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I. PRETRIAL PROCEDURE

A. Personal Jurisdiction

In Miller v. LG Chem, Ltd., ___ N.C. ___, 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 ___, 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.

B. Statute of Limitation

In McKinney v. Goins, ___ N.C. App. ___, ___ S.E.2d ___, 2023 WL 5925674, appeal docketed, No. 109PA22-2 (Oct. 2, 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 *1–2. 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. at *2 (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. (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. at *3.

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. at *3. 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. 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. at *4 (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 provides such protection above and beyond the Fourteenth Amendment." Id. at *6. Two judges found the revival window constitutional under the Law of the Land Clause. Then-Judge Riggs explained her reasoning. Judge Gore joined only in the result and did not author an opinion.

In the opinion written by Judge Riggs, she 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 *1.

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 *6 (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 *7. 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 *9 (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 *11. 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 *12 (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 *14. "Hinton thus resolves—with more direct applicability than Wilkes—whether the Revival Window is per se unconstitutional." Id.

The majority 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 *15 (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 *16 (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 *17. "[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. at *2, *17.

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. *18. 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, the majority 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. Accordingly, 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. *19.

The dissent stated that Wilkes "applies to all statutes of limitations, not merely those relating to real property," a position he found was supported by various appellate precedent. Id. at *20. The dissent 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 *21–22. 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. at *22.

Next, the dissent addressed vested rights. Id. at *24–25. "[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. at *24. 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. at *25. 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, the dissent concluded that overruling Wilkes would "undermine a hallmark of our justice system—stability in our jurisprudence." Id. Thus, Judge Carpenter would have affirmed the superior court. 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), the revival provision of the SAFE Child Act is unconstitutional. Id.

C. Rule 9(b)

In Value Health Solutions Inc v. Pharmaceutical Research Associates, Inc., ___ N.C. ___, ___ S.E.2d ___, 2023 WL 5658848 (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 *1. 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 *2. 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 *5. 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. at *8.

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 *8 (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. 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 19.

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. at *20. 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 does apply; 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. (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 *21. In order to allege a negligent misrepresentation claim, the plaintiff must allege that a duty of care existed. Id. 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.

D. 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 thus 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.

E. Dismissals

In Cowperthwait v. Salem Baptist Church, Inc., ___ N.C. App. ___, ___ S.E.2d ___, 2023 WL 5688789, appeal docketed, No. 263A23 (Oct. 9, 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 in a majority opinion written by Judge Murphy 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 majority 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 majority 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 majority 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 the 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 number 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.

F. Business Court Rule 10.9

In Value Health Solutions Inc v. Pharmaceutical Research Associates, Inc., ___ N.C. ___, ___ S.E.2d ___, 2023 WL 5658848 (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 *1. 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 *2. 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 *5. 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 *18. After hearing arguments, the business court denied the software company's Rule 10.9 discovery request. Id. at *5. 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. at *5-*6. 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 *17. 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 *18 (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. at *19 (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. at *18. 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. at *19. 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.

G. Rule 41

In Gantt v. City of Hickory, ___ N.C. App. ___, ___ S.E.2d ___, 2023 WL 5688398 (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 *1. 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. at *1–2. The TX

company then refiled the complaint a few months later asserting the same claims (the "second complaint"). Id. at *1.

As litigation progressed, it became apparent that the TX company was not involved in the injury alleged. Id. at *2. 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. at *1–2. The local company filed a petition for rehearing. Id. at *1. 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. at *1.

The local company argued that the first opinion conflicted with precedent as to "established principles regarding the doctrine of relation back." Id. at *2. 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 *3.

The local company also contended that notice "is the determinative inquiry" when analyzing the relation back doctrine under Rule 41. Id. at *2. The court of appeals concluded that the local company conflated Rule 41 with Rules 15 and 17. Id. at *3. Although notice is relevant under Rules 15 and 17, notice is not relevant to Rule 41. Id. at *2, *5.

Next, the court of appeals determined whether the local company was entitled to relation back under Rule 41. Id. at *3. "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. at *3 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 Original Complaint 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 TX company 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 *3.

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. at *5 (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 *3.

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. at *5. 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] Amended [second] Complaint 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 *6.

H. Rule 52

In Reints v. WB Towing Inc., 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 an 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 *1. 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. 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 *2–3.

The court of appeals first considered whether it had jurisdiction over the dismissal order due to the timing of the appeal. Id. at *3. 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 *5. Accordingly, the trial court had not abused its discretion. Id.

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

I. Standing

In Edwards v. Town of Louisburg, ___ N.C. App. ___, ___ S.E.2d ___, 2023 WL 5208776 (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.

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. at *2. 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 *3 (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 *4. 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 *3.

Judge Tyson dissented; though he also found a lack of standing, he would have analyzed the question differently. See id. at *4–9. 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 *5. 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 *7. 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 *8. 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 *8–9. Judge Tyson's position was that the supreme court had established that standing is a "prerequisite to a court's proper exercise of subject matter jurisdiction, and is not a merits adjudication." Id. at *9 (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. at *4.

J. Sovereign Immunity

In Howell v. Cooper, ___ N.C. App. ___, ___ S.E.2d ___, 2023 WL 5688779, appeal docketed and pet. for disc. rev. filed, (Sept. 28, 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 *1. 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). 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. 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. at *2. The trial court denied the motion as to some of the barkeepers' causes of action. Id. at *1. 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 *3 (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. (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 *4. 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 *7.

Accordingly, the majority affirmed the trial court. Id. at *7. (The dissent, written by Judge Arrowood, did not address sovereign immunity.)

II. TRIAL

A. Jurors

In State v. Wiley, ___ N.C. App. ___, ___ S.E.2d ___, 2023 WL 5208998 (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 *1. 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 *2. 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. at 2. 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 *3.

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.

B. Evidence

(1) 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." 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. 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).

Id. at ___, 890 S.E.2d at 734.

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.

(2) Attorney-Client Privilege

In Howard v. IOMAXIS, LLC, ___ N.C. ___, 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 ___, 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 ___, 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 ___, 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 ___, 887 S.E.2d at 855–56. The corporation appealed to the supreme court. Id. at ___, 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 ___, 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 ___, 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 ___, 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 ___, 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 ___, 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.

(3) Opening-the-Door Doctrine

In State v. McKoy, ___ N.C. ___, ___ S.E.2d___, 2023 WL 5656040 (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 *1. 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 *2. The phone contained photographs of the victim holding guns and text messages about "fight[ing] other people." Id. at *3 (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. at *2. 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. at *3. 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 *4. 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 *5.

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] might 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 *6.

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 *7.

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. *9. Thus, the supreme court unanimously affirmed the court of appeals. Id.

C. Damages

In Southland National Insurance Corporation v. Lindberg, ___ N.C. App. ___, 889 S.E.2d 512, pet. for disc. rev. filed, No. 173P23 (July 25, 2023), the court of appeals decided whether monetary damages for fraud are recoverable where a plaintiff elects 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.

The buyer did not close within 60 days of the entry of the consent order, as the consent order provided. Id. Both sides filed claims against the other, and a different superior court judge entered an order to enforce the consent order. Id. Because the judge construed the consent order as a standard real-estate contract, the judge found the order allowed the buyers to close in a reasonable time rather than requiring them to close in 60 days. Id. at ___, 888 S.E.2d at 689.

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 is 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, "a court 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 approve[d] 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. Appellate Procedure

In Cryan v. National Council of YMCAs of the United States, ___ N.C. ___, 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 ___, 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. 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 ___, 867 S.E.2d at 352. 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 ___, 887 S.E.2d at 851.

On appeal, the supreme court affirmed the decision of the court of appeals. Id. at ___, 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. at ___, 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 ___, 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.

III. ATTORNEY DISCIPLINE

In In re Inhaber, ___ N.C. App. ___, ___ S.E.2d ___, 2023 WL 5208775 (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 *1. 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. at *2. 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.

The court of appeals held that the trial court failed to provide appropriate notice for the hearing. Id. at *3. 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. (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 *3. "[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. at *4. There was no transcription made of the disciplinary hearing. Id. at *2. 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 *4. 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.