CIVIL LAW UPDATE
(OCTOBER 2020 TO JUNE 1, 2021)

2021 North Carolina Superior Court
Judges Summer Conference

Leslie C. Packer
Ellis & Winters LLP
4131 Parklake Ave., Suite 400
Raleigh, NC 27612
(919) 865-7009
leslie.packer@elliswinters.com

Dixie T. Wells
Ellis & Winters LLP
300 N. Greene St., Suite 800
Greensboro, NC 27401
(336) 217-4197
dixie.wells@elliswinters.com

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I. LIABILITY

A. Negligence

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

A general contractor was building a house and hired a subcontractor to build a retaining wall on the property. Id. at ___, 2021-NCCOA-62, ¶ 2. During construction, the wall collapsed on two occasions because of failure of the water drainage system and a compromised foundation from significant rains. Id. at ___, 2021-NCCOA-62, ¶ 2. The subcontractor entered into a contract with a second subcontractor to repair and replace the wall. Id. at ___, 2021-NCCOA-62, ¶ 2. While the second subcontractor was reconstructing the wall, the general contractor ordered the second subcontractor to stop working on the project because of the second subcontractor's substandard quality of work. Id. at ___, 2021-NCCOA-62, ¶ 3. The general contractor then directly contracted with a third subcontractor to perform repairs and rebuild the wall at a cost of $106,000.00. Id. at ___, 2021-NCCOA-62, ¶ 3. Both the general contractor and the subcontractor refused to pay the second subcontractor for its work. Id. at ___, 2021-NCCOA-62, ¶ 3.

The second subcontractor filed separate lawsuits against the general contractor and the subcontractor. Id. at ___, 2021-NCCOA-62, ¶ 4. The general contractor counterclaimed for damages as a result of the second subcontractor's alleged negligence. Id. at ___, 2021-NCCOA-62, ¶ 6. After learning that the original subcontractor had paid money to the general contractor for damages related to the retaining wall, the second subcontractor moved for summary judgment, contending that the general contractor was not allowed to recover money damages from the second

subcontractor that had already been paid by a third party. Id. at ___, 2021-NCCOA-62, ¶ 7-8. Based on the general contractor's argument that the collateral source rule should exclude evidence of the original subcontractor's payments, the trial court denied the second subcontractor's motion for summary judgment. Id. at ___, 2021-NCCOA-62, ¶ 8. The second subcontractor was ultimately found liable for damages in the amount of approximately $41,600.00 because of its negligence in reconstructing the retaining wall. Id. at ___, 2021-NCCOA-62, ¶ 1. The jury awarded $5,000.00 to the second subcontractor in quantum meruit for its supplies and efforts to remediate the site. Id. at ___, 2021-NCCOA-62, ¶ 11.

On appeal, the court of appeals considered whether the trial court erred in treating the payments by the original subcontractor as a "collateral source". Id. at ___, 2021-NCCOA-62, ¶ 14. The court observed that the collateral source rule is "an exception to the general common-law principle that there should be only one recovery for one injury." Id. at ___, 2021-NCCOA-62, ¶ 17. Specifically, the collateral source rule provides that a "tort-feasor should not be permitted to reduce [its] own liability for damages by the amount of compensation the injured party receives from an independent source." Id. at ___, 2021-NCCOA-62, ¶ 15 (citing Katy v. Capriola, 226 N.C. App. 470, 482, 742 S.E.2d 247, 256 (2013)).

In applying the collateral source rule, the court of appeals said that the "defining characteristic of a collateral source is its independence from the tortfeasor." Id. at ___, 2021-NCCOA-62, ¶ 16 (citing Hairston v. Harward, 371 N.C. 647, 656, 821 S.E.2d 384, 391 (2018)). The court considered that (i) the subcontractor had little involvement with reconstructing the wall beyond its contract with the second subcontractor and (ii) that the general contractor's counterclaim against the second subcontractor was based on negligence rather than breach of contract. Id. at ___, 2021-NCCOA-62, ¶ 20-21. Ultimately, the court concluded that the

subcontractor's payments to the general contractor were "entirely independent of [the second subcontractor's] negligence", the subcontractor's payments did not relieve the second subcontractor from liability to the general contractor for damage caused at the site, and the subcontractor had no obligation beyond his own contractual obligations to the general contractor to remedy any damages. Id. at ___, 2021-NCCOA-62, ¶ 22. The court dismissed concerns that the general contractor would recover twice for the same injury by referencing precedent in prior decisions that have established that the injured party – here, the general contractor – should reap any such windfall rather than the tortfeasor. Id. at ___, 2021-NCCOA-62, ¶ 26 (citing Wilson v. Burch Farms, Inc., 176 N.C. App. 629, 639, 627 S.E.2d 249, 257 (2006)).

(1) Medical Malpractice

In Estate of Savino v. Charlotte-Mecklenburg Hospital Authority, ___ N.C. ___, 847 S.E.2d 677 (2020), the supreme court considered whether the 2011 amendment to section 90-21.11 of the North Carolina General Statutes requires a claim for administrative negligence to be pleaded separately from a claim for medical negligence.

Decedent began experiencing chest pains in his home and called emergency medical services ("EMS"). Id. at ___, 847 S.E.2d at 679. EMS gave decedent medication, prepared a summary of his pain and the treatment provided to him, and transported him to the hospital. Id. EMS did not provide this paperwork to the attending physicians at the hospital. Id. at ___, 847 S.E.2d at 680. The hospital did not learn about the decedent's chest pains. Id. The hospital discharged him later that day. He died at home the same evening. Id.

The decedent's estate filed a complaint against the hospital, alleging that the interaction between EMS and the hospital constituted medical negligence. Id. During pre-trial motions, the estate argued that its medical negligence claim was based on theories of both medical negligence

and administrative negligence. Id. The hospital argued that the 2011 amendment to section 90-21.11 of the North Carolina General Statutes required the estate to plead a claim for administrative negligence separately from its claim for medical negligence. Id.

At the close of the evidence, the hospital moved for a directed verdict, arguing in relevant part that the estate had not pleaded a separate claim for administrative negligence, as required by section 90-21.11. Id. The trial court denied the motion. Id. The verdict form asked the jury to return a verdict on theories of both medical negligence and administrative negligence. Id. The jury found the decedent's death was the result of both types of negligence. Id.

The hospital appealed the verdict to the court of appeals, which held that the estate had not sufficiently pleaded administrative negligence. Id. at ___, 847 S.E.2d at 681. Despite holding that administrative negligence had to be pleaded separately, the court of appeals determined that no new trial was required on this issue because the jury had found that the hospital was also liable under a theory of medical negligence. Id.

The supreme court modified and affirmed in relevant part the decision of the court of appeals. The supreme court in an opinion written by Justice Hudson held that the 2011 amendment to section 90-21.11 does not require a claim for administrative negligence to be pleaded separately. Id. at ___, 847 S.E.2d at 681, 683.

The supreme court observed that administrative negligence claims had been treated as ordinary negligence claims before the 2011 amendment to section 90-21.11. Id. at ___, 847 S.E.2d at 683. In amending the statute, the legislature intended to reclassify administrative negligence claims against a hospital as medical malpractice actions as opposed to ordinary negligence claims. Id. at ___, 847 S.E.2d at 683-84. However, the amendment did not create a new cause of action for administrative negligence or require that it be pleaded separately from medical negligence. Id.

at ___, 847 S.E.2d at 683. Thus, the supreme court modified the decision of the court of appeals holding that the estate had pleaded administrative negligence sufficiently as a theory of medical negligence. Id.

Justice Newby dissented from the majority opinion. Id. at ___, 847 S.E.2d at 691 (Newby, J., dissenting). He reads the 2011 amendment to section 90-21.11 to require administrative negligence as a separate claim from medical negligence. Id. As a result, Justice Newby would have held that the estate had failed to properly plead administrative negligence. Id.

(2) Negligent Hiring

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

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

these aides would return to their home. Id. However, the aide was still assigned to the couple's home. Id.

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

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

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

an employee; and (2) the employer has the ability, necessity, and opportunity to control the employee's actions. Id. (citing Restatement (Second) of Torts § 317 (1965)).

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

Even assuming arguendo that the ordinary negligence claim was properly pleaded, the court held that the couple had failed to establish the requisite element of proximate causation Id. at ___, 853 S.E.2d at 56. The court held that to establish a claim for ordinary negligence, the couple needed to establish that the home-care service could foresee the aide would conspire with dangerous individuals to perpetrate a home invasion robbery against the couple. Id. The court held that based on the knowledge about the aide before the robbery—her polite demeanor, her previous misdemeanor convictions, her overdue child support payments, and that she was among the suspects who may have stolen money from the couple—a reasonably prudent person would

not have foreseen that the aide would perpetrate an armed robbery against the couple. Id. Thus, the court held that even if the ordinary negligence claim had been properly pleaded, the couple failed to establish the requisite element of proximate cause. Accordingly, the trial court should have granted the home-care service's motion for JNOV as to the claim for ordinary negligence. Id.

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

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

at ___, 853 S.E.2d at 60. Thus, the dissent would have upheld the trial court's denial of the home-care service's motion for JNOV.

(3) Loss of Chance

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

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

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

The woman sued the emergency room physician for negligence. Id. at 322, 852 S.E.2d at 323. She asserted that his failure to timely diagnose the stroke caused her permanent injuries and medical expenses. Id. She also asserted a "loss-of-chance" claim, which alleged that the doctor's failure to timely treat her with tPA caused her to lose an increased opportunity for an improved neurological outcome. Id.

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

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

On appeal, the supreme court affirmed. Writing for the court, Chief Justice Newby first noted that the woman's 40% likelihood of an improved outcome failed to meet the "more likely than not" standard for proximate cause in traditional medical malpractice. Id. at 324, 852 S.E.2d

at 324. The court then directly confronted "whether losing the chance for an increased opportunity for an improved outcome is a cognizable and compensable claim in North Carolina." Id. at 324, 852 S.E.2d at 325. It squarely held that the loss of chance itself "is not" a cognizable claim, because to hold otherwise "would award for the possibility that a defendant's negligence contributed to" an injury. Id. at 325, 852 S.E.2d at 325 (emphasis added). Recognizing the possibility of injury as an injury "would require a departure from our common law on proximate causation and damages," which the supreme court declined to do. Id. Instead, "[s]uch a policy judgment is better suited for the legislative branch of government." Id. at 326, 852 S.E.2d at 325-26 (footnote omitted).

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

In addition, the dissent noted that the supreme court historically surveys or investigates other jurisdictions when confronting an issue of first impression under North Carolina common law, as it did here. Id. at 334, 852 S.E.2d at 331. Justice Earls explained that at least twenty-five jurisdictions have adopted the "'loss of chance' doctrine," id. at 325, 852 S.E.2d at 325, but here,

the majority departed from that historical practice and failed to investigate other jurisdictions, id. at 335, 852 S.E.2d at 332. The result is "a rule that immunizes physicians from liability for their negligent conduct any time they fail to administer a treatment that cannot be proven to be effective 50% of the time or more." Id.

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

(4) Duty

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

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

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

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

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

Second, the court held that the girl did have the choice contemplated in the Baseball Rule. "The 'choice' embodied in the Rule is the choice on the part of the spectator to attend a baseball game in an unprotected seat when the ballpark operator has satisfied its duty to protect patrons by offering a reasonable number of protected seats." Id. (quoting Erickson v. Lexington Baseball Club, 233 N.C. 627, 628, 65 S.E.2d 140, 140 (1951)). Thus, a baseball stadium operator must provide a reasonable number of screened seats to attendees generally, but their unavailability to particular individuals does not preclude the Baseball Rule's application.

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

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

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

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

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

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

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

On appeal, the court of appeals reversed. The court discussed "the legal underpinning of the negligence claims . . . and the common law licensure defense." Id. at ___, 853 S.E.2d at 503. First, it noted that the negligence claims against the architect and structural engineer were based on breaches of "ordinary legal duties arising out of the need for architects and engineers to use due care in the exercise of their skills and abilities to avoid foreseeable harm to others." Id. An architect or engineer owes duties "to those who must reasonably rely upon his professional performance." Id. (quoting Shoffner Indus., Inc. v. W. B. Lloyd Constr. Co., 42 N.C. App. 259,

271-72, 257 S.E.2d 50, 59 (1979)). These "negligence claims are entirely separate from any rights or responsibilities that exist between the property owner and the builder under the construction contract." Id. Next, the court explained that the licensure defense was a common law doctrine created by the supreme court in recognition of statutory requirements, enacted "to 'protect the public from incompetent builders,'" mandating that "a general contractor . . . obtain a general contracting license before bidding on or working on a construction project costing $30,000 or more." Id. (quoting Bryan Builders Supply v. Midyette, 274 N.C. 264, 270, 162 S.E.2d 507, 511 (1968) and citing N.C. Gen. Stat. § 87-1). The licensure defense holds that "a contractor who fails to secure the necessary license cannot recover from the property owner for breach of contract." Id. (citing Midyette, 274 N.C. at 270, 162 S.E.2d at 511).

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

Next, the court of appeals observed that its holding was consistent with previous cases that had "examin[ed] the licensure defense outside the context of the contract between the owner and

the general contractor." Id. The court cited two cases that had not applied the licensure defense to a subcontractor or to negligence claims. Id. (citing Vogel v. Reed Supply Co., 277 N.C. 119, 133-34, 177 S.E.2d 273, 282 (1970) and RCDI Constr., Inc. v. Spaceplan/Architecture, Planning & Interiors, P.A., 148 F. Supp. 2d 607, 612–17, 620–22 (W.D.N.C. 2001), aff'd 29 F. App'x 120 (4th Cir. 2002)).

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

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

(5) Negligent Infliction of Emotional Distress

In Newman v. Stepp, 376 N.C. 300, 852 S.E.2d 104 (2020), the supreme court considered whether the parents of a two-year-old child who was killed at an unlicensed childcare facility had properly pleaded the foreseeability element of their claim for negligent infliction of emotional distress ("NIED").

A man left a loaded shotgun in the kitchen of his home, which operated as an unlicensed childcare facility. Id. at 301, 852 S.E.2d at 106. Parents left their two-year-old girl at the facility, and the girl was accidentally shot by one of the other children. Id. The girl was transported to the hospital by ambulance. Id. at 302, 852 S.E.2d at 106 The girl's father heard about a shooting of an unnamed female child in critical condition over the radio, and when he heard the childcare facility's address as the location of the shooting, he attempted to drive there. Id. He also called

his wife. Id. He saw the ambulance and followed it to the hospital. Id. He learned his daughter was still alive in the ambulance, and upon arrival, saw her being removed from the vehicle and taken into the hospital. Id. The girl's mother arrived shortly thereafter but was told that her daughter had died. Id.

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

The supreme court affirmed the court of appeals' reversal of the trial court's entry of judgment on the pleadings for the childcare providers and held that the parents had sufficiently alleged the foreseeability of their severe emotional distress. Because the only issue presented was the sufficiency of the allegations regarding the element of foreseeability, the court discussed the law of NIED foreseeability. Id. at 305-06, 852 S.E.2d at 108-09. North Carolina courts analyzing foreseeability in NIED cases consider the Johnson factors, which "include the plaintiff's proximity to the negligent act, the relationship between the plaintiff and the other person for whose welfare the plaintiff is concerned, and whether the plaintiff personally observed the negligent act." Id. at 306, 852 S.E.2d at 109 (quoting Johnson v. Ruark Obstetrics & Gynecology Assocs., P.A., 327 N.C. 283, 305, 395 S.E.2d 85, 98 (1990)). Yet, the supreme court emphasized that those factors are "not mechanistic requirements" and their presence or absence "is not determinative in all

cases." Id. (quoting Sorrells v. M.Y.B. Hosp. Ventures of Asheville, 334 N.C. 669, 672-73, 435 S.E.2d 320, 322 (1993)).

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

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

Id. at 312, 852 S.E.2d at 112. Thus, because the childcare providers knew of the parents, knew of the enormity of loss they would suffer in such a situation, and knew the identity of the girl, the supreme court held that the parents satisfied the requirements for pleading the foreseeability of their severe emotional distress. In concluding, the court stressed that in the context of NIED, "foreseeability must be determined under all of the facts presented and should be resolved on a case-by-case basis instead of mechanistic requirement associated with the presence or absence of the Johnson factors." Id. at 313, 852 S.E.2d at 113.

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

Justice Newby dissented. In the dissent's view, the majority failed to properly apply the foreseeability factors outlined in Johnson because the parents were neither present during the

negligent act nor did they observe the injury. Id. at 314, 852 S.E.2d at 113 (Newby, J., dissenting). The dissent discussed the factual similarities between the case before the court and Gardner v. Gardner, 334 N.C. 662, 435 S.E.2d 324 (1993). In that case, a father drove a vehicle into a bridge abutment and ultimately caused the death of his thirteen-year-old child. See Newman, 376 N.C. at 314, 852 S.E.2d at 113 (Newby, J., dissenting). The mother learned of the accident over the phone, went to hospital, and saw her son being taken into the emergency room. See id. The Gardner court "found persuasive that the wife was not in close proximity to her husband's negligent act, nor did she observe the resulting wreck," and ultimately held the mother's severe emotional distress was not foreseeable to the father. Id. at 315, 852 S.E.2d at 114. The dissent's view is that Gardner is controlling and therefore would have held that the parents in this case failed to allege the necessary foreseeability. Id.

The dissent also questioned the distinction drawn by the majority between this case and Gardner regarding whether the negligent act is "egregious." Id. at 317, 852 S.E.2d at 115. Justice Newby characterizes this as a "new factor" in the NIED foreseeability analysis. Id. at 319, 852 S.E.2d at 116. Because, under his view, the proper remedy for the instant facts is a wrongful death action and the Johnson foreseeability factors were well-established, he would reverse the court of appeals and affirm the trial court's award of judgment on the pleadings. Id.

B. Economic Loss Rule

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

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

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

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

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

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

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

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

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

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

II. PRETRIAL PROCEDURE

A. Personal Jurisdiction

In Parker v. Pfeffer, ___ N.C. App. ___, 850 S.E.2d 615 (2020), the court of appeals considered whether the defendant engaged in "substantial activity" in North Carolina sufficient under section 1-75.4(1)(d) of the North Carolina General Statutes to confer personal jurisdiction based on the defendant's vacations to, and communications with, someone located in North Carolina.

A North Carolina resident and a Texas resident were involved in a two-car accident in Austin, Texas. Id. at ___, 850 S.E.2d at 616. The Texas resident's contacts with North Carolina

were limited to a few visits that were unrelated to the car accident and communications with the North Carolina resident about the car accident. Id. at ___, 850 S.E.2d at 617. Specifically, the Texas resident had (a) visited North Carolina six times before the car accident; (b) planned one future visit to North Carolina to attend a wedding; (c) participated in a text message conversation with the North Carolina resident about the car accident, which the North Carolina resident initiated and within which the Texas resident exchanged twelve text messages over a two-month period; and (d) participated in one telephone call about the car accident with the North Carolina resident while the North Carolina resident was physically located in North Carolina. Id.

The North Carolina resident sued the Texas resident for negligence in relation to the car accident in Wake County District Court. Id. at ___, 850 S.E.2d at 616. The Texas resident moved to dismiss for, among other things, lack of personal jurisdiction under Rule 12(b)(2). Id. The trial court made findings of fact as to the Texas resident's communications and visits to North Carolina listed above. Based on its factual findings, the trial court concluded that the North Carolina resident had not established that North Carolina could exercise personal jurisdiction over the Texas resident. Id. at ___, 850 S.E.2d at 617-18. The trial court therefore granted the motion to dismiss for lack of personal jurisdiction. Id. at ___, 850 S.E.2d at 618.

The court of appeals affirmed dismissal. The North Carolina resident argued that North Carolina courts had personal jurisdiction because the Texas resident's communications into and visits to the state constituted "substantial activity within [North Carolina]." Id. at ___, 850 S.E.2d at 619 (quoting N.C. Gen. Stat. § 1-75.4(1)(d)). The court of appeals rejected that argument. Id. The court held that "mere correspondence" consisting of twelve text messages and one phone call do not satisfy the "substantial activity" requirement of North Carolina's long-arm statute. Id. at ___, 850 S.E.2d at 620. The court also held that the Texas resident's vacations to North Carolina,

which were unrelated to the car accident, did not constitute "substantial activity" necessary to confer personal jurisdiction upon North Carolina courts pursuant to section 1-75.4(1)(d). Id. Since no statutory basis for personal jurisdiction existed, the court of appeals did not analyze whether exercising jurisdiction satisfied constitutional requirements under these circumstances. Id.

For these reasons, the court of appeals affirmed the trial court's dismissal for lack of personal jurisdiction.

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

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

On appeal, Judge Berger, writing for the majority of the court of appeals panel, affirmed the trial court's order granting the motion to dismiss for lack of personal jurisdiction. Id. at ___, 853 S.E.2d at 21. The court observed that, when reviewing whether a North Carolina court has

personal jurisdiction, the court will employ a two-step analysis: First, section 1-75.4 of the North Carolina General Statutes—the state's long-arm statute—must authorize jurisdiction. Id. at ___, 853 S.E.2d at 23. Second, the exercise of jurisdiction must not violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution. Id. The court stated that a North Carolina court has personal jurisdiction in any action which relates to goods, documents of title, or other things of value shipped from North Carolina by the plaintiff to the defendant "on his order or direction." Id. (quoting N.C. Gen. Stat. § 1-75.4(5)(d) (2019)).

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

Judge Arrowood dissented on this issue of personal jurisdiction. Id. at ___, 853 S.E.2d at 25 (Arrowood, J., dissenting). The dissent stated that the majority was misinterpreting the long-arm statute and failed to adhere to the court's long-standing liberal construction of the long-arm statute. Id. at ___, 853 S.E.2d at 26. The dissent stated that "[b]y narrowly interpreting the long-

arm statute, the majority opinion effectively creates a loophole to allow individuals and corporations to shield themselves from the exercise of personal jurisdiction in North Carolina by conducting business through an intermediary." Id. The dissent then determined that a single contract could suffice to meet the requirements of the Due Process Clause's minimum-contacts test. Id. at ___, 853 S.E.2d at 27. The dissent would have held that although there was no written contract between the retailer and the manufacturer, the nature of the business transaction and the ongoing business relationship between the two companies that resulted in the debt constituted a "substantial connection" with North Carolina, as required by the Due Process Clause. Id.

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

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

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

these communications were "significant." Id. at ___, 853 S.E.2d at 308. Based on these communications, the trial court held that personal jurisdiction existed because the paramour had "availed himself to the laws of the State of North Carolina by actively communicating electronically with [the wife] on or before the date she and [her husband] separated[.]" Id. Thus, the court denied the motion to dismiss. Id.

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

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

The dissent also observed that in a previous supreme court decision, personal jurisdiction existed over a defendant whose only contacts with North Carolina were telephone calls and emails to the plaintiff's wife. Id. at ___, 853 S.E.2d at 312 (citing Brown v. Ellis, 363 N.C. 360, 678 S.E.2d 222 (2009)). The dissent stated that, here, the evidence showed an even greater connection between the paramour and North Carolina than in Brown: The wife was undisputedly in North Carolina when she received the text messages, unlike the wife in Brown. Id. at ___, 853 S.E.2d at 313. Moreover, the paramour had purchased and was paying the bill for a cell phone with a North Carolina zip code for the wife. Id.

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

B. Failure to State a Claim

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

The complaint alleged that in 2012 medical providers ordered a test for the patient that helps determine the likelihood of prostate cancer. Id. at ___, 853 S.E.2d at 259. The test results

were abnormally high, but the providers did not provide follow-up care or a referral. Id. The patient received another test in 2018, and the results were even higher. Id. Later, the patient was diagnosed with metastatic prostate cancer. Id.

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

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

On appeal, in an opinion written by Judge Murphy, the court of appeals reversed the trial court's order. The court observed that memoranda of law and arguments of counsel are not generally considered matters outside the pleadings for the purpose of converting a Rule 12 motion into a Rule 56 motion. Id. at ___, 853 S.E.2d at 261-62. Nonetheless, the court of appeals explained, a court's consideration of such memoranda and arguments "can" result in conversion

when the materials contain factual matters that are outside the pleadings. Id. The trial court in this case did not indicate that it excluded from consideration facts beyond those in the pleadings. Id. To the contrary, the order indicated that the trial court did indeed consider the memoranda and arguments that contained facts outside the pleadings. Id. Moreover, this occurred despite the trial court being made aware that the patient had repeatedly presented new facts. Id.

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

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

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

C. Rule 3

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

Plaintiff Lunsford voluntarily dismissed his original action in trial court on September 26, 2018. Id. at ___, 2021-NCCOA-96, ¶ 2. Almost one year later, on September 24, 2019, he requested, and received, a 20-day order extending his time to refile a complaint. Id. However, Lunsford failed to have a summons issued and did not refile his complaint until October 9, 2019, outside the one-year window permitted under Rule 41(a)(1) of the North Carolina Rules of Civil Procedure. Id. The trial court dismissed the action. Id. at ___, 2021-NCCOA-96, ¶ 1.

On appeal, the court of appeals affirmed the trial court's dismissal. Under Rule 3(a) of the Rules of Civil Procedure, a civil action may be commenced either by filing a complaint with the court or by the issuance of a summons and a trial court's grant of a 20-day extension to file the complaint. Id. at ___, 2021-NCCOA-96, ¶ 4. Because no summons was issued within 20 days of the request to the trial court, the action was not commenced under the second method. Id. at ___, 2021-NCCOA-96, ¶ 5. Rather, by filing a complaint on October 9, 2019, the action commenced on that day, which was outside of the one-year period granted by Rule 41(a)(1). Id.

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

D. Statute of Limitations

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

This case involved three individuals with membership interests in three different limited liability companies. Id. at ___, 2021-NCSC-7, ¶ 2. The three companies were formed for the purpose of developing commercial real estate in Wilmington, North Carolina. Id. at ___, 2021-NCSC-7, ¶ 2. Two members of the LLCs took actions over a period of several years that transferred control of the LLCs to the two members and diluted the membership interests of the third member, Chisum, to the point that they were extinguished. Id. at ___, 2021-NCSC-7, ¶ 6. Some time after the members' actions, Chisum visited a storage facility owned by one of the LLCs to access a complimentary owner's unit and was told by the facility's property manager that the LLC had sold the facility to a third-party buyer. Id. at ___, 2021-NCSC-7, ¶ 13. After receiving this information, Chisum searched the property records and discovered a recently recorded deed transferring ownership of the storage facility from the LLC to a new owner for a payment of $5.75 million. Id. at ___, 2021-NCSC-7, ¶ 13.

Shortly after discovering the existence of the recorded deed, Chisum filed suit alleging breach of contract, among other claims. Id. at ___, 2021-NCSC-7, ¶ 14. After a jury trial, the business court entered a final judgment that required the members to pay compensatory and punitive damages to Chisum. All parties ultimately appealed to the supreme court. Id. at ___, 2021-NCSC-7, ¶ 30.

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

The members contended that any potential breach of the operating agreements occurred outside of the three-year limitations period applicable to breach of contract-based declaratory judgment actions. Id. at ___, 2021-NCSC-7, ¶ 32. Essentially, the members argued that "the

applicable statute of limitations began running at the moment of the breach regardless of the extent to which the injured party had notice that the breach had occurred." Id. at ___, 2021-NCSC-7, ¶ 32, 36. Chisum argued that he did not have actual or constructive notice of breach of the operating agreements because of various actions of the members within the three-year period before the lawsuit, including the members sending him documents showing he was a member of both entities, providing "Schedule 1s" showing his ownership interests, and informing Chisum that he was a member "to the extent shown on the Schedule 1s". Id. at ___, 2021-NCSC-7, ¶ 33.

The supreme court referenced the general proposition that "'a statute of limitations should not begin running against [a] plaintiff until [the] plaintiff has knowledge that a wrong has been inflicted upon him.'" Id. at ___, 2021-NCSC-7, ¶ 34 (quoting Black v. Littlejohn, 312 N.C. 626, 639 (1985)). However, as soon as the injury becomes apparent or should reasonably become apparent to the claimant, "the cause of action is complete and the limitation period begins to run." Id. at ___, 2021-NCSC-7, ¶ 34 (quoting Pembee Mfg. Corp. v. Cape Fear Constr. Co., Inc., 313 N.C. 488, 493 (1985)).

Based on these principals, the supreme court concluded that the members' argument was inconsistent with recent decisions of the court and "basic notions of fairness." Id. at ___, 2021-NCSC-7, ¶ 36. The court noted that the record contained sufficient evidence to suggest that actions of the members kept Chisum from becoming aware of the breach for several years. Id. at ___, 2021-NCSC-7, ¶ 36. Accordingly, "the statute of limitations applicable to [Chisum's] declaratory judgment claims . . . began running at the time that he became aware or should have become aware of the [two member's] breaches of the operating agreements[.]" Id. at ___, 2021-NCSC-7, ¶ 36. Thus, Chisum's declaratory judgment claims relating to two of the LLCs were not time-barred and

the statute of limitations issue was properly submitted to the jury to determine when Chisum knew or should have known of the breach. Id. at ___, 2021-NCSC-7, ¶ 26.

E. Rule 9(j)

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

On September 30, 2011, a widow filed a medical malpractice complaint against hospital and physician for her husband's death. Id. at ___, 2021-NCCOA-212 at ¶ 2. On February 8, 2013, the wife voluntarily dismissed this complaint, but refiled the action on February 6, 2014. Id. at ___, 2021-NCCOA-212 at ¶¶ 2–3. The 2014 complaint included a Rule 9(j) certification, which stated that a "person who is reasonably expected to qualify as an expert witness" had reviewed the husband's medical care and medical records and who was "willing to testify" that the hospital and physician had breached the applicable standard of care and caused the husband's death. Id. at ___, 2021-NCCOA-212 at ¶ 7. The purported expert witness, an emergency room physician, also provided an affidavit stating as much. Id.

On March 13, 2014, the doctor filed an answer to the 2014 complaint, asserting that the wife had failed to pay costs after voluntarily dismissing the 2011 action, and filed a subsequent motion to tax costs. Id. at ___, 2021-NCCOA-212 at ¶ 9. On April 4, 2014, the doctor filed an amended answer as of right and included motions to dismiss for insufficient process, insufficient service of process, lack of personal jurisdiction, and statute of limitations. Id. at ___, 2021-NCCOA-212 at ¶ 9. The trial court denied these motions, finding that the previously filed motion to tax costs was a general appearance in the suit conferring personal jurisdiction and that the

process, service of process, and personal jurisdiction defenses in the amended answer did not relate back to his original answer and were, therefore, waived. Id.

In 2015, the expert testified in deposition that he was not offering criticism specific to the hospital, he did not consider himself an expert in emergency nursing, and he had no opinions as to whether the hospital breached the standard of care. Id. at ___, 2021-NCCOA-212 at ¶ 8. The expert never made these facts known to the wife prior to her filing the 2014 complaint. Id.

On the basis of this testimony, the hospital filed a motion to dismiss pursuant to Rule 9(j). Id. at ___, 2021-NCCOA-212 at ¶ 12. The trial court denied the motion, concluding that the complaint "facially complied with Rule 9(j)" and that the wife had "'exercised reasonable care and diligence' in assuring her Rule 9(j) certification was true." Id.

The trial court did, however, grant the physician's Rule 9(j) motion to dismiss on the grounds that the expert witness had not reviewed all of the medical care and medical records reasonably available prior to the Rule 9(j) certification. Id. at ___, 2021-NCCOA-212 at ¶ 15. Specifically, the expert had reviewed neither the widow's handwritten notes from the time of the husband's death nor the EMT records and certain prior medical records regarding the husband's care. Id. The trial court granted both the doctor's and the hospital's motions to exclude the expert witness for the same reasons. Id. at ___, 2021-NCCOA-212 at ¶ 16.

Accordingly, with the expert testimony excluded, the trial court found "no genuine issues of material fact exist" and concluded that the doctor and hospital were entitled to judgment as a matter of law. Id. at ___, 2021-NCCOA-212 at ¶ 18.

On appeal, the court of appeals affirmed the trial court's denial of the doctor's motion to dismiss and the order granting the hospital's motion to exclude the expert's testimony against the

hospital, but reversed the orders granting the doctor's motions to exclude and both Rule 9(j) motions to dismiss, and vacated the order granting summary judgment.

First, the court of appeals concluded that the doctor's motion to tax costs constituted a general appearance in the action, thereby waiving any defense of lack of personal jurisdiction. Id. at ___, 2021-NCCOA-212 at ¶ 38. The court also disagreed with the doctor's arguments that his defenses of process, service of process, and personal jurisdiction related back to his original answer, because that answer "did not allege any facts" regarding those defenses, so as to put the plaintiff on notice of them. Id. at ___, 2021-NCCOA-212 at ¶ 40. Thus, the trial court did not err in concluding that the doctor had waived these defenses. Id. at ___, 2021-NCCOA-212 at ¶ 41.

Second, the court of appeals addressed the key issue of whether the trial court erred in denying the hospital's motion to dismiss pursuant to Rule 9(j). When reviewing a Rule 9(j) motion to dismiss, the appellate court "must view the relevant evidence in the light most favorable to the plaintiff." Id. at ___, 2021-NCCOA-212 at ¶ 45. The court of appeals found that the complaint "facially complied with Rule 9(j)(1)'s requirements" because the widow "asserted the medical care and all medical records pertaining to the alleged negligence had been review by a person reasonably expected to qualify as an expert." Id. at ___, 2021-NCCOA-212 at ¶ 47.

The hospital, however, argued that facts which came to light after filing the complaint established that the putative expert was not willing to specifically critique the hospital and was not an expert in emergency nursing. Id. at ___, 2021-NCCOA-212 at ¶ 50. The court of appeals disagreed, stating that the dispositive question was whether the widow, at the time of filing her complaint, reasonably believed that the emergency room doctor was willing and able to testify as an expert witness against the hospital. Id. at ___, 2021-NCCOA-212 at ¶ 51. Because the record was devoid of any indication that the widow knew of her putative expert's reservations, she met

the Rule 9(j) pleading requirements. Id. at ___, 2021-NCCOA-212 at ¶¶ 51–52. However, the trial court correctly excluded the expert's testimony against the hospital on these grounds. Id. at ___, 2021-NCCOA-212 at ¶ 51, n. 9.

Next, the court of appeals addressed whether the widow's handwritten notes about her husband's death constituted "medical records" under Rule 9(j). Id. at ___, 2021-NCCOA-212 at ¶ 54. The trial court concluded that the expert witness had failed to review all pertinent medical records because he had not reviewed the handwritten notes. Id. at ___, 2021-NCCOA-212 at ¶ 56. Since there is no clear definition of what constitutes "medical records" under Rule 9(j), the court of appeals looked to the "common-sense definition" provided by the North Carolina Medico-Legal Guidelines—a framework created in collaboration between the North Carolina Medical Society and the Bar Association. Id. at ___, 2021-NCCOA-212 at ¶ 57, n. 10. The Guidelines define "medical records" as "a collection of Health Information … created by a physician or other health care provider[.]" Id. at ___, 2021-NCCOA-212 at ¶ 57.

Here, the widow's personal handwritten notes, "while certainly potentially relevant information," did not constitute medical records. Id. at ___, 2021-NCCOA-212 at ¶ 59. Accordingly, under the plain language of Rule 9(j), the expert was not required to review the notes. Id. at ___, 2021-NCCOA-212 at ¶ 60. Moreover, factual disputes over whether the expert reviewed the EMT records, whether prior medical records were relevant, and whether review of those materials would affect the expert's testimony were not proper grounds on which to grant a Rule 9(j) motion to dismiss. Id. at ___, 2021-NCCOA-212 at ¶ 63.

The court of appeals also disagreed with the trial court's determination that the expert doctor failed to review the relevant demographic information and, therefore, could not apply the proper standard of care. The trial court concluded that the widow could not have reasonably

expected the doctor to qualify as an expert because he reviewed demographic data from 2013-2015, not 2009-2010. Id. at ___, 2021-NCCOA-212 at ¶ 65. However, where a proffered medical witness who has previously testified to a lack of familiarity with the relevant community later supplements his knowledge after deposition, that witness remains qualified to testify as an expert. Id. at ___, 2021-NCCOA-212 at ¶ 67. Applying that standard here, it was not unreasonable for the widow to expected that the putative expert witness would supplement any deficiency in his familiarity with the relevant community. Id.

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

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

F. Standing

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

During an election campaign for Lieutenant Governor, a political action committee ran television advertisements in support of a Democratic candidate. Id. at 559, 2021-NCSC-6, ¶ 2. The advertisements did not comply with disclosure requirements mandated by statute. Id., 2021-NCSC-6, ¶ 3. The disclosure statute set forth certain requirements, but also created a private cause of action for opposing candidates who complied with the statute's requirements. Id. at 560, 2021-

NCSC-6, ¶ 6. The Republican candidate won the election. Id. at 559, 2021-NCSC-6, ¶ 4. Nonetheless, his political action committee sued that of the Democratic candidate based on the advertisements, asserting violations of the disclosure statute. Id. at 561, 2021-NCSC-6, ¶ 7. The trial court entered summary judgment in favor of the Democratic candidate's committee because the prevailing candidate failed to allege actual damages, and because the court found the disclosure statute was an unconstitutional content-based restraint on speech. Id., 2021-NCSC-6, ¶ 8.

The court of appeals reversed the trial court and held that the Republican candidate had standing to sue because a violation of the disclosure statute itself constitutes a sufficient injury, notwithstanding actual damages. Id. at 561-62, 2021-NCSC-6, ¶ 9. Chief Judge McGee dissented because in her view, since North Carolina appellate courts have previously applied the standing jurisprudence of the Supreme Court of the United States, the court of appeals was bound by Supreme Court decisions on standing issues. Id. at 562, 2021-NCSC-6, ¶ 10. The dissent relied on federal precedent holding that a mere statutory grant of standing is not necessarily sufficient to allow a party to sue. Id. Instead, the dissent concluded, the North Carolina Constitution required parties to sustain an injury in fact, and no such injury was present. Id.

The supreme court affirmed the court of appeals, holding that standing to sue under the North Carolina Constitution depends only on a legal injury, and that an injury-in-fact is not required. Id. at 609-10, 2021-NCSC-6, ¶ 85.

The supreme court observed that whether the North Carolina Constitution requires litigants to have suffered an injury in fact was a question of first impression. Id. at 563, 2021-NCSC-6, ¶ 13. First, the court analyzed the text of the state constitution and held that the constitutional text does not clearly limit the exercise of judicial power in a manner analogous to the federal constitution's limitations on federal courts. Id. at 566, 2021-NCSC-6, ¶ 19. Second,

the court examined the historical context that informed the framers of the state constitution. It observed that "the concept of 'standing,' as a personal stake, aggrievement, or injury as a prerequisite for litigation brought to vindicate public rights, was basically absent" from English common law. Id. at 571, 2021-NCSC-6, ¶ 27. Accordingly, the court concluded that the framers of the North Carolina Constitution "almost certainly" intended no "actual harm" or "injury in fact" requirement. Id., 2021-NCSC-6, ¶ 27.

Next, the court analyzed the historical evolution of standing jurisprudence. It noted that judicial writs were generally available to vindicate public rights without a showing of personal interest in a preponderance of states—including North Carolina—throughout the nineteenth century. Id. at 575, 2021-NCSC-6, ¶ 34. In contrast, the federal judiciary's concept of standing, "as a distinct constitutional requirement . . . first arose in the middle . . . of the twentieth century." Id. at 579, 2021-NCSC-6, ¶ 39. The first time the Supreme Court of the United States held that a federal statute expressly authorizing citizen lawsuits did not confer standing upon claimants who lack an injury in fact occurred in 1992, which is the same year that court required concrete and particularized, actual or imminent injury in fact. Id. at 588, 2021-NCSC-6, ¶¶ 54-55. Thus, the supreme court explained that although the federal standing requirement is rooted in the United States Constitution, the injury in fact requirement is a recent development that restricts historically permissible lawsuits. Id. at 590, 2021-NCSC-6, ¶ 57.

Finally, the court analyzed whether the North Carolina Constitution imposes a requirement for standing and an injury in fact where the state legislature has created a cause of action. Because the North Carolina Constitution does not limit judicial power to certain cases and controversies, the court held that the state framer's "did not, by their plain words, incorporate the [] federal standing requirements" grounded in those federal limitations. Id. at 591, 2021-NCSC-

6, ¶ 58. Moreover, North Carolina courts have recognized the legislature's ability to create causes of action to vindicate the public interest even where an injury in fact did not exist outside the statutory violation. Id. at 599, 2021-NCSC-6, ¶ 71. Thus, the supreme court held that the North Carolina Constitution does not include an injury in fact requirement. Id., 2021-NCSC-6, ¶ 72. Accordingly, a plaintiff has standing to sue even where he or she lacks a factual injury so long as he or she is within the class of persons upon whom a statute confers a cause of action.

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

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

G. Sovereign Immunity

In Farmer v. Troy University, ___ N.C. App. ___, 2021-NCCOA-36, the court of appeals considered whether interstate sovereign immunity bars a suit against an out-of-state public university that is registered in North Carolina as a nonprofit corporation.

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

On appeal, the court of appeals affirmed the trial court's ruling. At the outset, the court of appeals agreed with the trial court's interpretation of Hyatt III, explaining that the Constitution "embeds interstate sovereign immunity within the constitutional design." Id. (quoting Hyatt III, 139 S. Ct. at 1497). The court of appeals rejected the plaintiff's argument that Hyatt III was inapposite where "all the tortious conduct occurred within the sovereign boundaries of North Carolina." Id. at ___, 2021-NCCOA-36 ¶ 15. Rather, "the dispositive issue is whether one state has been 'haled involuntarily' into the courts of another state." Id. at ___, 2021-NCCOA-36 ¶ 16 (citing Hyatt III, 139 S. Ct. at 1494).

Next, the court of appeals addressed the employee's argument that the doctrine of interstate sovereign immunity did not apply because the university was acting in a corporate function, i.e., student recruitment, when the alleged tortious conduct occurred. The court of appeals rejected the argument that the university fell under a "business and commercial ventures" exception to Alabama's sovereign immunity, because the state had not "implicitly" waived its sovereign immunity. Id. at ___, 2021-NCCOA-36 ¶ 21. To find otherwise would conflate the doctrines of sovereign immunity—under which the State is immune from suit—and governmental immunity—under which a municipality is immune from suit for negligent conduct within governmental functions—and "[a]s an arm of the State of Alabama, Troy University is immune from suit under the doctrine of sovereign immunity, not governmental immunity." Id. at ___, 2021-NCCOA-36 ¶¶ 22, 23. Thus, without an explicit waiver of its sovereign immunity, the university, as an arm of the state, could "not be 'haled involuntarily' into the courts" of North Carolina. Id. at ___, 2021-NCCOA-36 ¶¶ 27, 28 (citing Hyatt III, 139 S. Ct. at 1497).

Moreover, the Hyatt III holding applies retroactively to bar the employee's claims even though the suit was filed prior to the Supreme Court's ruling. Id. at ___, 2021-NCCOA-36 ¶ 35.

The issue here is not one of intrastate sovereign immunity, which is a matter of state law. Id. at ___, 2021-NCCOA-36 ¶¶ 35, 36. Here, the court of appeals distinguished Smith v. State, which refused to apply retroactively a holding that when the State enters into a valid contract, it implicitly waives its sovereign immunity vis-à-vis that contract. Id. at ___, 2021-NCCOA-36 ¶ 36 (citing Smith, 289 N.C. 303, 320, 222 S.E.2d 412, 423–24 (1976)). Rather, Hyatt III "concerns the federal constitutional implications of interstate sovereign immunity…[and] 'is implied as an essential component of federalism.'" Id. at ___, 2021-NCCOA-36 ¶ 137 (quoting Hyatt III, 139 S. Ct. at 1497). Regardless, courts do not create law: "the act of overruling is a confession that the prior ruling was erroneous and was never the law." Id. at ___, 2021-NCCOA-36 ¶ 38 (quoting Cox v. Haworth, 304 N.C. 571, 573 284 S.E.2d 322, 324 (1981)). Thus, "retroactive application of Hyatt III is required to achieve the purpose of the Court's holding." Id. at ___, 2021-NCCOA-36 ¶ 41.

Finally, the court of appeals rejected the employee's argument that the individual defendants, as residents and citizens of North Carolina, did not fall within the ambit of the university's sovereign immunity. In his complaint, the employee failed to specify that he was suing either individual defendant in her personal capacity, and "[a] suit against a public official in her official capacity is a suit against the State." Id. at ___, 2021-NCCOA-36 ¶ 50 (quoting White v. Trew, 366 N.C. 360, 363, 736 S.E.2d 166, 168 (2013)).

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

H. Rule 45

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

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

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

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

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

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

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

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

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

I. Summary Judgment

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

A landlord leased a single-family residential property to two tenants. Id. at ___, 2021-NCSC-32, ¶ 2. The tenants owned a dog that lived with them on the property. Id. A child visiting

the home was playing with the dog, and the dog "nicked" the top of the child's head, causing a minor cut. Id. Animal services investigated the incident and determined that the dog did not meet the definition of a "dangerous dog" or a "potentially dangerous dog" under section 67-4.1 of the North Carolina General Statutes. Id. at ___, 2021-NCSC-32, ¶ 3. Accordingly, animal services advised the tenants of voluntary steps they could take to minimize the risks of keeping the dog, including keeping the dog on a leash anytime children were present. Id. Neither animal services nor the tenants notified the landlord of the incident. Id. at ___, 2021-NCSC-32, ¶ 6.

Over six months later, another child was visiting the tenants' home while the dog was restrained with a chain on the property. Id. at ___, 2021-NCSC-32, ¶ 4. When the child walked within the radius of the chain, the dog bit the child on the cheek, causing severe injuries. Id. The child, through his parents, brought negligence and strict liability claims against the tenants and landlord. Id. at ___, 2021-NCSC-32, ¶ 5. Based on the lack of evidence showing that the landlord had been informed of the first incident with the dog, the trial court granted the landlord's motion for summary judgment.

The court of appeals, with Judge Tyson writing on behalf of the majority, affirmed the trial court's ruling that there was no genuine issue of material fact as to whether the landlord had prior knowledge that the dog posed a danger. Id. at ___, 2021-NCSC-32, ¶ 9; see also Curlee v. Johnson, 270 N.C. App. 657, 666, 842 S.E.2d 604, 611 (2020) (Brook, J., dissenting). Judge Brook dissented, arguing that the landlord had not met his burden of establishing that no genuine issue of material fact existed. Id. at ___, 2021-NCSC-32, ¶ 10. The child's guardian ad litem appealed to the supreme court on the child's behalf based on the dissenting opinion. Id. at ___, 2021-NCSC-32, ¶ 11.

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

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

Id. at ___, 2021-NCSC-32, ¶ 12 (quoting Stephens v. Covington, 232 N.C. App. 497, 500, 754 S.E.2d 253, 255 (2014)). In concluding that the record evidence "clearly and consistently indicate[d] that [the] landlord had no prior knowledge of the prior incident" or any information related to the dog's history of potentially dangerous behavior, the court referenced the landlord's testimony that he had no knowledge of the first incident, testimony from one of the tenants that she never told the landlord about the first incident, and testimony from the guardian ad litem that she did not have any information or evidence to suggest that the landlord was notified by the sheriff, Animal Control, or any other party about the prior incident. Id. at ___, 2021-NCSC-32, ¶ 15. The court found that evidence of precautions such as "Beware of Dog" signs was "not sufficient to give a reasonable landlord constructive notice that his tenant is harboring a dog with dangerous propensities." Id. at ___, 2021-NCSC-32, ¶ 16. The court also concluded that responses from the tenant to requests for admission which contradicted her sworn testimony were inadmissible against landlord to establish a genuine issue of material fact. Id. at ___, 2021-NCSC-32, ¶ 15.

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

Residents filed a complaint against the trustee of a trust seeking to quiet title to real property that trustee had transferred to himself. Id. at ___, 2021-NCCOA-105, ¶ 5. The trustee counterclaimed, seeking among other relief, declaratory judgment and cancellation or recission of the documents signed by the settlor due to duress, undue influence, and lack of capacity. Id.

The trustee filed a motion for summary judgment, which was denied by the superior court judge assigned to the case. Id. at ___, 2021-NCCOA-105, ¶ 6. However, approximately ten days earlier, one of the residents was granted leave to file, and did in fact file, an amended and restated complaint against the trustee related to breach of fiduciary duty. Id. In response, the trustee answered the amended and restated complaint and amended his counterclaims. Id.

Several months later, the trustee filed a second motion for summary judgment before a different superior court judge. Id. at ___, 2021-NCCOA-105, ¶ 7. In an order granting declaratory judgment, the second superior court judge granted the trustee's motion for summary judgment in favor of the trustee on the parties' claims for quiet title and conversion and the trustee's third-party claim for cancellation and recission of the instruments executed by the settlor. Id.

In considering whether the trial court properly granted summary judgment in favor of the trustee, the court of appeals specifically referenced the "well-established rule" that "'no appeal lies from one Superior Court judge to another; that one Superior Court judge may not correct another's errors of law; and that ordinarily one judge may not modify, overrule, or change the judgment of another Superior Court judge previously made in the same action.'" Id. at ___, 2021-NCCOA-105, ¶ 33 (quoting Calloway v. Ford Motor Co., 281 N.C. 496, 501, 189 S.E.2d 484, 488 (1972)).

However, the court held that the trial court had jurisdiction to address the motion for summary judgment on the amended and restated complaint. Id. Specifically, the court of appeals reasoned that because an amended complaint has the effect of superseding the original complaint such that the filing of an amended and restated complaint renders any arguments regarding the original complaint moot, including the original motion for summary judgment, here the trial court had jurisdiction to address the subsequent motion for summary judgment. Id. (citing Houston v. Tillman, 234 N.C. App. 691, 695, 760 S.E.2d 18, 20 (2014)).

J. Discovery Sanctions

In Mace v. Utley, ___ N.C. App. ___, 853 S.E.2d 210 (2020), the court of appeals considered whether a court abuses its discretion by declining to impose discovery sanctions when the movant for sanctions failed to comply with the rules of discovery.

A site preparation company sued a fuel company after a commercial dispute. Id. at ___, 853 S.E.2d at 212. The parties were both aware that discovery would close on February 28, 2019. Id. Despite several communications between the parties over the next month, they were unable to agree upon a mutually acceptable date for depositions. Id. at ___, 853 S.E.2d at 212-13. On February 14, 2019, the site preparation company noticed the depositions of individuals related to the fuel company, to be held on February 28, 2019. Id. at ___, 853 S.E.2d at 213. The individuals were residents of Orange County, but the notice of deposition purported to require them to attend a deposition in Guilford County. Id. Counsel for those individuals informed counsel for the site preparation company that the individuals would not attend the deposition, and the site preparation company moved to compel. Id. The trial court denied the motion. Id.

The court of appeals affirmed the trial court's order denying the motion to compel depositions. First, the court of appeals noted that the notice of deposition was defective. Id. Under

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

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

K. Dismissal

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

This matter concerned two lawsuits: the "Sullivan Lawsuit," which involved the plaintiff Sullivan against Pugh, and the "TOG Lawsuit," which involved the plaintiff TOG against Pugh. Id. at ___, 2021-NCCOA-104, ¶ 2. Upon motion, the trial court consolidated the two lawsuits for trial. Id. After significant motions practice, TOG filed a notice of voluntary dismissal with prejudice in the TOG Lawsuit. Id. at ___, 2021-NCCOA-104, ¶ 7. TOG did not serve the notice of dismissal on Sullivan. Id. at ___, 2021-NCCOA-104, ¶ 8. Sullivan objected, asserting that he was denied due process because he was not served the notice. Id. The trial court denied Sullivan's

objection and found that the voluntary dismissal of the TOG Lawsuit was proper. Id. at ___, 2021-NCCOA-104, ¶ 9.

On appeal, the court of appeals affirmed the trial court's finding that the voluntary dismissal was valid. Sullivan argued that the voluntary dismissal was invalid because it was not served upon Sullivan. Id. at ___, 2021-NCCOA-104, ¶ 12. Under North Carolina law, "when cases are consolidated for trial, although it becomes necessary to make only one record, the cases remain separate suits and retain their distinctiveness throughout the trial and appellate proceedings." Id. at ___, 2021-NCCOA-104, ¶ 14 (quoting Kanoy v. Hinshaw, 273 N.C. 418, 424, 160 S.E.2d 296, 301 (1968)). Accordingly, despite the consolidation of the Sullivan Lawsuit and the TOG Lawsuit, "Sullivan was not a party to the TOG Lawsuit . . . and TOG was not required to serve its notice of Voluntary Dismissal upon Sullivan." Id. at ___, 2021-NCCOA-104, ¶ 15.

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

L. Mediation

In Mitchell v. Boswell, ___ N.C. App. ___, 851 S.E.2d 646 (2020), the court of appeals considered whether section 7A-38.1 of the North Carolina General Statutes allows enforcement of a memorandum of settlement signed at a mediation by the parties' attorneys.

After a successful mediated settlement conference between out-of-state parties in a legal dispute, the attorneys for each party signed a memorandum of settlement on the parties' behalf. Id. at ___, 851 S.E.2d at 648. The memorandum of settlement described the terms under which the parties would settle the case. Id. at ___, 851 S.E.2d at 649. The defendant's attorney subsequently sent the plaintiff's attorney a proposed settlement agreement. Id. The plaintiff signed the proposed settlement agreement, but the defendant refused to sign the agreement. Id.

The plaintiff filed a motion to enforce the memorandum of settlement that the defendant's attorney had signed at the mediation. Id. The trial court granted the plaintiff's motion to enforce the memorandum of settlement, concluding that the memorandum of settlement was "a binding contract between the parties" and that "counsel for the parties had the authority at mediation to execute the Memorandum of Settlement on behalf of the parties." Id. at ___, 851 S.E.2d at 650 (citation omitted).

On appeal, the court of appeals reversed the trial court's order. Id. at ___, 851 S.E.2d at 653. The court observed that the statute of frauds for settlement agreements provides "[n]o settlement agreement to resolve any or all issues reached at the proceeding conducted under this subsection or during its recesses shall be enforceable unless it has been reduced to writing and signed by the parties against whom enforcement is sought." Id. at ___, 851 S.E.2d at 650 (quoting N.C. Gen. Stat. § 7A-38.1(1) (2019)). The court determined that the definition of "party" in this statute does not include a party's attorney. Id. at ___, 851 S.E.2d at 652. Thus, the court held that, even though the defendant's attorney had signed the memorandum of settlement, the defendant's failure to sign the memorandum of settlement rendered it unenforceable against the defendant. Id. To read the statute otherwise, the court held, would require "inserting language into the statute" in contravention to well-established principles of statutory construction. Id. Additionally, the court observed the availability of the Uniform Electronic Transactions Act given "the increased use of virtual and telephonic attendance at settlement conferences." Id., n.4 (citing N.C. Gen. Stat. § 66-311, et seq.).

For these reasons, the court of appeals reversed the trial court's order granting the motion to enforce the memorandum of settlement.

III. TRIAL

A. Jury Selection

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

Police officers received a call about three suspicious black men sitting with several weapons in a parked Mustang in a parking lot. Id. at 376-77, 851 S.E.2d at 907-08. The officers arrived at the parking lot in four marked patrol vehicles, without lights or sirens activated. Id. at 377, 851 S.E.2d at 908. Two officers carrying weapons walked surreptitiously to the rear of the parking lot, to avoid being detected by the men sitting in the Mustang. Id. The officers did not identify themselves as police officers. Id. The driver of the Mustang noticed that men with guns were approaching his vehicle. Id. The men and the officers exchanged gunshots, though it was disputed which group fired their weapons first. Id.

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

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

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

The supreme court reversed the decision of the court of appeals. Id. at 375, 851 S.E.2d at 907. In a decision authored by Justice Earls, the majority held that the trial court had abused its discretion in prohibiting defense counsel from asking the specific questions to the prospective jurors. Id. The court noted that a trial court has discretion to limit the extent and manner of

counsel's examination of prospective jurors during voir dire. Id. at 380, 851 S.E.2d at 910. The court held that a trial court does not abuse its discretion when it prevents counsel from asking questions that are irrelevant, improper in form, or attempt to 'stake out' a juror. Id. at 382, 851 S.E.2d at 911. Moreover, the court held that the trial court is not prohibited from limiting questions to which the answer was admitted in response to another question or questions that contain an incomplete statement of law. Id. However, the court held that a crucial distinction exists between foreclosing entire lines of inquiry and rejecting specific inappropriate questions. Id. at 384, 851 S.E.2d at 912. While a trial court generally has the discretion to regulate the "manner and the extent of inquiries [during] voir dire" by rejecting improper questions, the trial court does not have discretion to entirely prevent a party from asking any questions at all about an appropriate and relevant subject. Id. (quoting State v. Allen, 322 N.C. 176, 189, 367 S.E.2d 626, 633 (1988)) (emphasis in original).

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

constituted inquiry into a relevant topic, and not an impermissible stakeout question, the court held that the trial court abused its discretion in categorically denying the defendant the opportunity to ask prospective jurors about police-officer shootings of black men. Id.

Moreover, the court disagreed with the court of appeals' determination that the trial court's denial of defense counsel's voir dire questions did not prejudice the defendant because "he did not know the individuals he was shooting at were police officers at the time of the shooting." Id. at 390, 851 S.E.2d at 916. The court held that the defendant's lack of awareness that he was shooting at police officers did not alter the possible relevance of any biases held by the jurors to their own resolution of the factual dispute. Id. The court ruled that a juror who harbored racial animus against black people, or who believed a police officer shooting an unarmed civilian was inevitably in the wrong, might struggle to fairly and impartially determine the defendant's guilt. Id. Furthermore, the court rejected the State's argument that no prejudicial error occurred simply because the trial court allowed the defendant to ask prospective jurors about their attitudes toward law enforcement officers. Id. at 391, 851 S.E.2d at 917. The court held that these questions were not a substitute for the questions which were denied by the trial court because none of those questions touched upon issues of race, and none elicited information about the prospective jurors' opinions of police-officer shootings of black men. Id. Thus, because there was a clear connection between the questions the defendant attempted to ask to prospective jurors and the meaningful factual disputes the jury was required to resolve, the court held that the trial court abused its discretion and prejudiced the defendant by restricting all inquiry into prospective jurors' racial biases and opinions regarding police-officer shootings of black men. Id.

Justice Davis dissented, and Justices Newby and Morgan signed onto his dissent. Id. at 393, 851 S.E.2d at 918 (Davis, J., dissenting). The dissent criticized the majority's opinion for

two reasons: First, the dissent stated that the majority focused on questions that the defendant could have asked prospective jurors rather than the specific questions that the defendant actually sought to ask prospective jurors. Id. at 399, 851 S.E.2d at 921. Second, the dissent stated that the majority did not acknowledge the reasons that defense counsel articulated to the trial court as his purpose for asking those questions. Id. at 401-02, 851 S.E.2d at 923. The dissent observed that the trial court's rulings were narrow, and only prohibited defense counsel from asking three specific questions. Id. at 399, 851 S.E.2d at 921. The dissent stated that defense counsel never actually asked prospective jurors non-objectionable questions about the general topic of racial bias, and that the trial court never ruled that the subject was an impermissible topic of questioning. Id. Moreover, the dissent noted that the defense counsel did not seek clarification as to the boundaries of the trial court's ruling or ask any other questions on race-related issues. Id. at 402, 851 S.E.2d at 923. The dissent also criticized the majority for not stating the actual arguments that the defense counsel put forward as his reasons for asking the objectionable questions. Id. at 401-02, 851 S.E.2d at 923. Rather, the dissent stated that the majority substituted more favorable arguments for the defendant than those actually made by defense counsel in the trial court. Id. The dissent accused the majority of being "complicit" in the defendant's attempts to "'swap horses' on appeal." Id. at 402, 851 S.E.2d at 923.

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

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

B. Evidence

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

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

Before the trial on his violation, the father filed a motion in limine to exclude testimony regarding the Facebook comments, citing a lack of connection between him and his daughter's

Facebook account. Id. The court denied the father's motion, holding that the mother's expected testimony would sufficiently authenticate the Facebook comments. Id. At trial, the State introduced screenshot photographs of Facebook posts and comments taken by the mother. Id. The mother testified that she had captured these screenshot photographs from her own Facebook posts. Id. at ___, 852 S.E.2d at 674-76. The State asked why she took these photographs, and the mother stated that she did so because she knew her daughter would not post these types of comments on the mother's Facebook posts. Id. at ___, 852 S.E.2d at 676. The trial court allowed the authentication of these photographs over the father's objection. Id.

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

admission of the Facebook comments. Id. The court further ruled that the jury could determine the credibility of the evidence regarding the authenticity and credibility of the writing. Id.

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

Judges Bryant and Berger concurred in the result only.

(1) Expert

In State v. Turner, ___ N.C. App. ___, 849 S.E.2d 327 (2020), the court of appeals considered whether the trial court must conduct a "substantial similarity" test separate from the analysis under Rule 702 of the North Carolina Rules of Evidence when admitting experimental evidence. Id. at ___, 849 S.E.2d at 330-33.

A criminal defendant was charged with first-degree murder. Id. at ___, 849 S.E.2d at 328. During his trial, the defense theorized that the defendant shot the victim in self-defense. Id. at ___, 849 S.E.2d at 330. Over the defendant's objection, the State put on evidence from a forensic firearms examiner about an experiment the expert had conducted to determine the direction and average distances that shell casings traveled after being fired from the defendant's gun. Id. at ___, 849 S.E.2d at 329-30. This testimony allowed the jury to make inferences about the defendant's location and the angle of the gun during the shooting. Id. at ___, 849 S.E.2d at 330. The jury rejected the self-defense theory and found the defendant guilty of first-degree murder. Id.

The court of appeals reviewed the trial court's admission of the forensic firearms examiner's testimony for abuse of discretion and found no error in the judgment. Id. at ___, 849 S.E.2d at 331. The defendant argued that the expert's testimony constituted experimental evidence, which required the trial court to conduct a "substantial similarity" test, separate from its Rule 702 analysis. Id. at ___, 849 S.E.2d at 331-32.

The court rejected the defendant's argument that the trial court must review experimental evidence under a stand-alone test. Id. The court reiterated that "Rule 702 uses a 'three-pronged reliability test' that requires expert testimony [1] to be based on sufficient facts or data; [2] to be the product of reliable principles and methods; and [3] to properly apply the principles and methods reliably to the facts of the case." Id. at ___, 849 S.E.2d at 331 (citing N.C. R. Evid. 702(a)(1)-(3)). The court held that the "substantial similarity" inquiry is folded into the third prong of this Rule 702 test, and that the entire Rule 702 analysis is reviewed for an abuse of discretion. Id. Noting that the trial court admitted the forensic firearms expert's testimony for a "very limited purpose," the court held that the trial court did not abuse its discretion. Id.

For these reasons, the court of appeals found no error in the trial court's judgment. Id. at ___, 849 S.E.2d at 333.

(2) Hearsay

In State v. Reid, ___ N.C. App. ___, 850 S.E.2d 567 (2020), rev. allowed, ___ N.C. ___, 856 S.E.2d 100 (2021), the court of appeals considered whether hearsay evidence may be admissible under the residual exception of Rule 803(24) where there is no record evidence that the proponent filed a proper written notice.

A criminal defendant was found guilty of first-degree murder and common law robbery, and subsequently filed a series of post-conviction motions. Id. at ___, 850 S.E.2d at 570. One of those was a motion for appropriate relief on the grounds of newly discovered evidence, based upon a witness's affidavit. Id. at ___, 850 S.E.2d at 574. The affidavit provided that an individual other than the defendant had admitted to committing the crime in a conversation with the affiant/witness. Id. at ___, 850 S.E.2d at 574-75. Later, at a hearing on the motion for appropriate relief, the affiant/witness testified to hearing this individual's admission. Id. at ___, 850 S.E.2d at 575-76.

Though both statements were hearsay, the trial court found that "the State [was] on notice that Defendant would offer such evidence at trial," and admitted them under the residual exception to hearsay, Rule 803(24) of the North Carolina Rules of Civil Procedure. Id. at ___, 850 S.E.2d at 580.

The court of appeals reversed the trial court. The appellate court observed that Rule 803(24) is generally disfavored and that "evidence proffered for admission pursuant to [] Rule 803(24), must be carefully scrutinized by the trial judge within the framework of the rule's requirements." Id. at ___, 850 S.E.2d at 586 (quoting State v. Smith, 315 N.C. 76, 91-92, 337 S.E.2d 833, 844 (1985)). The court of appeals analyzed one of those requirements, specifically, the notice requirement. Id. The notice requirement of Rule 803(24) provides:

> When hearsay testimony is sought to be admitted as substantive evidence under Rule 803(24), the proponent must first provide written notice to the adverse party . . . to provide the adverse party with a fair opportunity to prepare to meet the statement. The hearsay statement may not be admitted unless this notice (a) is in writing; and (b) is provided to the adverse party sufficiently in advance of offering it to allow him to prepare to meet it; and (c) contains (1) a statement of the proponent's intention to offer the hearsay testimony, (2) the particulars of the hearsay testimony, and (3) the name and address of the declarant.

Id. at ___, 850 S.E.2d at 587 (citing Smith, 315 N.C. at 92-96, 337 S.E.2d at 844-47). In this case, "there [was] no evidence in the record that Defendant filed a proper notice of intent to offer hearsay evidence pursuant to Rule 803(24) before the hearing on the motion for appropriate relief. Thus, Defendant failed to satisfy the first requirement of Rule 803(24), and the trial court abused its discretion when it concluded the written notice requirement had been satisfied." Id. (citing Smith, 315 N.C. at 92, 337 S.E.2d at 844). Because the court of appeals found no evidence in the record

of a proper notice of intent to offer hearsay evidence, the trial court's finding to the contrary was an abuse of discretion.

For this reason, the court of appeals reversed the trial court's order granting a new trial.

(3) Burden of Proof

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

A driver and her passenger were injured when an oncoming car hit black ice and spun out of control into them. Id. at ___, 2021-NCCOA-39, ¶ 2. The ice had formed when water from burst pipes flowed into a ditch adjacent to the road. Id. at ___, 2021-NCCOA-39, ¶ 3. The water hit a section of the ditch that was level with the surrounding land, which caused the water to flow into the road where it froze. Id. The driver sued the North Carolina Department of Transportation ("NCDOT") for negligence in failing to maintain the ditch in a manner that allowed water to flow freely through it. Id. at ___, 2021-NCCOA-39, ¶ 4

At trial, several expert witnesses presented testimony regarding the visibility of the filled-in portion of the ditch and the time it would have taken to fill in. See id. at ___, 2021-NCCOA-39, ¶¶ 5–9. In sum, the testimony indicated that the level spot was noticeable from the roadway, the level spot meant that the ditch required maintenance, and that the level spot had been noticeable for at least six months before the accident. Id. The trial court denied NCDOT's motion for directed verdict and based on the testimony, the jury found NCDOT liable for negligence. Id. at ___, 2021-NCCOA-39, ¶ 10. The trial court also denied NCDOT's motion for judgment notwithstanding the verdict and NCDOT appealed. Id. Specifically, NCDOT argued that "Plaintiffs failed to

adequately prove breach based upon a lack of actual or constructive notice of the dangerous condition." Id. at ___, 2021-NCCOA-39, ¶ 11.

On appeal, the court of appeals affirmed the trial court's ruling on NCDOT's motion. The court of appeals first explained that notice may be "constructive, which is defined as information or knowledge of a fact imputed by law to a person (although he may not actually have it), because he could have discovered the fact by proper diligence, and his situation was such as to cast upon him the duty of inquiring into it." Id. at ___, 2021-NCCOA-39, ¶ 13 (quoting Phillips ex rel. Bates v. N.C. Dep't of Transp., 200 N.C. App. 550, 558, 684 S.E.2d 725, 731 (2009)). Constructive knowledge can be established by "circumstantial evidence from which the fact finder could infer that the dangerous condition existed for some time." Id. (quoting Thompson v. Wal-Mart Stores, Inc., 138 N.C. App. 651, 654, 547 S.E.2d 48, 50 (2000)).

NCDOT argued "it did not breach its duty under a theory of constructive notice because it exercised proper diligence and there was no evidence of how long the condition existed." Id. at ___, 2021-NCCOA-39, ¶ 14. The court of appeals disagreed, finding that there "was more than a scintilla of evidence" to support the trial court's ruling. Id. Specifically, there were multiple witness who testified to seeing the ditch completely filled in shortly after the accident and "circumstantial evidence . . . from which the finder of fact could infer the dangerous condition existed for some time." Id.

Notably, expert testimony showed it would take "over a year" for such a ditch to fill up under normal circumstances and the ditch was completely filled in at the time of the accident. Id. at ___, 2021-NCCOA-39, ¶¶ 15, 16. Thus, the "evidence show[ed] the ditch was in violation of NCDOT guidelines for at least six months" and "'evidence of a defendant violating its own voluntary safety standards constitutes some evidence of negligence.'" Id. (quoting Thompson,

138 N.C. App. at 656, 547 S.E.2d at 51). Moreover, that NCDOT had six months to discover the ditch was in violation of its guidelines "constitutes more than a scintilla of evidence NCDOT did not exercise due diligence." Id. at ___, 2021-NCCOA-39, ¶ 17.

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

C. Damages

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

This case involved three individuals with membership interests in three different limited liability companies. Id. at ___, 2021-NCSC-7, ¶ 2. The three companies were formed for the purpose of developing commercial real estate in Wilmington, North Carolina. Id. at ___, 2021-NCSC-7, ¶ 2. Two members of the LLCs took actions over a period of several years that transferred control of the LLCs to the two members and diluted the membership interests of the third member, Chisum, to the point that they were extinguished. Id. at ___, 2021-NCSC-7, ¶ 6. Chisum filed suit, among other things, for breach of fiduciary duty on his own behalf and on behalf of one of the LLCs. Id. at ___, 2021-NCSC-7, ¶ 16. At trial, the jury awarded $1.00 in nominal damages and awarded the LLC $250,000.00 in punitive damages for the claim for breach of fiduciary duty and constructive fraud. Id. at ___, 2021-NCSC-7, ¶ 25. All parties ultimately appealed to the supreme court. Id. at ___, 2021-NCSC-7, ¶ 30.

At the outset, the supreme court observed that although it had not previously addressed the issue of whether a plaintiff is required to prove actual damages in support of breach of fiduciary duty and constructive fraud claims, the court of appeals has addressed the issue on multiple

occasions. Id. at ___, 2021-NCSC-7, ¶ 39. The supreme court discussed several court of appeals decisions, including: Mace v. Pyatt, 203 N.C. App. 245, 255-57, 691 S.E.2d 81, 89 (2010) ("merely nominal damages may support a substantial award of punitive damages"); Bogovich v. Embassy Club of Sedgefield, Inc., 211 N.C. App. 1, 12, 712 S.E.2d 257, 264 (2011) (finding that "the undisputed evidence established the existence of all of the elements required for a finding of liability for constructive fraud" and that according to well-established law, "once a cause of action has been established, a plaintiff is entitled to recover nominal damages as a matter of law"); and Collier v. Bryant, 216 N.C. App. 419, 434, 719 S.E.2d 70, 82 (2011) (holding that although nominal damages must be recoverable in order to support a punitive damage award, there is no requirement that nominal damages actually be recovered).

The supreme court concluded that the court of appeals decisions referenced above were correctly decided and adopted the reasoning of the court of appeals, holding that "potential liability for nominal damages is sufficient to establish the validity of claims for breach of fiduciary duty and constructive fraud and can support an award of punitive damages." Chisum, ___ N.C. at ___, 2021-NCSC-7, ¶ 44.

(1) Medical Liens

In Quaicoe v. Moses H. Cone Memorial Hospital Operating Corp., ___ N.C. App. ___, 852 S.E.2d 399 (2020), the court of appeals considered whether courts possess subject matter jurisdiction over motions seeking to reduce liens imposed by the North Carolina State Health Plan.

A family and Guardian ad Litem filed a medical malpractice action for injuries sustained by a minor child during birth. Id. at ___, 852 S.E.2d at 400. The North Carolina State Health Plan ("SHP") and Medicaid provided health insurance coverage for the birth and placed liens on the settlement. Id. at ___, 852 S.E.2d at 401.

During settlement negotiations, the plaintiffs moved the trial court to reduce the liens imposed by both SHP and Medicaid. Id. The Medicaid lien was voluntarily reduced, but SHP objected to a reduction of its lien. Id. SHP moved to dismiss the plaintiffs' motion to reduce its lien for lack of subject matter jurisdiction and for failure to state a claim. Id. The trial court denied the motion to reduce after finding no case law or statutory authority providing for a reduction of the SHP lien and therefore finding that it lacked jurisdiction to do so. Id.

The court of appeals affirmed the trial court's order. The court explained that although subject matter jurisdiction is conferred upon courts by either the North Carolina Constitution or statutes, the plaintiffs failed to identify a constitutional or statutory provision conferring the jurisdiction to reduce SHP liens. Id. at ___, 852 S.E.2d at 402. While the plaintiffs invoked the court's "equitable jurisdiction because of North Carolina courts' strong interest in protecting the rights of minors," such equitable powers could not extend to areas governed by statute. Id. The court determined that equitable jurisdiction did not extend to SHP liens because they, like the SHP itself, are expressly governed by section 135-48.37 of the North Carolina General Statutes. Id. That statute both provides the SHP a right to impose liens and limits those liens. Id. But, the court of appeals held, it does not confer judicial jurisdiction to review the amount of SHP liens. Id.

For these reasons, the court of appeals concluded that the trial correctly determined it lacked subject matter jurisdiction over the motion to reduce the SHP lien.

D. Attorneys' Fees

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

The trial court granted sanctions for failure to comply with a production order and awarded over $48,000 in attorneys' fees under Rules 11 and 37 of the North Carolina Rules of Civil Procedure. Id. at ___, 2021-NCCOA-41, ¶ 14. As relevant here, the award of attorneys' fees was appealed.

On appeal, the court of appeals remanded the award of attorneys' fees. Where attorneys' fees are awarded, "the record must contain findings of fact as to the time and labor expended, the skill required, the customary fee for like work, and the experience or ability of the attorney." Id. at ___, 2021-NCCOA-41, ¶ 36. The sanctioned party argued that the trial court's findings regarding the award amount were not supported by evidence because the court relied only upon counsel's "self-serving affidavits and conclusory statements." Id. at ___, 2021-NCCOA-41, ¶ 39.

The court of appeals agreed, finding that "the affidavit does not state a comparable rate by other attorneys in the area with similar skills for like work." Id. at ___, 2021-NCCOA-41, ¶ 41. Thus, because there was insufficient evidence to show "the customary fee for like work" by others in the legal market, the trial court erred by making a finding in that respect. Id. at ___, 2021-NCCOA-41, ¶ 42. For these reasons, the court of appeals vacated and remanded the issue of the amount of the attorneys' fees award.

E. Jury Instructions

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

During the course of a defendant's jury trial on drug-related charges, the jury remained deadlocked after approximately six and a half hours of deliberations spanning a two-day period. Id. at ___, 2021-NCCOA-214, ¶ 6-7, 27. The jury foreperson sent a note to the judge stating that the jury was "not in agreement with guilty or not guilty" and was "undecided on all seven charges."

Id. at ___, 2021-NCCOA-214, ¶ 7, 27. In response, the trial court gave additional verbal instructions to the jurors regarding their duty to render a verdict. Id. at ___, 2021-NCCOA-214, ¶ 7. The jury ultimately found defendant guilty of some of the charges and not guilty on some of the charges. Id. at ___, 2021-NCCOA-214, ¶ 7.

On appeal, the defendant contended that the trial court committed plain error when it provided the additional instructions to the jury because it did not specifically recite the language set forth in section 15A-1235(b) of the North Carolina General Statutes, the statute that sets the standard for charges to be given to a jury which is unable to agree upon a verdict. Id. at ___, 2021-NCCOA-214, ¶ 28, 29 (citing State v. Easterling, 300 N.C. 594, 608 S.E.2d 800, 809 (1980)).

The court of appeals rejected defendant's argument, holding that the instructions were proper because they "communicated all of the core ideas contained in the statute and did not contain any misstatements of law." Id. at ___, 2021-NCCOA-214, ¶ 28. In support of its holding, the court of appeals noted that the supreme court has previously upheld a trial court's instructions under section 15A-1235(b) when the trial court's instructions "'addressed all of the concerns set out in [the statute],' even though the trial court did not recite the statutory language verbatim." Id. at ___, 2021-NCCOA-214, ¶ 30 (quoting State v. Aikens, 342 N.C. 567, 579, 467 S.E.2d 99, 107 (1996)). To further illustrate its analysis, the court of appeals provided the following chart showing a side-by-side comparison of the instructions given (shown in italics) with the text of section 15A-1235(b):

(1) Jurors have a duty to consult with one another and to deliberate with a view to reaching an agreement, if it can be done without violence to individual judgment;	*I want to remind you that it is your duty to do whatever you can without surrendering an honest conviction as to the effect or weight of the evidence to reach a unanimous decision.*

(2) Each juror must decide the case for himself, but only after an impartial consideration of the evidence with his fellow jurors;	*You should reason this over as reasonable men and women and do everything possible to reconcile your differences.*
(3) In the course of deliberations, a juror should not hesitate to reexamine his own views and change his opinion if convinced it is erroneous;	*[H]owever, do not hesitate to re-examine your own views and change your opinion, if you become convinced it is erroneous.*
(4) No juror should surrender his honest conviction as to the weight or effect of the evidence solely because of the opinion of his fellow jurors, or for the mere purpose of returning a verdict.	*In getting back to work, no juror should change his verdict simply to reach a verdict[.]*

Id. at ___, 2021-NCCOA-214, ¶ 31. Based on the parallels in the statute and the trial court's instructions in the present case, the court of appeals reasoned that the trial court's instructions contained all of the key statutory elements. Id. at ___, 2021-NCCOA-214, ¶ 30. Accordingly, the court concluded that the jury was properly instructed regarding their duty to deliberate and that defendant failed to establish plain error. Id. at ___, 2021-NCCOA-214, ¶ 31.

F. Arbitration

In Short v. Circus Trix Holdings, LLC, ___ N.C. App. ___, 852 S.E.2d 388 (2020), the court of appeals considered whether a trial court must make findings of fact resolving agency disputes when ruling on a motion to compel arbitration, when the arbitration agreement was executed by a litigant's spouse but not the litigant himself.

A man and his family went to a trampoline park. Id. at ___, 852 S.E.2d at 390. Before they arrived at the park, the man's wife completed participation agreements for each member of the family including the man. Id. These liability waivers contained an arbitration clause. Id. The wife did not ask permission to sign the waiver on the man's behalf, nor did the wife tell or notify

the man that she had done so. Id. at ___, 852 S.E.2d at 391. The man was subsequently seriously injured in the trampoline park and sued. Id. at ___, 852 S.E.2d at 390.

The trampoline park moved to compel arbitration based upon the arbitration clause in the participation agreement. Id. The trampoline park filed an affidavit with the trial court, asserting that the injured man would have been asked about his agreement upon arrival at the park, seen a "Waiver Station Kiosk," or seen "Guest Responsibility signs" throughout the park facility. Id. at ___, 852 S.E.2d at 390-91. The injured man filed an affidavit, asserting he saw nothing at the park alerting him to the existence of any waiver and that he had no knowledge his wife had executed a liability agreement. Id. at ___, 852 S.E.2d at 391.

At oral argument, the parties argued over whether the man's wife had acted as his agent when she signed the participation agreement on his behalf, but the trial court focused on whether the man himself had signed the agreement. Id. at ___, 852 S.E.2d at 392. The court denied the motion to compel arbitration and held the arbitration clause unenforceable against the injured man because he had not read the agreement, and thus the parties had not mutually agreed to arbitrate disputes. Id. The trial court made no factual findings regarding whether an agency relationship existed between the injured man and his wife. Id. at ___, 852 S.E.2d at 394.

On appeal, the court of appeals vacated the trial court's order. The court explained that the order denying the motion to compel did not resolve the key factual issue of agency, but instead only addressed the uncontested fact that the man himself had not signed the agreement. Id. Agency was a critical factual issue because arbitration agreements are governed by contract law, and an agent may contractually bind a principal in contract. See id.

For these reasons, the court of appeals vacated the trial court's denial of the motion to compel and remanded for appropriate findings of fact.

IV. INSURANCE

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

The insured, a law firm, was sued in the underlying suit for obtaining and using individuals' "protected personal information" in a manner violating the Driver's Privacy Protection Act of 1994, 18 U.S.C. § 2721 et seq. ("DPPA"). Id. at ___, 2021-NCCOA-233 at ¶¶ 4–5. Specifically, the underlying complaint alleged that the insured "knowingly" obtained, disclosed, and used the protected personal information for advertisement purposes. Id. at ___, 2021-NCCOA-233 at ¶ 7. The insurer defended the action under a reservation of rights. Id. at ___, 2021-NCCOA-233 at ¶ 12. After summary judgment was granted for the insured in the underlying suit, the insurer commenced this coverage action seeking a declaratory judgment on its obligations. Id. at ___, 2021-NCCOA-233 at ¶¶ 8, 13. The trial court ruled in favor of the insurer, finding that the underlying suit did not trigger the insurer's obligations under the policy. Id. at ___, 2021-NCCOA-233 at ¶ 13.

On appeal, the court of appeals affirmed the trial court's order in favor of the insurer. First, the court of appeals reviewed the legal precedent surrounding questions of coverage. An insurer owes two independent duties to the insured: the duty to defend and the duty to indemnify. Id. at ___, 2021-NCCOA-233 at ¶ 26 (citing Harleysville Mut. Ins. Co. v. Buzz Off Insect Shield, L.L.C., 364 N.C. 1, 6–7, 692 S.E.2d 605. 610–11 (2010)). The duty to defend is broader than the duty to indemnify, such that "[a]n insurer is excused from its duty to defend when 'the facts are not even arguably covered by the policy.'" Id. at ___, 2021-NCCOA-233 at ¶ 28 (quoting Harleysville at

692, 340 S.E.2d at 378). When analyzing whether a complaint trigger's the duty to defend, courts utilize a "comparison tests" wherein the complaint, taking the facts alleged as true, is read "side by side" with the policies at issue to determine coverage obligations. Id. at ___, 2021-NCCOA-233 at ¶ 30. Moreover, the facts to consider include facts learned from the insured and facts discoverable by reasonable investigation. Id. at ___, 2021-NCCOA-233 at ¶ 31 (quoting Duke Univ. v. St. Paul Fire & Marine Ins. Co., 96 N.C. App. 635, 638, 386 S.E.2d 762, 764 (1990)).

With that framework established, the court of appeals looked to the policy language at issue, specifically the policy's exclusion for injuries "[a]rising out of the willful violation of a penal statute." Id. at ___, 2021-NCCOA-233 at ¶ 33. The insurer argued this exclusion applied to preclude coverage because the underlying complaint alleged the insured "knowingly obtained, disclosed and used" personal information in violation of the DPPA, a penal statute. Id. at ___, 2021-NCCOA-233 at ¶ 34. The court of appeals agreed, noting that a violation of the DPPA is also a violation of a penal criminal provision and concluding that "the words 'willful' and 'knowing' carry essentially the same or equivalent meaning," i.e. "deliberate." Id. at ___, 2021-NCCOA-233 at ¶¶ 39–40. Thus, "[a]n allegation of a 'knowing' violation of the DPPA is an allegation of a 'willful' violation." Id. at ___, 2021-NCCOA-233 at ¶ 40.

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

A. UIM

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

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

The mother and daughter also asserted that they were entitled to medical payments and underinsured motorist coverage under an insurance policy issued to the grandmother. Id. at 282, 851 S.E.2d at 893. The grandmother's policy designated the grandmother as the named insured and covered the grandmother and her late husband. Id. It did not cover the Ford automobile. Id. The policy provided, however, that an insured meant "you or any family member" and defined "family member" as any person "who was related to you by blood, marriage, or adoption who is a resident of your household." Id. Because the mother and daughter were related to the grandmother and were "residents" of her "household," they claimed to the insurance company that they were covered under the grandmother's policy. Id.

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

On appeal, the supreme court affirmed the majority opinion from the court of appeals. The court held that the insurance policy's plain language controlled its decision. Id. at 286, 851 S.E.2d

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

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

Applying this principle to the facts, the court observed that the mother and daughter had never actually lived in the same residence as the grandmother. Id. at 292, 851 S.E.2d at 899. Their houses were separated by a three to five-minute walk, and the houses had separate addresses and separate post office boxes. Id. The court expressed disapproval with the reasoning of a previous court of appeals' decision, in which the court of appeals stated that relatives "need not have ever actually lived in the same dwelling to be considered residents of the same household." Id. at 294, 851 S.E.2d at 900. (emphasis in original). Rather, the court held that "in order to be deemed residents of the same household, parties must have lived in the same dwelling for some meaningful

period of time under circumstances demonstrating an intent to form a common household—regardless of where in this state they happen to live." Id. at 295, 851 S.E.2d at 901. In so holding, the court stated that its decision did not manufacture an "urban versus rural" dynamic, but rather, was applying a longstanding requirement of its precedent. Id.

Justice Earls dissented, stating that the majority imposed an "unduly restrictive frame of reference that ignores the realities of rural life . . . ." Id. at 296, 851 S.E.2d at 901 (Earls, J., dissenting). The dissent stated that the type of living arrangement presented in this case is common in rural areas and is commonly understood to be a family household. Id. The dissent noted that the court should "apply the same fact-intensive, contextual approach to resolve a claim arising from Knotts Island as we would to a claim arising from Raleigh." Id. at 298, 851 S.E.2d at 903. The dissent remarked that the majority failed to account for and give legal recognition to the residential patterns that many rural families experience. Id.

V. WORKERS' COMPENSATION

In Dunbar v. Acme Southern, ___ N.C. App. ___, 852 S.E.2d 394 (2020), the court of appeals considered (1) whether under the Workers' Compensation Act (the "Act"), the two-year limitation period for medical compensation claims beginning upon an insurer's "last payment," N.C. Gen. Stat. § 97-25.1, is subject to the notice requirement of an insurer's "final payment," N.C. Gen. Stat. § 97-18(h); (2) whether a claim for further compensation may be equitably estopped by an insurer's failure to provide notice of "final" payment; and (3) whether the insurer's ability to deny further compensation after two years violates due process.

In 1998, an employee was injured in a workplace accident. Dunbar, ___ N.C. App. at ___, 852 S.E.2d at 396. The employee, his employer, and the employer's insurer settled the employee's

indemnity compensation claim, but not his medical compensation claim. Id. Nonetheless, the employee's medical providers sent bills to the insurer, who paid those bills. Id. Sometime around 2013 the employee's medical providers began billing Medicare instead of the insurer; the employee remained unaware of this change in billing practices and the insurer remained unaware of the employee's continuing medical care. Id. In October 2013, the insurer paid the last bill that it received. Id. at ___, 852 S.E.2d at 396-7. More than two years later, in 2017, the employee sought authorization to receive medical compensation for a new treatment to which he had been referred. Id. at ___, 852 S.E.2d at 396. His request was denied. Id.

The employee filed a request with the North Carolina Industrial Commission (the "Commission") to determine whether he was entitled to medical compensation. Id. A deputy commissioner found the Act did not entitle the employee to continued medical compensation because he had failed to submit a request within two years of the insurer's last payment. Id. The full Commission affirmed the deputy commissioner, and the employee appealed.

The court of appeals affirmed the opinion and order of the Commission. The court considered the relationship of two provisions of the Act, the notice requirement of section 97-18(h), and the time limitation of section 97-25.1. Id. at ___, 852 S.E.2d at 397. Section 97-18(h) requires insurers to notify the Commission or a workers' compensation claimant employee upon the insurer's "final payment" of medical or indemnity compensation. Section 97-25.1, on the other hand, provides that subject to certain exceptions "[t]he right to medical compensation shall terminate two years after the employer's last payment of medical or indemnity compensation." The employee argued that the insurer should not be deemed to have made the "last payment" which begins the two-year limitation period for medical compensation under section 97-25.1 because it did not provide notice of "final payment" under section 97-18(h).

The court of appeals applied the statutory construction guidelines set out in Deese v. Southeastern Lawn and Tree Expert Co., 306 N.C. 275, 293 S.E.2d 140 (1982), and ultimately concluded the notice provision of section 97-18(h) "is unrelated to" the two-year time limitation of section 97-25.1. Dunbar, ___ N.C. App. at ___, 852 S.E.2d at 397. The court explained several reasons for its holding. First, it noted that North Carolina appellate courts have "always construed the term 'last payment' as the date of the last actual payment," and that section 97-25.1 does not contain an internal notice requirement. Id. (compiling cases). The court also highlighted the distinct language used in the statutes: section 97-25.1 refers to a "last" payment, while section 97-18(h) refers to a "final" payment. Id. In addition, it observed that the notice requirement of section 97-18(h) provides for a sanction—a nominal civil fine—while the legislature chose not to condition medical compensation claims on the notice requirement. Id. Finally, the court stated that in this case, section 97-18(h) did not apply because there was no way that the insurer could have known that the October 2013 payment would be the last payment the employee would seek. Id. Accordingly, the court of appeals held that the notice requirement of section 97-18(h) does not apply to the time limitation of section 97-25.1. Id.

The court held that, where the two-year gap is caused by the fact that an insurer was not being billed and there was no indication of bad faith, equitable estoppel does not bar an insurer from asserting section 97-25.1 as a defense. Id. While the court "express[ed] no view as to whether estoppel would ever apply with respect to Section 97-25.1," it noted that "[i]t could be argued that estoppel should apply where an insurer was continuing to be billed but was not making payments, though acting in a way to suggest that they would make said payments." Id. at ___, 852 S.E.2d at 398. Yet on the facts before the court, the two-year gap was caused by the fact that insurer was not being billed, and therefore estoppel did not apply. Id.

Third and finally, the court of appeals held that the Act did not violate due process because, since the Act itself defines the scope of any right to medical compensation, limitations to such a right did not deprive the employee of a liberty or property interest. Id. Pursuant to the Act, any interest in compensation expires two years after the last payment. Id. Thus, no interest exists after that time and the lack of notice did not violate due process. In any case, the court also explained that the statute itself provides notice of the termination after two years because citizens are "presumptively charged with knowledge of the law." Id. (quoting Atkins v. Parker, 472 U.S. 115, 130 (1985)).

For these reasons, the court of appeals affirmed the Commission and found the employee was not entitled to further medical compensation because more than two years had passed since the insurer's last payment.

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

The decedent was employed by a company in the automotive industry and was killed in a work-related accident. Id. at ___, 2021-NCCOA-151, ¶ 1. Decedent's adult daughter, adult son, and estranged wife (collectively, the "family"), and his girlfriend all asserted death benefit claims under the North Carolina Workers' Compensation Act. Id. The girlfriend asserted that she was entitled to benefits because she was cohabiting with the decedent and was partially dependent on him for certain expenses. Id. Decedent's employer and his insurance carrier admitted compensability for the death benefits and filed a request for hearing with the industrial commission to determine the proper beneficiaries. Id. at ___, 2021-NCCOA-151, ¶ 1, 2. The family members

filed a motion to dismiss the girlfriend's claim and motion for attorneys' fees and sanctions, which was granted by the deputy commissioner. Id. at ___, 2021-NCCOA-151, ¶ 1. The full commission ultimately upheld the dismissal of girlfriend's claim, concluding that as a matter of law, she could not be a dependent of the decedent under section 97-39 of the North Carolina General Statutes. Id. at ___, 2021-NCCOA-151, ¶ 8.

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

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

N.C. Gen. Stat. § 97-39 (emphasis added). The court noted that the supreme court's holding in Fields expressly prohibited an unmarried romantic partner from being entitled to a decedent's death benefits; however, it held that the girlfriend's argument that the precedent set in Fields should not have barred her claim for benefits was "a good faith argument for . . . reversal of [] existing law" and thus the commission did not err in refusing to order sanctions against her. Id. at ___, 2021-NCCOA-151, ¶ 23.

The court of appeals also considered the girlfriend's argument that the commission's dismissal of her claim denied her equal protection of the law because it relied on precedent set in Fields, which the girlfriend contended impermissibly delineated between classes of individuals

based on their marital status. Id. at ___, 2021-NCCOA-151, ¶ 25 (citing Fields, 238 N.C. at 614, 78 S.E.2d at 740). On this point, the court of appeals concluded that it was bound by the supreme court's holding in Fields that "disallow[s] an unmarried romantic partner of a decedent the opportunity to establish entitlement to the decedent's death benefits." Id. at ___, 2021-NCCOA-151, ¶ 29.

VI. ETHICS

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

A judge presided over a probable cause hearing for a criminal defendant represented by court-appointed counsel. Id. at 129, 852 S.E.2d at 617. The State moved to continue the case, and defense counsel objected and demanded a probable cause hearing on behalf of his client. Id. The judge held the matter open for the parties to confer and instructed them to return to court at 2:00 p.m. that day. Id. at 130, 852 S.E.2d at 617. At 2:00 p.m., defense counsel did not reappear in the courtroom. Id. The judge had previous experiences where this defense counsel had not appeared in a timely manner for court appearances. Id. The judge proceeded with the remainder of his calendar. Id. At 2:50 p.m., defense counsel had still not appeared. Id. Without defense counsel present, the judge instructed the State to call the defendant's case for hearing. Id. During the hearing, the judge advised the defendant that he would not be permitted to speak because he may incriminate himself. Id. The defendant cross-examined witnesses from behind bars while handcuffed and without access to pen and paper. Id. At the close of the hearing and without giving

the defendant any opportunity to be heard or make any arguments, the judge immediately ruled in favor of the State. Id. The judge later explained that he allowed the proceeding to move forward without defense counsel present in order to "make a point" to counsel about appearing to court on time. Id. at 132, 852 S.E.2d at 618.

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

The supreme court reviewed and adopted the Commission's recommendation. Id. at 140-43, 852 S.E.2d at 623-24. The court ruled that the Commission's findings of fact were supported by clear, cogent, and convincing evidence, and adopted those findings. Id. at 140, 852 S.E.2d at 622. The court rejected the judge's argument that his conduct was the result of an objectively reasonably interpretation of the statutes governing probable cause proceedings. Id. (citing N.C. Gen. Stat. § 15A-606(e)-(f) (2019)). Rather, the court held that the judge's conduct did not objectively comply with the pertinent statutes. Id. The court further noted that the judge had "rushed to hold a hearing without counsel present," "failed to explore other options regarding counsel prior to commencing the proceeding," and "made comments about 'making a point' after the proceeding." Id. In light of this evidence, the majority held that the recommendation of a public reprimand was appropriate. Id. The court stated that, in reaching this decision, it had considered additional mitigating factors that had been presented to the Commission: multiple affidavits submitted on the judge's behalf that attested to his fairness and the fact that the judge had never been disciplined by the court. Id. at 143, 852 S.E.2d at 624.

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

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

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

In this role, the assistant exhibited unprofessional behavior: He was dishonest and did not diligently perform his duties. Id. at 223-24, 852 S.E.2d at 603-04. During the workday, he would regularly use profanity, as well as "fear and intimidation while interacting with and supervising the law clerks," including violent and angry outbursts while the judge was present in the chambers. Id. at 222, 852 S.E.2d at 602. On one occasion, the assistant slammed his fist so hard onto his desk that he activated an attached panic alarm. Id. at 225, 852 S.E.2d at 604. The assistant repeatedly made lewd, sexually suggestive, and harassing remarks to the female law clerks on multiple occasions. Id. at 223-24, 852 S.E.2d at 603-04. For instance, on one occasion, he made an inappropriate comment about a female intern applicant's body in front of two female law clerks. Id. at 224, 852 S.E.2d at 603. On another occasion, he told a law clerk on a cold day that "he would like to see her in a 'wife beater' tank top and shorts on a cold day." Id. at 223, 852 S.E.2d at 603.

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

Five months after his second law clerk resigned, an incident occurred in front of the judge during an internal chambers meeting. Id. at 225, 852 S.E.2d at 604. The assistant became angry with one of the law clerks, slammed his fist on his chair, used profanity toward the law clerk, and belittled and threatened the law clerk. Id. The judge did not take any action to correct or admonish the behavior. Id. The following week, the assistant offered a "non-apology" to the law clerk, but also threatened her by stating that "he influences the hiring and firing in the office." Id. Two weeks after this incident, the law clerk informed the judge that the assistant was dishonest and was lying to other employees at the court. Id. The judge still took no immediate action. Id. By the end of that month, another judge at the court had learned about concerns of potential sexual harassment in the chambers and reported his concerns. Id. at 226, 852 S.E.2d at 604.

The Judicial Standards Commission commenced an investigation of the judge and the assistant upon learning of the alleged sexual harassment. Id. The report alleged that the assistant had made a profane and sexually suggestive remark that he had always wanted to have sexual relations with "a red head"—a reference to one of the judge's former law clerks. Id. The judge met with an HR employee of the Administrative Office of the Courts, but he "lacked candor" when

speaking with the HR employee. Id. at 227, 852 S.E.2d at 605. He did not disclose the extent of the complaints that his law clerks had previously raised. Id. Rather, he downplayed the assistant's unprofessional conduct. Id. In response to the judge's statements to the HR employee, she advised the judge to remind his staff that "all concerns of sexual harassment would be taken seriously" and that his employees should "review the judicial branch's workplace conduct policy." Id. The HR employee then advised the judge to reach out to the former law clerk to determine if the assistant had made the alleged sexually suggestive remark. Id.

After meeting with the HR employee, the judge met with each of his law clerks, the former law clerk referenced in the allegation, and the assistant. Id. Prior to these meetings, the judge assured the assistant that his job was secure. Id. During his meeting with the former law clerk, the judge asked her about any sexually suggestive remarks the assistant had made to her. Id. She responded that the assistant had made the "wife beater" remark and had never apologized for the remark. Id. The former law clerk denied knowing about any "red head" comment. Id. at 228, 852 S.E.2d at 605. During the judge's conversations with them, the current law clerks told the judge that the assistant had angry and profane outbursts, exhibited dishonest behavior, and threatened their jobs. Id. at 228, 852 S.E.2d at 606. When the judge met with the assistant, the assistant denied making any sexually inappropriate comments to the former law clerk. Id.

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

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

The Judicial Standards Commission completed its investigation of the judge and found that he had violated multiple Canons of the Code of Judicial Conduct: First, it determined he violated Canon 1, which imposes an affirmative duty on judges to "establish, maintain, and enforce appropriate standards of conduct in the judiciary." Id. Second, it determined he violated Canon 2B, which provides that judges must not allow "social or other relationships to influence [their] judicial conduct or judgment." Id. Third, it found he violated Canon 3B(3), which imposes a duty on judges to ensure the highest degree of professionalism among attorneys, fellow judges, and any judicial branch employees or court officials subject to their direction and control. Id. at 233, 852 S.E.2d at 608. Fourth, it determined he and his assistant violated Canon 3B(2), which both law clerks and judges to ensure that law clerks adhere to the standards of conduct set forth in the Law Clerk Code of Conduct. Id. Fifth, the Commission found that the assistant had violated Canon 3A(3), which required him to engage in patient, dignified, and courteous conduct to others. Id. Additionally, the Commission observed that judges have a compelling interest to ensure that young lawyers maintain their integrity and moral character. Id. The Commission concluded that the judge's violations of the Code amounted to conduct "prejudicial to the administration of justice that brings the judicial office into disrepute." Id. at 234, 852 S.E.2d at 609. The Commission observed that the judge's lack of candor and reckless disregard for the truth, as well as his willful

pattern of misrepresenting or downplaying the assistant's workplace misconduct, undermined the judiciary's ability to enforce appropriate standards of professional conduct. Id. Based on these findings and conclusions, the Commission unanimously recommend that the judge be censured. Id. at 235, 852 S.E.2d at 609.

In a unanimous opinion, the supreme court adopted the recommendation of the Judicial Standards Commission to censure the judge. Id. at 235-42, 852 S.E.2d at 609-14. The court observed that it reviews the Commission's recommendation as "a court of original jurisdiction, rather than in its typical capacity as an appellate court." Id. at 235, 852 S.E.2d at 609. Although the judge argued that his due process rights had been violated based on the Commission's "prosecution, rather than investigation" of him, the court rejected this argument as without merit. Id. The court also rejected the judge's argument that the Commission's findings were conclusory or over-exaggerated statements of witnesses, and instead held that "there was no reason for the Commission panel to believe that the clerks' testimony was anything less than truthful." Id. at 236, 852 S.E.2d at 610. The court concluded that the Commission's findings were supported by clear and convincing evidence and adopted those findings. Id.

The court held that the judge had violated Canons 1, 2B, 3B(2), and 3B(3) of the Code of Judicial Conduct. Id. at 238-40, 852 S.E.2d at 611-13. It rejected the judge's argument that he could not be held liable for his assistant's violations of the Code. Id. at 240, 852 S.E.2d at 613. Rather, the court held that judges must require "dignified and courteous" behavior of their staff members. Id. The court further observed that judges must understand the magnitude of their influence and that a judge's title alone "carries a presumption that the individual possesses the ability to ensure order and fairness." Id. at 42, 852 S.E.2d at 613. The court held that the judge had fallen short of those expectations. Id. Based on the totality of the circumstances, the court

held that the judge's conduct brought the judicial office into disrepute and was prejudicial to the administration of justice. Id. at 42, 852 S.E.2d at 614. The court ruled, however, that the conduct did not rise to the level of incurring suspension or removal. Id. Therefore, the court ordered that the judge be censured for violation of these Canons of the Code of Judicial Conduct. Id. at 243, 852 S.E.2d at 614.

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

The Judicial Standards Commission charged a judge with ethics violations for serving as executor for the estates of two former clients who were not members of the judge's family, collecting substantial fees or commissions for such service, and failing to properly report that income. Id. at _____, 2021-NCSC-36, ¶ 2. The judge admitted to the charges and the parties agreed to the following stipulated facts: the judge was compensated nearly $90,000 for serving as executor of the two estates not of the judge's family; the judge failed to disclose this extra-judicial income; and the judge knew or should have known that he was required to report this income. Id. at _____, 2021-NCSC-36, ¶ 3.

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

Carolina General Statutes. Id. For these violations, the commission unanimously recommended that the supreme court censure the judge. Id. at _____, 2021-NCSC-36, ¶ 6.

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

The supreme court, exercising its original jurisdiction over the matter, first concluded that the commission's findings of fact and conclusions of law were supported by clear and convincing evidence. Id. at _____, 2021-NCSC-36, ¶¶ 7, 8. The supreme court also agreed with the commission that the judge's misconduct in this matter was not "minor" and, therefore, required more than a public reprimand. Id. at _____, 2021-NCSC-36, ¶ 9.

However, the supreme court disagreed with the commission's decision only to censure the judge, because a censure would not keep with the purpose of the Code of Judicial Conduct to uphold an "independent and honorable judiciary." Id. at _____, 2021-NCSC-36, ¶ 10. Importantly, the court noted how this matter departed from previous cases resulting in censure, because the activity giving rise to the unreported, extra-judicial income was itself prohibited by the Code. Id. at _____, 2021-NCSC-36, ¶ 10. Moreover, the prohibited conduct, i.e., acting as executor of a non-family member's estate, occurred in the judge's own judicial district. Id. These additional aggravating factors "created an appearance of a lack of judicial independence." Id. In sum, the judge's conduct "was a willful violation prejudicial to the administration of justice and brought the judicial office into disrepute." Id.

For these reasons, the supreme court imposed a one-month suspension of the judge for his violations of Canons 1, 2A, 5D, and 6C of the Code of Judicial Conduct and section 7A-376 of the North Carolina General Statutes. Id. at _____, 2021-NCSC-36, ¶ 13.