reasons for its peremptory challenges (Batson step two) and the trial court rules on them (step three), "'the question of whether a defendant initially established a prima facie case of discrimination becomes moot.'" Id. (quoting Hobbs, 374 N.C. at 355, 841 S.E.2d at 500). Likewise, here, the question of whether the murderer had established a prima facie case of discrimination had become moot. See id.

"As the trial court issued its ruling after soliciting input from the State, it was required, pursuant to Hobbs, to engage in a full analysis of [the murderer]'s arguments that the State employed its peremptory strikes in a racially discriminatory manner." Id. (citing Hobbs, 374 N.C. at 355–56, 841 S.E.2d at 500–01). The court of appeals concluded that the trial court's findings of fact were inadequate under Hobbs. Id. at *10. Specifically, the trial court failed to explain "how it weighed the totality of the circumstances surrounding the prosecution's use of peremptory challenges." Id. It also failed to provide a "comparative analysis" between the stricken jurors,

who were black, and other jurors who were not stricken but were similarly situated. Id. In fact, many of the murderer's arguments "went completely unaddressed." Id.

Ordinarily, on a defendant's appeal from a Batson challenge, the court of appeals will "conduct a comparable analysis to that of the trial court in order to determine whether the ruling at issue was clearly erroneous." Id. However, here, the murderer did not seek review of the trial court's analysis; he only argued that the trial court failed to conduct a comparative analysis as a whole. Id. Thus, the court of appeals was limited to reversing and remanding to the trial court for further proceedings, and did so. Id. at *10–11.

Judge Dillon concurred separately to state that the trial court did not err in determining that there had been no prima facie showing of discrimination during jury selection. Id. at *11. However, due to current jurisprudence, the trial court was required to conduct a full Batson inquiry. Id.

Judge Stading also wrote separately to concur in part and dissent in part. Id. He specifically dissented from the majority's conclusion that the trial court erred under Hobbs. Id. In his view, the trial court was not required to engage in a full Batson analysis because it determined that the murderer failed to make his prima facie showing at Batson step one. Id. The fact that the challenge would not have survived step three did not render step one moot. Id. According to Judge Stading, it was not the trial court that moved to Batson step two, but the State; when the murderer raised a Batson challenge, the trial court invited the State to respond, but the State "prematurely sought to address the second prong of the Batson inquiry." Id. at *12. Thus, Judge Stading dissented from the majority's conclusion that the trial court's first Batson step was moot. Id. at *13.

B. Evidence

(1) Expert

In State v. Watson, 286 N.C. App. 143, 879 S.E.2d 355 (2022), the court of appeals considered whether an expert witness can provide admissible opinion testimony for a report created by an out-of-court expert.

A driver appealed his conviction for driving while impaired. Id. at 144, 879 S.E.2d at 357. The driver had been stopped by a police officer for a traffic infraction. Id. The officer suspected the driver to be intoxicated and performed several tests. Id. at 144-45, 879 S.E.2d at 357. After these assessments, the driver was arrested. Id. at 145, 879 S.E.2d at 357. A blood sample was collected and analyzed by an analyst in the State Bureau of Investigation's crime lab. Id. at 145, 879 S.E.2d at 358. The analyst prepared a report indicating that the driver's blood alcohol concentration was .27 grams per 100 milliliters on the night of the arrest. Id. Another agent in the lab conducted an administrative and technical review of the analyst's report. Id.

Before trial, the driver filed a notice of objection to "the introduction during trial of any affidavits and written statements" regarding the chemical analysis of the driver's blood. Id. at 144, 879 S.E.2d at 357. Subsequently, the state provided notice that it intended to introduce the crime lab's toxicology report concerning the driver's chemical analysis of his blood on the night of his arrest. Id. However, before the driver's trial began, the agent who conducted the analysis and prepared the report left the State Bureau of Investigation's office. Id. As a result, the state filed a notice to substitute the agent with the individual who did the administrative and technical review of the driver's case as its forensic toxicology expert. Id. The driver objected to introducing the toxicology report without the original analyst's testimony. Id. At trial, the substituted agent was admitted as an expert witness for forensic toxicology. Id. at 145, 879 S.E.2d at 358. Over the

driver's objection, the agent testified that, after reviewing the report, it was her opinion that the driver's blood sample had a blood alcohol concentration of .27 grams per 100 milliliters. Id. The jury found the driver guilty of driving while impaired. Id. at 144, 879 S.E.2d at 357.

On appeal, the court of appeals found no error by the trial court in admitting the substituted agent's testimony and toxicology report. Id. at 147, 879 S.E.2d at 359. The driver contended that the trial court erred in admitting the toxicology report "because no expert with knowledge of how the toxicology tests were performed testified." Id. at 146, 879 S.E.2d at 358. Rule 703 governs types of evidence on which an expert may rely. Id. The court of appeals explained that under Rule 703, "[a]n expert may properly base his or her opinion on tests performed by another person, if the tests are reasonably relied on in the field." Id. (quoting State v. Fair, 354 N.C. 131, 162, 557 S.E.2d 500, 522 (2001)). In this case, the substituted agent was admitted as an expert in the field of forensic toxicology. Id. The agent was the administrative and technical reviewer for the driver's case. Id. At trial, the agent described in detail the scientific method for analyzing the driver's blood samples and her review of the report before forming an independent opinion about the blood alcohol concentration in the driver's blood sample. Id.

Taking this into consideration, the court concluded that under Rule 703 the toxicology report was admissible to show the basis of the substituted agent's opinion. Id. However, the court explained that a limitation to the admissibility of the toxicology report could have been applied if the driver's counsel had properly objected. Id. at 147, 879 S.E.2d at 359. The court specified that because the report was being used as the basis of an expert's opinion, and not for substantive evidence, the driver was entitled to an instruction limiting its consideration for this purpose only. Id. However, the driver only provided a general objection and did not request a limiting

instruction. Id. Because the driver did not request a limiting instruction, the court found that the trial court did not commit reversible error. Id.

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

(2) Rule 404

In State v. Jones, 288 N.C. App 175, 884 S.E.2d 782 (2023), the court of appeals addressed whether evidence of a burglar's past act of burglary was admissible under Rule 404(b) of the North Carolina Rules of Evidence.

A burglar was indicted on felony attempted breaking and entering and possession of burglary tools. Id. at 176, 884 S.E.2d at 786. At trial, as part of the investigating officer's testimony, the state sought to introduce surveillance footage of a prior breaking and entering to which the burglar had pled guilty in 2018. Id. at 177, 884 S.E.2d at 787. Defendant opposed admission of the evidence under Rule 404(b). Id. The trial court ruled that the evidence was admissible, and the burglar was convicted for misdemeanor attempted breaking and entering and possession of burglary tools. Id. The burglar appealed. Id.

The court of appeals stated that Rule 404(b) of the North Carolina Rules of Evidence provides that "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith," but may be admitted "for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident." Id. at 179, 884 S.E.2d at 788 (quotation marks omitted) (quoting N.C. Gen. Stat. § 8C-1, Rule 404(b)). In other words, the court of appeals explained, although Rule 404 generally acts "as a gatekeeper" against evidence of the defendant's character that is solely introduced to prove that the defendant acted in conformity therewith, Rule

404 also has a clear inclusive nature. Id. at 181, 884 S.E.2d at 789 (quotation marks omitted) (quoting State v. Pabon, 380 N.C. 241, 258, 867 S.E.2d 632, 643–44 (2022)). Particularly, Rule 404(b) allows the introduction of "relevant evidence of past crimes, wrongs, or acts by a defendant" unless its "only probative value is to show that the defendant has the propensity or disposition to commit an offense of the nature of the crime charged." Id. (quoting Pabon, 380 N.C. at 258, 867 S.E.2d at 644).

The court of appeals explained that Rule 404(b) requires admissible evidence to be similar (in that there are unique and distinguishable facts present in both crimes) and somewhat close in time (determined on a case-by-case basis) to the crime at issue. Id. (citing State v. Beckelheimer, 366 N.C. 127, 131, 726 S.E.2d 156, 159 (2012)). In summary, the court of appeals noted that three requirements must be met to admit evidence under Rule 404(b): (1) probative value beyond a showing that the defendant has a propensity to commit a certain offense, (2) similarity, and (3) temporal proximity. Id. (citing Pabon, 380 N.C. at 258–59, 867 S.E.2d at 644).

The court of appeals concluded that the burglar's 2018 breaking and entering incident was sufficiently similar to the crimes at issue in several ways: the structure broken into (a shed), the time of the crime (just after midnight), and the instrument used (a knife the first time, a box cutter the second). Id. at 182, 884 S.E.2d at 790. The court of appeals concluded that the probative value requirement was also met, as the 2018 charge was probative of intent "because it shows in the past in similar circumstances [the burglar] had the requisite intent." Id. at 184, 884 S.E.2d at 791. Lastly, the gap between the two crimes was about two and half years, and the court of appeals had previously found that a two-year gap was not overly remote to fulfill this requirement. Id. (citing State v. Martin, 191 N.C. App. 462, 467, 665 S.E.2d 471, 474-75 (2008)). Thus, evidence of the 2018 charge also satisfied the third requirement under Rule 404(b): temporal proximity. Id.

Accordingly, the court of appeals found there was no error as to the trial court's Rule 404(b) analysis. Id. at 190, 884 S.E.2d at 795.

(3) Rule 803

In State v. Hocutt, ___ N.C. App. ___, 890 S.E.2d 730 (2023), the court of appeals considered whether a written statement is admissible as substantive evidence under Rule 803(5) of the North Carolina Rules of Evidence 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.

A son met his father in their shared driveway outside of their adjacent homes after hearing a gunshot in the neighborhood. Id. at ___, 890 S.E.2d at 731. The father was drunk at the time. Id. A dog owner, who lived in the same neighborhood, returned home that evening after dark and found that his dog had been shot. Id. A deputy sheriff arrived the next day to investigate the matter. Id. The father offered to give a statement attesting that, while he was sitting out in the yard, he heard the gunshot and then saw a neighbor running away from the dog owner's front gate with a rifle in his possession. Id. That statement was dictated to the son because the father could not read or write. Id. After dictating the statement, the father signed the document, but no one read it back to him to confirm its accuracy. Id. at ___, 890 S.E.2d at 732. The document also failed to disclose that the father was legally blind and drunk at the time that he saw the neighbor running from the dog owner's house. Id.

After the investigation, the neighbor was indicted for felony cruelty to animals. Id. The prosecution called the father to testify and the father stated that he could not remember exactly what happened that day because he was drinking and that he suffered from short-term memory loss. Id. Upon further questioning, he testified that he saw the neighbor but did not clearly see what was in the neighbor's hands because he was inebriated. Id at ___, 890 S.E.2d at 733. When

presented with his written statement, the father stated that he could not read or write and was legally blind, although he confirmed that he and his son had signed the statement. Id. The prosecution read the written statement aloud for the jury, however, the father could not confirm that the written statement was what he stated at the time. Id. The jury returned a guilty verdict. Id.

On appeal, the court of appeals held that the trial court plainly erred in admitting the father's hearsay statement as substantive evidence without adequate foundation. Id. at ___, 890 S.E.2d at 736. The court of appeals acknowledged that Rule 803(5) of the North Carolina Rules of Evidence has been summarized to consist of three necessary parts:

> (1) The document must pertain to matters about which the declarant once had knowledge; (2) The declarant must now have an insufficient recollection as to such matters; (3) The document must be shown to have been made by the declarant or, if made by one other than the declarant, to have been examined and adopted when the matters were fresh in her memory." Id. at *5 (citing State v. Love, 156 N.C. App. 309, 314, 576 S.E.2d 709, 712 (2003) (cleaned up) (citation omitted) (emphasis added)). Under the third prong, "the record need not have been made by the witness herself, it is enough that she [is] able to testify that (1) she saw it at a time when the facts were fresh in her memory, and that (2) it actually represented her recollection at the time.

Id. at ___, 890 S.E.2d at 734(citing State v. Spinks, 136 N.C. App. 153, 159, 523 S.E.2d 129, 133 (1999) (cleaned up) (citation and quotation marks omitted) (emphasis added)).

The court of appeals found that Rule 803(5)'s third prong was not satisfied here. Id. at ___, 890 S.E.2d at 735. It was undisputed that the father did not write the statement attributed to him, as he is illiterate, is legally blind, and was drunk on the day it was transcribed. Id. There was also no dispute that the father did not read the statement before signing it because of the aforementioned issues. Id. Finally, there was no evidence that anyone ever read the statement back to the father at the time it was transcribed. Id. To the contrary, "the father alternatingly

testified that no one read [the written statement] back to him or that he could not remember whether anyone did so." Id. Moreover, while the father testified at trial that the statement appeared to be accurate, it cannot be said that he was adopting it when the matter was fresh in his memory because he repeatedly testified that he could not recall key facts recounted in the written statement and, on one occasion, contradicted them. Id.

The prosecution contended that the written statement was adequately adopted because the father signed it. Id. However, the court of appeals invoked precedent that a signature on a statement is inadequate to satisfy the third prong of Rule 803(5) 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. Id. (citing Spinks, 136 N.C. App. at 159, 523 S.E.2d at 133). Thus, the trial court erred in admitting the statement as an exhibit, in contravention of the express provisions of the Rule. Id.

For these and other reasons, the court of appeals concluded that the trial court plainly erred and ordered a new trial. Id. at ___, 890 S.E.2d at 736.

(4) Findings of Fact

In In the Matter of H.B., 384 N.C. 484, 886 S.E.2d 106 (2023), the supreme court considered whether the trial court's findings contained proper evidentiary findings to support its conclusions of law when it referred to an admitted exhibit that it identified as credible and reliable rather than delineating specific findings of fact.

Robeson County Department of Social Services ("DSS") filed a petition alleging that a child was neglected and dependent. Id. at 486, 886 S.E.2d at 109. Two years later, after investigating the child's circumstances and attempting reunification, DSS filed a petition to terminate the mother's parental rights. Id. at 487, 886 S.E.2d at 109. A social worker involved in

the investigation testified during the hearing. Id. During her testimony, DSS introduced a timeline that summarized its interactions with the mother and reflected much of the social worker's testimony. Id. at 487, 886 S.E.2d at 110. The timeline was admitted into evidence. Id. Following the hearing, the trial court entered an order terminating the mother's parental rights. Id. The order included the following finding of fact: "The Court relies on and accepts into evidence the Timeline, marked as DSS Exhibit '__', in making these findings and finds the said report to [be] both credible and reliable." Id. at 488, 886 S.E.2d at 110.

The mother appealed. Id. The court of appeals affirmed the trial court's order in a divided panel. Id. The majority concluded that the trial court properly terminated the mother's parental rights "for willful failure to make reasonable progress" under section 7B-1111(a)(2) of the North Carolina General Statutes, but "[t]he dissent asserted that there were insufficient findings to support the trial court's adjudication" under that subsection. Id. The mother appealed to the supreme court based on the dissenting opinion. Id. at 489, 886 S.E.2d at 110.

Writing for the majority, Justice Dietz wrote that it is "best practice" for a trial court that intends to find facts mirroring those in an exhibit to set out the findings in the written order. Id. However, in this case, the court observed that "the trial court incorporated the timeline by reference into the order." Id. at 490, 886 S.E.2d at 111. The majority explained:

> The key portion of Finding of Fact 15 is the trial court's finding that the timeline and its contents are "credible and reliable." This distinguishes Finding of Fact 15 from findings which a trial court merely references evidence in the record. These mere references—such as recitations of witness testimony at hearing—are not proper evidentiary findings standing alone. But this sort of referential finding is sufficient if it also includes "an indication concerning whether the trial court deemed the relevant portion of the testimony credible." When the trial court makes a credibility determination about recited evidence, that transforms the recited evidence from a "mere recitation" into a proper "evidentiary finding."

Id. (internal citations omitted).

Accordingly, the majority concluded that the trial court's finding was a proper evidentiary finding "because [it] did not merely accept and rely upon the timeline and its contents;" instead, it "expressly evaluated [the] contents and determined that they were credible and reliable based on other evidence received at the hearing." Id. at 489, 886 S.E.2d at 111. The supreme court cautioned:

> We stress that our holding today is not an endorsement of this sort of fact finding. As noted above, the better practice always will be to make specific, express findings in the written order about what the trial court determined the facts to be, rather than referencing evidence in the record and stating that the referenced evidence is credible.

Id. at 490-91, 886 S.E.2d at 111.

The dissent, authored by Justice Morgan, would have found "that the trial court did not make adequate material findings of fact upon which to support its ultimate findings of fact and conclusions of law at the adjudicatory stage of the respondent-mother's termination of parental rights proceeding." Id. at 494, 886 S.E.2d at 113. The dissent considered the trial court's findings "woefully deficient" under Rule 52(a) of the North Carolina Rules of Civil Procedure. Id. at 500, 886 S.E.2d at 116. The dissent stated that although "the evidence in the record possibly may have amply supported sufficient findings of fact to substantiate grounds for the termination . . . the majority artificially bolsters the trial court's inadequate findings with an unfortunate relaxation of . . . standards." Id.

(5) Attorney-Client Privilege

In Howard v. IOMAXIS, LLC, 384 N.C. 576, 887 S.E.2d 853 (2023), the supreme court addressed whether a single corporate member could unilaterally waive attorney-client privilege in a matter in which counsel jointly represented the corporation and its individual corporate members.

Prior to 2020, a law firm represented a corporation "in connection with 'general corporate matters' under a standard corporate engagement letter." Id. at 577, 887 S.E.2d at 855. This engagement letter identified a specific attorney as "the primary attorney handling the corporate legal matters" described therein (the "primary attorney"). Id. In 2018, the corporation and its individual members faced a lawsuit. Id. at ___, 887 S.E.2d at 856. The law firm executed a second engagement letter specifically to cover this lawsuit; this letter did not create "any separation . . . between attorneys handling the corporate matters and attorneys handling the litigation matters." Id. This letter "also addressed potential implications of the joint representation[,]" noting that, in the event of a disagreement among the members, the attorney-client privilege would not protect the information they shared with the law firm. Id.

In July 2020, the primary attorney participated in a conference call with the corporation and individual members regarding the pending litigation. Id. During this call, one of the individual corporate members secretly recorded the conversation (the "renegade member"). Id. "After a falling out," the renegade member retained new counsel, sought to assert cross-claims against the other individual members, and revealed that he had recorded the July conference call. Id. at 577, 887 S.E.2d at 855–56. The corporation moved for a protective order, "assert[ing] that it held the exclusive attorney-client privilege over the [conference] call." Id. The business court rejected the corporation's argument. Id. at 579, 887 S.E.2d at 856. Specifically, the business court ruled that: the conference call "was made under the second engagement letter"; at that moment, the primary attorney was acting as joint litigation counsel for all the defendants, not as corporate counsel for the corporation alone, and; the renegade member held attorney-client privilege and was thus allowed to waive it. Id. at 577, 887 S.E.2d at 855–56. The corporation appealed to the supreme court. Id. at 579, 887 S.E.2d at 856.

On appeal, the supreme court set out to determine whether the business court properly decided that the renegade member "jointly held the attorney-client privilege over the [conference] call," and whether the business court "used the proper legal test to make that determination." Id. Generally, once a North Carolina court determines that an attorney-client relationship exists, it must apply "a five-factor test to assess whether a particular communication is protected by the privilege." Id. at 580, 887 S.E.2d at 857 (citing Friday Invs., LLC v. Bally Total Fitness of the Mid-Atl., Inc., 370 N.C. 235, 240, 805 S.E.2d 664, 669 (2017)). This test addresses whether:

> (1) the relation of attorney and client existed at the time the communication was made, (2) the communication was made in confidence, (3) the communication relates to a matter about which the attorney is being professionally consulted, (4) the communication was made in the course of giving or seeking legal advice for a proper purpose although litigation need not be contemplated and (5) the client has not waived the privilege.

Id. (quoting Friday, 370 N.C. at 240, 805 S.E.2d at 669).

The corporation, however, contended that this five-factor test was ill-suited to address the "more complex attorney-client relationships in the corporate setting[,]" an issue of first impression for the supreme court. Id. Rather, the corporation urged the supreme court to follow a different test used by "other courts" and established in In re Bevill, Bresler & Schulman Asset Management Corporation, 805 F.2d 120 (3d Cir. 1986) (the "Bevill test"). The Bevill test was specifically designed to address whether "a separate attorney-client relationship [arises] between the attorney and the individual officer, director, or employee." Id. (citing Bevill, 805 F.2d at 123). It requires individual corporate members asserting personal privilege claims to show the following:

> (1) that they approached the corporate counsel for the purpose of seeking legal advice, (2) that when they approached counsel they made it clear that they were seeking legal advice in their individual rather than in their representative capacities, (3) that counsel saw fit to communicate with them in their individual capacities, knowing that a possible conflict could arise, (4) that their conversations with

> counsel were confidential, and (5) that the substance of their conversations with counsel did not concern matters within the company or the general affairs of the company.

Id. at 581, 887 S.E.2d at 857–58 (citing Bevill, 805 F.2d at 123).

The supreme court saw merit in the Bevill test; indeed, the Bevill test "can provide clarity for corporate counsel concerning the appropriate steps to either create, or avoid creating, a separate attorney-client privilege when communicating with corporate officers or employees." Id. at 582, 887 S.E.2d at 858. However, this was not the case here. See id.

Here, the business court had found that, when the law firm held the July 2020 conference call, it was giving advice to the corporation and its individual members jointly as defense counsel, not as corporate counsel. Id. Specifically, the call was conducted for the purpose of advising whether the individual corporate members should sign a proposed amended operating agreement in light of the pending litigation. Id. Indeed, the primary attorney gave "personal legal advice" to the renegade member "without limitation or qualification." Id. (quotation marks omitted). Additionally, the second engagement letter expressly named the renegade member, as well as all of the other individual corporate members and the corporation itself, as a client jointly represented by the law firm. Id.

All of the business court's findings of fact were supported by "at least some competent evidence," which, "[u]nder the competent evidence standard," was enough for the supreme court to accept these findings despite the existence of competing evidence. Id. at 583, 887 S.E.2d at 858–59 (citing Adams v. AVX Corp., 349 N.C. 676, 681, 509 S.E.2d 411, 414 (1998)).

The supreme court affirmed the business court. Id. at 584, 887 S.E.2d at 859. However, the supreme court also noted that its decision was fact-specific. Id. The supreme court's ruling was not intended to interfere with the "many steps that corporations and their counsel can take to

avoid factual disputes over the scope of counsel's legal advice," such as: choosing "not to jointly represent both the corporation and the individual [members]"; drafting an engagement letter that identifies specific attorneys within the same firm to handle litigation defense separately from attorneys endeavored with handling corporate matters, or; even providing "a clear disclaimer of representation" explaining that the firm only represents the corporation. Id.

Since "[n]one of this took place here," the business court correctly resolved the factual dispute in favor of the renegade member, with findings of fact supported by competent evidence. Id.

(6) Opening-the-Door Doctrine

In State v. McKoy, 385 N.C. 88, 891 S.E.2d 74 (2023) the supreme court addressed the rules that apply when a party opens the door to certain evidence.

A grand jury indicted a suspect on charges of murder. Id. at 89, 891 S.E.2d at 76. Throughout the trial, the suspect maintained that he shot the victim in self-defense. Id. The evidence at trial tended to show that the suspect and the victim had known each other for years, and that the suspect had known the victim to be involved in crime and carry a gun. Id.

The State's witnesses included the victim's parents; his mother admitted on cross-examination that she and the victim's father had seen the contents of the victim's cell phone with the detective. See id. at 91, 891 S.E.2d at 77. The phone contained photographs of the victim holding guns and text messages about "fight[ing] other people." Id. at 92, 891 S.E.2d at 77 (quotation marks omitted). The State filed a motion in limine requesting that the court prohibit defense counsel from asking the father about the contents of the victim's phone relating to the victim's past. Id. The trial court allowed defense counsel to question the victim's father outside the jury's presence so that the court could understand the evidence that the defense counsel wished

to present. Id. During this questioning, the victim's father denied having been shown the contents of the victim's phone during his meetings with the detective. Id.

The trial court ruled that defense counsel could ask the victim's father in front of the jury about whether he met with the detective and viewed the contents of the victim's phone but did not allow any questions as to those contents. Id. The jury found the suspect guilty of voluntary manslaughter. Id.

The suspect appealed, "arguing that the trial court committed reversible error by excluding the photographs and text messages on [the victim]'s cell phone." Id. A divided court of appeals concluded that the suspect "received a fair trial free of prejudicial order." Id. (citation omitted). "According to the majority, in deciding which questions defense counsel could or could not ask [the victim's father] regarding [the victim]'s cell phone, 'the [trial] court engaged in the evidentiary balancing test prescribed by Rule 403 of the North Carolina Rules of Evidence.'" Id. (final alteration in original) (citation omitted). Additionally, even if refusing to admit the cell phone evidence was error, "the error was not sufficiently prejudicial to warrant a new trial." Id. (citation and quotation marks omitted). Conversely, "[t]he dissent would have held that the testimony of [the victim]'s parents opened the door to the cell phone evidence and that the trial court's refusal to admit the evidence entitled [the suspect] to a new trial." Id.

The suspect appealed to the supreme court based on the dissent. Id. at 93, 891 S.E.2d at 78. Because "[t]he disagreement between the majority and the dissent" at the court of appeals "centers . . . on whether, if the door was opened, [the suspect] had the right to ask [the victim's father] specific questions about the cell phone's contents in front of the jury," the supreme court limited its review to that specific issue. Id. at 95, 891 S.E.2d at 79.

The "opening-the-door rule" exists so that when a party offers evidence that raises an inference favorable to his case, the other party has the right to explore, explain, or rebut that evidence. Id. (citation omitted). Though the rule originated before the General Assembly's enactment of the North Carolina Rules of Evidence and is thus no longer applicable in many instances," "the rule is still sometimes invoked to permit the introduction of evidence that the Rules [of Evidence] otherwise exclude." Id. (citations omitted). The rule "is intended to reduce the likelihood that a party's introduction of misleading or confusing evidence will impair the capacity of the jury to perform its fact-finding role." Id. at 96, 891 S.E.2d at 80.

The supreme court explained that, "[a]lthough a party can open the door to otherwise irrelevant or inadmissible evidence," the opposing party's right to introduce that evidence is not absolute. Id. "[T]here may be circumstances in which the opposing party's evidence risks confusing or misleading the jury as much as the evidence that the opposing party wishes to refute or contextualize." Id. "Thus, even when the door has been opened to otherwise irrelevant or inadmissible evidence, the trial court as gatekeeper may still exclude it pursuant to Rule 403 of the Rules of Evidence if its probative value is substantially outweighed by," among other things, "the danger of unfair prejudice." Id. (citation and quotation marks omitted). "[I]n a case in which the door was opened to otherwise irrelevant or inadmissible evidence, the party appealing the trial court's decision to admit or exclude such evidence under Rule 403 faces a steep uphill climb." Id. at 98, 891 S.E.2d at 81.

The supreme court concluded that the trial court did not abuse its discretion in "refus[ing] to permit defense counsel to ask the victim's father or other witnesses about the photographs and text messages on the victim's phone," as "[t]here [was] no reasonable possibility that a ruling in

[the suspect]'s favor on that matter would have led to a different jury verdict." Id. at 98, 891 S.E.2d at 82. Thus, the supreme court unanimously affirmed the court of appeals. Id.

(7) Character

In State v. Pickens, ___ N.C. ___, ___ S.E.2d ___, 2023 WL 6933330 (2023), the supreme court considered whether evidence of a teacher's alleged sexual assault of another student was properly admitted at trial pursuant to Rule 404(b) of the North Carolina Rules of Evidence.

A former chorus teacher was convicted of first-degree rape and first-degree statutory sexual offense with a child who was a recent middle school student. Id. at *1. While the trial involved the teacher's assaults on the recent middle school student, testimony of a former middle school student's assault by the same teacher was presented before the jury. Id. Before the trial, the teacher filed a motion in limine to exclude the former middle school student's testimony pursuant to Rule 404(b) of the North Carolina Rules of Evidence. Id. The district court denied the motion and the jury found the teacher guilty of all charges. Id. The teacher entered notice of appeal. Id.

On appeal, the court of appeals considered the Rule 404(b) testimony evidence issue and an unrelated sentencing issue. Id. (citing State v. Pickens, 284 N.C. App. 712, 719, 876 S.E.2d 633 (2022)). The court of appeals determined that the Rule 404(b) evidence from the former middle school student had been properly admitted. Id. Afterwards, the teacher filed a notice of appeal with the supreme court on the Rule 404(b) issue. Id.

The supreme court acknowledged that evidence of a defendant's character "is not admissible to prove he acted in conformity therewith," and noted that "[e]vidence of other crimes, wrongs, or acts . . . may, however, be admissible [to prove] motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident." Id. at *3 (quoting N.C. Gen. Stat. § 8C-1, Rule 404(a)-(b)). The supreme court also noted that in order "[t]o

be admissible, prior bad acts do not need to 'rise to the level of the unique and bizarre' and instead will be considered sufficiently similar and admissible 'if there are some unusual facts present in both crimes that would indicate that the same person committed them.'" Id. (quoting State v. Beckelheimer, 366 N.C. 127, 131, 726 S.E.2d 156 (2012)).

The prosecution contended that the former middle school student's testimony was properly offered to prove the teacher's intent, motive, plan, and design to assault middle school students from schools where he worked as a teacher. Id. at *4. In support of this argument, the prosecution noted several similarities between the testimony of both the assault of the former middle student and the assault of the recent middle school student by the teacher. Id. at *4-*5. The supreme court agreed with the prosecution and explained that a Rule 404(b) analysis of testimony evidence offered to show intent, motive, plan, and design in this case should "focus[ ] on the similarities and not the differences between the bad acts offered and the acts of the defendant." Id. at *6 (citing Beckelheimer, 366 N.C. at 131-32, 726 S.E.2d 156).

Here, the similarities were sufficient to show "some unusual facts present in both crimes that would indicate that the same person committed them." Id. at *6 (quoting Beckelheimer, 366 N.C. at 131, 726 S.E.2d 156 (2012) (cleaned up)).

In other words, the former middle school student's testimony was admitted to show the teacher's intent, motive, plan, and design to assault middle school students. Id. at *5. The supreme court listed several unique facts common to both victims that included:

> (1) the [students] were middle-school-aged children attending schools where [the teacher] taught; (2) [the teacher] used his position as a middle school teacher to gain access to both victims; (3) [the teacher] exerted control over both victims during the assaults despite their protests, tears and resistance; (4) [the teacher] engaged in vaginal intercourse or tried to engage in vaginal intercourse with both victims; (5) [the teacher] committed the

> offenses during school hours or during school-related activities; (6) [the teacher] only removed his pants and underwear halfway during both assaults; and (7) [the teacher] threatened the [students] after the assaults were completed.

Id. at *5.

For these reasons, the supreme court affirmed the court of appeals' holding that the Rule 404(b) evidence of the teacher's assault on the recent middle school student was properly admitted. Id. at *9.

C. Damages

In Southland National Insurance Corporation v. Lindberg, ___ N.C. App. ___, 889 S.E.2d 512, temp. stay allowed, 888 S.E.2d 666 (July 13, 2023), the court of appeals decided whether monetary damages for fraud are recoverable where a plaintiff elects for specific performance as a remedy for breach of contract.

In 2014, a business executive re-domesticated to North Carolina several insolvent insurance companies that he had previously purchased. Id. at ___, 889 S.E.2d at 515. He then developed a scheme by which over one billion dollars held for the insurance companies' policyholders were "invested into other non-insurance companies that he also owned or controlled." Id. This was made possible by entering into an agreement with the then-Commissioner of Insurance, which allowed the business executive to invest up to forty percent of the insurance companies' assets into his other businesses. Id.

About two years later, a new Commissioner of Insurance (the "Commissioner") was elected, who capped the business executive's investment percentage at ten percent. Id. After it became apparent that the business executive was struggling to comply, the Commissioner, the insurance companies, the business executive, and the business executive's private-equity firm entered a consent order by which the business executive and his private-equity firm agreed to

reduce his affiliated investments by a specific deadline. Id. at ___, 889 S.E.2d at 516. Thereafter, when it again became apparent that the reduction would not occur by the new deadline, the insurance companies "agreed to negotiate a restructuring of the affiliated business entities' obligations." Id. These negotiations were captured in a memorandum of understanding (the "MOU"). Id. Among other things, the MOU provided that, in the event of a breach of contract, the nonbreaching party would be "entitled to specific performance . . . in addition to any other remedy to which they are [sic] entitled at law or in equity." Id. at ___, 889 S.E.2d at 517 (ellipses in original).

Two weeks before the deadline to perform under the MOU, the chairman of the private-equity firm notified the insurance companies that the restructuring plan would not occur by the deadline. Id. After the deadline passed, the insurance companies filed suit against the business executive and his private-equity firm for breach of contract, requesting as relief specific performance of the MOU, compensatory damages, and punitive damages. Id.

The trial court found in favor of the insurance companies, awarding them specific performance but no damages. Id. In addition to finding that the business executive and the private-equity firm breached the contract by failing to abide by the restructuring deadline, the trial court also found that they had fraudulently induced the insurance companies to sign the MOU on false representations. Id. at ___, 889 S.E.2d at 518. Nevertheless, the trial court did not award the insurance companies any damages "because they had elected the remedy of specific performance." Id. The business executive and private-equity firm appealed; the insurance companies filed a "Conditional Notice of Cross-Appeal, seeking review of the trial court's failure to award fraud damages." Id.

On cross-appeal, the insurance companies argued that the trial court erred in failing to award damages for fraud. Id. at ___, 889 S.E.2d at 522. Conversely, the business executive and the private-equity firm argued that damages did not apply to this case, as that "would amount to 'double recovery,' running afoul of the election of remedies doctrine." Id.

The court of appeals stated that, per supreme court precedent, "both breach of contract and fraud may coexist." Id. at ___, 899 S.E.2d at 523. Indeed, though "[a]ffirming the contract ends the defrauded party's right to rescind the contract, [it] does not excuse breach of that agreement." Id. "Here, the doctrine of election of remedies [did] not bar [the insurance companies] from recovering for both specific performance and for monetary damages because each remedy relates to a separate and distinct wrongdoing . . . ." Id. In other words, these two harms consisted of two separate events: breach of contract occurred when the business executive and the private-equity firm failed to restructure by the MOU deadline; fraud occurred months prior, when they entered the MOU. Id. Thus, the insurance companies' election of specific performance for breach did not preclude them for recovering damages for fraud. Id. "These harms are not mutually exclusive and neither are their remedies." Id.

Accordingly, the court of appeals vacated the trial court's judgment only as it pertained to damages, remanding for further proceedings consistent with its opinion and otherwise affirming the rest of the judgment. Id.

D. Consent Orders

In Kassel v. Rienth, ___ N.C. App. ___, 888 S.E.2d 682 (2023), the court of appeals considered 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.

A buyer and seller entered into a lease agreement that included an option to purchase. Id. at ___, 888 S.E.2d at 687. Before the time ran on the option to purchase, a hurricane damaged the home necessitating the replacement of the roof. Id. Despite an unresolved dispute over who should pay for the roof, the buyers notified the sellers that they were exercising their option to purchase. Id. The buyers brought an action for breach once it became clear that the sellers refused to close. Id. The buyer and seller ultimately agreed upon a consent order, which was presented to and entered by the court. Id. The consent order included findings of fact and conclusions of law. Id. The judge signed the order that the parties presented without making any changes. Id. at ___, 888 S.E.2d at 688. Subsequently, a different superior court judge entered an order to enforce the consent order.

On appeal, the sellers' issues surrounding the consent order were "whether the trial court erred in (1) interpreting the consent order as a standard real estate contract and not a court order, and (2) rewriting the consent order's explicit deadline for the buyers to close on the purchase of the home by allowing the buyers 'a reasonable time to perform.'" Id. To address these issues, the court had to "determine whether the consent order was a court-approved contract subject to regular principles of contract interpretation, or an order of the court enforceable only through contempt powers." Id. "Traditionally, consent orders have been considered 'merely a recital of the parties' agreement and not an adjudication of rights." Id. The issue before the court was whether the inclusion of findings of fact and conclusions of law in the consent order changed the nature of it from a court-approved reiteration of the parties' private agreement into a binding order. Id.

The court discussed three "lines" of cases for how courts have determined the classification. The first line of cases has concluded that "when a consent order contains findings of fact and conclusions of law, it is an order of the court only actionable through contempt powers."

Id. In the second line of cases, the courts have "definitively held consent orders are court-approved contracts subject to principles of contract interpretation, not contempt powers, without indicating whether the consent order contained findings of fact." Id. at ___, 888 S.E.2d at 690. In the third line of cases, the courts have "reviewed the four-corners of the consent judgment at issue to determine whether it was more appropriately considered a court-approved contract or an order of the court." Id.

The court of appeals affirmed the trial court and concluded "that findings of fact and conclusions of law are not dispositive of whether a consent order is a court-approved contract enforceable through a breach of contract action, or an order of the court enforceable through contempt powers." Id. at ___, 888 S.E.2d at 691. Instead, "courts must consider whether, on its face, the order goes beyond a mere recital of the parties' agreement, the facts of each individual case, and the procedural history surrounding the litigation." Id. (internal quotations and citations omitted). In making that determination, 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." Id. The court next considered whether the judge who signed the consent order made any determination of the respective rights of each party. Id. Finally, the court considered whether "the judge essentially 'rubber stamped' the agreement reached by the parties." Id. In this case, the court found that 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. Id. Accordingly, the court of appeals concluded that the consent order was a court-approved contract subject to standard rules of contract interpretation. Id.

Because the consent order was subject to the standard rules of contract interpretation, the court concluded that the trial court properly allowed the buyers "a reasonable time to perform." Id. at ___, 888 S.E.2d at 692.

E. Attorney's Fees

In Woodcock v. Cumberland County Hospital System, Inc., 384 N.C. 171, 884 S.E.2d 633 (2023), the supreme court considered whether the trial court's findings and conclusions were sufficient to support an order awarding attorneys' fees to a general partner.

Fayetteville Ambulatory Surgery Center Limited Partnership operates an ambulatory surgery center in Fayetteville, North Carolina ("surgery center"). Id. at 172, 884 S.E.2d at 635. One limited partner filed his initial complaint against the general partner and its owner (collectively "general partner") asserting various causes of action in his individual capacity, all of which related to the ownership and operation of the surgery center. Id. This same limited partner later filed his first amended complaint, adding an additional claim. Id. In response, the general partner filed a motion to dismiss the amended complaint pursuant to Rule 12(b)(1) or, alternatively, Rule 12(b)(6), arguing that the limited partner lacked individual standing to assert any of the claims he purported to bring. Id.

A week later, the limited partner moved for leave to amend the first amended complaint and simultaneously filed a proposed second amended complaint. Id. The trial court granted the motion, allowed other limited partners to join as plaintiffs, deemed the second amended complaint filed as of that date, and denied the pending motion to dismiss as moot. Id. Through the second amended complaint, the limited partners, in their individual capacities, asserted five claims against the general partner. Id. The general partner filed its answer, contending that the limited partners were barred due to subject matter jurisdiction and for failure to state a claim upon which relief may

be granted. Id. The general partner later filed a motion for judgment on the pleadings, asserting that the limited partners improperly attempted to bring individual claims. Id.

The initial complaint, first amended complaint, and second amended complaint all brought claims against the general partner in the limited partners' individual capacities for what essentially amounted to breaches of the partnership agreement among the parties. Id. at 175, 884 S.E.2d at 636. However, the limited partners did not make any allegations supporting their claim of separate and distinct injury. Id. at 176, 884 S.E.2d at 637. The limited partners did not allege derivative claims, that a pre-suit demand was made on the general partner or partnership relating to the claims they raised in this lawsuit, or any reason that would have excused such a demand. Id. at 175, 884 S.E.2d at 636. The limited partners did not argue that their claims were subject to the "special duty" exception in their response to the motion for judgment on the pleadings or in their response brief to the motion for fees. Id. Instead of a special duty owed by the general partner, the limited partners argued that they suffered a "'separate and distinct injury' because they were denied their contractual right to vote under . . . the Partnership Agreement." Id.

Ultimately, the trial court concluded that the limited partners lacked standing to bring the claims asserted in the initial complaint, first amended complaint, and second amended complaint as direct, individual actions. Id. at 176, 884 S.E.2d at 637. The general partner repeatedly placed the limited partners on notice of the deficiency in their claims through multiple motions and briefs expressly and specifically challenging the limited partners' standing. Id. The limited partners ignored the general partner's standing arguments and persisted litigating their non-justiciable claims despite having multiple opportunities to amend. Id. The general partner then made a motion for attorneys' fees as a part of its costs under Rule 41(d) pursuant to section 6-21.5 of the North Carolina General Statutes, and the trial court granted that motion. Id.

On appeal, the supreme court held that the unchallenged findings and conclusions sufficed to support the trial court's award of attorneys' fees. Id. The court acknowledged that although attorneys' fees generally are not recoverable under the common law, the North Carolina legislature has enacted provisions allowing for the recovery of attorneys' fees. Id. (citing Sunamerica Fin. Corp. v. Bonham, 328 N.C. 254, 257, 400 S.E.2d 435 (1991)). Additionally, section 6-21.5 of the North Carolina General Statutes provides that the court may award a reasonable attorney's fee to the prevailing party if the court finds that there was a complete absence of a justiciable issue of either law or fact raised by the losing party in any pleading. Id. at 177, 884 S.E.2d at 637. A justiciable issue has been defined as an issue that is real and present as opposed to imagined and fanciful. Id. (citing Sunamerica Fin. Corp., 328 N.C. at 257-58, 400 S.E.2d 435). In order to find a complete absence of a justiciable issue, courts must find that justiciable issues conclusively appear absent even after giving the pleadings the indulgent treatment they receive on motions for summary judgment or to dismiss. Id. However, it is also possible that a pleading that appears to set forth a justiciable controversy when read alone, may, when read with a responsive pleading, no longer present a justiciable controversy. Id.

Here, the limited partners made several arguments; however, the supreme court found that they either failed or were not preserved. Id. at 178, 884 S.E.2d at 638. Thus, the supreme court reasoned that it was bound by the trial court's unchallenged determination that all claims brought against the general partner were alleged breaches of the partnership agreement, which the limited partners brought in their individual capacities. Id. Also unchallenged was the trial court's conclusion that limited partners lacked standing to bring direct, individual claims for these alleged breaches. Id. The supreme court was further bound by the trial court's finding that the limited partners' good faith argument concerned a non-pleaded breach of the partnership agreement. Id.

For the foregoing reasons, the supreme court concluded that the trial court did not abuse its discretion by granting defendant's motion for award of attorneys' fees as part of its costs under Rule 41(d) of the North Carolina Rules of Civil Procedure. Id.

F. Appellate Procedure

In Mole' v. City of Durham, 384 N.C. 78, 884 S.E.2d 711 (2023), the supreme court published a two-sentence per curiam opinion. This opinion reads as follows:

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

Id. at 79, 884 S.E.2d at 711 (citation omitted). The per curiam opinion was accompanied by one concurring opinion by Justice Dietz and two dissenting opinions by Justice Morgan and Justice Earls. Id. at 79-101, 884 S.E.2d at 712-25.

Justice Dietz concurred in the court's order, and Justice Berger joined his concurrence. Justice Dietz explained that "unpublishing" a court of appeals opinion is not a new function created by the supreme court in this opinion. Id. at 79, 884 S.E.2d at 712. In fact, the supreme court has unpublished court of appeals opinions nearly one hundred times in the last fifty years. Id. However, many of those orders were made when there was a recusal and the supreme court's remaining members were equally divided, which was not the case here. Id. at 80, 884 S.E.2d at 712. When there is no majority of the full court voting for a particular disposition, the supreme court has long had the option to take no action on the merits and to render the court of appeals decision non-precedential so that the issue could continue to percolate in the lower courts. Id. Justice Dietz also explained that this approach is rare but necessary when doing otherwise "would only make things worse." Id. at 80, 884 S.E.2d at 713. Justice Dietz noted that he was "not fond of unpublishing a Court of Appeals decision" because the court of appeals' ability to create its own

body of binding precedent is "essential to our State's jurisprudence." Id. Nonetheless, Justice Dietz concluded that this was "one of those rare cases" in which doing otherwise "would only make things worse." Id. at 81, 884 S.E.2d at 713.

Justice Morgan dissented from both the determination that discretionary review was improvidently allowed in the present case and the "unpublishing" of the court of appeals opinion rendered in this case. Id. Justice Morgan insisted that the constitutional issues raised by the parties "easily met" the court's requirements for discretionary review and would have allowed the court to "determine a resolution of plaintiff's constitutionally significant claims." Id. Justice Morgan also took issue with how the decision lacked "a transparent divulgence of the numerical breakdown of the Justices favoring affirmance or reversal of the Court of Appeals decision," and how it also lacked "the [c]ourt's clear declaration of the outcome of the case based on the lack of precedential value of the Court of Appeals opinion." Id. at 88, 884 S.E.2d at 717. In particular, he noted that the majority "glaringly fails to adhere to this Court's tradition, with the issuance of a per curiam opinion to unequivocally announce the ultimate outcome of the case in the last line of the opinion, such as the opinion of the Court of Appeals being affirmed or reversed." Id. at 89, 884 S.E.2d at 718. In response to these concerns, Justice Morgan made two recommendations in his dissenting opinion: namely, that the court (1) "definitively decide the critical constitutional issues which have been presented, especially those which are impacted by the North Carolina Constitution," and (2) "follow the institutionalized precedent set by prior per curiam opinions" and "disclose, at the least, the numerical breakdown of the Justices here who favored affirmance, reversal, or some other reviewing disposition of the Court of Appeals . . . ." Id.

Justice Earls joined Justice Morgan's dissent and wrote separately to explicitly address the two procedural issues: (1) the unpublishing of a court of appeals decision, and (2) the holding that

discretionary review was improvidently allowed. Id. at 91-101, 884 S.E.2d at 719-25. Justice Earls criticized the decision to unpublish the court of appeals decision because the practice of unpublishing was not supported by doctrine or the North Carolina Rules of Appellate Procedure:

> It is unwise for the Court to hand itself this new power without even publishing an amendment to the Rules of Appellate Procedure to establish clear and fair guidelines for taking such action. The Court is making a hasty and unexamined, yet fundamental and radically destabilizing shift in the authority to determine legal precedent. It has far-reaching implications for the jurisprudence of this state.

Id. at 92, 884 S.E.2d at 719.

Additionally, Justice Earls asserted that the supreme court's use of the "discretionary review was improvidently allowed" ("DRIA") disposition "should be rare" because it undermines the court's reliability and "amounts to a waste of money, energy, and time." Id. at 98, 884 S.E.2d at 723. She reasoned that once a court decides to take a case, "allowing the objecting Justices to subsequently vote to dismiss the petition would render a court's procedures meaningless." Id. Finally, simultaneously using the DRIA disposition and unpublishing the court of appeals decision is "exceedingly harmful" when the case concerns issues of public interest or the court of appeals opinion is in conflict with supreme court precedent. Id. Justice Earls cautioned that this practice constituted an "exercise of arbitrary power" and would only create uncertainty about the rule of law:

> In this instance, the use of the DRIA disposition deprives the parties, the attorneys who represented them, those who filed amicus briefs in support of one party's position, and the people of North Carolina collectively of [protection from the arbitrary exercise of power, subversion of the rule of law, and the creation of uncertainty]. Furthermore, taking from the Court of Appeals the ability to decide which of its opinions have precedential value without otherwise disturbing anything in the opinion is a disingenuous sleight of hand and a dangerous threat to the fair application of the laws to all citizens.

Id. at 101, 884 S.E.2d at 725.

In Cryan v. National Council of YMCAs of the United States, 384 N.C. 569, 887 S.E.2d 848 (2023), the supreme court considered two issues: (1) what test applies when deciding whether to grant a writ of certiorari and (2) whether the supreme court may consider on appeal an issue that is not the basis for a dissent where appellate jurisdiction is based on a dissent in the court of appeals.

Alleged victims of sexual abuse brought claims under the SAFE Child Act against the YMCA. Id. at 571, 887 S.E.2d at 850. The YMCA moved to dismiss the claims under Rule 12(b)(6) on the ground that the SAFE Child Act's revival of the statute of limitations violated the North Carolina Constitution. Id. After a hearing, 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. Id.

The YMCA filed a notice of appeal. Id. Plaintiffs moved to dismiss on the basis that the appeal was an impermissible interlocutory appeal, and the YMCA responded by filing a petition for a writ of certiorari. Id. The court of appeals unanimously found that there was no right to appeal. Id. The majority in the court of appeals chose to exercise its discretion to issue a writ of certiorari and held that the YMCA had asserted an as-applied challenge. Id. As a result, the majority vacated the transfer order and remanded the case to the trial court for further proceedings. Id. at 572, 887 S.E.2d at 850. The dissenting judge argued in detail that it was improper to issue a writ of certiorari. Id. With respect to whether the challenge raised by the YMCA was an as-applied challenge, the dissenting judge said only, "Because I would determine jurisdiction to decide the constitutional issue is proper before the three-judge panel in Wake County, I would deny Defendant's petition for writ of certiorari." Id. at 574, 887 S.E.2d at 852. Plaintiffs timely

filed a notice of appeal to the supreme court based on the dissent but did not petition for discretionary review of any additional issues not addressed by the dissent. Id. at 572, 887 S.E.2d at 851.

On appeal, the supreme court affirmed the decision of the court of appeals. Id. at 573, 887 S.E.2d at 852. The supreme court explained that "[t]here is no fixed list of 'extraordinary circumstances' that warrant certiorari review, but this factor generally requires a showing of substantial harm, considerable waste of judicial resources, or 'wide-reaching issues of justice and liberty at stake'." Id., 887 S.E.2d at 851 (quoting Doe v. City of Charlotte, 273 N.C. App. 10, 23, 848 S.E.2d 1 (2020)). In its review, the court of appeals "observed that the appeal raised a recurring issue concerning 'a relatively new statutory scheme which has limited jurisprudence surrounding it'" and that the question "involved the trial court's 'subject matter jurisdiction,' which potentially deprives the trial court of any power to rule in the case." Id. (quoting Cryan v. Nat'l Council of YMCAs of the U.S., 280 N.C. App. 309, 315-16, 867 S.E.2d 354, 354 (2021). The supreme court further explained that "the decision to issue a writ of certiorari rests in the sound discretion of the presiding court." Id. (citing State v. Ricks, 378 N.C. 737, 740, 862 S.E.2d 835 (2021)). In the present case, the decision by the court of appeals to issue a writ of certiorari was well within the court's sound discretion and was not manifestly arbitrary. Id. at 574, 887 S.E.2d at 852.

The supreme court then proceeded to address the second issue of whether it 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. Id. In their new brief to the supreme court, the plaintiffs challenged two separate issues from the court of appeals opinion: first, the majority's decision to issue the writ of certiorari, and second, the majority's determination that the YMCA asserted an

as-applied constitutional challenge (not a facial challenge) to the SAFE Child Act. Id. The dissenting judge did not expressly oppose the majority's second decision—the determination that the YMCA raised an as-applied challenge—or provide any explanation for why that decision was wrong. Id. The supreme court reasoned that if the dissent's vague, implied disagreement with the majority's decision—one in which the dissenting judge provided no reasoning—could be sufficient to confer jurisdiction on the supreme court, so too would a judge in a single-issue appeal stating, "I dissent." Id. In concluding, the supreme court said, "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)." Id.

For these reasons, the supreme court affirmed the decision of the court of appeals. Id.

G. Arbitration

In JRM, Inc. v. The HJH Cos., Inc., 287 N.C. App. 592, 883 S.E.2d 217 (2023), the court of appeals addressed (1) whether the trial court erred in concluding that there was no agreement to arbitrate and denying the company's motion to compel, and (2) whether the appeal was interlocutory.

A manufacturer of irrigation equipment sued its chief financial officer ("CFO") and a separate company after the CFO and the company allegedly signed a contract against the manufacturer's wishes, binding the manufacturer. Id. at 594, 883 S.E.2d at 218. The purported contract "included a reference to arbitration agreement provisions included on [the company's] website." Id.

The company moved to dismiss the manufacturer's complaint, or, in the alternative, to compel arbitration. Id. at 595, 883 S.E.2d at 219. The manufacturer served two affidavits in

opposition thereto; the company filed one affidavit in support after the deadline to do so had passed. Id. Following a hearing on the company's motions, the trial court struck the company's affidavit as untimely, concluded that the company had failed to meet its burden of showing that a valid arbitration agreement existed between it and the manufacturer, and denied its motion to compel arbitration. Id. The company appealed. Id.

Judge Tyson, writing for the majority, noted first that, generally, an order denying arbitration is interlocutory yet immediately appealable because it involves "a substantial right" that might be lost if appeal is delayed. Id. (quoting Earl v. CGR Dev. Corp., 242 N.C. App. 202, 22, 773 S.E.2d 551, 553 (2015)).

Next, the court of appeals stated that trial courts should enforce the terms of an arbitration agreement where such agreement exists; by that same token, trial courts may properly deny motions to compel arbitration where an arbitration agreement does not exist. Id. at 596, 883 S.E.2d at 220. On a motion to compel arbitration, if the opposing party opposes the motion, the trial court should order the parties to arbitrate unless it finds that there is no valid agreement. Id. (quoting N.C. Gen. Stat. § 1-569.7(a)(2) (2021)). The party seeking to compel arbitration must show that the parties mutually agreed to arbitrate their disputes. Id. (quoting Slaughter v. Swicegood, 162 N.C. App. 457, 461, 591 S.E.2d 577, 580 (2004)). Then, a trial court's findings regarding the existence, or lack thereof, of a valid arbitration agreement are conclusive on appeal if supported by competent evidence, even if the same evidence could support a finding to the contrary. Id. (quoting Slaughter, 162 N.C. App. at 457, 591 S.E.2d at 580). A trial court may deny a motion to compel "if it determines evidence of the very existence of an arbitration agreement is lacking." Id. (quotation marks omitted) (quoting Evangelistic Outreach Ctr. V. General Steel Corp., 181 N.C. App. 723, 727, 640 S.E.2d 840, 843 (2007)).

The court of appeals concluded that, because the company's affidavit was stricken as untimely, the trial court did not err in concluding that there was no evidence showing that a valid arbitration agreement existed between the manufacturer and the company. Id. at 597, 883 S.E.2d at 221. Accordingly, in the absence of a valid arbitration agreement, there was no substantial right at stake, and the company's appeal was purely interlocutory, rendering the court of appeals without jurisdiction to hear the appeal. Id. The court of appeals thus dismissed the company's appeal. Id.

In a separate concurring opinion, Judge Dillon stated that, although he agreed with the majority's analysis, he did not believe that the manufacturer's appeal should be dismissed, because a substantial right remained at stake regardless of the trial court's findings. Id. at 599, 883 S.E.2d at 222. Thus, Judge Dillon claimed that the court of appeals did indeed have jurisdiction to hear the matter, and that "the disposition should be to affirm the trial court order." Id.

In Canteen v. Charlotte Metro Credit Union, 286 N.C. App. 539, 881 S.E.2d 753 (2022), petition for disc. review filed (Jan. 6, 2023), the court of appeals considered whether a bank was permitted to unilaterally add an arbitration provision to an existing membership agreement.

A customer opened an account with the bank and signed a deposit agreement (the "agreement"). Id. at 540, 881 S.E.2d at 754. The agreement provided a choice of law provision, as well as a provision stating that the bank reserved the right to change the terms, notifying the customer thereof electronically. Id. at 541, 881 S.E.2d at 755.

Several years later, the bank amended the agreement to include a provision requiring any dispute between the customer and the bank to be resolved via arbitration and requiring the customer to waive the right to bring a class action. Id. at 540, 881 S.E.2d at 754. The bank notified the customer "for three consecutive months" via multiple emails in which the subject line read "Changes to the Membership and Account Agreements." Id. at 541, 881 S.E.2d at 755. These

emails contained hyperlinks respectively entitled "Information about Arbitration," "Arbitration and Class Action Waiver," and "Membership and Account Agreement Change in Terms." Id. The "Arbitration and Class Action Waiver" hyperlink led to a document that illustrated the amendment requiring arbitration as a means of dispute; the same document also allowed the customer to elect to opt out of this new provision. Id.

The customer never noticed these emails from the bank. Id. Accordingly, the customer did not notify the bank whether she wanted to opt out of the arbitration provision. Id. The customer continued using her account with the bank. Id.

The customer filed a class action against the bank, alleging that it had charged her overdraft and non-sufficient fees in violation of the agreement. Id. at 540, 881 S.E.2d at 754. The bank filed a motion to stay and to compel arbitration. Id. The trial court entered an order denying the motion. Id. The bank appealed. Id.

On appeal, a divided panel of the court of appeals reversed and remanded the trial court's order. Id. at 544, 881 S.E.2d at 757. The majority, in an opinion authored by Judge Dillon, found that the amendment constituted a binding arbitration agreement because it "was a change to the forum selection procedure," the customer agreed to be notified of any amendments via email, and she failed to opt out of the arbitration requirement. Id. at 542, 881 S.E.2d at 755.

The majority distinguished this case from Sears Roebuck & Co. v. Avery, 163 N.C. App. 207, 593 S.E.2d 424 (2004). Id., 881 S.E.2d at 756. In Sears, the court of appeals held that "no valid arbitration agreement existed based on a unilateral amendment because the original contract 'made no reference to arbitration or any other dispute resolution procedures and did not in any manner address the forum in which a customer could have disputes resolved.'" Id. (quoting Sears, 163 N.C. App. at 208, 593 S.E.2d at 426). Conversely, the majority reasoned, the agreement

between the customer and the bank contained a choice of law provision, which put the customer on notice that the bank could change this provision to require disputes to be settled in a different forum, such as "before an arbitrator." Id. (citing Scherk v. Alberto-Culver Co., 417 U.S. 506, 519 (1974)). The majority also observed that other jurisdictions have enforced arbitration provisions "where a bank customer was provided notice of an amendment containing the provision." Id. (collecting cases).

The majority found the fact that the customer had not read the emails from the bank of no moment because "she agreed to be bound to the amendments when notified of them by email." Id. Since the customer could read and write, the majority would not relieve her from liability upon the amendment when she could have informed herself thereof but failed to do so. Id. (quoting Weaver v. St. Joseph, 187 N.C. App. 198, 213, 652 S.E.2d 701, 712 (2007)).

For these reasons, the majority reversed and remanded the trial court's order. Id. at 544, 881 S.E.2d at 757.

In dissent, Judge Arrowood agreed with the trial court that the bank had no authority to unilaterally amend the agreement and add "entirely new terms." Id. at 545, 881 S.E.2d at 758. Specifically, the agreement had only put the customer on notice of the bank's ability to make amendments, not to add "additional, uncontemplated terms." Id.

The dissent observed that, "because arbitration agreements are governed by the principles of contracts, they are also subject to the implied covenants of good faith and fair dealing." Id. (citing Bicycle Transit Auth., Inc. v. Bell, 314 N.C. 219, 228, 333 S.E.2d 299, 305 (1985)). In the dissent's view, the bank "blatantly breached the covenants of good faith and fair dealing provisions inherent in every contract" by "requiring" customers to navigate through "numerous links and forms to determine that it was attempting to add new terms to the [a]greement." Id. Moreover,

"allowing [the bank] unlimited authority to alter the terms of an established contract renders the contract illusory." Id.

The dissent explained that this view was "consistent with the previous holdings" of the court of appeals, "which the majority [was] required to follow under the holding set forth in In re Civil Penalties." Id. (citing In re Civil Penalties, 324 N.C. 373 384, 379 S.E.2d 30, 37 (1989)). Particularly, the dissent would have found that Sears controlled because the agreement at issue there, much like the agreement at issue here, "did not contain an arbitration clause," and thus the company was not permitted to unilaterally add a new arbitration provision. Id. (citing Sears, 163 N.C. App. at 212, 218–19, 593 S.E.2d at 428, 432); see also id. (collecting cases).

Accordingly, the dissent opined that the majority violated "previous precedent" of the court of appeals as well as "black letter . . . contract law." Id.

In Earnhardt Plumbing, LLC v. Thomas Builders, Inc., ___ N.C. App. ___, ___ S.E.2d ___, 2023 WL 6814788, the court of appeals addressed whether the trial court properly concluded, without making findings of fact in support thereof, that the Federal Arbitration Act did not preempt North Carolina law in determining whether a forum-selection clause to an arbitration agreement was enforceable.

A North Carolina plumber entered a contract with two property owners, a North Carolina company and its affiliated Tennessee corporation. Id. at *1. Under the contract, the plumber agreed to install plumbing and gas line systems for a hotel located in Fayetteville that was owned by the property owners. Id. The contract contained an arbitration agreement providing that arbitration "'shall be held at the discretion of the Contractor either at the Contractor's principle [sic] place of business or where the Project is located.'" Id.

The plumber eventually commenced an action against the property owners for breach of contract, alleging failure to pay in full for services rendered. Id. The property owners filed a pre-answer motion to dismiss or alternatively to stay the proceedings pending mediation and/or arbitration. Id. At a hearing on the motion, the parties focused their arguments on where, not whether, the matter should be arbitrated; specifically, the arguments centered around whether, per the contract, the property owners could compel arbitration to take place in Tennessee. Id.

The trial court denied the property owners' motion to dismiss and granted their alternative motion to stay. Id. Although the trial court concluded that the contract contained a valid agreement to arbitrate, it also concluded that the property owners were barred by North Carolina law from forcing the arbitration to occur in Tennessee. Id. Specifically, the trial court held that the property owners were barred by Section 22B-3 of the North Carolina General Statutes, which provides that "'any provision in a contract entered into in North Carolina that requires . . . the arbitration of any dispute that arises from the contract to be instituted or heard in another state is against public policy and is void and unenforceable.'" Id. (alteration in original) (quoting N.C. Gen. Stat. § 22B-3). Additionally, the trial court concluded that the Federal Arbitration Act ("FAA") did not preempt Section 22B-3. Id. The trial court thus ordered arbitration to occur in North Carolina. Id. The property owners appealed. Id.

Generally, orders denying arbitration and orders addressing the validity of forum-selection clauses, albeit interlocutory, are immediately appealable because they involve a substantial right that may be lost if the appeal is delayed. Id. at *2. The property owners argued that a substantial right was at stake here because the trial court, although granting arbitration, "deprive[d] them of their contractual right to select the forum for arbitration." Id. The court of appeals agreed. Id.

The dispositive issue before the court of appeals was whether the trial court properly concluded that the FAA did not preempt Section 22B-3 and whether it correctly determined that the forum selection clause to the arbitration agreement was unenforceable under North Carolina law. Id.

The court of appeals stated that, when a contract involves interstate commerce, "'the FAA preempts North Carolina's statute and public policy regarding forum selection.'" Id. at *3 (quoting Goldstein v. Am. Steel Span, Inc., 181 N.C. App. 534, 538, 640 S.E.2d 740, 743 (2007)). Furthermore, whether a contract involves interstate commerce is a question of fact, which is strictly within the province of trial courts, not appellate courts, to determine. Id.

Here, the trial court concluded that the FAA did not preempt Section 22B-3 without making any findings of fact to support that conclusion. Id. Accordingly, the court of appeals was required to remand so that the trial court could first make findings of fact as to whether the contract involved interstate commerce and then, based on those findings, apply the appropriate law to the forum-selection clause. Id.

Thus, the court of appeals vacated and remanded the trial court's order. Id. at *4.

IV. INSURANCE

A. Coverage

In Radiator Specialty Co. v. Arrowood Indem. Co., 383 N.C. 387, 881 S.E.2d 597 (2022), the supreme court addressed when insurance coverage is triggered for injuries that span multiple insurance providers and how the coverage is allocated amongst several insurers.

A manufacturer filed a declaratory judgment action against multiple insurers "seeking a declaration of the duties and obligations" of each insurer with respect to benzene litigation under

policies sold to the manufacturer over several decades. Id. at 391, 881 S.E.2d at 601-02. The manufacturer produced "automotive, hardware, and plumbing products" containing benzene and had accrued "hundreds of personal injury lawsuits" against it "seeking damages for bodily injury" caused by exposure to benzene over time. Id. at 389, 881 S.E.2d at 600.

The manufacturer's action presented a unique personal injury case, as benzene exposure, unlike injuries occurring at a definite point in time, is by its nature an injury "spanning multiple insurance-policy periods and implicating different providers." Id. at 389, 881 S.E.2d at 601.

The trial court entered a judgment "determining that the insurers were obligated to defend and indemnify [the manufacturer] under their policies 'subject to their respective policy limits.'" Id. at 392, 881 S.E.2d at 602. "As a result, the insurers were required to reimburse $1.8 million of [the manufacturer]'s past costs." Id.

The court of appeals affirmed the judgment in part and dismissed it in part. Id. All parties petitioned for discretionary review. Id. at 394, 881 S.E.2d at 604.

The manufacturer and insurers disputed as to when "each insurer's coverage was triggered." Id. at 400, 881 S.E.2d at 606. The supreme court, in an opinion authored by Justice Earls, found that "[t]he unambiguous language of each of the relevant policies require[d] the insurers to indemnify [the manufacturer] for claims raised by claimants who suffered some form of personal or bodily injury. . . ." Id. at 404, 881 S.E.2d at 609. However, these policies "d[id] not define personal or bodily injury to require some diagnosable sickness or disease for coverage to be triggered." Id.

The supreme court found that "benzene causes bodily injury upon exposure." Id. For example, although "cancer is a manifestation of the injury that occurs upon benzene exposure," it is not the injury itself. Id. The supreme court concluded that, although it held that "exposure to

benzene is synonymous with the coverage-triggering injury, that injury is only compensable if it results in damages." Id. "[I]f a person is exposed to benzene but suffers no consequences," there is "no compensable harm." Id. (emphasis in original).

Borrowing from federal court opinions, the supreme court found that "'[c]umulative disease cases are different from the ordinary accident or disease situation' in part because, if the injury-in-fact theory were adopted, 'the manufacturer's coverage becomes illusory since the manufacturer will likely be unable to secure any insurance coverage in later years when the disease manifests itself.'" Id. at 405, 881 S.E.2d at 609 (alteration in original) (emphasis omitted) (quoting Imperial Cas. and Indem. Co. v. Radiator Specialty Co., 862 F. Supp. 1437, 1443 (E.D.N.C. 1994) (quoting Ins. Co. of North Am. v. Forty-Eight Insulations, 633 F.2d 1212, 1219 (6th Cir. 1980)), aff'd, 67 F.3d 534 (4th Cir. 1995)).

"If coverage is triggered only upon disease manifestation, then a [manufacturer] . . . could not invoke its coverage if the individuals who were exposed to benzene during the coverage period did not develop a disease or die until after the policy expired." Id. "That would make the availability of coverage to [the manufacturer] predicated on its maintenance of coverage in perpetuity, even if [the manufacturer] had stopped manufacturing benzene-containing products." Id.

Next, the supreme court addressed "how to properly allocate [the manufacturer]'s benzene liabilities among the [insurers]." Id. at 406, 881 S.E.2d at 610. The insurers argued that "pro rata allocation [was] appropriate based on the terms of their policies"; the manufacturer "advocate[d] for adopting an all sums approach." Id. at 407, 881 S.E.2d at 611. "Under a pro rata . . . allocation approach, each triggered policy bears a share of the total damages proportionate to the number of years it was on the risk, relative to the total number of years of triggered coverage." Id. at 406-07,

881 S.E.2d at 610-11 (citation and quotation marks omitted). "By contrast, all sums, or joint and several, liability allows recovery in full under any triggered policy of the policyholders' choosing and leaves the selected insurer to pursue cross-claims against other carriers whose policies were also available." Id. (citation and quotation marks omitted) (emphasis omitted). The supreme court concluded that the policies' "non-cumulation and continuing coverage provisions" supported pro rata allocation. Id. at 417, 881 S.E.2d at 617.

For these reasons, the supreme court affirmed in part and reversed in part the court of appeals' opinion. Id. at 422, 881 S.E.2d at 620. The supreme court affirmed the court of appeals' opinion to the extent that it "applied an exposure-based approach in determining at what point the insurers' coverage was triggered." Id. at 422, 881 S.E.2d at 621. The supreme court reversed the court of appeals' opinion to the extent that it held that "the trial court's decision regarding allocation [was] moot"; rather, "the trial court properly applied pro rata allocation based on the policies at issue." Id.

Justice Barringer wrote separately, joined by Justice Hudson, dissenting in relevant part. Id. at 423-37, 881 S.E.2d at 621-28. Regarding the issue of when coverage is triggered, the dissent agreed with the majority that "there is no material question of fact that benzene exposure caused 'bodily injury' in the form of alterations to DNA at the time of exposure." Id. at 430, 881 S.E.2d at 624. However, because the "occurrence is benzene exposure," id., the dissent disagreed with the majority's approach. Id. at 431, 881 S.E.2d at 625. Specifically, the dissent found that the majority, "without analyzing the policies or citations," concluded "that an 'application of a continuous trigger would be at odds with [the supreme court's] holding that, in benzene cases, the injury that triggers coverage occurs at the time of exposure.'" Id. (emphasis in original). Although "[i]n this case, there is no material question of fact that a bodily injury in fact occurs upon exposure

to benzene," the majority's approach would not lend itself to "future cases" in which there is such a material question of fact. Id.

Justice Barringer also found that the majority "neglect[ed] to follow [the supreme court]'s well-established rules of construction for insurance policies." Id. at 423, 881 S.E.2d at 621. In her view, the supreme court "should construe the policy language in accordance with the rules of contract interpretation." Id. at 435, 881 S.E.2d at 627. The majority, instead, "read into the policies a pro rata allocation of coverage to which the [manufacturer and insurers] did not agree contractually." Id. As a result, she found that the majority had "redistribut[ed] the risk, taking from the insured for the benefit of the insurer and taking from some insurers for the benefit of other insurers," when insurers were well enough equipped with their own re-insurance markets "to restructure their risks dynamics and cost-benefit analysis." Id.

In Ha v. Nationwide General Insurance Company, 286 N.C. App. 581, 881 S.E.2d 742 (2022), the court of appeals considered whether proof of mailing a cancellation notice of an insured's insurance policy is sufficient to cancel the policy under section 58-44-16 of the North Carolina General Statutes.

Homeowners brought an action against an insurer after a house fire destroyed their residence. Id. at 582, 881 S.E.2d at 743. Prior to the fire, the insurer mailed a cancellation notice of the homeowners' policy. Id. The court of appeals previously considered arguments in this case about the meaning of "furnishing" in section 58-41-15(c) of the North Carolina General Statutes. Id. The court defined "furnishing" as "actual delivery to and/or receipt of [a notice of cancellation] by the insured." Id. In applying this definition, the court found that merely mailing the cancellation notice was insufficient to cancel the policy. Id. This decision was subsequently vacated by the supreme court, which remanded the matter "to determine whether Article 41, Article

36 or other statutes govern [the] matter." Id. (quoting Ha v. Nationwide Gen. Ins. Co., 375 N.C. 87, 845 S.E.2d 436 (2020)). On remand, the trial court held that although section 58-41-15 did not apply to the policy, section 58-44-16 did apply. Id. In applying section 58-44-16 of the North Carolina General Statutes to the underlying facts, the trial court concluded that the insurer complied with the statute by providing proof of the mailed cancellation notice. Id. The homeowners appealed this judgment to the court of appeals. Id.

In Judge Griffin's majority opinion, the court of appeals held that the homeowners' policy was properly cancelled under section 58-44-16 of the North Carolina General Statutes. Id. Section 58-44-16(f)(10) of the North Carolina General Statutes provides that standard fire policies "may be cancelled at any time by th[e] insurer by giving the insured a five days' written notice of cancellation[.]" Id. at 583, 881 S.E.2d at 743-44. Because the word "giving" is not defined under the statute, the court applied the word's plain meaning and concluded that the word "includes the act of mailing notice of cancellation to the insured." Id. at 583-84, 881 S.E.2d at 744. Furthermore, while other statutory provisions in the code expressly require certain insurance policies to issue cancellation notices through certified mail or to be received by the recipients, section 58-44-16 does not contain these requirements. Id. Thus, the court held that the "legislature intended mailing to constitute 'giving' notice of cancellation." Id.

Judge Arrowood, writing in dissent, expressed that he would "hold that for an insurance company to effectively cancel a policy [under section 58-44-16], they would need to show proof the notice of cancellation was actually received." Id. at 585, 881 S.E.2d at 745. Judge Arrowood maintained that courts are constrained by a reasonableness standard when they read words left undefined by a statute according to their plain meaning. Id. If the statute is unclear, "courts must resort to statutory construction to determine legislative will and the evil the legislature intended

the statute to suppress." Id. (quoting State v. Jackson, 353 N.C. 495, 501, 546 S.E.2d 570, 574 (2001)). Judge Arrowood explained that our courts have consistently interpreted insurance policy provisions liberally to afford coverage whenever reasonable, irrespective of whether the underlying statute extends or excludes coverage. Id. Lastly, Judge Arrowood highlighted that other jurisdictions interpreting similar statutes have found that proof of mailing is insufficient to cancel an insured's policy. Id. at 586, 881 S.E.2d at 745.

V. WORKERS' COMPENSATION

In West v. Hoyle's Tire & Axle, LLC, 383 N.C. 654, 881 S.E.2d 149 (2022), the supreme court considered whether an individual who lacks a legal relationship with a deceased employee can be a dependent entitled to file a claim for death benefits under section 97-39 of the North Carolina General Statutes of the North Carolina Workers' Compensation Act ("the Act").

A decedent died from injuries sustained from a work-related accident while working for his employer. Id. at 655, at ___, 881 S.E.2d at 151. The decedent's daughter, son, estranged wife, and cohabitating fiancée filed a claim for death benefits under the Act. Id. The decedent's daughter, son, and estranged wife sought dismissal of the fiancée's claim for benefits from the North Carolina Industrial Commission on grounds that she lacked standing pursuant to section 97-39 of the North Carolina General Statutes. Id. The deputy commissioner granted the motion and dismissed the fiancée's claim. Id. On appeal, the full commission affirmed the ruling, concluding that because the decedent's fiancée was not a factual dependent of the decedent, as required by the statute, her claim should be dismissed. Id. at 656, 881 S.E.2d at 151. The fiancée appealed to the court of appeals, which unanimously affirmed the full commission's order. Id. The fiancée filed a petition for discretionary review, which was granted by the supreme court. Id.

In the majority opinion by Chief Justice Newby, the supreme court affirmed that the fiancée was precluded from filing a claim for the decedent's death benefits. Id. at 659, 881 S.E.2d at 153-54. Section 97-39 of the North Carolina General Statutes is part of a series of statutes under the Act that classifies individuals based on their legal level of dependency. Id. at 656, 881 S.E.2d at 152. The statutes provide a presumption of dependency for widows, widowers, and children for the recovery of a decedent's benefits. Id. However, "in all other cases questions of dependency . . . shall be determined in accordance with the facts as the facts may be at the time of the accident." Id. (quoting N.C. Gen. Stat. § 97-39 (2021)). Because this statutory language is unclear in its scope, the statutory construction must be guided by precedent Id. For this case, precedent established that "a person is a dependent under the Act when he or she is in a legally recognized relationship with the employee involving more than purely voluntary support." Id. at 658, 881 S.E.2d at 153. Here, because the fiancée was not in a legally recognizable relationship with the decedent, she could not be classified as a dependent eligible to file a claim for benefits under section 97-39 of the North Carolina General Statutes. Id. The majority concluded that straying from established precedent in accordance with the "changing times" would be "impermissible judicial legislation." Id. at 659, 881 S.E.2d at 153.

Justice Hudson, writing for the dissent, found that the majority's holding "undermin[ed] the legislature's careful construction of a systematic way of determining benefits and beneficiaries in cases of this kind." Id. at 659, 881 S.E.2d at 154. She explained that the Act provides differing benefits for those who are "wholly dependent (a widow, widower, or child . . .), and those who are not . . . ." Id. at 662, 881 S.E.2d at 155. Under section 97-38 of the North Carolina General Statutes, "[w]hole dependents are entitled to receive the entire compensation benefit payable" while "partial dependents receive less generous benefits." Id. Justice Hudson contended that

because the Act is structured in a tiered system, the legislature had already considered "prioritizing dependents according to the strength of the connection with the employee." Id. As a result, the dissent would have overruled the earlier case decided by the court of appeals and remanded the case to determine whether the fiancée qualifies as a partial dependent. Id. at 664, 881 S.E.2d at 156.

In McAuley v. North Carolina A&T University, 383 N.C. 343, 881 S.E.2d 141 (2022), the supreme court considered whether a deceased employee's prior timely filing of a workers' compensation claim for an injury was sufficient to establish the North Carolina Industrial Commission's jurisdiction over a dependent's subsequent claim for death benefits allegedly resulting from the same injury.

A decedent suffered a back injury while working for his employer. Id. at 344, 881 S.E.2d at 142. Less than two weeks after the accident, the decedent filed a Form 18, Notice of Accident to Employer and Claim of Employee. Id. at 344, 881 S.E.2d at 143. Shortly thereafter, the decedent passed away, leaving behind his dependent widow. Id. While investigating the decedent's claim, the employer paid the decedent's medical compensation. Id. Approximately three years after the decedent's death, the widow filed a Form 33, Request that Claim be Assigned for Hearing with the Industrial Commission. Id. at 344-45, 881 S.E.2d at 143. She contended that the decedent's prior workplace injury was the proximate cause of his death. Id. at 344, 881 S.E.2d at 143. The employer sought dismissal of the widow's claim on grounds that the death claim was time-barred. Id. at 345, 881 S.E.2d at 143. The deputy commissioner dismissed the widow's claims, finding that because the claim had not been filed within two years of the decedent's injury or last payment of medical compensation, the Industrial Commission lacked jurisdiction under section 97-24(a) of the North Carolina General Statutes. Id. The full commission affirmed the

ruling and stated that because death benefits and workers' compensation benefits are distinct, "any claims by [decedent] for workers' compensation benefits cannot serve as [plaintiff]'s 'filing a claim' for death and funeral benefits." Id. In a divided opinion, the court of appeals affirmed the full commission's ruling. Id. at 346, 881 S.E.2d at 144. The widow appealed to the supreme court. Id.

In the majority opinion by Justice Hudson, the supreme court reversed the court of appeals' ruling that the widow's claim lacked jurisdiction in the Industrial Commission. Section 97-24(a) of the North Carolina General Statutes provides a two-year time limitation as a condition precedent for the Industrial Commission's jurisdiction over an injured employee's claim. Id. at 347, 881 S.E.2d at 145. Specifically, the statute states:

> [t]he right to compensation under this Article shall be forever barred unless (i) a claim . . . is filed with the Commission or the employee is paid compensation as provided under this Article within two years after the accident or (ii) a claim . . . is filed within two years after the last payment of medical compensation when no other compensation has been paid and when the employer's liability has not otherwise been established under this Article.

Id. (quoting N.C. Gen. Stat. § 97-24(a) (2021)).

Separately, section 97-38 of the North Carolina General Statutes governs death benefits clams resulting from the death of an injured employee:

> If death results proximately from a compensable injury or occupational disease within six years thereafter, or within two years of the final determination of disability, whichever is later, the employer shall pay or cause to be paid, subject to the weekly payments of compensation equal to sixty-six and two-thirds percent . . . of the average weekly wages of the deceased employee at the time of the accident.

Id. at 348, 881 S.E.2d at 145 (quoting N.C. Gen. Stat. § 97-38 (2021)).

These statutes require a plaintiff seeking death benefits under section 97-38 to comply with the time requirement in section 97-24. Id. Here, it is undisputed that the decedent's initial workers' compensation claim was timely filed. Id. Due to the plain language of the statute, the relevant legislative history, and the principle of liberal construction, the majority held that "an injured employee's timely worker's compensation claim establishes the Industrial Commission's jurisdiction over that injury, including over a dependent's subsequent claim for death benefits allegedly resulting from that same injury." Id.

First, the plain language of section 97-24(a) does not distinguish a claim by an employee from a claim by a dependent. Id. at 349, 881 S.E.2d at 145. Nor does the plain language distinguish a workers' compensation claim made by an employee from a death benefits claim made by a dependent. Id. This suggests that an "injured employee's timely workers' compensation claim for an injury thus establishes the Industrial Commission's jurisdiction over a subsequent death benefits claim arising from the same injury." Id. at 349, 881 S.E.2d at 146.

Second, the legislative history of section 97-24(a) also supports this conclusion. Id. at 351, 881 S.E.2d at 147. If the legislature amends a statute to delete "specific words or phrases from a statute, it is presumed that the legislature intended that the deleted portion no longer be law." Id. (quoting Nello L. Teer Co. v. N.C. DOT, 175 N.C. App. 705, 710 (2006)). The original version of section 97-24(a) had separate filing requirements for a claim for injury and a claim for death. Id. The original statute stated "[t]he right to compensation under this act shall be forever barred unless a claim be filed with the Industrial Commission within one year after the accident, and if death results from the accident, unless a claim be filed with the Commission within one year thereafter." Id. (quoting The North Carolina Workmen's Compensation Act, ch. 120 § 24, 1929 N.C. Pub. [Sess.] Laws 117, 127 (emphasis added)). The removal of the emphasized language

indicates the legislature's intent was to no longer distinguish between the two claims. Id. at 352, 881 S.E.2d at 147.

Third, and finally, the majority contended that its holding is supported by the liberal construction principle of the Workers' Compensation Act ("the Act"). Id. It is well established that the Act should be liberally construed "to the end that the benefits thereof [shall] not be denied upon technical, narrow, and strict interpretation." Id. (quoting Cates v. Hunt Constr. Co., 267 N.C. 560, 563 (1966)). Thus, the majority concluded that the Industrial Commission and the court of appeals erred in interpreting section 97-24 as requiring a separate and distinct claim for death benefits to obtain jurisdiction to bring the claim. Id. at 352, 881 S.E.2d at 148.

Justice Barringer, writing in dissent, would have found that the Industrial Commission did not have jurisdiction over the widow's claim. Id. at 353, 881 S.E.2d at 148. She supported her conclusion in three ways. See id. at 354-55, 881 S.E.2d at 148-49. First, she contended that while death benefits are not expressly mentioned in section 97-24(a), the term "compensation" is defined under the Act to include funeral benefits. Id. at 354, 881 S.E.2d at 148 (citing N.C. Gen. Stat. § 97-2(11) (2021)). Second, section 97-24(a) discusses compensation broadly under the Act in providing that "[t]he right to compensation under this Article shall be forever barred." Id. at 354, 881 S.E.2d at 149. Because "this Article" is inclusive of section 97-38, the time limitation for filing a claim is governed by section 97-24. Id. Lastly, Justice Barringer argued that the majority's holding was contrary to precedent, which treats death benefits and workers' compensation claims as separate and distinct from one another. Id.

In Sturdivant v. N.C. Department of Public Safety, 288 N.C. .App. 470, 887 S.E.2d 85 (2023), the court of appeals considered how to interpret a subsection added to North Carolina's Workers' Compensation Act (the "Act") in 2011, codified in section 97-29(c) of the North Carolina

General Statutes, which allows benefits to extend beyond the 500-week cap for temporary total disabilities imposed by Section 97-29(b). Id. at 472, 887 S.E.2d at 87.

A corrections officer suffered a compensatory back injury while working at a previous job in 2006. Id. In 2011, the corrections officer experienced back pain while transporting an inmate and "immediately sought disability benefits under the Act for his back issues." Id. In 2013, the Full Industrial Commission ("Commission") approved a consent order between the corrections officer and the North Carolina Department of Public Safety ("NCDPS"), "whereby [NCDPS] accepted compensability and agreed to begin paying temporary, total disability benefits pursuant to Section 97-29(b)." Id. "In 2020, after receiving temporary, total disability benefits for over 425 weeks, [the corrections officer] filed a Form 33, seeking to qualify for 'extended benefits' pursuant to Section 97-29(c) beyond the maximum 500 weeks of benefits allowed under Section 97-29(b). Id. NCDPS "responded by filing a Form 33R, alleging that [the corrections officer] could not carry his burden to show he was entitled to extended benefits." Id.

After a hearing in May 2021, a deputy commissioner denied the corrections officer's request for an extension of benefits. Id. The corrections officer appealed, and the Commission affirmed the deputy commissioner's order, concluding that the corrections officer "failed to establish that he had suffered a total loss of wage-earning capacity." Id. The corrections officer appealed the order of the Commission to the court of appeals. Id. at 473, 887 S.E.2d at 87.

The court of appeals, in an opinion by Judge Dillon, affirmed the Commission's denial of the corrections officer's claim for extended benefits, concluding that the corrections officer "had the burden of showing 'total loss of wage-earning capacity,' and the Commission did not err in finding that [the corrections officer] failed to meet his burden of showing he qualifies for extended

benefits under Section 97-29(c)." Id. at 479, 887 S.E.2d at 91. The court explained the key terms used to define disability under the Act:

> [T]he term "disability" concerns "not the physical infirmity" suffered by the employee, but rather the employee's "diminished capacity to earn wages" resulting from the injury. Indeed, the term "disability" has long been defined under the WCA as the "incapacity because of injury to earn the wages which the employee was receiving at the time of the injury in the same or any other employment." A disability is "total" during a particular week where the employee has no wage-earning capacity that week. However, an employee is considered only "partially" disabled if he has the ability to earn some wage that week, though less than what he was earning. [. . .] A total disability is considered "temporary" if the disability is not caused by an injury described in Section 97-29(d), which provides that "[a]n injured employee may qualify for permanent total disability only if the employee has one of the [physical limitations enumerated in that subsection] resulting from the injury[.]"

Id. at 473, 887 S.E.2d at 87 (emphasis in original) (citations omitted).

Here, "the 2013 consent order, approved by the Commission, deemed [the corrections officer's] injury to be total." Id. Also, "neither party contend[ed] that [the corrections officer's] back injury constituted a "permanent" injury under the Act." Id. Accordingly, the court held that the corrections officer's back injury caused a temporary, total disability. Id. The court explained that "[a]n employee qualifies for extended temporary, total disability benefits, beyond the 500-week cap, if 'pursuant to the provision of [section] 97-84, . . . the employee shall prove by a preponderance of the evidence that the employee has sustained a total loss of wage-earning capacity.'" Id.

In the present case, the corrections officer appealed the denial of his application for extended benefits for his 2011 back injury and contended that the Commission had "misconstrued the meaning" of section 97-29(c). Id. The court of appeals agreed, stating that it was persuaded

by supreme court opinions that used the phrase "loss of wage-earning capacity" synonymously with "disability." Id. at 475, 887 S.E.2d at 88 (citing Wilkes v. City of Greenville, 369 N.C. 730, 745, 799 S.E.2d 838, 849 (2017)). Consequently, "total disability" under section 97-29(b) is synonymous with "total loss of wage-earning capacity" under section 97-29(c). Id. Moreover, the general assembly expressly defined "disability" in the Act as the "incapacity . . . to earn wages," so the plain language of the statute reasonably implied that "total disability" meant "total incapacity to earn wages," and the phrase "total incapacity to earn wages" conveyed "the same idea" as the phrase "total loss of wage-earning capacity." Id.

Also at issue was the burden of proof required for extended benefits under section 97-29(c). Id. The court acknowledged that "[a]n employee seeking temporary, total disability benefits has the burden to show his disability for each week for which he seeks benefits." Id. However, in 1971, the supreme court held that "an initial award by the Commission of weekly disability benefits (whether partial or total) creates a presumption in favor of the employee." Id. "This presumption, known as the Watkins presumption, states that the disability continues each week until 'the employee returns to work at wages equal to those he was receiving at the time his injury occurred.'" Id. (quoting Watkins v. Central Motor Lines, 279 N.C. 132, 137, 181 S.E.2d 588, 592 (1971)). This presumption is rebuttable, and the supreme court "has never determined whether the Watkins presumption, available for continued benefits under Section 97-29(b), applies beyond the 500-week cap." Id.

The court of appeals concluded that, according to the statutory language, "an employee who seeks extended benefits under Section 97-29(c) is not entitled to a presumption that he has suffered a total loss of wage-earning capacity merely because it was previously determined that he had suffered a disability under Section 97-29(b)." Id. The court observed that the statute "plainly

states that to qualify for extended benefits, the employee 'shall prove' that he 'has sustained a total loss of wage-earning capacity,'" and furthermore that the general assembly did not intend for "an injured employee to rely on a prior determination of total disability beyond the 500-week cap." Id. Thus, the corrections officer was correct in asserting that "the Commission erred by concluding that his burden to show a 'total loss of wage-earning capacity' under Section 97-29(c) for extended benefits is higher than was his burden to show 'total disability' to qualify for the initial 500 weeks of benefits." Id. at 476, 887 S.E.2d at 89.

Despite this error, the Commission elsewhere applied the correct standard and made sufficient findings of fact to support its decision. Id. Consequently, the court decided not to remand and instead reviewed the Commission's conclusions of law de novo. Id. The standard for "showing a disability" is established by precedent:

> In Russell, our Court held that an employee meets his burden of showing a disability, that is a loss of wage-earning capacity, in one of four ways: (1) by showing he is incapable of performing any work; (2) by showing that he is capable of work but that "after a reasonable effort on his part, been unsuccessful" in finding employment; (3) by showing that he is capable of work but that "it would be futile" to seek other employment "because of preexisting conditions; i.e., age, inexperience, lack of education"; (4) by showing he has obtained employment, but at a lower wage than he was earning before the accident.

Id. (quoting Russell v. Lowes, 108 N.C. App. 762, 765, 425 S.E.2d 454, 457 (1993)).

Here, the court found that "the Commission made findings as to the three ways [the corrections officer] could have proved a total loss of wage-earning capacity." Id. After weighing the evidence, the Commission found: (1) the corrections officer had "some transferable skills from his several decades of prior employment in various fields"; (2) "there were jobs in [the corrections officer's] home county that were compatible with his skill"; and (3) given the corrections officer's work history and education, he "would be able to obtain some employment, at a minimum, part-

time work in a sedentary position." Id. The Commission then determined that the corrections officer "had not met his burden, in part, based on its determination that [he] failed to show a loss of wage-earning capacity" under the Russell analysis. Id. These findings were supported by evidence in the record from the hearing before the Deputy Commissioner, including the testimonies of NCDPS's medical and vocational experts. Id. at 478, 887 S.E.2d at 90.

Chief Judge Stroud concurred in result only, and Judge Hampson concurred in part and dissented in part by separate opinion. Id. In his opinion, Judge Hampson explained that his dissenting view was limited to the determination that the corrections officer failed to meet his burden of presumption under the Russell analysis. Id. Judge Hampson contended that "the appropriate disposition is to vacate the Opinion and Award of the Full Commission and remand this matter to the Full Commission to allow the Commission—as the sole judge of the credibility of the evidence—to undertake any further proceedings it deems necessary and to make findings of fact and conclusions of law applying the correct standard based on the evidence before it." Id. at 480, 887 S.E.2d at 91-92.

For these reasons, the court of appeals affirmed the Commission's order denying the corrections officer's extended benefits. Id.

In Sprouse v. Mary B. Turner Trucking Company, LLC, 384 N.C. 635, 887 S.E.2d 699 (2023), the issue before the supreme court was whether the court of appeals erred when it made its own credibility determinations when it reversed and remanded the North Carolina Industrial Commission's ruling.

This case arises out of a tractor-trailer accident in which a husband and wife, both employees of the defendant trucking company, sustained injuries. Id. at 636, 887 S.E.2d at 702. Immediately after the accident, the wife provided notice to the trucking company and its insurance

carrier of the accident and of her husband's injuries; she did not, however, report any injury to herself. Id. After she began experiencing pain and underwent surgery, the wife filed a claim under the Workers' Compensation Act. Id. at 638, 887 S.E.2d at 703–04. The Deputy Industrial Commissioner filed an opinion and award in favor of the wife despite the fact that she had not immediately reported a workers' compensation injury after the accident. Id. at 639, 887 S.E.2d at 705. The trucking company and insurance carrier appealed. Id. The matter then came before the North Carolina Industrial Commission (the "Commission"), which found that the greater weight of the evidence indicated that the wife's injury was caused by the accident, thus finding in favor of the wife. Id. Once again, the trucking company and insurance carrier appealed. Id. at 642, 887 S.E.2d at 706.

A divided court of appeals reversed and remanded the Commission's opinion. Id. The majority made "its own credibility determinations, viewing the evidence in a light which was not most favorable to [the wife]," and found error on three grounds: (1) the Commission's conclusion that the wife's condition was causally related to the accident was unsupported by the findings of fact; (2) the wife failed to provide a reasonable excuse for failing to timely notify the trucking company of her injury and failed to demonstrate that the trucking company and insurance carrier were not prejudiced by this delay; and (3) undisputed facts showed that the wife was only disabled for approximately three and a half months. Id. at 643, 887 S.E.2d at 706–07. The wife appealed to the supreme court. Id. at 642, 887 S.E.2d at 706.

The Commission "is the fact-finding body under the Workers' Compensation Act." Id. (citing Brewer v. Powers Trucking Co., 256 N.C. 175, 182, 123 S.E.2d 608 (1962)). "As the finder of fact, the Commission 'is the sole judge of the credibility of the witnesses and the weight to be given their testimony.'" Id. (quoting Anderson v. Lincoln Constr. Co., 265 N.C. 431, 433–34, 144

S.E.2d 272, 274 (1965)). As a result, "appellate courts are limited when reviewing opinions and awards issued by the Commission to determinations of: (1) whether the Commission's findings of fact are supported by competent evidence, and (2) whether the Commission's conclusions of law are justified by its findings of fact." Id.

The supreme court concluded that the court of appeals majority deviated from this "well-established" standard. Id. at 643, 887 S.E.2d at 707. Specifically, by making its own credibility determinations, the court of appeals had "usurp[ed] the Commission's role as factfinder in this workers' compensation matter." Id. Furthermore, the court of appeals reached its outcome in part by relying on the wife's previous medical history; this was error, as "a claimant's medical history . . . is not dispositive of whether a particular injury . . . may be causally related to a workplace accident." Id. at 645, 887 S.E.2d at 708.

The supreme court, relying on the "routinely recognized and utilized" standards of appellate review, determined that "the Commission's findings of fact were supported by competent evidence and that these findings, in turn, justified [its] conclusions of law," noting that, "[a]s an appellate court, [its] duty goes no further." Id. at 643, 887 S.E.2d at 707.

Accordingly, the supreme court reversed and remanded the decision of the court of appeals with instruction to "fully reinstate the Commission's opinion and award." Id. at 652, 887 S.E.2d at 712.

VI. ATTORNEY DISCIPLINE

In In re Inhaber, ___ N.C. App. ___, 891 S.E.2d 608 (2023), the court of appeals considered whether the trial court could discipline an attorney where there was no evidence the attorney had notice of the charge or potential for sanctions.

An attorney licensed in North Carolina represented several clients with traffic infractions in district court. Id. at ___, 891 S.E.2d at 610. He asked an assistant district attorney ("ADA") to re-calendar several matters and withdraw the motions for arrest based upon his clients' failure to appear in those cases. Id. The ADA opposed this request because the attorney had been late to the administrative court sessions. Id. Two weeks later, the attorney and the same ADA had an argument regarding a continuance and another failure to show, during which the attorney "purportedly raised his voice and acted unprofessionally." Id. This argument caused a ten-minute delay of the court's proceedings. Id. That same day, another ADA requested that the attorney return to court for the afternoon session under the pretext that he would address the attorney's client's traffic citation. Id. Instead, the trial court held a disciplinary hearing at the end of the afternoon session regarding the attorney's conduct during the argument earlier that day and his conduct earlier that month. Id.

Three days after the hearing, the trial court entered an order suspending the attorney's license to practice law in that judicial district for one year. Id. The suspension order stated that the attorney was provided notice of a disciplinary hearing but did not indicate whether the notice specified the attorney's problematic conduct that would be considered for sanctions or the proposed sanctions. Id. The suspension order provided instructions on how the attorney could reinstate his ability to practice law in that judicial district. Id. The attorney filed a timely notice of appeal. Id. at ___, 891 S.E.2d at 611.

The court of appeals held that the trial court failed to provide appropriate notice for the hearing. Id. at ___, 891 S.E.2d at 612-13. The court of appeals acknowledged that "trial courts have the inherent power and duty to discipline attorneys, as officers of the court, for unprofessional conduct." Id. at ___, 891 S.E.2d at 611. (citing In re Hunoval, 294 N.C. 740, 744, 247 S.E.2d 230,

233 (1977)). However, this power and duty to discipline attorneys must be preceded by proper notice. Id. at ___, 891 S.E.2d at 612. "[W]here sanctions may be imposed, the parties must be notified in advance of the charges against them." Id. (citing Griffin v. Griffin, 348 N.C. 278, 280, 500 S.E.2d 437 439 (1998)). Notably, "[p]articipation in the hearing without prior notice of the charges and proposed sanctions, does not waive the notice requirements." Id. (citing Griffin, 348 N.C. at 280, 500 S.E.2d at 439).

Here, the court of appeals noted that the record was insufficient to determine whether there was sufficient notice. Id. There was no transcription made of the disciplinary hearing. Id. at ___, 891 S.E.2d at 611. The suspension order stated that the attorney was provided notice of the disciplinary hearing but did not indicate whether the notice identified the attorney's problematic conduct that would be considered for sanctions, nor did it provide notice of what the sanctions would be. Id. at ___, 891 S.E.2d at 612. The attorney asserted that he had no notice of the charges or the sanctions against him. Id. The attorney also proffered a "transcriptive narrative" made pursuant to Rule 9(c) of North Carolina Appellate Procedure that stated he was not provided notice of the hearing. Id.

Based on these reasons, the court of appeals held that notice was not proper and vacated the suspension order. Id.