CIVIL LAW UPDATE
(MAY 17, 2022 TO MAY 15, 2023)

2023
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

TABLE OF CONTENTS

TABLE OF CASES

I. LIABILITY

A. Negligence

In Asher v. Honeycutt, 284 N.C. App. 583, 2022-NCCOA-517, the court of appeals considered whether sufficient evidence existed to forecast that homeowners breached the duty of care owed to guests on their property when they failed to notice and remedy minor code violations with steps.

Homeowners purchased a house to use as a rental property. Id. ¶ 2. The house could be entered through the garage using three wooden steps. Id. Prior to purchasing the house, the homeowners had it inspected to evaluate potential problems. Id. ¶ 3. The inspection revealed that there was "a little play or movement of the handrail" on the garage steps and recommended only that the handrail be tightened or secured. Id. The homeowners secured the handrail without making other alterations to the garage steps. Id.

The homeowners rented the home to a tenant for two years who testified the steps "always felt stable and safe." Id. ¶ 4. The homeowners then rented the home to a second tenant. Id. The second tenant did not observe any problem with the steps during a visual inspection with the homeowners at the time of renting the house or while living there. Id.

The second tenant hosted a party at the house. Id. ¶ 5. While assisting his wife down the steps as they were leaving the party, a guest lost his balance and fell down the steps. Id. He severed his left optic nerve, causing complete loss of vision in that eye. Id.

Subsequent inspection of the garage steps revealed that they did not comply with the applicable provisions of the North Carolina Residential Building Code: the variance among step heights was 1/4-inch greater than the code permitted, the threshold height from the floor

was 1/4-inch higher than code allowed, the variance in tread depth was 3/8-inches greater than code permitted, and at least one tread sloped 1.1% more than code allowed. Id. ¶ 7.

The guest filed suit against the homeowners alleging negligence per se and common law negligence. Id. ¶ 8. The trial court granted the homeowners' motion for summary judgment. Id. ¶¶ 9–10.

Reviewing the trial court's decision de novo, the court of appeals affirmed. Id. ¶¶ 1, 19. The court of appeals concluded the guest failed to forecast evidence that the homeowners knew or should have known of the code violation. Id. ¶ 24. Accordingly, no genuine issue of material fact existed as to the negligence per se claim. Id. ¶¶ 21–26.

As to the common law negligence claim, the guest argued the homeowners had a duty to inspect the steps and perform necessary repairs, which they failed to do as evidenced by the code violations. Id. ¶ 27. To prove a homeowner was negligent in a premises liability care case, the invitee must show that the property owner "either (1) negligently created the condition causing the injury, or (2) negligently failed to correct the condition after actual or constructive notice." Id. ¶ 31 (citing Burnham v. S&L Sawmill, Inc., 229 N.C. App. 334, 340, 749 S.E.2d 75, 80 (2013)).

The court of appeals explained that while the homeowners owed the guest a duty of care, the guest could not demonstrate that the homeowners breached that duty by failing to notice and remedy a minor code violation. Id. ¶ 33. The court of appeals concluded the homeowners acted reasonably in relying upon a professional inspection to ascertain the existence of hidden dangers rather than measuring the steps themselves. Id. ¶¶ 34–36. Given the inspection and absence of complaints by two tenants, the homeowners had no reason to suspect the garage steps contained "hidden hazards". Id. ¶ 36. The court of

appeals concluded that "accepting [the guest's husband's] position would require landowners to double-check the work of their hired professionals, which would unreasonably mandate that landowners perform important safety tasks without the requisite expertise." Id. ¶ 38.

The court of appeals held there was no evidence that the homeowners breached their duty to make a reasonable inspection of the house. Id. ¶ 39. Accordingly, it affirmed the trial court's entry of judgment in favor of the homeowners. Id. ¶ 40.

In Keith v. Health-Pro Home Care Services, Inc., 381 N.C. 442, 2022-NCSC-72, the supreme court considered whether an employer's failure to vet one of its employees may give rise to a negligent hiring claim for that employee's subsequent criminal conduct.

An elderly couple filed a complaint for negligence against an in-home health care services provider whose employee committed a home invasion and armed robbery of the elderly couple. Id. ¶¶ 3–4. The couple alleged that "despite [the employee's] criminal record, lack of a driver's license, and history of prior incidents of suspected prior thefts from the [couple's] home, [the employer] negligently allowed [the employee] to provide in-home care to [the couple], and [the employer's] conduct in assigning [the employee] to these responsibilities as opposed to some other position in the company, was the proximate cause of the robbery . . . and the consequent injuries sustained therein." Id. ¶ 4. At trial, following the conclusion of the elderly couple's evidence, the employer moved for a directed verdict. Id. ¶ 6. The trial court denied the motion. Id. Subsequently, the case progressed and proposed jury instructions were submitted. Id. ¶ 8. The trial court proposed an instruction stating the general common law of negligence. Id. The employer contended that the couple's claim was for negligent hiring, and it proposed an alternative instruction. Id. The

trial court refused to give the employer's instruction. Id. The jury ultimately returned a verdict in favor of the couple. Id. ¶ 9. The employer moved for judgment notwithstanding the verdict; the trial court denied this motion. Id. ¶10. On appeal, a divided court of appeals panel reversed the trial court's judgment and remanded for entry of the employer's motion for judgment notwithstanding the verdict. Id. ¶ 11. The court of appeals found that the couple alleged a claim for negligent hiring and that the trial erred in denying the employer's requested jury instruction. Id. ¶¶ 12–13.

In an opinion by Justice Barringer writing for the majority, the supreme court reversed the court of appeals. Id. ¶ 81. North Carolina recognizes a cause of action against an employer for negligent hiring. Id. ¶ 27. A plaintiff bringing a claim on this ground must prove:

> (1)The specific negligent act on which the action is founded . . . (2) incompetency, by inherent unfitness or specific acts of negligence, from which incompetence may be inferred; and (3) either actual notice to the master of such unfitness or bad habits, or constructive notice, by showing that the master could have known the facts had he used ordinary care in 'oversight and supervision,' . . . and (4) that the injury complained of resulted from the incompetency proved.

Id. (quoting Medlin v. Bass, 327 N.C. 587, 591, 398 S.E.2d 460, 462 (1990)).

The supreme court found that the court of appeals erred, id., holding that to survive a motion for directed verdict or judgment notwithstanding the verdict, the couple had to present evidence supporting the elements addressed in Medlin, id. ¶ 66. Here, the evidence presented at trial showed that when the couple initially sought the in-home health care services, they were told that all employees underwent a criminal background check. Id. ¶ 38. It was the employer's policy that all potential employees went through a criminal background check with the "State Bureau of Investigations or another approved entity." Id.

¶ 40. However, this criminal check was never sufficiently performed by the employer; the criminal check was performed by a third party that specifically stated on its website that "its services cannot be used to conduct background checks for employees or applicants." Id. ¶ 42. The website had no record of any crimes committed by the employee. Id. Had a sufficient criminal check been completed it would have showed that the employee had been charged multiple times for communicating threats along with several other misdemeanors. Id. ¶ 46. Additionally, the employer did not confirm whether the employee had a valid driver's license, as indicated on her application. Id. ¶ 45. Had the employer confirmed, it would have discovered that the employee did not have a valid driver's license. Id. ¶ 46. Furthermore, at some point prior to this incident, the couple discovered that more than $2,000 had been stolen from their home. Id. ¶ 51. Suspecting it could have been the employee, the couple informed the employer. Id. ¶ 54. The employer, having a strong belief that the employee was responsible, withdrew her from the home. Id. Nevertheless, a few weeks later, the employee was reassigned to the home. Id. ¶ 55. A couple of weeks thereafter, the employee perpetrated the crime. Id. ¶ 57. Taking these circumstances into account, the supreme court found that there was evidence to support each element of the couple's cause of action. Id. ¶ 64.

The majority further held that there is a sufficient nexus between the injurious act and the employment relationship to create a duty. Id. ¶ 67. This is demonstrated by the facts that: (1) the employer assigned the employee to the couple's home, (2) the employer participated in the meeting between the employee and the couple, (3) the employer reaped financial benefit from the employee's meeting with the couple, and (4) the employee used the intelligence she received working for the couple to engage in her criminal behavior. Id.

Furthermore, the inaccuracies in the employee's employment application, the employer's belief that the employee committed a prior theft at the couple's home, and the employee's criminal background supports the inference that the employer should have known that the employee was incompetent to be the couple's provider. Id. ¶ 69. Since the nexus requirement and the elements provided by Medlin are met, the court concluded that the jury, not the court, was required to determine the outcome of the case. Id. ¶ 72. Thus, the supreme court reversed the court of appeals' decision.

Chief Justice Newby, concurring in part and dissenting in part, agreed with the majority's analysis of the case, that: (1) negligent hiring requires a plaintiff to show evidence of each of the three elements from Medlin and a nexus connection between the employment and injury, (2) the evidence was sufficient to submit the case to a jury, (3) the pattern instructions were incorrectly given, and (4) the trial court erred in giving an ordinary negligence jury instruction and not a negligent hiring instruction. Id. ¶ 82. However, Chief Justice Newby would have held that the "trial court's failure to give a negligent hiring instruction prejudiced the defendant such that defendant is entitled to a new trial." Id. This state has established that "a party's decision to request the delivery of a particular jury instruction during the jury instruction conference suffices to preserve a challenge to the trial court's refusal to deliver that instruction to the jury." Id. ¶ 83. Here, the health care provider requested a specific instruction during the conference and objected to the trial court's instruction after it was given. Id. ¶ 87. Thus, a new trial should have been awarded. Id. ¶ 88.

Justice Berger, dissenting, concluded that the circumstances at issue in the case did not give rise to a legal duty on behalf of the employer. Id. ¶ 91. He stated that the law

provides that "[i]n cases where a plaintiff asserts liability founded on a defendant's relationship to a third party who injured them, the establishment of a legal duty hinges on whether defendant held a special relationship with the third party." Id. (citing Stein v. Asheville City Bd. of Educ., 360 N.C. App. 321, 329, 626 S.E.2d 263, 268 (2006)). He observed that employment alone does not satisfy that relationship, but rather the employer must "[(1)] know or should know of the third person's violent propensities and (2) the [employer must have] the ability and opportunity to control the third person at the time of the third person's criminal acts." Id. (quoting Stein, 360 N.C. App. at 330, 626 S.E.2d at 269). Here, the employee's prior convictions were for non-violent offenses and the employer did not have any complaints as to her violent propensity. Id. ¶ 93. Additionally, the employer had no ability to control the employee's actions in the robbery. Id. Thus, Justice Berger would have found no legal duty was owed to the couple. Id.

1. Doctrine of Sudden Emergency

In Chahdi v. Mack, ___ N.C. App. ___, ___ S.E.2d ___, 2023 WL 3184928 (2023), the court of appeals considered whether the trial court erred in instructing the jury on the doctrine of sudden emergency when a driver collided with a convenience store after experiencing brake failure several miles earlier. Id. at *1.

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

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

The doctrine of sudden emergency applies "when a defendant is confronted by an emergency situation not of his own making" and requires the defendant to act only as a reasonable person would react in similar circumstances. Id. at *2 (quoting Massengill v. Starling, 87 N.C. App. 233, 236, 360 S.E.2d 512, 514 (1987)). The trial court must find substantial evidence of two essential elements in order to instruct the jury on the doctrine: (1) an emergency situation exists that requires "immediate action to avoid injury," and (2) the emergency was not created by "the negligence of the party seeking the protection" afforded by the doctrine. Id. (quoting Allen v. Efird, 123 N.C. App. 701, 703, 474 S.E.2d 141, 142–43 (1996)).

The court of appeals held that sudden brake failure is an emergency in which the sudden emergency doctrine may apply. Id. at *3. The store employee argued that the driver failed to present substantial evidence that she was confronted with an emergency requiring immediate action because she continued to drive for several miles and spoke with the owner of the vehicle for one-to-two minutes following the discovery and before the collision. Id. The court of appeals reasoned that the store employee's argument confused "immediate action with immediate resolution" and failed "to recognize that a brake failure will

generally, inevitably end in an unavoidable accident, in spite of a defendant acting immediately to avoid injury." Id.

The court of appeals explained that "application of the doctrine does not focus on the instant in which the defendant was able to resolve the emergency, but rather on whether, taking the emergency into account, the defendant acted as a reasonable person would, given similar circumstances." Id. Further, the court of appeals held that whether the driver acted reasonably under the circumstances was a question for the jury. Id. at 5.

The court of appeals concluded that the trial court did not abuse its discretion and properly instructed the jury on the doctrine of sudden emergency. Id. at *6.

2. Contributory Negligence

In Lovett v. University Place Owner's Association, Inc., 285 N.C. App. 366, 2022-NCCOA-594, the court of appeals considered whether voluntary intoxication can rise to the level of gross contributory negligence that bars a plaintiff's tort claim.

An administrator of a decedent's estate filed a wrongful death action against the owners of a restaurant. Id. ¶¶ 2, 6. The administrator alleged that the owners' negligence and gross negligence directly and proximately caused the decedent's death. Id. ¶ 6. The decedent met his friends at the restaurant on the day of his death. Id. ¶ 2. The decedent was intoxicated when he arrived. Id. The decedent consumed more alcoholic beverages at the restaurant. Id. After leaving the restaurant, the decedent and his friends chose to walk around a lake, which was adjacent to the restaurant. Id. ¶ 3. At some point thereafter, the decedent walked to the edge of the lake and jumped in. Id. He was pulled out of the water and given aid. Id. Shortly after, the decedent jumped into the lake a second time. Id. ¶ 4. He was unable to be pulled out of the water and ultimately disappeared below the water. Id.

The next day, divers retrieved the decedent's body from the lake. Id. ¶ 5. A toxicology report showed that the decedent's blood alcohol content at the time of his death was .37 grams per millimeter. Id. At the wrongful death trial, the owners moved to dismiss the administrator's complaint asserting contributory negligence as a defense. Id. ¶ 6. The trial court granted the owners' motion to dismiss. Id. The administrator appealed. Id.

On appeal, the court of appeals affirmed the trial court's grant of the owners' motion to dismiss. Id. ¶ 19. Under this state's laws, contributory negligence can be used as a bar to recover for a negligence claim, however, only gross contributory negligence precludes recovery from a grossly negligent defendant. Id. ¶ 12. Here, the decedent was voluntarily intoxicated when he jumped into the lake. Id. ¶ 16. Further, the decedent's blood alcohol content was nearly five times the legal threshold. Id. The court concluded these facts sufficient to find the decedent grossly negligent. Id. ¶ 17. Therefore, the decedent's intoxication barred his claim. Id. ¶ 16.

Thus, for the foregoing reasons, the court affirmed the trial court's dismissal of the administrator's complaint.

B. Constitutional Claims

In Kinsley v. ACE Speedway Racing, Ltd., 284 N.C. App. 665, 2022-NCCOA-524, rev. allowed, 883 S.E.2d 455 (N.C. 2023), the court of appeals considered whether a business adequately pleaded a constitutional violation of infringement on the right to earn a living as guaranteed by the North Carolina Constitution's fruits of labor clause when the governor issued executive orders prohibiting mass gatherings in response to the COVID-19 pandemic.

ACE Speedway is a racetrack that can host a maximum of 5,000 fans. Id. ¶ 4. To cover overhead costs associated with hosting an event, the speedway needs around 1,000 fans to attend. Id. In May 2020, amidst the COVID-19 pandemic, Governor Cooper issued Executive Order 141, which temporarily prohibited "mass gatherings" (defined as an event bringing together more than twenty-five people outdoors). Id. ¶ 5. This Order nullified the speedway's ability to hold economically feasible racing events. Id.

Five days before the Executive Order was issued, speedway personnel met with local health officials and agreed to health precautions for the event, including contact tracing, temperature screenings, social distancing, use of plexiglass, and reduced and distanced seating arrangements. Id. After the Order was issued, the speedway hosted three events that drew over 1,000 spectators each. Id.

The day of the second event, the governor's office requested that the county sheriff personally ask the speedway to stop holding events that violated the Executive Order. Id. ¶ 8. The sheriff relayed the message, but publicly announced he would not take action to enforce the Executive Order. Id. The governor's office sent a letter advising the speedway that it could face sanctions if it continued operating in violation of the Executive Order. Id. The speedway hosted its third event the following day. Id.

After the third event, the Secretary of the North Carolina Department of Health and Human Services issued an order demanding that the speedway abate further "mass gatherings" in violation of the Executive Order. Id. ¶ 9. The speedway did not comply with the terms of the abatement order. Id. Seeking to enforce the terms of the abatement order, the secretary filed a complaint, motion for temporary restraining order, and motion for preliminary injunction. Id. ¶ 10.

The trial court granted the secretary's motions for temporary restraining order and preliminary injunction, enjoining the speedway from taking action that was prohibited by the abatement order. Id. The speedway subsequently answered the secretary's complaint and filed constitutional counterclaims. Id. ¶ 11.

In September 2020, the governor issued a new Executive Order, loosening the restrictions on "mass gatherings," allowing up to fifty people to congregate at outdoor events. Id. ¶ 12. The secretary voluntarily dismissed its complaint as the terms of the abatement order were mooted by the new Executive Order. Id. The speedway did not dismiss its counterclaims. Id. The secretary moved to dismiss the speedway's counterclaims, arguing sovereign immunity. Id. ¶ 13. The trial court denied the secretary's motion and the secretary appealed. Id.

Reviewing the trial court's decision de novo, the court of appeals concluded the secretary was not entitled to sovereign immunity because the speedway raised claims of infringement of constitutional rights. Id. ¶¶ 20–21. The North Carolina Constitution recognizes the right to earn a living as an inalienable right. Id. ¶ 22 (citing N.C. Const. art. 1, §§ 1, 19). The court of appeals explained, "[t]he right to work and to earn a livelihood is a property right that cannot be taken away except under the police power of the State in the paramount public interest for reasons of health, safety, morals, or public welfare." Id. ¶ 23 (quoting Roller v. Allen, 245 N.C. 516, 518, 96 S.E.2d 851, 854 (1957)).

> To effectively plead government intrusion on a constitutional right, the claimant's pleadings must show: (1) a state actor violated the claimant individual's constitutional rights; (2) the claim alleged substantively presents a "colorable" constitutional claim; and (3) no adequate remedy exists apart from a direct claim under the Constitution.

Id. ¶ 24 (citing Deminski v. State Bd. of Educ., 377 N.C. 406, 412-14, 2021-NCSC-58, ¶¶ 15–18).

The speedway adequately pleaded its claim by alleging the state deprived it of the ability to earn a living and did not have an adequate, alternative remedy. Id. ¶¶ 25–26. The court of appeals recognized that the speedway's claim was novel as claims of government intrusion on the right to earn a living are generally asserted against the legislature for enacting regulation. Id. ¶ 27. However, the court of appeals explained, "[i]t naturally follows that actions taken by other non-legislative state actors, whether elected officials or unelected bureaucrats, may run afoul of a citizen's right to the fruits of his own labor when they arbitrarily interfere with occupations, professions, or the operation of business." Id.

The court of appeals concluded that the speedway adequately pleaded the secretary deprived the speedway of its constitutional right to earn a living and affirmed the trial court's order denying the secretary's motion to dismiss. Id. ¶ 29.

In Kelly v. State, 286 N.C. App. 23, 2022-NCCOA-675, the court of appeals considered how to evaluate whether a challenge to a statute is facial or as-applied for purposes of applying section 1-267.1 of the North Carolina General Statutes and Rule 42(b)(4) of the North Carolina Rules of Civil Procedure, which require trial court judges to transfer facial constitutional challenges to a three-judge panel.

Plaintiffs brought action against the State of North Carolina and the North Carolina State Educational Assistance Authority ("SEAA") alleging that an educational program operated by the defendants violated several sections of the North Carolina Constitution. Id. ¶ 5. This case arose from the general assembly's enactment of a scholarship program that sought to enable a "small number of students in low-income families to receive

scholarships from the State to attend private school." Id. ¶ 2 (citation and quotation marks omitted). Each year, the SEAA makes available applications for "eligible students" to aid them in attending any "nonpublic school." Id. ¶ 3. The act defines a "nonpublic school" as "a school that meets the requirements of Part 1 [private church schools and schools of religious charter] or Part 2 [qualified nonpublic schools] of [section 115C-562.1 of the North Carolina General Statutes]." Id.

Plaintiffs first contended that this program violated their state constitutional rights under Article I, Sections 13 and 19 of the North Carolina Constitution by: (1) funding a program based on an individual's religious faith and sexual orientation, (2) creating a program limiting a student's choice in schools by his or her religious beliefs, (3) funding schools that condition enrollment on adopting religious belief that condemn homosexuality, (4) directing taxpayers' dollars to institutions that discriminate against persons of the plaintiffs' religious faiths, (5) dividing communities by religion, and (6) denying plaintiffs the ability to live in a community without state-supported discrimination. Id. ¶ 5. Separately, plaintiffs also contended that the program violated their constitutional rights under Article I, Sections 13, 14, and 19 and Article V, Sections 2(1) and 2(7) of the North Carolina Constitution by funding schools that prejudice and discipline students whose beliefs do not conform to the school's doctrine, require conformity with religious beliefs, mandate religious services as a part of the curriculum, and condemn homosexuality and LGBTQ rights. Id. ¶ 6. Lastly, plaintiffs contended that the program violated Article 1, Section 15 and Article V, Sections 2(1) and 2(7) of the North Carolina Constitution by transferring taxpayer funds to private schools "without any accountability or requirements ensuring that students will actually receive an education." Id. ¶ 7. Defendants filed a motion

to transfer the case to a three-judge panel, arguing that the plaintiffs' complaint "clearly asserts a facial constitutional challenge" and thus "must be heard by a three-judge panel of the Superior Court of Wake County" as required by Section 1-267.1 of the North Carolina General Statutes and Rule 42(b)(4) of the North Carolina Rules of Civil Procedure. Id. ¶ 9 (quotation marks omitted). The trial court denied this order and found that the complaint "presents an as-applied challenge to the Program." Id. ¶ 10. Defendants filed an appeal to the court of appeals. Id.

In the majority opinion by Judge Wood, the court of appeals reversed the trial court's order and found that the case should have been transferred to a three-judge panel. Id. ¶ 34. Section 1-267.1 of the North Carolina General Statutes provides that:

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

Id. ¶ 19 (citation omitted).

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

> Pursuant to G.S. 1-267.1, any facial challenge to the validity of an act of the General Assembly, other than a challenge to plans apportioning or redistricting State legislative or congressional districts, shall be heard by a three-judge panel in the Superior Court of Wake County if a claimant raises such a challenge in the claimant's complaint or amended complaint in any court in this State, or if such a challenge is raised by the defendant in the defendant's answer, responsive pleading, or within 30 days of filing the defendant's answer or responsive pleading.

Id. (citation omitted).

The court explained that an as-applied challenge considers whether a statute "can be constitutionally applied to a particular defendant, even if the statute is otherwise generally enforceable." Id. ¶ 21 (quoting State v. Packingham, 368 N.C. 380, 383, 777 S.E.2d 738, 743 (2015)). By contrast, a facial challenge "is an attack on the statute itself," rather than an attack on its application. Id. ¶ 22 (quoting State v. Grady, 372 N.C. 509, 522, 831 S.E.2d 542, 554 (2019)). "When determining whether a challenge is as-applied or facial, the court must look at the breadth of the remedy requested." Id. ¶ 24 (citing Doe v. Reed, 561 U.S. 186, 194 (2010)). A facial challenge exists if the remedy sought reaches beyond the circumstances of the adjudicating plaintiffs. Id. Alternatively, an as-applied challenge exists if the remedy is "limited to a plaintiff's particular case." Id. (quoting Libertarian Party v. Cuomo, 300 F. Supp. 3d 424, 439 (W.D.N.Y. 2018)).

Here, the court found the remedy that the plaintiffs sought was to void the statute in its entirety. Id. ¶ 28. This remedy reaches beyond just the plaintiffs' particular circumstances. Id. The conclusion that the attack is a facial challenge is supported by case law, which indicates that when relief "is not limited to defendant's particular case but enjoins application . . . to other . . . individuals," the challenge is facial. Id. Additionally, the court explained that a "trial court's ability to examine an as-applied challenge is predicated upon the existence of facts specific to a defendant from which to determine whether the statute is unconstitutional as applied." Id. ¶ 30. Here, no plaintiff had applied for a scholarship under the program's terms. Id. Rather, plaintiffs only attacked the fact that a portion of the program has religious characteristics. Id. Since the plaintiffs failed to plead facts sufficient to assert an as-applied challenge, and because the plaintiffs' claims effectively would preclude enforcement of any portion of the statute, the court concluded

that the action was a facial challenge that required the court to transfer the matter to a three-judge panel. Id. ¶¶ 31, 34.

Judge Hampson, writing for the dissent, found that it was premature and contrary to statutory procedure to decide at such a preliminary stage whether the plaintiffs' asserted as-applied challenge was a facial challenge required to be heard by a three-judge panel. Id. ¶ 37. He explained that the statutory scheme requires the trial court to decide if and when to transfer the matter. Id. ¶ 42. Judge Hampson conceded in part that the plaintiffs' complaint sought broad relief; however, he contended that this factor is not dispositive. Id. ¶ 39. He highlighted the difference between as-applied and facial challenges is "not what must be pleaded in a complaint," but rather about the ultimate relief imposed. Id. However, an "inexact prayer for relief does not preclude proper relief from being granted." Id.

Furthermore, the dissent observed that if during litigation it becomes evident that relief cannot be granted without a determination as to the facial constitutionality of the statute, the transfer statutes provide an answer for such circumstance. Id. ¶ 42. Specifically, the dissent highlighted that under Rule 42(b)(4) of the North Carolina Rules of Civil Procedure and section 1-81.1(a1) of the North Carolina General Statutes, such determination is a bifurcated process where the court should decide the matters it can, and if the facial validity of the act remains at issue, then the trial court should transfer the case to a three-judge panel. Id. Thus, Judge Hampson concluded that the correct interpretation of the transfer statutes provides that trial courts can transfer a case after resolving all issues the courts have authority to decide. Id. (citing Holdstock v. Duke Univ. Health Sys., Inc., 270 N.C. App. 267, 281, 841 S.E.2d 307, 317 (2020)). Judge Hampson also discussed his concern that by granting certiorari in this case, the court ratified a process that any decision

related to transferring a case to a three-judge panel may become immediately appealable, and its decision "forces Plaintiffs to make facial challenges contrary to the precedent of this Court." Id. ¶ 47.

C. Woodson Claims

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

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

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

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

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

The court of appeals, in an opinion by Judge Collins, affirmed the trial court's decision to deny the employer's motion to dismiss because the employee alleged facts sufficient to establish exceptions to the Commission's exclusive jurisdiction under Woodson and Pleasant. Id. at *12. The court acknowledged that the North Carolina Workers' Compensation Act ("the Act") provides as follows:

> [T]he Act provides an avenue for injured employees to receive "sure and certain recovery for their work-related injuries without having to prove negligence on the part of the employer or defend against charges of contributory

> negligence." Whitaker v. Town of Scotland Neck, 357 N.C. 552, 556, 597 S.E.2d 665, 667 (2003). "In return, the Act limits the amount the employee's right to pursue potentially larger damages awards in civil action." Woodson v. Rowland, 329 N.C. 330, 338, 407 S.E.2d 222, 227 (1991) (citation omitted). The exclusivity provision generally precludes common law negligence actions against employers and co-employees whose negligence caused the injury. Pleasant v. Johnson, 312 N.C. 710, 713, 325 S.E.2d 244, 247 (1985).

Id. at *4 (citations in original). However, the court identified two exceptions to the "exclusivity provision." Id. First, "an employee may pursue a civil action against an employer when the employer 'intentionally engages in misconduct knowing it is substantially certain to cause injury or death to employees and an employee is injured or killed by that conduct[.]'" Id. (quoting Woodson, 329 N.C. at 340–41, 407 S.E.2d at 228). Second, "an employee may pursue a civil action against a co-employee for their willful, wanton, and reckless negligence." Id. (citing Pleasant, 312 N.C. at 717, 325 S.E.2d at 250).

Here, the court first considered the Woodson claim. Id. at *4–10. The employer argued that the estate "failed to allege facts sufficient to establish an exception to the Commission's exclusive jurisdiction under Woodson." Id. at *4. To state a Woodson claim, the estate was required to allege that "the employer intentionally engaged in misconduct knowing that such conduct was substantially certain to cause injury or death." Id. (citing Woodson, 329 N.C. at 340–41, 407 S.E.2d at 228). Under Woodson, "substantial certainty" of injury or death is more than a "mere possibility" or "substantial probability." Id. (citing Arroyo v. Scottie's Prof. Window Cleaning, Inc., 120 N.C. App. 154, 159, 461 S.E.2d 13, 16 (1995)). When analyzing the validity of a Woodson claim under the "substantial certainty" standard, the court considers "all of the facts taken together," and "[n]o one factor is determinative." Id. (citing Arroyo, 120 N.C. App. at 159, 461 S.E.2d at 16).

When the court of appeals examined the Woodson exception in Arroyo, it reversed a trial court's dismissal of the plaintiff's complaint, "holding that plaintiff's allegations were 'sufficient to state a legally cognizable claim under Woodson that defendant intentionally engaged in conduct that it knew was substantially certain to cause serious injury or death'" when the defendant knew the danger of requiring the plaintiff to "work from a great height" without safety training or equipment. Id. at *6 (quoting Arroyo, 120 N.C. App. at 159–60, 461 S.E.2d at 17). By contrast, in Vaughn, the court of appeals reversed a trial court's denial of a motion to dismiss, holding that the "plaintiff was unable to articulate specific facts indicating that the employer knew of and disregarded safety procedures, and his conclusory allegations were discordant with the employer's published safety policies." Id. at *7 (citing Est. of Vaughn v. Pike Elec., LLC, 230 N.C. App. 485, 498–99, 751 S.E.2d 227, 236–37 (2013)).

Here, the court found that the estate's allegations more closely resembled those in Arroyo than those in Vaughn. Id. at *8. Notably, the employee alleged that his employer "knew [that] working under heavy loads without proper support or using proper equipment was certain to result in death or serious injury[,] that NCOSH concluded [the employer] had committed a "Willful Serious" violation of [OSHA], whereby employees stood under or passed under the elevated portion of a [forklift] while unbolting metal plates weigh[ing] approximately 1,705 pounds," and NCOSH concluded the employer "modified their [forklifts] without manufacturer approval to facilitate this process." Id. As was the case in Arroyo, the employee "alleged facts that, taken as true, establish that [the employer] was both aware of and encouraged the misconduct that resulted in [the employee's] death." Id.

Moreover, the employee "alleged facts that, taken as true, establish that [the employer's] conduct was 'substantially certain to cause injury or death'":

> In Woodson, our Supreme Court held that directing employees to dig a trench without a trench box was substantially certain to result in the trench caving in. In Arroyo, this Court held that directing employees to clean high-rise windows with no fall protection was substantially certain to result in an employee falling from the building. Here, directing employees to stand beneath and disassemble 2,000-pound metal tire molds—suspended by forklifts that had been modified without manufacturer approval—without the proper supports necessary to prevent a crushing-type incident is substantially certain to result in the tire mold falling on and crushing the employee.

Id.

Based on the foregoing, the court held that the employee's allegations were sufficient to state a legally cognizable claim under Woodson. Id. at *10.

The court also considered whether the employee alleged "facts sufficient to establish an exception to the Commission's exclusive jurisdiction under Pleasant." Id. at *10–12. "To state a Pleasant claim, a plaintiff must allege that a co-employee acted with willful, wanton, and reckless negligence; and that the co-employee's negligence resulted in plaintiff's injury." Id. at *10 (citing Pleasant, 312 N.C. at 717–18, 325 S.E.2d at 250). "In Pleasant, plaintiff's co-employee on a construction site attempted to drive a truck as close to plaintiff as possible without striking him, but miscalculated and struck plaintiff, seriously injuring him." Id. (citing Pleasant, 312 N.C. at 711, 325 S.E.2d at 246). There, the supreme court found that the allegations about the co-employee's driving sufficiently evinced recklessness to establish a claim. Elsewhere, however, the supreme court held that two co-employees' alleged conduct was not negligent when the facts did not support an inference that the co-employees intended to injure the plaintiff or were "manifestly indifferent to the

consequences" of injuring him. Id. (citing Pendergrass v. Card Care Inc., 333 N.C. 233, 238, 424 S.E.2d 391, 394 (1993)). "More recently, in Vaughn, [the court of appeals] held that the plaintiff had alleged facts sufficient to state a Pleasant claim against his supervisor." Id. There, an insufficiently trained employee was electrocuted while following his supervisor's order to work on live power lines. Id. Here, the court considered the estate's allegations similar to those in Vaughn because the decedent employee was killed while following his supervisor's order to work on a heavy tire mold despite not receiving any training to do the work safely. Id. at *11. The estate's allegations were thus "sufficient to state a legally cognizable claim under Pleasant." Id.

Judge Dillon concurred in part and dissented in part. Id. Judge Dillon contended that the alleged facts more closely resembled the facts in Whitaker than those in Woodson. Id. at *14. He acknowledged that the supreme court had reversed the court of appeals' Whitaker decision and emphasized the narrowness of Woodson exceptions:

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

Id. (quoting Whitaker v. Town of Scotland Neck, 357 N.C. 552, 557, 597 S.E.2d 665, 668 (2003)). Nevertheless, Judge Dillon maintained that the similarity between the factual allegations in Whitaker, where the failure of a latching mechanism caused a dumpster to hit an employee, and the present case, where the failure of a bolt—rather than any inexperience on the decedent employee's part—caused the tire mold to fall on the employee, indicated that the employer was not "substantially certain" the injury would occur. Id. at 14.

Consequently, Judge Dillon would have found that the factual allegations showed, at most, "willful negligence" on the part of the employer and supervisor. Id.

In Estate of Baker v. Reinhardt, ___ N.C. App. ___, ___ S.E.2d ___, 2023 WL 3185054 (2023), the court of appeals considered whether the forecast of evidence presented to the trial court "show[ed] the requisite degree of negligence to establish a valid Pleasant claim."

A worker at a furniture manufacturer "died tragically in a workplace accident without any eyewitnesses." Id. at *1. The worker, "without direction or instruction from anyone, was cleaning around [a bandsaw machine] when he stepped into a partially-enclosed area to its rear." Id. at *2. "Nearby employees heard a strange noise from the machine before observing [the worker] laying on his back in a semi-conscious state." Id. After the worker died from his injuries, his estate filed suit against the president and plant manager of the furniture manufacturer for willful, wanton or reckless negligence under Pleasant v. Johnson, 312 N.C. 710, 325 S.E.2d 244 (1985). Id. at *1. Pleasant "allows recovery for workplace accidents, independent of the Workers' Compensation Act's ("the Act") exclusivity provision, that arise out of the 'willful, wanton and reckless negligence' of co-employees." Id. at *3 (citations omitted). Both the president and plant manager moved to dismiss the complaint under Rule 12(b)(1) and for summary judgment under Rule 56(b). Id. The trial court granted the motions as to the president but denied the motions as to the plant manager. Id.

On appeal, the court considered whether the trial court lacked subject matter jurisdiction over the deceased worker's claim because the forecast of evidence presented to the trial court failed to establish a Pleasant exception to the Act's exclusivity provision. Id.

at *3–9. Ultimately, the court of appeals held that the evidence forecasted by the deceased worker's estate could not meet the "high bar necessary to establish a Pleasant claim." Id. at *7. The Act "ordinarily provides 'the exclusive remedy in the event of an employee's injury by accident in connection with their employment, . . . and the injured employee may not elect to maintain a suit for recovery of damages for their injuries, but must proceed under the Act.'" Id. at *4. "This rule is one of subject matter jurisdiction, as 'such cases are within the exclusive jurisdiction of the Industrial Commission; the superior court has been divested of jurisdiction by statute.'" Id. at 5. "It is not, however, absolute." Id. In Pleasant, the supreme court "held that an injured employee may sue a co-employee for workplace injuries caused by the latter's 'willful, wanton and reckless negligence.'" Id. (quoting Pleasant, 312 N.C. at 717, 325 S.E.2d at 250). The exception to this rule "is based on a recognition that 'wanton and reckless behavior may be equated with an intentional act,' and therefore, 'injury to another resulting from willful, wanton and reckless negligence [by a co-employee] should also be treated an intentional injury' that falls outside the exclusive jurisdiction of the Industrial Commission." Id. at *5 (quoting Pleasant, 312 N.C. at 715, 325 S.E.2d at 248.). Ultimately, the plaintiff "must clear a high bar in alleging and proving such a claim" because prior supreme court and court of appeals cases indicate that a plaintiff who seeks to recover under Pleasant has a heavy burden of proof. Id. (citing Trivette v. Yount, 366 N.C. 303, 310, 735 S.E.2d 306, 311 (2012)). Moreover, "[k]nowledge of a dangerous hazard, standing alone, does not establish a viable claim under Pleasant." Id. at *8.

Here, the uncontroverted evidence established that the furniture manufacturer "operated an award-wining safety program, which included quarterly safety briefings." Id. at *7. The deceased worker attended that program in the weeks before the accident and was

trained on the machine and its predecessor. Id. All evidence in the record indicated, without dispute, that the plant manager did not request or instruct the deceased worker to clean around the machine. Id. Furthermore, during a combined fifteen years of operation, all of which occurred during the deceased worker's employment: "(1) nobody was injured on the [bandsaw machine]; (2) OSHA issued no violations related to the [bandsaw machine]; [and] (3) [the wood furniture manufacturer] received no safety complaints from staff about the bandsaws." Id. At no point did the furniture manufacturer undercut the precautions and training. Id. at *8.

For the foregoing reasons, the court of appeals concluded that the binding precedents applying Pleasant discussed above precluded the court from recognizing such a claim on the facts presented. Id. at *9. Consequently, the court reversed the trial court's order denying summary judgment for the plant manager and remanded for entry of a judgment consistent with the court of appeals' opinion. Id. at *9.

D. Defamation

In Walker v. Wake County Sheriff's Department, 284 N.C. App. 757, 2022-NCCOA-530, rev. allowed, 883 S.E.2d 446 (N.C. 2023), the court of appeals considered whether the fair report privilege precluded a defamation action when the news report satisfied the substantial accuracy test.

A certified nursing assistant ("CNA"), employed by Capital Nursing was arrested for an assault on his stepfather. Id. ¶¶ 2, 5. The following morning, an employee of a broadcast network emailed the sheriff's office public information officer requesting additional information on the assault: "I'm guessing it's domestic but if it's related to a client from Capital Nursing I'm interested in more details." Id. ¶ 3. The public information

officer responded, "Related to his employer." Id. During the evening news, the network reported:

> New at 6:00 a Wake County man who works with the elderly is facing an assault charge. [The CNA] works for Capital Nursing. According to the warrant [he] hit the victim in the face with a closed fist.
> The Sheriff's Office telling [sic] us the charge is related to his job. We've reached out to Capital Nursing but so far they have refused to comment.

Id. ¶ 4.

The CNA filed a lawsuit alleging defamation against the network for reporting inaccurate allegations that implied he assaulted an elderly resident. Id. ¶ 5. In pertinent part, the complaint alleged that the charges were false, filed by the CNA's stepfather, and not related to his job. Id. The network moved to dismiss the complaint pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. Id. ¶ 7. The trial court granted the motion and the CNA appealed. Id. ¶¶ 8–9.

After reviewing the dismissal de novo, the court of appeals affirmed the trial court's order. Id. ¶ 24. The court of appeals explained that the fair report privilege "exists to protect the media from charges of defamation." Id. ¶ 25 (quoting LaComb v. Jacksonville Daily News Co., 142 N.C. App. 511, 512, 543 S.E.2d 219, 220 (2001)). The privilege applies when a "publication is confined to a substantially accurate statement of the facts and does not comment upon or infer probability guilt of the person arrested." Id. A publication satisfies the substantial accuracy test when it conveys a substantially correct account of the proceedings. Id. (citing Desmond v. News & Observer Publ'g Co., 241 N.C. App. 10, 26, 772 S.E.2d 128, 140 (2015)).

The court of appeals analyzed the broadcast sentence-by-sentence and concluded the information "was not merely substantially accurate, it was an almost verbatim recitation of information in the arrest warrant and [the public information officer]'s email". Id. ¶ 26 (emphasis added). Further, though the network's employee initially suspected the charge was domestic, the fair report privilege applies even if the publisher does not personally believe the defamatory words to be true. Id. ¶ 27. Finally, the court of appeals acknowledged that the public information officer's email response was a flimsy basis upon which to report but noted the network did not report the CNA assaulted a resident, but rather accurately reported the charge as described in the warrant and relayed information received from the state. Id. ¶ 28. The words of the report were accurate, regardless of the impression those words left with viewers. Id. ¶ 29.

The court of appeals affirmed the dismissal because the broadcast network satisfied the substantial accuracy test and therefore the CNA did not have an actionable defamation claim under the fair report privilege. Id. ¶ 30.

E. Duty

In Connette ex rel. Gullatte v. Charlotte Mecklenburg Hosp. Auth., 382 N.C. 57, 2022-NCSC-95, the supreme court considered whether a certified registered nurse anesthetist who collaborates with a doctor to select an anesthesia treatment plan can be liable for negligence in the selection of that treatment.

A patient presented to the operating room for a surgical procedure on her heart. Id. ¶ 2. Anesthesia was provided by a team, including a physician ("MD") and certified registered nurse anesthetist ("CRNA"). Id. Shortly after the anesthesia was administered,

the patient went into cardiac arrest. Id. The MD was able to revive the patient after thirteen minutes. Id. As a result of oxygen deprivation, the patient suffered injuries. Id.

The patient, through a guardian ad litem, filed a lawsuit to recover damages for malpractice for allegedly negligent selection of anesthesia. Id. The case was first tried against the MD, the CRNA, and two other treating physicians. Id. ¶ 3. The jury could not reach a verdict as to the claims against the MD and the CRNA and returned a defense verdict for the other treating physicians. Id. Two years later, a second trial proceeded against only the CRNA. Id. ¶ 4. The evidence showed that the CRNA advised the MD, agreed with the MD, and participated with the MD in the election and administration of the anesthesia plan even though the ultimate decision rested with the MD. Id.

The trial court did not allow the patient's CRNA expert to opine on the professional standard of care applicable to the CRNA under Daniels v. Durham County Hospital Corp., 171 N.C. App. 535, 615 S.E.2d 60 (2005) and Byrd v. Marion General Hospital, 202 N.C. 337, 162 S.E. 738 (1932). Id. ¶ 5. Specifically, "the trial court prohibited the introduction of testimony from [the patient]'s expert witness Cary which would have tended to show that the standard practice of CRNAs . . . would have expressly prohibited the course of action followed by [the CRNA]." Id. Based on the law, "the trial court observed that a nurse may be liable for independent action taken against a plaintiff but could not be held liable for planning and selecting the appropriate anesthesia technique because nurses operate under the compulsory supervisions of physicians licensed to practice medicine." Id. (emphasis added). The jury returned a verdict in favor of the CRNA. Id. ¶ 6.

While analyzing the evolution of medicine and observing its own lack of authority to overrule a supreme court decision, the court of appeals unanimously affirmed the trial

court's exclusion of the testimony of the patient's proffered expert concerning the CRNA's involvement in selection and implementation of the allegedly negligent anesthesia plan. Id. ¶¶ 6, 20. The supreme court reviewed the trial court's decision de novo after concluding that whether nurses owe an independent duty to patients in the selection and planning of treatment is a question of law. Id. ¶ 7.

Writing for the majority on discretionary review, Justice Morgan reviewed the law—statutes, administrative codes, and case law. Id. ¶¶ 8–9. Under Byrd, "a nurse could be held liable for how nursing duties were executed outside the supervision of a physician . . . [but] a nurse could not be held liable for what the nurse did to 'diligently execute the orders of the physician.'" Id. ¶ 9 (quoting Byrd, 202 N.C. at 341–43) (emphasis in original). The supreme court also reviewed the evolution of the nursing profession over the past ninety years, including a licensure requirement implemented in 1965 and the use of collaborative practice agreements. Id. ¶¶ 10–14. Though they fulfill their duties under the supervision of a licensed physician, CRNAs are explicitly permitted to "(1) select and administer preanesthetic medications, (2) select, implement, and manage general anesthesia consistent with the patient's needs and procedural requirement, and (3) initiate and administer several palliative and emergency medical procedures." Id. ¶ 14 (citing Nurse Anesthesia Practice, 21 N.C. Admin. Code 36.0226 and N.C. Gen. Stat. § 90-171.20(7)(e)). The supreme court concluded CRNAs work in collaboration with physicians, not merely at the direction of physicians. Id.

The supreme court overruled Byrd in holding, "even in circumstances where a registered nurse is discharging duties and responsibilities under the supervision of a physician, a nurse may be held liable for negligence and for medical malpractice in the event

that the registered nurse is found to have breached the applicable professional standard of care." Id. ¶ 21. The supreme court observed that it is "properly positioned" to make such a ruling "without treading upon the Legislature's domain" because it established the legal principle at issue in Byrd. Id. ¶ 22.

The CRNA in this case had heightened responsibilities as recognized by law, so the supreme court reversed the trial court's evidentiary decision and remanded the case. Id. ¶¶ 23–24.

Writing for the dissent, Justice Barringer concluded the policy change made by the majority should be made by the legislature and no justification existed to deviate from the longstanding precedent in Byrd. Id. ¶¶ 25, 37. Reviewing the administrative code, statutes, and case law, Justice Barringer opined the three are consistent: a "physician is solely responsible for the diagnosis and treatment of his patient." Id. ¶¶ 40–42 (citing N.C. Gen. Stat. § 90-171.20(7)(e) and (f), 21 N.C. Admin. Code 36.0226, and Byrd, 202 N.C. at 343).

Justice Barringer observed:

> It appears the majority's newly created theory holds CRNAs liable if they negligently collaborate with their supervising physician in choosing a treatment plan. Left unanswered is what constitutes adequate collaboration or what happens when the physician and CRNA disagree.

Id. ¶ 46. The dissenting justices would have affirmed the trial court's decision. Id. ¶ 48.

II. PRETRIAL PROCEDURE

A. Jurisdiction

(1) Personal Jurisdiction

In ITG Brands, LLC v. Funders Link, LLC, 284 N.C. App. 322, 2022-NCCOA-454, the court of appeals considered whether a company that collected payments from merchants in North Carolina may be subjected to personal jurisdiction.

A tobacco manufacturer filed a civil action against a finance company for violating this state's Unfair and Deceptive Trade Practices Act and the Uniform Voidable Transactions Act. Id. at ¶¶ 2–3, 10. The tobacco manufacturer entered a contract with a marketing company for its services. Id. ¶ 4. The parties negotiated and formed the contract in North Carolina. Id. The marketing company was chartered and headquartered in North Carolina. Id. The marketing company failed to perform under the contract. Id. The tobacco manufacturer sued the marketing company for damages arising from the breach and obtained a favorable judgment. Id. During discovery, it became apparent that the marketing company had no cash flow to meet its ongoing financial obligations, and the finance company provided cash advances and loans to the marketing company. Id. ¶¶ 5, 7. The finance company contended that it did not contract with merchants and that it only operates to collect payments from merchants. Id. ¶ 9. The finance company further contended that another entity with a similar name contracted to purchase its accounts receivables, and the finance company acted only as the servicing agent for that entity. Id. Upon the tobacco company's filing of this action, the finance company filed a motion to dismiss, in part, for lack of personal jurisdiction. Id. ¶ 10. The trial court denied the motion. Id.

On appeal, the court of appeals affirmed the trial court's order denying the finance company's motion to dismiss for lack of personal jurisdiction. Id. ¶ 32.

Here, the finance company's minimum contacts supported being subjected to personal jurisdiction in North Carolina courts and did not offend the traditional notions of fair play and substantial justice: (1) the finance company serviced accounts for the company that purchased the accounts receivables; (2) the company that purchased the accounts receivables filed a UCC-1 in North Carolina to perfect its security interest; and (3) the finance company withdrew monies from a North Carolina account daily for five months. Id. ¶ 31. Accordingly, the finance company's activities in the state provided a reasonable expectation it could be hauled into the state's courts. Id.

For these reasons, the court of appeals affirmed the trial court's denial of the finance company's motion to dismiss under Rule 12(b)(2).

In a series of cases against Automoney, Inc., the court of appeals considered whether North Carolina courts had personal jurisdiction over a foreign corporation based on its contacts with North Carolina borrowers. Leake v. Automoney, Inc., 284 N.C. App. 389, 2022-NCCOA-490, rev. denied, 884 S.E.2d 738 (N.C. 2023); Wall v. Automoney, Inc., 284 N.C. App. 514, 2022-NCCOA-498, rev. denied, 884 S.E.2d 739 (N.C. 2023); Troublefield v. Automoney, Inc., 284 N.C. App. 494, 2022-NCCOA-497, rev. denied, 884 S.E.2d 739 (N.C. 2023); Hundley v. Automoney, Inc., 284 N.C. App. 378, 2022-NCCOA-489, rev. denied, 884 S.E.2d 737 (N.C. 2023). The panel included Judges Gore, Hampson, and Wood. Each authored one of the four decisions, with the others concurring.

Automoney, Inc. is a South Carolina corporation with a principal place of business in Charleston, South Carolina. Leake, ¶ 2; Wall, ¶ 2; Troublefield, ¶ 2; Hundley, ¶ 2. It

provides loans secured by motor vehicles. Id. It is a supervised lender under the South Carolina Board of Financial Institutions. Troublefield, ¶ 2.

Automoney does not have any physical offices or make car title loans in North Carolina. Leake, at ¶¶ 7–9; Wall, at ¶¶ 6–7; Troublefield, at ¶¶ 9–12; Hundley, ¶ 2. It is not registered to do business in North Carolina nor does it have a representative agent, mailing address, or phone number in North Carolina. Id. Automoney allows North Carolina borrowers to make payments over the phone or internet with a debit card and sends collections reminders regardless of the borrower's state of residence. Id. Automoney has a website that is accessible to borrowers, regardless of residency, through which Automoney can be contacted. Id. Automoney offers its services to North Carolina residents: it advertises in a magazine that is primarily distributed in North Carolina, sends fliers to North Carolina residents, offers rewards in exchange for referrals of North Carolina residents, and has a sign on its South Carolina storefront that says "NC Titles Welcomed". Wall, ¶ 6; Troublefield, at ¶¶ 3, 11; Hundley, ¶ 4. When Automoney issued a loan to a North Carolina borrower, it secured the lien through the North Carolina Department of Motor Vehicles. Leake, ¶ 4; Troublefield, ¶ 7.

The plaintiffs in these actions are more than fifteen North Carolina residents who obtained loans from Automoney. Leake, ¶ 2; Wall, ¶ 2; Troublefield, ¶ 3; Hundley, ¶ 2. They verified their eligibility before driving to South Carolina to obtain their loans. Leake, ¶ 3; Troublefield, ¶ 3; Hundley, ¶ 3. Automoney charged interest rates between 129% and 229% on the loans ranging from $621 to $3,520 in these cases. Leake, ¶ 4; Wall, ¶ 2; Troublefield, ¶ 4; Hundley, ¶ 4. The borrowers made payments from North Carolina. Leake, ¶ 5; Hundley, ¶ 5. Automoney contacted the borrowers in North Carolina for

collections. Hundley, ¶ 5. When the borrowers failed to make payments, Automoney contracted with a North Carolina company to repossess the cars located in North Carolina. Leake, ¶ 5; Wall, ¶ 6; Troublefield, ¶ 12. Automoney repossessed more than 442 vehicles in North Carolina. Id.

The North Carolina borrowers filed suits in North Carolina superior courts (Richmond County, Scotland County, and Rockingham County) alleging violations of the North Carolina Borrower Finance Act and Unfair and Deceptive Trade Practices Act associated with the loans. Leake, ¶ 3; Wall, ¶ 3; Troublefield, ¶ 8; Hundley, ¶ 6. In each of the cases, Automoney moved to dismiss for lack of personal jurisdiction. Leake, ¶ 11; Wall, ¶ 5; Troublefield, ¶ 9; Hundley, ¶ 6.

The trial courts denied Automoney's motions, concluding North Carolina "has a strong interest in the enforcement of its consumer protection law and in protecting its citizens from what under North Carolina law are usurious loan rates." Leake, ¶ 11; Wall, ¶ 9; Troublefield, ¶ 1; Hundley, ¶ 1. In each of the cases, the court of appeals affirmed the trial court's decision. Leake, ¶ 16; Wall, ¶ 48; Troublefield, ¶ 28; Hundley, ¶ 1.

For a North Carolina court to exercise personal jurisdiction over a foreign corporation, the court must determine (1) if the long-arm statute requirements are satisfied and (2) if so, whether an exercise of personal jurisdiction comports with due process. Leake, ¶ 23; Wall, ¶ 17; Troublefield, ¶ 20; Hundley, ¶ 14. Due process requires minimum contacts between the forum state and nonresident. Leake, ¶ 25 (citing Tom Togs, Inc. v. Ben Elias Industries Corp., 318 N.C. App. 361, 365, 348 S.E.2d 782, 786 (1986)); Wall, ¶ 17 (same); Troublefield, at ¶¶ 21–22 (same); Hundley, ¶ 14 (same). The court of appeals explained:

> A State may, consistent with due process, exercise judicial power over a person outside of the State when that person

> (1) directs electronic activity into the State, (2) with the manifested intent of engaging in business or other interactions within the State, and (3) that activity creates, in a person within the State, a potential cause of action cognizable in the State's courts.

Leake, ¶ 30 (citing Harvey v. Valentine, 172 N.C. App. 812, 816–17, 616 S.E.2d 642, 647–48 (2005)). Further, the "contacts must be the defendant's own choice and not 'random, isolated, or fortuitous." Wall, at ¶¶ 18–20 (quoting Ford Motor Co. v. Montana Eighth Jud. Dist. Ct., ___ U.S. ___, 141 S. Ct. 1017, 1025 (2021) and citing Travelers Health Ass'n v. Virginia, 339 U.S. 643, 648 (1950)).

Based on the facts above, the court of appeals concluded that Automoney created a substantial connection with North Carolina sufficient to confer personal jurisdiction. Leake, at ¶¶ 29–32; Wall, at ¶¶ 18–21; Troublefield, at ¶¶ 25–28; Hundley, at ¶¶ 17–21. The court of appeals summarized:

> Because [Automoney] had direct contact with North Carolina through its business operations, internet advertisements, and local publication advertisements, [Automoney] purposefully availed itself of the privilege of conducting activities within North Carolina . . . the sum and quality of [Automoney]'s contacts with this State, paired with [Automoney]'s obvious intent to recruit North Carolina clients, is sufficient to establish personal jurisdiction.

Leake, ¶ 33. It further held that Automoney could not have "reasonably and in good faith" advertised in North Carolina and placed liens on property in North Carolina and expect paperwork signed in South Carolina to protect it from the reach of North Carolina courts. Hundley, ¶ 23.

Accordingly, the court of appeals held the trial courts properly exercised personal jurisdiction over Automoney. Leake, ¶ 16; Wall, ¶ 48; Troublefield, ¶ 28; Hundley, ¶ 1.

In Bartlett v. Estate of Burke, 285 N.C. App. 249, 2022-NCCOA-588, petition for disc. rev. filed (N.C. Oct. 20, 2022), the court of appeals considered whether a foreign entity that is affiliated with an American entity doing business in this forum is subject to personal jurisdiction in this state.

The administrators of several estates filed a wrongful death action against multiple entities, including a jet engine manufacturer and a helicopter distribution company. Id. ¶¶ 15–17. The action arose from a helicopter crash resulting in the death of all passengers. Id. ¶¶ 3–4. The helicopter involved in the crash was equipped with engines built by the defendant manufacturer. Id. ¶ 6. The manufacturer's principal place of business is in France. Id. The manufacturer sold and delivered the underlying engine to a helicopter distribution company in Germany. Id. The helicopter distribution company's principal place of business is in Germany. Id. Several years prior to the underlying accident the helicopter distribution company entered a contract with a helicopter importer. Id. ¶ 10. The importer agreed to promote, market, and support the distribution company's products for resale in the United States. Id. ¶ 11. Subsequently, the distribution company sold the underlying helicopter to the importer in Germany. Id. ¶ 12. The agreement provided that the importer was responsible for importing the helicopter into the United States. Id. The importer then sold the helicopter to a North Carolina university's health system in Texas. Id. ¶ 13. At trial, the manufacturer and the helicopter distribution company moved to dismiss the actions based on a lack of personal jurisdiction. Id. ¶¶ 19–20. The trial court denied these motions. Id. ¶ 20.

On appeal, the court of appeals reversed the trial court's order denying the manufacturer's and distribution company's motions to dismiss finding there was a lack of

personal jurisdiction. Id. ¶¶ 65–66. It is essential for courts when finding specific personal jurisdiction "that there be some act by the which the defendant purposefully avails itself of the privilege of conducting activities within the forum State." Id. ¶ 30 (quoting Burger King v. Rudzewicz, 471 U.S. 462, 474–75 (1985). Therefore, the suit must "arise out of or relate to the defendant's contacts with the forum." Id. ¶ 31 (quoting Bristol-Myers Squibb Co. v. Superior Court of Cal., 582 U.S. 255, 262 (2017)). Thus, for specific personal jurisdiction inquiries, our courts must consider whether the defendant had "the minimum contacts with North Carolina necessary to meet the requirements of due process." Id. ¶ 34 (quoting Sherlock v. Sherlock, 143 N.C. App. 300, 303, 545 S.E.2d 757, 760 (2001)). Previously in a separate case, this court has held that "[t]he mere fact that [a defendant] was 'connected' to the manufacture or distribution of [a product] is not sufficient to support a conclusion that [the defendant] purposefully availed itself of North Carolina jurisdiction by injecting its products into the stream of commerce." Id. ¶ 46 (citing Miller v. L.G. Chem, Ltd., 281 N.C. App. 531, 536 (2022)). Rather, a court –

> may exercise personal jurisdiction over a defendant who delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State, but not over a defendant who directed marketing and sales efforts at the United States without engaging in conduct purposefully directed at the forum state.

Id. ¶ 47 (quoting Mucha v. Wagner, 378 N.C. 167,173, 2021-NCSC-82, ¶ 15 (2021)).

In holding that the jet engine manufacturer and helicopter distribution company were not subject to personal jurisdiction in North Carolina, the court compared the circumstances of this case with Ford Motor Company v. Montana Eighth Judicial District Court, ___ U.S. ___, 141 S. Ct. 1017 (2021), Cohen v. Continental Motors, Inc., 279 N.C. App. 123, 2021-

NCCOA-449 (2021), and Miller v. L.G. Chem, Ltd., 281 N.C. App. 531, 2022-NCCOA-55 (2022). Id. ¶¶ 35, 44, 45.

Here, the court of appeals concluded that the helicopter distribution company was not subject to personal jurisdiction in North Carolina. Id. ¶ 60. Unlike Ford in Ford Motor Company v. Montana Eighth Judicial District Court, 151 S. Ct. 1017 (2021), the helicopter distribution company "does not import nor operate a dealer network within the United States," but rather their units are sold directly to the helicopter importer abroad in Germany. Id. ¶ 55. Additionally, while the helicopter distribution company operates a website for the purpose of providing technical support information, the existence of a passive website alone cannot provide a court the basis for exerting jurisdiction over the party. Id. ¶¶ 56, 58. Rather, a website can be the basis when the defendant "(1) directs electronic activity in the State, (2) with the manifested intent of engaging in business or other interactions within the State, and (3) that activity creates . . . a potential cause of action cognizable in the State's courts." Id. ¶ 58 (quoting Havey v. Valentine, 172 N.C. App. 812, 816–17, 616 S.E.2d 642, 647–48 (2005). Here, unlike the website in Cohen v. Continental Motors, Inc., 279 N.C. App. 123, 864 S.E.2d 816 (2021), the website does not solicit paid subscriptions. Id. ¶ 59. Therefore, the court of appeals found that the helicopter distribution company did not purposefully avail itself of this forum. Id. ¶ 60.

Likewise, the court also found that the engine manufacturer was not subject to personal jurisdiction in North Carolina. Id. ¶ 62. Here, like in Miller v. L.G. Chem, Ltd., 281 N.C. App. 531, 868 S.E.2d 896 (2022), the manufacturer never intended to develop a market for standalone engines in the state. Id. ¶ 61. The manufacturer never "advertised, sold, or distributed any engines for sale to individual users or consumers" in the state. Id.

Rather, all the manufacturer's commercial activities have been done on a worldwide scope and not specific to the forum. Id. ¶ 62. Without more, merely placing a product into the "stream of commerce" does not establish proper personal jurisdiction. Id.

Thus, the court of appeals reversed the trial court's order.

In Toshiba Global Commerce Solutions, Inc. v. Smart & Final Stores LLC, 381 N.C. 692, 2022-NCSC-81, the supreme court considered whether a foreign company that contracted with a North Carolina company could be subject to personal jurisdiction in this state, despite never having a physical presence in the state.

A technology company filed an action against a grocery company for breach of contract and related claims. Id. ¶ 1. The technology company is a North Carolina company, and the grocery company is a California company that does business in the western part of the country. Id. This action arises from a contractual dispute regarding a service agreement where the technology company agreed to provide maintenance and repair services for the grocery company's point of sale systems. Id. The parties' relationship first began in 2017 when the grocery company contacted the technology company. Id. ¶ 6. At that time, the technology company returned a formal proposal but ultimately was not chosen for the grocery company's business. Id. The grocery company later contacted the technology company for a second time seeking its services. Id. The parties negotiated a contract in 2019. Id. Negotiations were held primarily over the phone and through email. Id. The finalized agreement provided that the technology company would provide repair services for all of the grocery company's point of sale machines for three years. Id. Furthermore, the agreement provided that the grocery company could extend the agreement period for an additional year with written notice to the technology company's North Carolina

headquarters. Id. A little more than a year after the parties entered the contract, the grocery company terminated the agreement without cause. Id. ¶ 1. At trial, the grocery company moved to dismiss the technology company's complaint for lack of personal jurisdiction. Id. ¶ 1. The trial court denied this motion. Id.

On appeal, the supreme court affirmed, finding that a sufficient connection existed for personal jurisdiction in North Carolina. Id. ¶ 24. Due Process is not offended when a court finds personal jurisdiction where "the suit was based on a contract which had substantial connection with that state." Id. ¶ 9 (citing McGee v. Int'l Life Ins. Co., 355 U.S. 220, 223 (1957) (concluding personal jurisdiction was proper against a nonresident insurance company because its contract had a substantial connection with the forum state)). The court found this case to be analogous to the landmark case of Burger King v. Rudzewicz, 471 U.S. 462 (1985). Toshiba Global Commerce Solutions, 2022-NCSC-81, ¶ 13. In Burger King, the Supreme Court concluded that a nonresident in a contract dispute was subjected to personal jurisdiction in a forum where he had no physical ties, held any offices, or even visited. Id. ¶ 11. In making its determination the court explained that "prior negotiations and contemplated future consequences, along with the terms of the contract and the parties' actual course of dealing . . . must be evaluated [when considering a defendant's] minimal contacts with the forum." Id. ¶ 10. Here, like in Burger King, these factors were sufficient to satisfy the minimum contacts test for personal jurisdiction. Id. ¶ 12. The grocery company actively solicited and engaged in a relationship with the technology company knowing the technology company was based in North Carolina. Id. ¶ 13. The court found that the grocery company sought a long-term contractual relationship as opposed to a one-off transaction with the North Carolina company. Id. This is analogous

to Burger King, as the defendant in that case entered contract negotiations with the purpose of becoming a "long-term franchise," and not a "one-off transaction." Id. Additionally, like in Burger King, the parties entered a contract for an extended period of several years. Id. ¶ 14. Furthermore, the technology company had additional contacts as it continuously maintained, replaced, and repaired the grocery company's point of sale systems in its depot. Id. The evidence showed that the technology company performed "more than 2,600 repairs" and made "more than 4,200 shipments" to maintain inventory. Id. ¶ 15. The "contemplated future consequences" under the "terms of the contract" required the technology company to maintain repairs and inventory through its depot. Id. ¶ 17. Furthermore, the "actual course of dealings" showed that the grocery company continuously availed itself of the technology company's depot. Id. Separately, the "terms of the contract" required written notice to be sent to the technology company's North Carolina office, and the grocery company in its "actual course of dealing" sent written notice of termination to the North Carolina address. Id. These circumstances were sufficient to find the grocery company made a substantial enough connection to be subject to personal jurisdiction in this state. Id. While it was undisputed that the grocery company did not have any physical connections in the state, physical presence is not a prerequisite to jurisdiction. Id. ¶ 19 (citing to Walden v. Fiore, 571 U.S. 277, 285 (2014)). Furthermore, the fact that the contract was formed and negotiations occurred outside the forum state does not preclude a defendant from being subject to jurisdiction in a forum state. Id. ¶ 20.

Thus, for the foregoing reasons, the supreme court held that the trial court did not err by denying the grocery company's motion to dismiss for lack of personal jurisdiction

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

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

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

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

The supreme court recognized that the jurisdictional inquiry requires a two-part analysis: first, it must determine whether the long-arm statute permits the exercise of jurisdiction; second, it must determine whether exercise of jurisdiction would violate the Due Process Clause of the Fourteenth Amendment of the United States Constitution. Id. at 556, 878 S.E.2d at 543. The supreme court acknowledged that in circumstances like these, the "successor likely has or should have notice of the liabilities of its predecessor in a given jurisdiction." Id. at 559, 878 S.E.2d at 545. In this case, the supreme court concluded that due process allows North Carolina courts to exercise jurisdiction over the new entities because: "(1) the parties expressly agreed to assume [the predecessor entity's] liabilities in the April 2019 Separation Agreement . . . ; and (2) the State alleged sufficient facts at the motion to dismiss stage to support the claim that [the predecessor entity] transferred its assets to [the successor entities] in an attempt to defraud the State in its position as a creditor." Id. The court cautioned: "[a] company cannot expressly assume liabilities from its predecessor, fail to limit those liabilities geographically, and then disclaim liability based on the notion that it did not expect to be brought to court in a particular forum." Id. at 562, 878 S.E.2d at 547. It further explained that successor liability is permitted where:

> (1) a party assumes another entity's debts or liabilities through an express or implied agreement; (2) the transfer

> constitutes an actual or de factor merger of corporations; (3) a transfer of assets occurred for the purpose of defrauding the corporation's creditors; or (4) the purchasing corporation is a continuation of the selling corporation because it has the same shareholders, directors, and officers.

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

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

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

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

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

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

> [former employee's] employment, and mailed tax documents to his North Carolina address.

Id.

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

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

On discretionary review, the supreme court concluded that specific jurisdiction exists over the corporations "because they purposefully availed themselves of the privileges of conducting various business-related activities in North Carolina, and [the former employee's] claims arise out of or are related to those activities." Id. at ___, 884 S.E.2d at 705. On the other hand, as to the individual officers, the supreme court concluded that the former employee failed "to demonstrate that their conduct directed at North Carolina was

sufficient to permit the trial court to exercise specific jurisdiction over them in this litigation." Id.

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

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

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

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

(2) Subject Matter Jurisdiction

In Nation Ford Baptist Church, Inc. v. Davis, 382 N.C. 115, 2022-NCSC-98, the supreme court considered whether a court has subject matter jurisdiction over a claimant's action regarding employment decisions made by a religious organization.

A church filed an action against its former pastor to prevent him from accessing its facilities and speaking with staff. Id. ¶ 9. This dispute arose from the employment relationship between the church and its former pastor. See id. In 1997, the church adopted a set of bylaws giving it the ability to make decisions regarding employment matters. Id. ¶ 6. However, upon applying for a bank loan in 2008, the church attached bylaws that varied from its previous set. Id. ¶ 7. These new bylaws provided that the "Bishop of the Church could be dismissed only by a 75% vote of the congregation attending a Special General Meeting called for that purpose." Id. In 2015, the church hired the pastor. Id. The pastor's offer letter stated that the pastor was an "at-will employee." Id. Due to a lack of success

under his tenure, the church's board voted to terminate its employment relationship with the pastor. Id. ¶ 8. Despite the vote, the pastor continued to hold services in the church. Id. These actions led to the church filing this suit and seeking an injunction. Id. ¶ 9. In response to this filing, the pastor filed a counterclaim, third-party complaint, and motion for injunctive relief seeking:

> (1) a declaratory judgment that he remained the "Bishop, Senior Pastor, and spiritual leader" of the church, that he was not an "at-will employee," that the bylaws included in the 2008 loan application controlled the terms of his employment, that his termination was unlawful, and that his appearances on church property were lawful; (2) injunctive relief allowing him to resume his employment; (3) damages arising from the Board's breach of fiduciary duty it owed him; (4) damages arising from the Board's tortious interference with his employment relationship; and (5) access to the Church's financial records and establishment of a constructive trust for funds the Board had allegedly misappropriated.

Id.

Subsequently, the church filed a motion to dismiss the pastor's claims on the grounds that the trial court lacked subject matter jurisdiction "because resolving [the pastor's] claims would require the court to impermissibly review ecclesiastical matters." Id. ¶ 10. The trial court denied this motion. Id. In a divided opinion, the court of appeals affirmed. Id. ¶ 5.

On appeal, the supreme court reversed in part and affirmed in part holding that some of the pastor's claims may be adjudicated solely through neutral principles of law. Id. ¶ 29. Civil courts lack subject matter jurisdiction to resolve disputes involving "purely ecclesiastical questions and controversies." Id. ¶ 17 (citing Braswell v. Purser, 282 N.C. 388 (1972)). However, this concept does not provide religious organizations with absolute immunity. Id. ¶ 18. Rather, the impermissible entanglement doctrine precludes judicial

involvement only in circumstances involving "disputes [that] implicate controversies over church doctrine and practice." Id. ¶ 19 (citing Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church, 393 U.S. 440, 445 (1969)). In considering jurisdictional challenges, "[t]he dispositive question is whether resolution of the legal claim requires the court to interpret or weigh church doctrine." Id. ¶ 20 (citing Smith v. Privette, 128 N.C. App. 490, 494, 495 S.E.2d 395, 398 (1998)). If the underlying claim can be resolved through neutral principles of law, there is no impermissible entanglement. Id. ¶ 20 (citing Johnson v. Antioch United Holy Church, Inc., 214 N.C. App. 507, 512, 714 S.E.2d 806, 810–11 (2011)).

In analyzing whether the factual circumstances of this case gave rise to an adjudication that can be resolved by legal principles, the court found an earlier court of appeals decision in Tubiolo v. Abundant Life Church, Inc., 167 N.C. App. 324, 605 S.E.2d 161 (2004), to be analogous. Id. ¶ 21. In Tubiolo, several one-time church members claimed the church violated its bylaws in improperly terminating their membership. Id. The court stated that the trial court could consider whether the member's membership was improperly terminated because "the persons purporting to terminate their membership were without authority to take that action." Id. The church's bylaws established who possessed authority to terminate membership, and its members argued that the bylaws were improperly adopted. Id. The court of appeals determined that "whether the bylaws were properly adopted and who was authorized to terminate membership were inquiries that could be made without resolving any ecclesiastical or doctrinal matters." Id. Here, the court extended the framework in Tubiolo to the factual circumstances of this case. Id. ¶ 22. To resolve the pastor's claims, the trial court must consider: (1) whether the newer version of bylaws will

be applied to the pastor's employment contract, (2) who had the authority to act for the church in employing the pastor, (3) who had the authority to act on behalf of the church to terminate the pastor, and (4) whether the pastor had an at-will employment relation or had certain contractual rights. Id. If under the inquiry, the trial court concludes that the church acted outside its authority under the governing bylaws, then the pastor will be entitled to declaratory relief. Id. This inquiry does not utilize any doctrinal or ecclesiastical consideration. Id. However, the pastor's proposed remedy under the first claim would entangle the court in the religious matters of the case, as the court can neither declare the pastor the spiritual leader of the church nor can it require that the pastor be allowed to conduct services. Id. ¶ 23.

Additionally, the supreme court has previously stated that a court is not permitted to examine "the church's view of the role of the pastor, staff, and church leaders . . . [b]ecause a church's religious doctrine and practice affect its understanding of each of these concepts." Id. ¶ 24 (citing Harris v. Matthews, 361 N.C. 265, 273, 643 S.E.2d 566, 571 (2007)). The pastor's claims that required the court to consider whether he "in good conscience . . . act[ed] honestly, in good faith and in the best interests of the Church," whether the church acted "without justification" in terminating the pastor, and whether certain funds "were properly devoted to the Church's benefit," questioned the substantive reasoning of the board and are not otherwise based on the church's bylaws. Therefore, the court was forbidden under the First Amendment to adjudicate these claims. Id.

The church's argument that the trial court lacks subject matter to hear all claims entirely if any "condition or element of a cause of action" involves ecclesiastical matters was wrong. Id. ¶ 27. Rather, at this stage a court must only assure itself that any of the

plaintiff's claims can possibly be adjudicated and that any form of relief can possibly be granted. Id. If a court can answer that consideration in the affirmative, then it has jurisdiction to proceed on the claims. Id. The court found that the pastor's claims could proceed for declaratory judgment establishing which bylaws applied, whether the church properly followed its bylaws, and whether there was an employment contract that incorporated the bylaws. Id. ¶ 29. On the contrary, where the claims required entanglement into ecclesiastical matters or implicated church doctrine and practice, the claims should be dismissed. Id.

Thus, for the foregoing reasons, the supreme court affirmed in part and reversed in part the lower court's denial of the church's motion to dismiss.

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

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

in person. Id. "Most other contact between them occurred via email, text messages, and social media . . . ." Id. Some of the social media interactions allegedly occurred while the wife was living in North Carolina. Id. at ___, 884 S.E.2d at 167–68.

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

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

Turning to the husband's claims, the court of appeals stated that it was essential to establish whether the infringing conduct occurred in a state that recognized the tort of alienation of affections, as "most jurisdictions have abolished [it]." Id. (quotation marks omitted) (quoting Hayes v. Waltz, 246 N.C. App. 438, 443, 784 S.E.2d 607, 613 (2016)). This analysis, however, did not require that the alleged conduct between the wife and the paramour have occurred in North Carolina for the husband to raise a valid claim. Id. Rather, the conduct must have occurred within any state recognizing the tort. Id. (citing Hayes, 246 N.C. App. at 443, 784 S.E.2d at 613). In this case, there were two states at play where the alleged conduct might have occurred that recognize the tort: Utah and North Carolina. Id. The court of appeals addressed the fact that it had previously heard cases where alienation of affections was alleged to have occurred across multiple states; however, those cases were distinct in that, there, "North Carolina was the only jurisdiction involved that recognized the claim of alienation of affections." Id. In those other cases, unlike the husband's claim here, the outcome turned on whether the alleged conduct had occurred in North Carolina specifically. Id. at ___, 884 S.E.2d at 171 (collecting cases).

The court of appeals explained that, historically, the issue of subject matter jurisdiction as to alienation of affections claims has gotten confused; namely, the question "is frequently conflated with the question of where the alleged alienating conduct and injury occurred because North Carolina is often the only jurisdiction involved that recognizes the claim." Id. However, in the case at bar, the issue of subject matter jurisdiction was "deceptively simple." Id. Because North Carolina recognizes the tort of alienation of affections, the trial court "indisputably" possessed subject matter jurisdiction. Id.

Accordingly, rather than calling for a complex conflict of laws analysis, the question of law posed by the husband's claim was "straightforward." Id.

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

B. Service of Process

In Blaylock v. AKG North America, 285 N.C. App. 72, 2022-NCCOA-549, the court of appeals considered whether filing a notice of removal constitutes a general appearance that waives defenses for insufficiency of process and service of process.

An employee of a company filed suit for sexual harassment, hostile work environment, and failure to supervise/intervene. Id. ¶ 2. Days after the employee filed suit, the sheriff attempted, but failed, to serve the company as the address was in a different county. Id. ¶ 3. Over the next year, the employee never properly served the company. Id.

Thirteen months after suit was filed, the company removed the action to the Middle District of North Carolina on the grounds that the employee asserted federal claims in his complaint. Id. The company asserted improper service of process in its notice of removal. Id. The company then sought an extension of time within which to respond to the complaint. Id. The employee filed a motion to remand the action to state court, disavowing any reliance on federal law. Id. ¶ 4. The federal court remanded the case back to state court. Id.

The company moved to dismiss the employee's complaint pursuant to Rules 12(b)(2), 12(b)(4), 12(b)(5), and 12(b)(6) of the North Carolina Rules of Civil Procedure, asserting the court lacked personal jurisdiction because of defective service. Id. ¶¶ 5–6.

The trial court granted the company's motion to dismiss. Reviewing the trial court's decision de novo, the court of appeals affirmed. Id. ¶¶ 10–11. The court of appeals held that actual notice cannot cure insufficient service of process and Rule 4 of the North Carolina Rules must be strictly enforced for the court to exercise jurisdiction over a defendant. Id. ¶ 13 (citing Grimsley v. Nelson, 342 N.C. 542, 545, 467 S.E.2d 92, 94 (1996) and Stewart v. Shipley, 264 N.C. App. 241, 244, 825 S.E.2d 684, 686 (2019)).

The employee argued the company's attorney made a general appearance, waiving jurisdictional defenses by (1) removing the case to federal court and (2) seeking extensions of time. Id. ¶ 14. Statutorily, obtaining an extension of time does not constitute a general appearance. Id. ¶ 15 (citing N.C. Gen. Stat. § 1-75.7(1) (2021)). As a matter of first impression, the court of appeals analyzed whether filing a notice of removal constitutes a general appearance, which would confer personal jurisdiction regardless of whether service was defective. Id. ¶¶ 15–16, 18 (citing Alexiou v. O.R.I.P., Ltd., 36 N.C. App. 246, 247, 243 S.E.2d 412, 413, cert. denied, 295 N.C. 465, 246 S.E.2d 215 (1978)).

The court of appeals explained that a general appearance is made when a "defendant by motion or otherwise invokes the adjudicatory powers of the court in any other matter not directly related to the questions of jurisdiction". Id. ¶ 16 (citing Swenson v. Thibaut, 39 N.C. App. 77, 89, 250 S.E.2d 279, 288 (1978)). Collecting cases addressing whether specific actions constitute a general appearance, the court of appeals articulated "[i]n order to constitute a general appearance, '[t]he appearance must be for a purpose in the cause, not a collateral purpose.'" Id. ¶ 17 (quoting Bullard v. Bader, 117 N.C. App. 299, 301, 450 S.E.2d 757, 759 (1994)).

The court of appeals analyzed the courts' roles when a defendant removes an action. Id. ¶ 20. Removal is governed by federal statute and once a defendant files a notice of removal, all proceedings in state court are stopped. Id. Concluding that state courts do not exercise discretion or adjudicatory authority during the removal process, the court of appeals held filing a notice of removal does not constitute a general appearance. Id. ¶¶ 20–22. Accordingly, the court of appeals affirmed the trial court's order. Id. ¶ 26.

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

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

of Service was mailed to the same address using the United States Postal Service ("USPS"). Id.

The car driver moved to dismiss pursuant to Rules 4, 12(b)(2), 12(b)(4), 12(b)(5), and 12(b)(6) of the North Carolina Rules of Civil Procedure. Id. The car driver's motion to dismiss included two affidavits: (1) an affidavit from the car driver, stating that he had moved and had not been personally served with a copy of the summons or complaint, and (2) an affidavit from the person currently living at the car driver's former address, stating that he resided at that address on the day the summons and complaint were sent. Id.

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

On appeal, the court of appeals affirmed the trial court's decision to grant the motion to dismiss with prejudice. Id. at ___, 884 S.E.2d at 72–73. The court of appeals held that the two affidavits, taken together, provided sufficient evidence for the trial court to find and conclude that the car driver was not timely served according to statute. Id. at ___, 884 S.E.2d at 73. The court acknowledged the rule that a person relying on the service of a notice by mail must show strict compliance with the requirements of the statute. Id. at ___, 884 S.E.2d at 72 (citing In re Appeal of Harris, 273 N.C. 20, 24, 159 S.E.2d 539, 543 (1968)). It further explained that Rule 4 provides for several options for the acceptable manner of service of process. Id. "One option for serving a 'natural person' is to 'deposit [] with a designated delivery service . . . a copy of the summons and complaint, addressed

to the party to be served, delivering to the addressee, and obtaining a delivery receipt.'" Id. (quoting N.C. Gen. Stat. § 1A-1, Rule 4(j)(1)(d)). If the record demonstrates compliance with the statutory requirements for service of process, such compliance raises a rebuttable presumption that the service is valid. Id. (citing Patton v. Vogel, 267 N.C. App. 254, 258, 833 S.E.2d 198, 202 (2019)).

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

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

C. Res Judicata

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

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

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

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

The trial court denied the facility's motion. Id. The facility timely appealed. Id.

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

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

In this case, the facility conceded that it was not "categorically entitled" to an interlocutory appeal. Id. at ___, 885 S.E.2d at 362. However, the facility failed to explain in its opening brief how the trial court's denial of its motion for summary judgment in this case "create[d] a risk of inconsistent verdicts or [would] otherwise affect a substantial right based on the particular facts of this case," as is required by precedent. Id. (emphasis original).

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

D. Notice of Motion

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

Plaintiff, a remodeling company, filed a breach of contract claim asserting unjust enrichment against numerous related entities regarding the remodeling of a hotel. Id. at *1. The remodeling company remodels hotels and supplies hotel furniture, fixtures, carpet, and craft stonework. Id. The remodeling company and the hotel owner-operator allegedly reached an agreement to remodel a hotel and to also supply hotel furnishings and fixtures. Id. However, the hotel owner-operator was displeased with the remodeling company's finished work. Id. The remodeling company also alleged that the hotel owner-operator failed to pay for the services according to the terms of their agreement. Id.

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

The hotel owner-operator attempted once more to schedule a hearing on both motions and the remodeling company again refused to a agree to a hearing on the Rule 12(b)(2) motion because it still had not received some outstanding discovery responses related to personal jurisdiction. Id. at *3. The parties eventually agreed to calendar the remaining Rule 12(b)(6) motion for a hearing but at that hearing, the hotel owner-operator raised the Rule 12(b)(2) motion with the trial court prior to discussing the Rule 12(b)(6) motion. Id. The remodeling company immediately objected and stated to the trial court that it was still awaiting outstanding responses for the jurisdictional discovery. Id.

Sometime after the hearing, the hotel owner-operator submitted partial responses but it failed to answer several interrogatories, provide official responses to the remodeling company's request for production, or explain which requests for production each of the documents produced answered. Id. Five hundred and seventy-four days after the hearing, the trial court entered an order granting hotel owner-operator's motion to dismiss for failure to state a claim and motion to dismiss for lack of personal jurisdiction. Id. The remodeling company timely appealed. Id.

On appeal, the court of appeals vacated the trial court's decision to grant the motion to dismiss for lack of personal jurisdiction. Id. at *4-6. The court of appeals held that the hotel owner-operator failed to properly notify the remodeling company of its intention for the trial court to hear its motion to dismiss for lack of personal jurisdiction. Id. The court acknowledged the rule that "[a]n irregular judgment is one entered contrary to the usual course and practice of the court." Id. at *5 (citing Everett v. Johnson, 219 N.C. 540, 542, 14 S.E.2d 520, 521 (1941)). Thus, "[i]f a party has no prior required notice of a hearing on a motion, judgment on the motion is irregular, and action thereon is not binding." Id.

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

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

E. Statute of Limitation

In K&S Resources, LLC v. Gilmore, 284 N.C. App. 78, 2022-NCCOA-409, rev. denied, 881 S.E.2d 308 (N.C. 2022), the court of appeals considered whether the statute of limitations ran from the date of the original judgment or the date of the amended judgment which included additional findings of facts and conclusions of law but kept the ultimate relief intact.

Plaintiff filed a complaint in the trial court on August 9, 2019, seeking a renewal of a prior amended judgment against defendant. Id. ¶ 2. In the first action against the defendant, a prior plaintiff sought damages from the defendant for the breach of a commercial lease. Id. ¶ 3. Judgment in that action was entered in favor of the prior plaintiff on July 20, 2009. Id. In the first action, the defendant moved to amend the judgment on July 30, 2009, which the court subsequently entered on September 29, 2009, nunc pro tunc July 20, 2009. Id. In the amended judgment, the court made additional findings of fact and conclusions of law. Id. Both judgments ordered the defendant to pay the plaintiff the costs for the breach, pre-judgment interest, post-judgment interest, and reasonable attorney's fees. Id. ¶ 4. The prior plaintiff was unsuccessful in recovering any of the amount ordered. Id. ¶ 5. In 2016, the prior plaintiff in the original action assigned the amended judgment to the plaintiff of this current action. Id. As mentioned earlier, the complaint for the second action was filed on August 9, 2019, and sought renewal of the prior amended judgment. Id. ¶ 2. The trial court in this second action granted summary judgment to the plaintiff. Id. ¶ 6.

On appeal, the court of appeals reversed the trial court's order granting summary judgment on behalf of the plaintiff. Id. ¶ 28. Section 1-47(1) of the North Carolina General Statutes "governs the statute of limitations on the renewal of a prior judgment, for other than real property." Id. ¶ 10. The statute states:

> [w]ithin ten years an action . . . [u]pon a judgment or decree of any court of the United States, or of any state or territory thereof, from the date of its entry. No such action may be brought more than once or have the effect to continue the lien of the original judgment.

Id.

The plaintiff contended that the statute of limitations began running from the filing date of the amended judgment, as opposed to the original judgment. Id. ¶ 12. To determine whether the statute of limitations ran from the original judgment date or the amended judgment date, the court of appeals determined the answer depends on whether the amended judgment was entered pursuant to Rule 52 or Rule 59 of the North Carolina Rules of Civil Procedure. See id. ¶ 18. Rule 52(b) provides that "[u]pon motion of a party made not later than 10 days after entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly." Id. ¶ 16. Furthermore, Rule 52(b) enables a trial court that has "omitted certain essential findings of fact" to "correct this oversight and avoid remand by the appellate court for further findings." Id. This differs from Rule 59, which is "appropriate if the court has failed in the original judgment to afford the relief to which the prevailing party is entitled" or "a party seeks to have an order or judgment vacated in its entirety." Id. ¶ 17. Under Rule 59(e), "a motion to alter or amend the judgment" may be brought if it is brought under one of the grounds stated under 59(a). Id. Rule 59(a) provides:

> On a motion for a new trial in an action tried without a jury, the [trial] court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.

Id.

The court concluded that an amended judgment under Rule 59(e) in accordance with this section is a new judgment. Id. ¶ 18. In contrast, under Rule 52(b) a trial court may amend the judgment to include additional findings of fact and conclusions of law but does not interfere with the prevailing party's relief. Id. In such instances, the validity of the original judgment remains intact. Id. Under the circumstances of this case, the trial court added additional findings of fact and conclusions of law. Id. ¶ 19. However, the trial court declined to enter the specific facts and conclusions of law requested by the defendant, nor did the trial court recalculate damages. Id. Accordingly, the relief afforded to the plaintiff in the initial action remained the same. Id. Thus, the defendant's motion to amend the judgment was pursuant to Rule 52(b) and not Rule 59(e), and the 10-year statute of limitation barred the action. Id. ¶¶ 13, 19.

For these reasons, the court of appeals reversed the trial court's order denying defendant's motion for summary judgment.

In Izzy Air, LLC v. Triad Aviation, Inc., 284 N.C. App. 655, 2022-NCCOA-523, the court of appeals considered whether the borrowing provision of section 1-21 of the North Carolina General Statutes requires application of the statute of limitations in the state in which the action accrued or of North Carolina's statute of limitations.

Aircraft owners hired a maintenance corporation to perform repairs to the engine of their air aircraft. Id. ¶ 2. The aircraft was owned by a Delaware corporation and two South

Carolina residents. Id. The maintenance corporation's facility was located in Burlington, North Carolina. Id. Aircraft owners shipped the engine of the aircraft from South Carolina to the North Carolina facility. Id. The engine was repaired, overhauled, inspected, and tested in North Carolina. Id.

The maintenance corporation provided the aircraft owners with a limited warranty. Id. ¶ 3. The limited warranty included a choice-of-law provision, providing that North Carolina law would apply in the event there was a dispute under the warranty. Id.

After the engine was returned, the aircraft owners experienced engine failure shortly after taking off from a South Carolina airport. Id. ¶ 4. The aircraft owners made an emergency landing in a South Carolina field and the plane was damaged beyond repair. Id. They notified the maintenance corporation, but it refused to honor the express warranty on the work performed. Id. ¶ 5.

The aircraft owners filed a complaint alleging violation of North Carolina's Unfair and Deceptive Trade Practices Act almost four years following the engine failure. Id. ¶ 6. The statute of limitations applicable to claims brought under North Carolina's Unfair and Deceptive Trade Practices Act is four years. Id. ¶ 13. The statute of limitations applicable to the same claim in South Carolina is three years. Id. ¶ 9. The maintenance corporation filed a motion to dismiss the complaint, arguing the claim was time-barred as North Carolina's borrowing statute (section 1-21 of the North Carolina General Statutes) required application of South Carolina's three-year statute of limitations. Id. The trial court agreed and dismissed the claim with prejudice. Id.

In affirming the trial court's decision, the court of appeals explained "where a claim arising in another jurisdiction is barred by the laws of that jurisdiction, and the claimant is

not a resident of North Carolina, the claim will be barred in North Carolina as well." Id. ¶ 11 (quoting George v. Lowe's Cos., 272 N.C. App. 278, 280, 846 S.E.2d 787, 788 (2020)). The court of appeals recognized that it was undisputed that the aircraft owners were not residents of North Carolina, that they were residents of South Carolina, and that they filed their suit more than three, but less than four, years after the action accrued. Id. ¶ 12. Based on those undisputed facts, the court of appeals concluded the borrowing statute applied to bar the aircraft owners' claim. Id.

The court of appeals rejected the aircraft owners' argument that the choice-of-law provision contained in the limited warranty subjected their claim to North Carolina's four-year statute of limitations. Id. ¶ 13. The choice-of-law provision applied only to disputes arising out of the warranty, not all potential litigation. Id. The court of appeals observed the choice-of-law provision did not specifically apply to the UDTP claim and that "neither an intentional breach of contract nor a breach of warranty, standing alone, is sufficient to maintain a UDTP claim." Id. (citing Mitchell v. Linville, 148 N.C. App. 71, 74, 557 S.E.2d 620, 623 (2001)). Further, even applying the choice-of-law provision, North Carolina's borrowing statute requires that South Carolina's statute of limitations applies. Id. ¶¶ 15–16.

The court of appeals also rejected the aircraft owners' argument that the borrowing statute did not apply because the cause of action arose out of the maintenance corporation's flawed repair performed in North Carolina. Id. ¶ 17. The "North Carolina Supreme Court has not addressed the proper choice-of-law test for UDTP claims, and there is split authority" in the court of appeals. Id. ¶ 18. Courts have utilized both the significant relationship test and lex loci approach. Id. Under either test, the aircraft owners' claim arose in South Carolina:

> Under the most significant relationship test, the [aircraft owners] reside in South Carolina, [aircraft owners] shipped the engine to [the maintenance corporation] from South Carolina, the airplane accident occurred in South Carolina, [aircraft owners] sustained their injuries in South Carolina, and [aircraft owners'] alleged efforts to notify [the maintenance corporation] of the accident occurred in South Carolina. While North Carolina is not without connection to the occurrence giving rise to the action, South Carolina has the more significant relationship.
>
> Under the lex loci approach, [aircraft owners] sustained their injuries in South Carolina and the last act giving rise to [their] claim occurred in South Carolina when [their] airplane engine failed in South Carolina and they were forced to attempt an emergency landing in South Carolina. Thus, under the lex loci approach, [aircraft owners'] "claim arose" in South Carolina.

Id. ¶¶ 21–23.

Accordingly, the court of appeals affirmed the trial court's order dismissing the action as barred by South Carolina's statute of limitations pursuant to section 1-21 of the North Carolina General Statutes. Id. ¶ 24.

In Morris v. Rodeberg, 285 N.C. App. 143, 2022-NCCOA-555, the court of appeals considered the statute of limitations applicable to medical malpractice claims that accrue when the plaintiff is a minor over the age of ten given the intersection of sections 1-17 and 1-15(c) of the North Carolina General Statutes.

A thirteen-year-old patient underwent a laparoscopic appendectomy in February 2015. Id. ¶¶ 2–3. Following the procedure, the patient developed an infection, requiring an extended hospital stay. Id. ¶ 4.

In September 2020, the patient filed a medical malpractice lawsuit, nearly five years after the claim accrued. Id. ¶¶ 5, 8. The patient alleged the suit was initiated within the statute of limitations under section 1-17(b) of the North Carolina General Statutes as the

claim accrued while the patient was a minor and the complaint was filed within one year of the patient attaining the age of majority (or before attaining the age of nineteen). Id. ¶ 6. The providers moved to dismiss the patient's complaint under Rule 12(b)(6) of the North Carolina Rules of Civil Procedure, arguing section 1-17(c) applied to the patient's claim and the statute of limitations expired three years after the surgery regardless of his status as a minor. Id. The patient argued subsection (c) of section 1-17 did not apply. Id. ¶ 9.

The trial court denied the providers' motions to dismiss. Id. ¶ 11. The providers filed a petition for certiorari review by the court of appeals, which was granted. Id. ¶ 17.

The court of appeals held section 1-17(c) applies to medical malpractice actions brought by all minors and "provides a three-year limitations period for accrual of a medical malpractice claim for a minor over the age of ten." Id. ¶ 20. Accordingly, the patient's claim was untimely as he was over the age of ten when the claim accrued and did not initiate suit until nearly five years after the claim accrued. Id.

Writing for the majority, Judge Gore explained that subsections (b) and (c) of section 1-17 operate to reduce the statute of limitations on suits alleging medical malpractice. Id. ¶¶ 25–26 (citing King v. Albemarle Hosp. Auth., 370 N.C. 467, 470–71, 809 S.E.2d 847, 849 (2018)). Subsection (b) applies to malpractice actions (not limited to medical malpractice), requiring a claim that accrued when an injured party was a minor to be filed by the time that individual reaches nineteen years of age. Id. ¶ 25. This narrows subsection (a), which allows an injured individual to bring a claim within three years after attaining the age of majority. See id. Subsection (c), a later addition to the statute, further narrows the time specifically in medical malpractice actions. Id. ¶ 26.

Based on the foregoing, the court of appeals held the trial court erred in denying the providers' motions to dismiss. Id. ¶ 36.

Judge Hampson dissented. Judge Hampson opined the court of appeals should have exercised judicial restraint, denied the petition for certiorari review, and declined to "wade into a question of first impression involving novel statutory interpretation". Id. ¶ 37. Judge Hampson interprets subsections (b) and (c) of 1-17 and section 1-15(c) to provide that "a minor injured by alleged medical negligence [has] until the age of nineteen to bring suit, unless the action accrues before the minor turns seven, in which case, the minor has until age ten to bring suit." Id. ¶ 46. In this case, Judge Hampson would apply the statute of limitations set forth in section 1-17(b), permitting this patient to timely initiate suit before attaining the age of nineteen. Id.

F. Statute of Repose

In Gaston County Board of Education v. Shelco, LLC, 285 N.C. App. 80, 2022-NCCOA-550, rev. denied, 883 S.E.2d 469 (N.C. 2023) the court of appeals considered whether a plaintiff's claims are barred by the statute of repose where the complaint does not conclusively allege facts necessary to that determination.

As relevant here, a county board of education filed an action against an engineer and subcontractor who were hired as part of building a public high school. Id. ¶ 4. The underlying project included the construction of several retaining walls around the school's athletic complex. Id. ¶ 6. This portion of the construction was completed in 2011. Id. A year later, the board became aware that portions of the wall were cracking. Id. In May 2013, the board, the contractor, and architect signed a certificate of completion for the project. Id. ¶ 7. The certificate was not signed by the subcontractor and engineer. Id.

Subsequently, all parties signed a tolling agreement with a stated effective date of March 1, 2019, that tolled the statute of limitations until September 15, 2020. Id. ¶ 8. In November 2020, the board filed action against the engineer and the subcontractor for the defects in the retaining walls. Id. ¶ 9. Shortly thereafter, the engineer and subcontractor filed Rule 12(b)(6) motions to dismiss the board's complaint based on the state's six-year statute of repose under section 1-50 of the North Carolina General Statutes. Id. The trial court granted the engineer's and subcontractor's Rule 12(b)(6) motions based on the statute of repose because they did not sign the 2013 certificate of completion, which means the tolling agreement did not place the board's claims within the repose period because the retaining wall was completed in 2011, more than six years before the effective date of the tolling agreement. Id. ¶ 10.

On appeal, the court of appeals reversed. Id. ¶ 33. Under section 1-50 of the North Carolina General Statutes:

> No action to recover damages based upon or arising out of the defective or unsafe condition of an improvement to real property shall be brought more than six years from the later of
> [1] the specific last act or omission of the defendant giving rise to the cause of action or
> [2] substantial completion of the improvement . . . or specified area or portion thereof (in accordance with the contract[.]

Id. ¶ 16.

While the board has the burden of proof to present evidence that the statute of repose does not defeat the plaintiff's claim, the burden does not arise at the pleading stage. Id. ¶ 18. Accordingly, a Rule 12(b)(6) motion to dismiss is only appropriate at the pleading stage if the complaint alleges facts that "conclusively show[s] that it was not filed within the

applicable statute of repose." Id. Here, the board did not allege in its complaint either the date for the "specific last act" giving rise to the action or the date of "substantial completion" as provided under the repose statute. Id. Therefore, dismissal was inappropriate. Id.

Nevertheless, the engineer and subcontractor contended that the act necessary for substantial completion of the retaining walls occurred in 2011. Id. ¶ 28. They further argued that substantial completion does not have to relate to the entire project, but rather a specific area or portion thereof, i.e., the retaining walls. Id. The engineer and subcontractor argued that this is appropriate based on section 1-50 of the North Carolina General Statutes, which states in part that substantial completion is the "degree of completion of a project, improvement or specified area or portion thereof . . . upon attainment of which the owner can use the same for the purpose in which it was intended." Id. ¶ 27. The court agreed that the plain interpretation of this statute provides that "the date of substantial completion occurs with respect to a particular contractor when the part of the improvement the contractor was hired to provide services for has reached a 'degree of completion' where 'the owner can use the same for the purpose for which was intended." Id. ¶ 29. The court clarified this statute by a contrasting example:

> [W]hen an owner contracts with a company to build the foundation of a house, the statute of repose begins when the foundation is completed such that the owner can contract with someone else to build the frame, etc. The entire house need not to be complete for the statute of repose to run against the contractor hired to build the foundation. Of course, if one contractor is hired to build the entire house, then the statute of repose to sue the contractor for laying a bad foundation would not start until the entire house was completed, as the contractor contracted to build the entire house.

Id.

Under these facts, the board alleged that the engineer was contracted to "provide geotechnical engineering service for the Project," as opposed to performing services for the retaining wall only. Id. ¶ 30. Additionally, as stated earlier, there are no allegations when the entire project was completed. Id. Lastly there is no allegation that the date of completion was determined by written agreement as the board did not allege that the engineer was a party to the certificate of completion. Id.

Likewise, the board did not state any allegations that the subcontractor was hired to work on the retaining wall alone. Id. ¶ 31. The subcontractor similarly was not a party to the certificate of substantial completion. Id. Furthermore, the board's contract with the architect, who contracted for services with the subcontractor, provided that the architect was to "provide architectural [and other] services for the Project." Id.

Thus, for the foregoing reasons, the court reversed the trial court's granting of the engineer and subcontractor's 12(b)(6) motion to dismiss based on the statute of repose.

G. Rule 9(j)

In Gray v. Eastern Carolina Medical Services, PLLC, 284 N.C. App. 616, 2022-NCCOA-520, rev. allowed, 880 S.E.2d 680 (N.C. 2022), and appeal withdrawn, 884 S.E.2d 748 (N.C. 2023), and appeal withdrawn, 886 S.E.2d 518 (N.C. 2023), and appeal withdrawn, 886 S.E.2d 518 (N.C. 2023), the court of appeals considered whether plaintiff could have reasonably expected her Rule 9(j) expert to qualify to testify under Rule 702 of the Rules of Evidence.

The administratrix of an estate[1] filed suit seeking damages for allegedly negligent medical treatment provided at Pitt County Detention Center. Id. ¶ 2. Prior to his incarceration, a detainee was diagnosed with pneumonia and prescribed antibiotics. Id. During the three weeks he was incarcerated at Pitt County Detention Center, the detainee submitted many requests for sick call and was prescribed an inhaler, over-the-counter pain medications, and antibiotics. Id. After his transfer to another facility, the detainee was transported to the hospital, where he was diagnosed with acute left-sided empyema and sepsis. Id. ¶ 3. He was then transferred to a higher acuity hospital, where he was diagnosed with septic shock due to staphylococcus, necrotizing pneumonia, acute respiratory failure, and acute kidney failure. Id. ¶ 4. He was intubated and had his left lung surgically removed. Id. The detainee was discharged from the hospital after a five-day admission and released from the North Carolina Department of Corrections one year later. Id.

The administratrix filed suit against two physicians who supervised care provided at Pitt County Detention Center as well as the nurses who treated the detainee. Id. ¶¶ 5–6. One of the physicians is board certified in psychiatry and addiction medicine, was previously board certified in internal medicine, and practices as a general practitioner in supervising care at Pitt County Detention Center. Id. ¶ 5. The other is board certified in internal medicine. Id.

The providers filed motions to dismiss pursuant to Rule 9(j). Id. ¶ 7. The administratrix voluntarily dismissed her case and refiled a complaint including a Rule 9(j) certification. Id. ¶¶ 7–8. She identified her Rule 9(j) expert as a physician who is board

[1] The decedent died from an apparent drug overdose two years after the allegedly negligent care at issue. Id. ¶ 4.

certified in internal medicine, pulmonary disease, and critical care medicine. Id. ¶ 10. During the year preceding the care at issue, the Rule 9(j) expert served as a pulmonary and critical care physician at a tertiary care hospital, and the director of pulmonary specialists and rehabilitation program. Id. He supervised medical staff, including nurses, in his practice. Id. After the Rule 9(j) expert's deposition (which was limited to evaluating his qualifications), the providers argued their motions to dismiss. Id. ¶¶ 11–12.

The trial court dismissed the action for failure to comply with Rule 9(j). Id. ¶ 13. The court of appeals conducted an analysis of whether the administratrix could have reasonably expected the Rule 9(j) expert to qualify under Rule 702(b). Id. ¶¶ 17–40.

No dispute existed that the Rule 9(j) expert did not specialize in the same specialties as the physicians, so he could not have been expected to qualify under Rule 702(b)(1)a. Id. ¶ 18. But the court of appeals concluded the administratrix could have reasonably expected the Rule 9(j) expert to qualify under Rule 702(b)(1)b. Id. ¶ 20. The court emphasized that the Rule 9(j) expert need not actually qualify to satisfy the gatekeeping requirement. Id. Further, the trial court is required to "examine the facts and circumstances known or those which should have been known to the pleader at the time of filing, and to the extent there are reasonable disputes or ambiguities in the forecasted evidence, the trial court should draw all reasonable inferences in favor of the nonmoving party". Id. (quoting Preston v. Movahed, 374 N.C. 177, 189, 840 S.E.2d 174, 183–84 (2020)).

The court of appeals concluded that the trial court impermissibly drew inferences against the administratrix in finding that she knew or should have known her Rule 9(j) expert was not practicing in a similar specialty as the physicians against whom she filed suit. Id. ¶¶ 21, 24. The evidence showed that the Rule 9(j) expert was asked to provide opinions on

the standard of care for the treatment of a patient with pneumonia. Id. ¶ 23. The court of appeals specifically found that the trial court misapplied the requirements of Rule 9(j) in concluding that the 9(j) expert "did not practice in a similar specialty as any of the defendants which included within it the primary care of patients during the applicable period." Id. ¶¶ 24–25, 28.

The court of appeals found that the physicians were holding themselves out as internal medicine physicians in a primary care practice; that the evidence supported an inference that pulmonary disease medicine and critical care medicine are sub-specialties of internal medicine; and it was reasonable for the administratrix to expect her Rule 9(j) expert to be considered in a similar specialty. Id. ¶¶ 26–27. Regarding supervision of the nurses, the court of appeals concluded the Rule 9(j) expert's supervision of nurses in the hospital setting was not so dissimilar from a general practice setting to render it unreasonable to expect him to qualify as an expert. Id. ¶¶ 38–39. The court of appeals further observed that there was no evidence to suggest that a pulmonologist would treat pneumonia differently than an internist. Id. ¶ 37.

The court of appeals remanded the case for further proceedings. Id. ¶ 42.

In Miller v. Carolina Coast Emergency Physicians, LLC, 382 N.C. 91, 2022-NCSC-97, the supreme court considered whether a trial court must dismiss a complaint that facially complies with Rule 9(j) when it is subsequently determined that the plaintiff's Rule 9(j) expert witness is unwilling to testify that the defendant violated the applicable standard of care in one of various ways alleged in the complaint.

The wife of a patient who was pronounced dead in the emergency department of a hospital filed suit against the hospital and emergency room physician seeking damages for

medical negligence. Id. ¶¶ 3–4. In her complaint, the wife advanced two theories of liability against the hospital: (1) direct liability for the alleged negligence of the nurses and (2) vicarious liability for the alleged negligence of the physician as an apparent agent. Id. ¶ 5.

The wife retained a Rule 9(j) expert who opined that the emergency room physician violated the applicable standard of care. Id. ¶ 6. He also testified the remaining care appeared to comply with the applicable standard of care, to the extent he reviewed it. Id. Finally, the Rule 9(j) expert testified that he did not consider himself a nursing expert and never expressed opinions to the wife's counsel beyond those expressed regarding the emergency room physician. Id. Based on his testimony, the hospital filed a motion to dismiss for failure to substantively comply with Rule 9(j). Id. ¶ 7.

In opposition, the wife's counsel filed an affidavit stating that the Rule 9(j) expert communicated his ability and willingness to testify that the hospital did not comply with the appropriate standard of care prior to the filing of the lawsuit. Id. ¶ 8. The trial court denied the hospital's motion finding the wife reasonably expected the Rule 9(j) expert to testify against the hospital. Id.

The trial court later excluded both experts proffered by plaintiff and entered summary judgment for the hospital and emergency room physician. Id. ¶¶ 9–10. The court of appeals unanimously affirmed the trial court's order denying the hospital's motion to dismiss for failure to comply with Rule 9(j). Id. ¶ 11. The court of appeals concluded that there was no evidence in the record to support that the Rule 9(j) expert informed the wife's counsel that he was unwilling to testify that the hospital was negligent. Id. ¶ 12.

Writing for the majority after discretionary review, Justice Earls reviewed the two requirements set forth in Rule 9(j)(1): the proffered expert must be (1) reasonably expected

to qualify to testify under Rule 702 of the Rules of Evidence and (2) willing to testify that the medical care did not comply with the standard of care. Id. ¶ 15. Justice Earls explained that trial courts must analyze both requirements "in the exact same way": "[i]n evaluating the second requirement, just as with the first Rule 9(j) requirement, what matters is what was known or what reasonably should have been known at the time of the filing." Id. ¶ 18 (relying upon Preston v. Movahed, 374 N.C. 177, 183–86, 840 S.E.2d 174 (2020)). The majority concluded that, given the evidence taken in the light most favorable to the wife, the Rule 9(j) expert was willing to testify against the hospital at the time of the filing of the complaint and the wife had no reason to doubt his competence, thoroughness, or honesty. Id. ¶¶ 18, 22.

Accordingly, the supreme court affirmed the trial court's denial of the hospital's Rule 9(j) motion to dismiss. Id. ¶ 32.

Writing on behalf of the dissent, Justice Barringer suggested that the case should be remanded for a proper application of Rule 9(j) because the trial court failed to find whether the Rule 9(j) expert was willing to testify. Id. ¶ 34. Justice Barringer explained that "Rule 9(j)'s requirement that an expert be willing to testify is not dependent on plaintiff's reasonable belief that the expert is willing to testify." Id. ¶ 37. Looking at the plain language of the statute, the reasonable expectation language modifies only the proffered expert's qualifications. Id. ¶ 38. "[I]f the legislature wished the term "reasonable expectation" to apply to both requirements, it would have positioned it to modify both clauses". Id. ¶ 39. Accordingly, "Rule 9(j)'s requirement that an expert be willing to testify does not depend on the plaintiff's reasonable expectation but rather simply requires that plaintiff's proffered witness actually be willing to testify." Id. ¶ 40.

Justice Barringer also observed that "[a]s the pleader's representative, it is the responsibility of plaintiff's attorney to confirm that the selected expert focused on every cause of action in the complaint and is willing to testify regarding each of the claims." Id. ¶ 44. The Rule 9(j) expert testified regarding his lack of willingness to testify that the hospital—through its nurses—breached the applicable standard of care. Id. ¶ 46. The dissent explained that the wife's counsel should have known that the Rule 9(j) expert was not willing to testify against the hospital. Id. ¶ 47. Given the lack of specific findings contained in the trial court's order, the dissent would have remanded the Rule 9(j) issue for further proceedings and proper application. Id. ¶ 53.

H. Rule 26

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

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

The court of appeals noted that it had previously decided a similar issue in Myers, where the trial court excluded all the father's expert testimony due to his failure to disclose the identity of his expert witnesses "sufficiently in advance of trial." Id. at ___, 885 S.E.2d at 109 (quoting Myers, 269 N.C. App. at 240, 837 S.E.2d at 447–48). The court of appeals also noted, as it did in Myers, that North Carolina Rule 26 "is clear as mud," and thus did

not fault the father for citing it incorrectly in his brief. Id. at ___, 885 S.E.2d at 111 (quotation marks omitted) (quoting Myers, 269 N.C. App. at 247, 837 S.E.2d at 451–52).

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

The court of appeals addressed the changes the general assembly made in 2015 to North Carolina Rule 26 "in detail" in Myers, explaining that the amendments made the rule more similar to its federal counterpart but only in a "superficial" way. Id. (quoting Myers, 269 N.C. App. at 243, 837 S.E.2d at 449). "Because the 2015 Amendments to [North Carolina] Rule 26 incorporated the concept of required disclosure of expert witnesses but set no procedure or timing for the disclosure," North Carolina Rule 26(b) is "ambiguous." Id. (quoting Myers, 269 N.C. App. at 247, 837 S.E.2d at 451–52).

The court of appeals explained that it had concluded in Myers that, although North Carolina Rule 26 set no time frame for disclosure of expert witnesses, it did require advance disclosure, even without a discovery request. Id. This was of particular importance in the case at bar, as neither party had served any written discovery or discovery requests on the other. Id. (quoting Myers, 269 N.C. App. at 256, 837 S.E.2d at 456–57). The court of appeals also noted, per Myers, that trial courts possess the "inherent authority to impose a

sanction for failure to disclose sufficiently in advance of trial," as well as the "discretion to allow or to exclude" an expert witness's evidence "or to impose another sanction for failure to disclose." Id. (alterations omitted) (quoting Myers, 269 N.C. App. at 256, 837 S.E.2d at 457). The guiding purpose of Rule 26(b) is "to provide openness and avoid unfair tactical advantage in the presentation of a case at trial." Id. (quoting Myers, 269 N.C. App. at 255, 837 S.E.2d at 456). Thus, a trial court must, in its discretion, determine whether a party's failure to disclose an expert witness sufficiently in advance created an "unfair tactical advantage." Id. (quoting Myers, 269 N.C. App. at 255, 837 S.E.2d at 456). A trial court is not required to exclude evidence if a party fails to disclose expert witnesses sufficiently in advance, but it is certainly allowed to do so. Id.

Next, the court of appeals addressed the "'important exception' carved out of Rule 26(b)(4)(a)(1) by subdivision 26(b)(4)(f)." Id. Subsection (4)(f) "sets a time for disclosure of testifying expert witnesses" if the parties have agreed to submit written reports pursuant to specific subsections of the rule. Id. (quoting Myers, 269 N.C. App. at 249 n.7, 837 S.E.2d at 452 n.7). In the case at bar, the parties had no such agreement—nor a "stipulation, discovery plan, or order setting disclosure timelines"—and thus subsection (4)(f) did not apply. Id. (citing Myers, 269 N.C. App. at 249, 837 S.E.2d at 453).

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

I. Rule 37

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

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

The first insurer filed a motion to compel. Id. The trial court issued a consent order, signed by the respective attorneys of the motorist and the first insurer only, requiring the motorist to produce all the requested documents. Id. at 382, 881 S.E.2d at 727–28. The motorist again failed to comply. Id.

The first insurer filed an amended motion for sanctions, or, in the alternative, a motion to dismiss for failure to prosecute, "pursuant to Rules 26, 33, 34, 37, and 41 of the North Carolina Rules of Civil Procedure." Id. The trial court issued an order dismissing the motorist's complaint with prejudice as to both the first insurer and the second insurer. Id. at 383–84, 881 S.E.2d at 728. The motorist appealed. Id.

On appeal, the court of appeals affirmed in part, reversed in part, and remanded. Id. at 383, 881 S.E.2d at 727. The court of appeals found that the trial court had not abused its discretion in dismissing the motorist's complaint with prejudice under Rule 37 as to the first

insurer due to the motorist's repeated failures to comply with the first insurer's discovery requests. Id. at 386, 881 S.E.2d at 729. Because the court of appeals found the trial court's order permissible under Rule 37, it did not address whether it was permissible under Rule 41. Id. The court of appeals thus affirmed this portion of the trial court's order. Id. at 385–86, 881 S.E.2d at 729.

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

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

J. Rule 52

In Taylor v. Bank of America, N.A., 382 N.C. 677, 878 S.E.2d 798 (2022), the supreme court considered whether the court of appeals erred by remanding a case to the trial court to make findings of fact and conclusions of law in its order granting defendant's Rule 12(b)(6) motion to dismiss. Id. at 677–78, 878 S.E.2d at 799.

Customers filed suit against the bank, alleging fraud and other claims arising out of the bank's Home Affordable Modification Program. Id. at 678, 878 S.E.2d at 799. The bank moved to dismiss the complaint pursuant to Rule 12(b)(6) of the North Carolina Rules

of Civil Procedure. Id. The trial court granted the bank's motion, concluding that the applicable statute of limitations or doctrines of res judicata and collateral estoppel barred all claims. Id. Because the trial court's order did not include findings of fact, the court of appeals concluded that it could not conduct a meaningful review of the conclusions of law. Id.

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

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

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

This case arises from the parties' sexual relationship, which plaintiff claims was, at least in part, nonconsensual. Id. at 416, 881 S.E.2d at 635. Plaintiff filed a complaint against

the defendant requesting a no-contact order for stalking or nonconsensual sexual contact. Id. The plaintiff sought a no-contact order pursuant to section 50C of the North Carolina General Statutes. Id. In response to plaintiff's complaint, the defendant filed a motion to dismiss under Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. Id. At the motion's hearing, the trial court concluded in open court that the "[p]laintiff had failed to prove grounds for issuance of a no-contact order." Id. As a result, the trial court dismissed the plaintiff's complaint by written order. Id.

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

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

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

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

During discovery in the lawsuit filed by the widow, the widow submitted interrogatories and requests for production of documents to all defendants. Id. at 666–67, 881 S.E.2d at 119. At issue in this matter was the portion of these requests that sought documents relating to any investigation conducted by medical personnel regarding the decedent's death and information related to the care provided. Id. The physician assistant, in responding to these requests, claimed that she never participated in any investigation or peer review process with her employer. Id. Nevertheless, during the physician assistant's

deposition, counsel for the widow realized that a report to the risk management department that employed the physician assistant was never produced. Id. at 668, 881 S.E.2d at 120. Subsequently, the widow filed a motion to compel the production of the report. Id. In defense of the motion, the medical professionals and entities asserted the medical review privilege pursuant to section 90-21.22A of the North Carolina General Statutes. Id. The trial court, without including findings of fact, granted the decedent's wife's motion and filed a written order for the report's disclosure. Id.

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

The supreme court reversed the determination by the court of appeals and concluded that the medical professionals and entities did not request findings of facts regarding the elements of the medical review privilege and that the trial court was not obligated to make such findings in its order. Id. at 670, 881 S.E.2d at 121. Generally, a trial court's responsibility to make findings of fact depends on whether a statute or rule imposes such a requirement. Id. at 670–71, 881 S.E.2d at 121–22. Some statutes explicitly require that the trial court make findings of fact; however, the medical review committee privilege does not expressly state this requirement. Id. Further, while Rule 52 imposes a requirement that in

a bench trial the court must "find the facts specially and state separately its conclusions of law [before] direct[ing] entry of the appropriate judgment," this matter concerned only an interlocutory order compelling discovery. Id. at 671, 881 S.E.2d at 122 (quoting N.C. Gen. Stat. § 1A-1, Rule 52(a)(1)). Thus, to receive findings of fact on the trial court's order compelling discovery, the medical professionals and entities would have had to request such instruction. Under the circumstances presented, the medical professionals and entities never made such a request. Id. at 672, 881 S.E.2d at 122.

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

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

K. Standing

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

Following political protests, the city declared the statue a "public nuisance" and removed it from the grounds of a private entity, formerly a county courthouse, believing the statue posed a threat to public health and safety. Id. at 614–18, 881 S.E.2d at 37–39. In response, the association filed suit against the city and the county seeking to enjoin them from relocating the statue "prior to a full adjudication of the respective rights and obligations of the [p]arties." Id. at 619, 881 S.E.2d at 40. The city and county moved to dismiss the complaint for lack of subject matter jurisdiction under Rule 12(b)(1) of the North Carolina Rules of Civil Procedure and for failure to state a claim under Rule 12(b)(6). Id. The trial court granted these motions and dismissed the association's complaint with prejudice. Id. The association appealed. Id. at 620, 881 S.E.2d at 41.

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

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

On the issue of standing, the supreme court said that since "the North Carolina Constitution confers standing on those who suffer harm," the association's standing in this case depended on whether the association had "alleged such a personal stake in the outcome." Id. at 625, 881 S.E.2d at 44 (citation and quotation marks omitted). The supreme

court also observed that the court of appeals had previously "consistently held that North Carolina's standing requirements were identical to those enforced in the federal courts," thus requiring a showing of: (1) an injury-in-fact that is (2) "fairly traceable to the challenged action of the defendant" and (3) "is likely, as opposed to merely speculative, . . . [to] be redressed by a favorable decision." Id. (citation and quotation marks omitted).

However, in the recent decision in Committee to Elect Dan Forest v. Employee Political Action Committee, which was filed after the trial court's order and the opinion from the court of appeals in the immediate case, the supreme court held that, "since the North Carolina Constitution does not contain the same 'case-or-controversy' provision that appears in the United States Constitution, it does not require the existence of 'injury-in-fact' to establish standing," thus making a "legal injury" sufficient. Id. at 625–26, 881 S.E.2d at 44–45 (quoting Comm. to Elect Dan Forest, 376 N.C. 558, 853 S.E.2d 698).

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

The supreme court found that the association's argument—that "simply filing a declaratory action and asserting that there was an 'actual controversy between the parties'" suffices to establish standing—"rest[ed] upon a fundamental misunderstanding of the law of standing." Id. at 629, 881 S.E.2d at 46. In fact, establishing standing must happen as a "prerequisite for the assertion of a declaratory judgment claim." Id. (citations omitted).

Thus, the association was required to demonstrate legal or factual injury arising from the city's actions "as a prerequisite for maintaining the present declaratory judgment action." Id. (citations omitted). Instead, the association failed to show deprivation of any identifiable legal right. Id. at 629, 881 S.E.2d at 47.

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

The supreme court observed that both state appellate courts had held that "the absence of standing can be raised in a motion to dismiss for failure to state a claim" under Rule 12(b)(6). Id., 881 S.E.2d at 59 (citations omitted). Moreover, both courts had "consistently recognized that standing is a necessary prerequisite to a court's proper exercise of subject matter jurisdiction." Id. (citations and quotation marks omitted). Additionally, these previous opinions relied on the since-rejected notion that a plaintiff must allege an injury-in-fact to establish standing. Id., 881 S.E.2d at 60 (citing Comm. to Elect Dan Forest, 376 N.C. at 596, 853 S.E.2d at 725–26).

Here, the supreme court concluded that, "[a]lthough the practical consequence of a dismissal of a complaint under Rule 12(b)(6) or 12(b)(1) is the same—the case is dismissed—the legal effect is quite different." Id. at 650, 881 S.E.2d at 60 (quoting Cline v. Teich for Cline, 92 N.C. App. 257, 263, 374 S.E.2d 462, 466 (1988)). Dismissing an action for failure to state a claim constitutes a final judgment on the merits—"unless the court specifies that the dismissal is without prejudice"—and bars the plaintiff from filing

another action on the basis of the same claim. Id. (citing Rest. (Second) of Judgments § 19 cmt. d. (1982); Clancy v. Onslow Cnty., 151 N.C. App. 269, 272, 564 S.E.2d 920, 923 (2002)). Conversely, dismissing an action for lack of subject matter jurisdiction "does not result in a final judgment on the merits and does not bar further action by the plaintiff on the same claim." Id. (emphasis in original) (citing Rest. (Second) of Judgments § 20 cmt. e.; Street v. Smart Corp., 157 N.C. App. 303, 305, 578 S.E.2d 695, 698 (2003)).

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

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

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

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

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

L. Immunity

(1) Sovereign

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

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

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

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

The supreme court recognized that a state can waive its right to sovereign immunity and may be sued in a sister state when it has availed itself of a "sue and be sued" clause. Id. at 371–72, 879 S.E.2d at 128–29 (citing Thacker v. Tennessee Valley Auth., 139 S. Ct. 1435 (2019)). Noting that the "sue and be sued" clause is not without its limits, the supreme court clarified: "In cases involving governmental activities in which a sue and be sued clause is present, immunity will only apply 'if it is clearly shown that prohibiting the type of suit at issue is necessary to avoid grave interference with a governmental function's performance.'" Id. at 372, 879 S.E.2d at 129 (quoting Thacker, 139 S. Ct. at 1443). In this case, the university registered under the North Carolina Nonprofit Corporation Act, which includes a "sue and be sued clause." Id. at 372, 879 S.E.2d at 128. Further, it engaged in business or commercial—rather than governmental—activities, including marketing services and recruiting students. Id. at 373, 879 S.E.2d at 129.

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

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

Justice Barringer authored a dissenting opinion, which Chief Justice Newby joined. Id. at 379–86, 879 S.E.2d at 133–38. The dissent opined that Hyatt III should control the outcome and that the university should be afforded sovereign immunity. Id. at 381, 879 S.E.2d at 134–35. The dissent found no clear indication that the sister state consented to be sued in North Carolina courts. Id. at 384, 879 S.E.2d at 136. Further, North Carolina courts have refused to infer a waiver of immunity in circumstances involving a "sue and be sued" clause, opting instead to strictly construe statutes conferring immunity. Id. at 384, 879 S.E.2d at 137. Accordingly, the dissent concluded that denying sovereign immunity violates the United States Constitution and North Carolina's own standard for waiver of sovereign immunity. Id. at 386, 879 S.E.2d at 137–38.

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

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

The students filed suit, alleging that the universities entered an implied-in-fact contract with the students when the universities offered the services and the students accepted the offer by paying the fees. Id. at 578, 879 S.E.2d at 295. The students claimed they did not receive the services, benefits, or opportunities for which they paid, nor did they receive a refund following the shutdowns. Id. at 579, 879 S.E.2d at 296. The universities asserted sovereign immunity and moved to dismiss the students' claims. Id. at 580, 879 S.E.2d at 296. The trial court denied the motion to dismiss, and the universities appealed. Id. at 580, 879 S.E.2d at 297.

Reviewing the trial court's order de novo, the court of appeals concluded that the universities waived sovereign immunity by entering an implied-in-fact contract with the students. Id. at 595, 879 S.E.2d at 306. The court explained that the state waives sovereign immunity by entering a valid contract. Id. at 588, 879 S.E.2d at 301. Thus, it analyzed whether the state waives its sovereign immunity by entering an implied-in-fact contract,

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

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

(2) Governmental

In Bartley v. City of High Point, 381 N.C. 287, 2022-NCSC-63, the supreme court considered whether a law enforcement official may successfully assert a public official immunity defense against civil liability when an opposing party shows evidence of malicious behavior.

A civilian filed a civil suit against the City of High Point and one of its officers in his individual and official capacities for malicious prosecution, false imprisonment/arrest, and assault and battery. Id. ¶ 8. The suit arose after the officer arrested the civilian following a confrontation from an illegal traffic maneuver. Id. ¶¶ 2, 6–7. On the day in question, the civilian was traveling home behind a pickup truck traveling at a low rate of

speed. Id. ¶ 2. The civilian impatiently passed the truck by crossing the double yellow line they were traveling along. Id. At that point, the officer, who was driving behind the civilian in an unmarked vehicle activated his lights, air horn, and sirens to catch up to the civilian car. Id. Despite signaling the civilian to pull over, the civilian continued driving to his house. Id. Upon parking in his driveway and getting out of his car, the civilian first noticed the officer. Id. ¶ 3. The officer, who was plain clothed, ordered the civilian back into his car. Id. The civilian informed the officer, who had not identified himself as an officer, that he was on private property and refused his command. Id. According to the civilian's testimony, the officer subsequently "body slammed" him onto his trunk, handcuffed him, and informed him he was being detained. Id. ¶ 4. Additionally, the civilian testified that he remained in handcuffs for "20-25 minutes even after he was patted down . . . and even though a backup officer had been called to the scene." Id. ¶ 6. The civilian further testified he informed the officer that the handcuffs were too tight and hurt his wrists, to which the officer replied that "had he done as he was initially told, he would not have been in this situation." Id. The civilian documented bruising and marks from the handcuffs in photographs. Id. As a result of the incident, the civilian was charged with resisting, delaying, and obstructing a public officer. Id. ¶ 7. These charges were eventually dismissed, and the civilian filed this civil action. Id. ¶¶ 7–8.

At trial, the City of High Point and the officer asserted governmental and public official immunity defenses. Id. ¶ 8. The trial court granted summary judgment on the claims against the City of High Point and the officer in his official capacity on the grounds of sovereign immunity. Id. ¶ 9. However, the trial court denied the officer's motion for summary judgment as to the claims against him in his individual capacity. Id.

Subsequently, the officer appealed the partial summary judgment motion to the court of appeals. Id. ¶¶ 9–10. A divided panel of the court of appeals affirmed the trial court's order, holding that the officer was not entitled to summary judgment on the ground of public immunity. Id. ¶ 10.

On appeal, in an opinion by Justice Earls writing for the majority, the supreme court affirmed the judgment finding a material issue of fact as to whether public immunity was a sufficient defense under the circumstances. Id. ¶ 34. Public official immunity serves to "shield public officials from tort liability when those officials truly perform discretionary acts that do not exceed the scope of their official duties." Id. ¶ 19 (citing Hipp v. Ferrall, 273 N.C. 167, 91 S.E. 831 (1917); Templeton v. Beard, 159 N.C. 63, 74 S.E. 735 (1912)). However, an official "will not enjoy the immunity's protections if his actions 'was (1) outside the scope of official authority, (2) done with malice, or (3) corrupt.'" Id. ¶ 20 (citing Wilcox v. City of Asheville, 222 N.C. App. 285, 288, 730 S.E.2d 226, 230 (2012)). It is presumed under North Carolina law "that public officials will discharge their duties in good faith and exercise their powers in accord with the spirit and purposes of the law." Id. ¶ 21. Thus, it is a rebuttable presumption when a "party produces competent and substantial evidence that an officer failed to discharge his duties in good faith." Id. (citing Leete v. Cnty. of Warren, 341 N.C. 116, 119, 462 S.E.2d 476, 478 (1995)). Under this framework, the court concluded that the civilian presented competent and substantial evidence that the officer acted with malice to show a material issue of fact as to the applicability of the public official immunity doctrine. Id. ¶ 25.

A "malicious act is one which is '(1) done wantonly, (2) contrary to the actor's duty, and (3) intended to be injurious to another.'" Id. ¶ 23 (citing Wilcox, 222 N.C. App. at 289,

730 S.E.2d at 230). While case law has been clear that a police officer has the right to use force to discharge his duties and overcome any resistance when making an arrest, he "may not act maliciously in the wanton abuse of his authority or use unnecessary and excessive force." Id. ¶ 26. This proposition has also been codified under section 15A-401(d) of the North Carolina General Statutes. Id. Here, the civilian claimed that the officer was acting maliciously when the officer body slammed him against the trunk and tightly handcuffed the civilian without justification. Id. ¶ 27. In his deposition, the officer acknowledged that the civilian did not resist arrest, threaten him, or try to evade the arrest. Id. Furthermore, the civilian was unarmed during the incident. Id. In considering these facts the court found that evidence of malice could be discerned from the use of a body slam maneuver on a non-resistant individual who posed no threat to the safety of the officer or others. Id.

Further, the court found that the officer's refusal to loosen the handcuffs upon being informed of its harm as well as the red marks and bruises on the civilian's wrists is also evidence of malice. Id. ¶ 28. This is especially true as there is evidence of retaliation from the officer stating that "had he done as he was initially told, he would not be in the situation that he was in," and by keeping the civilian handcuffed for twenty minutes in front of his neighbors. Id. In coming to this conclusion, the court found the Third and Sixth Circuit to be "instructive on whether tight handcuffing resulting in physical injury indeed constitutes excessive force and therefore some evidence of malice." Id. ¶ 29. These circuits have concluded that "excessively tight or forceful handcuffing, particularly handcuffing that results in physical injury, constitutes excessive force." Id. (citing Kopec v. Tate, 361 F.3d 772, 777 (3d Cir. 2004); Martin v. Hiedeman, 106 F.3d 1308, 1313 (6th Cir. 1997)). Furthermore, the court assessed the Sixth Circuit's test for evaluating whether a handcuffing

claim may survive summary judgment. Id. ¶ 30. This test provides "a plaintiff must offer sufficient evidence to create a genuine issue of material fact that: (1) the plaintiff complained the handcuffs were too tight, (2) the officer ignored those complaints, and (3) the plaintiff experienced 'some physical injury' resulting from the handcuffing." Id. (citing Morrison v. Bd. of Trs., 583 F.3d 394, 401-02 (6th Cir. 2009)). Here, the civilian's evidence shows that he complained about the tightness of the handcuffs and the officer failed to take heed to his complaint. Id. ¶ 31. While the officer's testimony disputes the civilian's versions of events on the contrary, "it is not the version of events that is determinative on summary judgment, where the question before [the court] is whether the evidence in the light most favorable to the non-moving party is sufficient to establish malice that defeats a claim of public official immunity." Id. Thus, the court concluded that the civilian presented sufficient evidence of the officer's malice to create a genuine issue of material fact that public official immunity applies to defeat the civilian's action against the officer. Id. ¶ 32.

For the foregoing reasons, the supreme court affirmed the trial court's order denying summary judgment to the officer on public official immunity grounds.

Justice Berger, writing for the dissent, would have found that the officer met his burden to sustain a summary judgment determination. Id. ¶ 44. In the dissent, Justice Berger reemphasized that the law affords a presumption to public officials that "they will discharge their duties in good faith and exercise their powers in accord with the spirit and purpose of the law." Id. ¶ 43 (citing Leete, 341 N.C. at 119, 462 S.E.2d at 478). Since the officer was performing his duties as a law enforcement officer at the time of the disputed conduct, he is entitled to this presumption. Id. ¶ 44. Furthermore, to overcome this heavy burden a challenging party must present competent and substantial evidence. Id.

First, Justice Berger asserted that the civilian failed to produce such evidence showing the officer's malice. Id. ¶ 46. The dissenting opinion acknowledges that the officer attempted to stop the civilian for a traffic violation, but the civilian refused to comply and resisted arrest. Id. ¶ 45. Accordingly, the officer acted with probable cause prior to arresting the civilian. Id. Next, the dissent argued that the majority erroneously puts emphasis on the fact that the civilian testified that the officer "body slammed" him. Id. ¶ 46. Rather, the evidence indicated that the officer only bent the civilian over the waist on his car after the officer perceived him to be resisting arrest. Id. Further, the civilian testified that he suffered no harm from this maneuver. Id. This would leave the only possible perceived harm to be the tightness of the handcuffs, which Justice Berger again emphasized was done with probable cause and within the officer's duties. Id. Therefore, the dissent would have concluded that the evidence did not establish the officer acted with malice. Id.

Second, Justice Berger asserted that the civilian failed to supply competent and substantial evidence that the officer acted with the "intent to injure." Id. ¶ 51. To establish this requisite intent, "the plaintiff must show at least that the officer's actions were so reckless or so manifestly indifferent to the consequences as to justify a finding of willfulness and wantonness equivalent in spirit to actual intent." Id. ¶ 47 (citing Brown v. Town of Chapel Hill, 233 N.C. App. 257, 265 (2014)). The dissent found erroneous the majority's decision finding this element to be established through the testimony indicating that the officer refused to loosen the handcuffs and the civilian suffered bruises. Id. Rather than evaluating federal cases from the Third and Sixth Circuit recognizing that tight handcuffing resulting in injury constitutes excessive force, the dissent would have first evaluated Fourth Circuit cases, which support an opposite conclusion. Id. ¶ 48. Furthermore, the injury

suffered by the civilian was minimal, id. ¶ 49, especially considering the civilian received no medical care and did not have any "sensitivity, strange feeling, nerve damage, tingling, and lack of use of his wrists," id. As a matter of fact, the civilian "could not even remember if the alleged redness on his wrists lasted until the next day." Id. Lastly, the dissent disputed that the instruction the officer gave stating "if [the civilian] had done as he was instructed, he would not be in 'this situation,'" as determinative of evidence of actual intent. Id. ¶ 50–51. Rather this assertion was a de-escalation attempt and an accurate statement in that "had [the civilian] simply complied with the officer's instructions he would not have been handcuffed and arrested." Id. ¶ 51. Thus, the dissent would have concluded that the civilian failed to produce sufficient evidence to meet his "heavy burden' to forecast specific facts constituting malice, and [the officer] is entitled to judgment as a matter of law." Id.

H. Confession of Judgment

In RH CPAs, PLLC v. Sharpe Patel, PLLC, 284 N.C. App. 424, 2022-NCCOA-493, appeal docketed, No. 237A22 (N.C. Aug 1, 2022), the court of appeals considered whether the trial court appropriately enforced the clerk's entry of judgment pursuant to a confession of judgment.

Partners at an accounting firm announced their intent to separate and form their own company. Id. ¶ 3. After mediation regarding the terms of separation resulted in impasse, the partners filed suit against the firm. Id. ¶ 4. Through discovery, the firm learned that the partners had been planning to leave for months and contacted employees and clients about their planned departure while still fiduciaries of the firm. Id.

The parties entered a settlement agreement, requiring the partners to make a series of payments – in an amount to be determined by an agreed upon neutral accounting firm –

to the firm in exchange for their release from obligations under the partnership agreement. Id. ¶ 5. The settlement agreement also included a confession of judgment, which provided that the partners agreed to pay $500,000 in the event they defaulted on payment under the agreement and were provided written notice fifteen days before the confession of judgment could be filed. Id.

The partners and the firm attempted to agree upon an accounting firm to help determine the amount of the payments the partners were to pay the firm under the settlement agreement. Id. ¶¶ 7–8. The partners instructed a different accounting firm, without the firm's permission, to calculate the amount of payments owed. Id. ¶ 8.

The firm sent the partners a notice of breach of settlement agreement and additional notices of default over the course of three months. Id. ¶ 9. The firm filed the confession of judgment with the clerk when the partners failed to cure their default. Id. ¶ 10. The clerk entered judgment in an amount greater than what the partners' accounting firm concluded the partners owed to the firm. Id. ¶¶ 9–10.

The partners appealed the entry of judgment to superior court pursuant to section 1-301 of the North Carolina General Statutes. Id. ¶ 11. The partners also sought to stay the clerk's judgment and moved for relief pursuant to Rules 52, 58, 59, 60, and 68.1 of the North Carolina Rules of Civil Procedure. Id. The trial court denied the partners' motions for relief. Id. ¶ 1.

Writing for the majority, Judge Inman concluded that entry of the confession of judgment and denial of relief requested by the partners was proper. Id. ¶¶ 14–15. The majority disagreed with the dissent's characterization that the firm's filing of the confession of judgment was fraudulent or a misrepresentation. Id. ¶ 22. Finally, the court of appeals

concluded that the partners sought the wrong remedy in seeking relief from judgment entered pursuant to a proper confession of judgment. Id. ¶ 23.

In his dissenting opinion, Judge Tyson opined that the partners demonstrated a misrepresentation by the firm and, therefore, should be entitled to relief. Id. ¶ 25. He concluded that the settlement agreement lacked mutually agreed upon terms regarding the accounting firm to be retained to determine the amount of the payments the partners agreed to pay the firm. Id. ¶ 27. Accordingly, the firm had no right to file the confession of judgment. Id. Further, Judge Tyson disagreed with the majority that the partners sought the wrong remedy because the risk of reputational harm cannot be addressed by suing for damages. Id. ¶ 35

I. Summary Judgment

In Watson v. Watson, ___ N.C. App. ___, 2023 WL 2762774 (2023), the court of appeals considered whether the trial court abused its discretion in granting a husband summary judgment on his wife's alimony claim.

The wife commenced a domestic action against her husband in 2020, requesting alimony and other relief. Id. at *1. The husband moved for summary judgment on the wife's alimony claim on the basis that the wife had engaged in illicit sexual behavior during the marriage, prior to the date of separation. Id. at *3. The husband produced sworn statements from alleged paramours of his wife that each had engaged in adultery with the wife during her marriage with her husband. Id. The wife also conceded to engaging in at least one affair. Id.

After a hearing on the matter in July 2021, the trial court granted the husband partial summary judgment on his wife's claim for alimony. Id. at *1. Later that month, the wife

moved for the judgment to be amended or, in the alternative, for relief from the judgment. Id. On December 2, 2021, the trial court denied the wife's motion. Id. On December 7, 2021, the wife filed her written notice of appeal from both the July 2021 partial summary judgment order and the December 2021 order denying her subsequent motion. Id.

On appeal, the court of appeals vacated the trial court's order and remanded for further proceedings, instructing the trial court to consider the husband's motion after resolution of a discovery issue. Id. at *4. The court of appeals held that the trial court abused its discretion in granting the husband summary judgment on his wife's alimony claim. Id. The wife argued that the trial court should not have ruled on her husband's motion while he had not yet turned over discovery that the trial court had ordered him to produce and which could show that the husband had an inclination and opportunity to commit illicit sexual acts during the marriage. Id. at *3. The court of appeals acknowledged that "ordinarily it is error for a court to hear and rule on a motion for summary judgment when discovery procedures, which might lead to the production of evidence relevant to the motion, are still pending and the party seeking discovery has not been dilatory in doing so." Id. (citing Conover v. Newton, 297 N.C. 506, 512, 256 S.E.2d 216, 220 (1979)). However, this rule is not absolute, and a trial court's decision to grant summary judgment with discovery pending is within the discretion of the trial court. Id. (citing Conover v. Newton, 297 N.C. 506, 512, 256 S.E.2d 216, 220 (1979)).

In the present case, the court of appeals noted that the wife had knowledge of several suspicious texts between her husband and a co-worker and that she had sought from the husband his Facebook messages and travel records during the time she suspected her husband to have engaged in an illicit affair. Id. at *3. The record showed that the wife filed

a motion to compel discovery of these documents when her husband failed to timely respond, that the trial court granted the wife's motion to compel as to these and other documents, and that the husband still had not complied at the time of the hearing on the husband's summary judgment motion. Id.

For these reasons, the court of appeals vacated the trial court's summary judgment order and remanded for further proceedings so that the trial court could consider the husband's motion after resolution of the discovery issue. Id. at *4.

III. TRIAL

A. Jury Selection – Batson Challenge

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

In 2015, defendant was indicted on charges of murder and kidnapping. Id. At trial, defendant's counsel filed a motion for complete recordation; however, she specified that she was not requesting that jury selection be recorded. Id. As a result, jury selection was not recorded, and there was no transcript of jury voir dire. Id. However, the record on appeal was sufficient for appellate review to the extent that "the trial court's care in ensuring that exchanges between counsel and the trial court relevant to Batson were put on the record." Id. at ___ n.1, 884 S.E.2d at 677 n.1.

During initial jury selection, the State exercised three peremptory challenges, and defendant did not object. Id. at ___, 884 S.E.2d at 677. Then, while selecting alternate

jurors, the State exercised two more peremptory challenges. Id. In response, the defendant raised a Batson objection, arguing that the State had exercised three out of four challenges to strike black jurors and had otherwise "tried extremely hard" to exclude for cause "every African-American." Id. (quotation marks omitted). Furthermore, the defendant contended, neither stricken alternate juror had indicated an inability to perform juror duties. Id. The State responded, noting that although it had race-neutral reasons to exclude both jurors, "the trial court was first required to determine that defendant had made a prima facie showing under Batson," to which the defendant agreed. Id. at ___. 884 S.E.2d at 677–78.

The trial court denied the Batson challenge, concluding that the defendant had failed to make a prima facie showing, "even though such a showing 'is a very low hurdle.'" Id. at ___, 884 S.E.2d at 678. The trial court asked the State if it wished to offer a racially neutral basis for its peremptory strikes, and the State declined, reasoning that such an offer "could be viewed as a stipulation that there was a prima facie showing." Id. (quotation marks omitted). The trial court reiterated that no such showing had been made, and it denied the Batson challenge. Id. The trial court then ordered the State to "proceed as to stating a racially-neutral basis for the exercise of the peremptory challenges." Id. (quotation marks omitted). The State complied. Id. At the conclusion of the trial, the defendant was found guilty and was sentenced to life without parole. Defendant appealed. Id. at ___, 884 S.E.2d at 679.

The defendant argued before the court of appeals that "the trial court erred in concluding that he failed to establish a prima facie case of impermissible racial discrimination during jury selection." Id. The court of appeals majority found no error. Id. The defendant petitioned the supreme court for a writ of certiorari, and the supreme court

remanded the case to the court of appeals for reconsideration in light of State v. Hobbs, 374 N.C. 345, 841 S.E.2d 492 (2020). Id. On remand, a court of appeals majority "once again found no error, and, once again, there was a dissent urging remand to the trial court for additional findings of fact." Id. The defendant appealed to the supreme court. Id.

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

The defendant argued that the State's "use of three out of four of its peremptory strikes against black jurors was sufficient to establish a prima facie case." Id. at ___, 884 S.E.2d at 682. However, because the defendant did not move to record jury voir dire, the record that the supreme court reviewed did not "contain the intimate details of the interaction between counsel and prospective jurors." Id.

Next, the supreme court concluded that the State was correct in objecting to the trial court's attempt to skip the first step in the three-step inquiry. Id. Indeed, if a trial court

rules there has been no prima facie showing before the State articulated racially-neutral reasons for excluding a prospective juror, the supreme court does not consider whether the State's reasons were proper. Id. Accordingly, the supreme court would only review whether the trial court erred in determining that the defendant failed to make a prima facie showing of racial discrimination during jury voir dire. Id.

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

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

In dissent, Justice Earls stated that the majority refused to acknowledge "what is in plain sight and turn[ed] a blind eye to evidence of racial discrimination in jury selection," turning the Batson test "into an impossible hurdle." Id. Justice Earls pointed out that among the State's reasons for its peremptory strikes was the fact that one of the prospective jurors was "a participant, if not an organizer, for Black Lives Matter at her current college." Id. (quotation marks omitted). Thus, the State's reason indicated racial bias, stating "precisely that which was the defendant's burden to demonstrate at Batson Step 1." Id. at ___, 884 S.E.2d at 685. Furthermore, the prospective juror's involvement in Black Lives Matter was

revealed after the trial court ruled that the defendant failed to make a prima facie showing; thus, the defendant had no way of knowing this information while attempting to meet his burden as to the first Batson step. Id. at ___, 884 S.E.2d at 686. "It is a troubling and illogical proposition to assert that it is race-neutral for a prosecutor to excuse a Black woman as a prospective juror on the grounds that she cannot be unbiased due to her association with a predominately Black organization that brings to light what it means to be Black in this country." Id. (alterations omitted) (citation and quotation marks omitted). "The majority's only way to overcome the natural force of this race-conscious rationale is to pretend it did not happen." Id.

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

Under Batson, courts must engage in a three-pronged test to determine whether a prosecutor improperly sought to strike a prospective juror on the basis of the juror's race. Id. at ___, 884 S.E.2d at 642. First, the defendant must make a prima facie showing of purposeful discrimination. Id. Second, the State must provide a race-neutral reason for its peremptory strike. Id. Third, the trial court must determine whether the defendant established that the prosecutor acted with purposeful discrimination. Id. The supreme court adopts this test to review peremptory challenges under the North Carolina Constitution. Id. On appeal, a trial court's ruling on a Batson challenge will be sustained unless it is clearly erroneous. Id.

When the matter originally came before the supreme court in State v. Hobbs, 374 N.C. 345, 841 S.E.2d 492 (2020) ("Hobbs I"), it remanded the case to the trial court to conduct a hearing and make findings of fact under the third Batson step: namely, whether the defendant in question proved that the State engaged in purposeful discrimination in peremptorily striking three black prospective jurors. Id. at ___, 884 S.E.2d at 641. Specifically, the supreme court instructed the trial court to consider whether the primary reason given by the State for excluding one of the three jurors was pretextual. Id. at ___, 884 S.E.2d at 641–42.

The ultimate determination under step three of a Batson analysis is "whether the prosecutor's peremptory strike was 'motivated in substantial part by discriminatory intent.'" Id. at ___, 884 S.E.2d at 643 (quoting Snyder v. Louisiana, 552 U.S. 472, 477 (2008)). Thus, the trial court must evaluate the prosecutor's credibility. Id. (quoting Snyder, 552 U.S. at 477). Often, the best evidence thereof will be the prosecutor's demeanor. Id. (quoting Hernandez v. New York, 500 U.S. 352, 365 (1991)). Because the trial court is in the best position to determine the prosecutor's demeanor and credibility, appellate courts will give this determination great deference, "overturning it only if it is clearly erroneous." Id. (quotation marks omitted) (quoting Hobbs I, 374 N.C. at 349, 841 S.E.2d at 497).

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

the supreme court's instruction and made findings of fact, based on which it concluded that there was no Batson violation as to any of the three prospective black jurors. Id.

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

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

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

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

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

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

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

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

B. Evidence

In Beavers v. McMican, 285 N.C. App. 31, 2022-NCCOA-547, the court of appeals considered whether evidence of post-separation acts is admissible to support an inference of pre-separation acts in actions for alienation of affection or criminal conversation.

An ex-husband filed suit against his ex-wife's new significant other and alleged paramour for alienation of affection and criminal conversation. Id. ¶ 3. After twelve years of marriage, the ex-husband discovered texts on his ex-wife's phone in which she referenced

a prior instance of sexual intercourse and sent nude photos to a contact identified as "Bestie." Id. ¶¶ 3–4. The ex-wife admitted that she engaged in sexual acts with "Bestie" but denied the two had sexual intercourse. Id. She also admitted that she had sexual intercourse with a co-worker named "Dustin". Id. The ex-husband was unable to discover "Dustin's" identity and suspected "Dustin" might be a pseudonym. Id. ¶ 6.

Approximately three months after separating, the ex-wife began dating the significant other, who was her coworker. Id. ¶¶ 6–7. Evidence showed the ex-wife and her significant other had an extensive relationship based on volume of texts messages and communication across other platforms. Id. ¶ 7. However, there was no direct evidence that the two became romantically involved until after the separation. Id.

The new significant other filed a motion for summary judgment, arguing the ex-husband presented insufficient evidence of at least one element of both offenses (malicious acts of the defendant produced the loss of love and affection for alienation of affection claim and sexual intercourse between the defendant and spouse during the marriage for criminal conversation claim). Id. ¶¶ 8, 18, 25. After a hearing, the trial court granted the significant other's motion to dismiss. Id.

Writing for the majority, Judge Murphy reviewed the court of appeals' earlier decision in Rodriguez v. Lemus, 257 N.C. App. 498, 495, 810 S.E.2d 1, 5 (2018), in which it held "evidence of post-separation conduct may be used to corroborate evidence of pre-separation conduct . . . so long as the evidence of pre-separation conduct is sufficient to give rise to more than mere conjecture." Id. ¶ 21. The court of appeals rejected the significant other's argument that Rodriguez limits the admissibility of corroborating evidence to when the defendant has been identified as the paramour in one or more independently sufficient

instances of pre-separation conduct. Id. ¶ 23. The court of appeals recognized that "[a]dultery is nearly always proved by circumstantial evidence." Id. (quoting In re Est. of Trogdon, 330 N.C. 143, 148, 409 S.E.2d 897, 900 (1991)).

The court of appeals held the trial court erred in granting the significant other's motion for summary judgment. Id. ¶ 24. "The evidence of a friendship and frequent contact between [the ex-wife] and [her new significant other] that existed prior to the relationship, as well as their romantic and sexual relationship after separation, while not sufficient for a jury to conclude the final element of alienation of affection had been met on its own, could convince a jury that [the new significant other] was 'Bestie'—or if different, the person with whom she admitted she had engaged sexual intercourse." Id. The court of appeals concluded the post-separation behavior constitutes "viable corroborative evidence for the purposes of satisfying the burden of production where the identify of a pre-separation extramarital sexual partner is unknown." Id. ¶ 27.

Judge Dillon concurred, writing separately to address the dissent's argument that heartbalm torts should be abolished. Id. ¶ 31.

Judge Jackson dissented, opining that heartbalm torts should be abolished. Id. ¶¶ 51–71. In analyzing the case before the court, Judge Jackson opined that Rodriguez was decided incorrectly and that the General Assembly, based on his review of the legislative history of section 52-13(a) of the North Carolina General Statutes, did not intend for a jury to be permitted to infer pre-separation conduct based on evidence of post-separation conduct. Id. ¶ 72. Further, he would have held that the post-separation evidence presented in this case gives rise to nothing more than conjecture and is insufficient to overcome a motion for summary judgment. Id. ¶¶ 86–99.

(1) Expert

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

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

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

toxicology. Id. at 145, 879 S.E.2d at 358. Over the driver's objection, the agent testified that, after reviewing the report, it was her opinion that the driver's blood sample had a blood alcohol concentration of .27 grams per 100 milliliters. Id. The jury found the driver guilty of driving while impaired. Id. at 144, 879 S.E.2d at 357.

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

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

its consideration for this purpose only. Id. However, the driver only provided a general objection and did not request a limiting instruction. Id. Because the driver did not request a limiting instruction, the court found that the trial court did not commit reversible error. Id.

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

(2) Rule 404

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

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

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

words, the court of appeals explained, although Rule 404 generally acts "as a gatekeeper" against evidence of the defendant's character that is solely introduced to prove that the defendant acted in conformity therewith, Rule 404 also has a clear inclusive nature. Id. at ___, 884 S.E.2d at 789 (quotation marks omitted) (quoting State v. Pabon, 380 N.C. 241, 258, 867 S.E.2d 632, 643–44 (2022)). Particularly, Rule 404(b) allows the introduction of "relevant evidence of past crimes, wrongs, or acts by a defendant" unless its "only probative value is to show that the defendant has the propensity or disposition to commit an offense of the nature of the crime charged." Id. (quoting Pabon, 380 N.C. at 258, 867 S.E.2d at 644).

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

The court of appeals concluded that the burglar's 2018 breaking and entering incident was sufficiently similar to the crimes at issue in several ways: the structure broken into (a shed), the time of the crime (just after midnight), and the instrument used (a knife the first time, a box cutter the second). Id. at ___, 884 S.E.2d at 790. The court of appeals concluded that the probative value requirement was also met, as the 2018 charge was probative of intent "because it shows that in the past in similar circumstances [the burglar]

had the requisite intent." Id. at ___, 884 S.E.2d at 791. Lastly, the gap between the two crimes was about two and half years, and the court of appeals had previously found that a two-year gap was not overly remote to fulfill this requirement. Id. (citing State v. Martin, 191 N.C. App. 462, 467, 665 S.E.2d 471, 474–75 (2008)). Thus, evidence of the 2018 charge also satisfied the third requirement under Rule 404(b): temporal proximity. Id.

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

(3) Findings of Fact

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

Robeson County Department of Social Services ("DSS") filed a petition alleging that a child was neglected and dependent. Id. at ___, 886 S.E.2d at 109. Two years later, after investigating the child's circumstances and attempting reunification, DSS filed a petition to terminate the mother's parental rights. Id. A social worker involved in the investigation testified during the hearing. Id. at ___, 886 S.E.2d at 109–10. During her testimony, DSS introduced a timeline that summarized its interactions with the mother and reflected much of the social worker's testimony. Id. at ___, 886 S.E.2d at 110. The timeline was admitted into evidence. Id. Following the hearing, the trial court entered an order terminating the mother's parental rights. Id. The order included the following finding of fact: "The Court relies on and accepts into evidence the Timeline, marked as DSS Exhibit

'__', in making these findings and finds the said report to [be] both credible and reliable." Id.

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

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

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

Id. (internal citations omitted).

Accordingly, the majority concluded that the trial court's finding was a proper evidentiary finding "because [it] did not merely accept and rely upon the timeline and its contents;" instead, it "expressly evaluated [the] contents and determined that they were

credible and reliable based on other evidence received at the hearing." Id. The supreme court cautioned:

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

Id.

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

(4) Hearsay – Prior Testimony

In State v. Joyner, 284 N.C. App. 681, 2022-NCCOA-525, petition for disc. rev. filed (N.C. Sept. 6, 2022), the court of appeals considered whether testimony during a civil hearing by a declarant who was unavailable for a subsequent criminal proceeding falls within the former testimony exception to the hearsay rule where the subject of the testimony involved the same events.

A man offered to perform home improvement work for an elderly woman who lived alone. Id. ¶ 2. The elderly woman hired the man to paint and clean her gutters. Id. After

beginning work, the man told the elderly woman that he found something that appeared to be rotten wood laying in the gutter. Id. He showed her photos of rotten wood and explained that she needed her roof repaired. Id. The elderly woman hired the man to repair her roof. Id. The man invoiced the elderly woman $1,500 for the roof repair, $750 of which the elderly woman paid upfront. Id. ¶ 3.

After the man purportedly finished the roof repair, the elderly woman requested that he return to repair an issue with her toilet. Id. ¶ 4. The man, who did not have a plumber's license, inspected the toilet, concluded it was broken, and informed the elderly woman that a leak was causing water damage under her house. Id. The man invoiced the elderly woman $2,200, which she paid in full upfront. Id.

As the man left to obtain materials to repair the toilet and leak, an officer initiated a traffic stop after concluding the man was operating without an active license. Id. ¶ 5. After the traffic stop, the officer reviewed the man's criminal history, which revealed previous charges for obtaining property by false pretenses, defrauding the elderly, and breaking and entering. Id. The officer, knowing the neighborhood in which the man reported performing work was predominately elderly, visited the elderly woman's house to inquire about the work the man was performing. Id. ¶ 6. The officer contacted the building inspector for a professional opinion as to whether the man performed the work as he represented to the elderly woman. Id. ¶ 7.

Upon inspection, the building inspector found no rot, structural damage to the house, or plumbing issues. Id. ¶ 7. The man returned to the elderly woman's house and was taken into custody. Id.

A roofing expert subsequently inspected the elderly woman's home and found no evidence of new shingles being installed, rotten wood being removed, or any work completed to prevent roof damage. Id. ¶ 8. The expert acknowledged the man completed minimal work, which he estimated to be worth approximately $300. Id.

Before the man was indicted, his mother went to the elderly woman's home and had her sign a pre-drafted affidavit, which spelled the elderly woman's name incorrectly and was subsequently notarized. Id. ¶ 9. After he was indicted for obtaining property by false pretenses and exploitation of an older adult or disabled adult while in a business relationship, the elderly woman filed an action for a civil no-contact order against the man. Id. ¶ 10. Though the man was properly served with the complaint and notice of hearing, he did not appear at the hearing. Id. The court entered a no-contact order, prohibiting the man from communicating with the elderly woman. Id.

Before the man's criminal trial, the elderly woman passed away. Id. During the criminal trial, the trial court admitted the elderly woman's testimony from the no-contact hearing. Id. The jury found the man guilty of obtaining property by false pretenses and exploitation of an older adult by a person in a business relationship. Id. ¶ 11. The trial court imposed two sentences of fifteen-to-twenty-seven months to be served consecutively. Id.

The man appealed arguing, in part, the trial court erred by admitting the elderly woman's former testimony. Id. ¶ 1. The court of appeals reviewed the trial court's admission of the elderly woman's prior testimony de novo and found no error. Id. ¶ 23.

The court of appeals explained that the elderly woman was unavailable as she passed before the man's criminal trial. Id. ¶¶ 24–25. Rule 804(b)(1) of the North Carolina Rules

of Evidence provides that prior testimony from an unavailable witness is admissible when the testimony was

> Given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceedings, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

In this case, the court of appeals explained the trial court properly admitted the elderly woman's prior testimony because "the no contact hearing dealt with the same issues and facts that were the subject of [the man]'s criminal trial" and the man "had a similar opportunity to ask [the elderly woman] questions regarding the facts and issues that were the subject of his criminal trial at the civil hearing." Id. ¶ 25.

C. Attorney's Fees

In Reynold-Douglass v. Terhark, 381 N.C. 477, 2022-NCSC-74, the supreme court considered whether a real estate contract constituted "evidence of indebtedness" under section 6-21.2 of the North Carolina General Statutes to allow the recovery of reasonable attorney's fees.

A seller of a home brought an action against a prospective buyer for fees arising from a real estate contract. Id. ¶ 5. The seller in this action placed his home on the market looking for potential buyers. Id. Subsequently, the home caught the interest of the prospective buyer. Id. ¶ 3. As a result, the buyer executed an "Offer to Purchase and Contract." Id. The agreement required in part that the prospective buyer pay a $2,000 due diligence fee and a $2,500 earnest money deposit. Id. The agreement further defined the specifics and terms of the due diligence fee and the earnest money deposit. Id. The due

diligence fee is defined in part as "[a] negotiated amount . . . by Buyer to Seller with this Contract for Buyer's right to terminate the Contract." Id. The earnest money deposit section describes the deposit as "monies paid or required to be paid with this transaction . . . . In the event of breach . . . the [d]eposit shall be paid to Seller as liquidated damages." Id. The preceding section additionally provided that "[i]f legal proceedings are brought . . . to recover the Earnest Money Deposit, the prevailing party in the proceeding shall be entitled to recover . . . reasonable attorney fees and court costs in connection with the proceeding." Id. Sometime after executing the contract, the prospective buyer informed the seller that he intended to cancel the contract. Id. ¶ 4. Despite the cancellation, the prospective buyer did not pay either the due diligence fee or the earnest money deposit contemplated under the agreement. Id. Prior to going to trial, the seller initiated an action in small claims court for the disputed amount. Id. ¶ 5. The magistrate judge awarded fees in the seller's favor. Id. A separate action was then initiated where a trial court granted summary judgment in favor of the seller and awarded the seller a substantial award including: the $2,000 due diligence fee, the $2,500 earnest money deposit, $776.22 in prejudgment interest, and $13,067.70 in attorney fees. Id. ¶ 7. On appeal, the court of appeals affirmed the trial court's order. Id. ¶ 8. The court specified that the trial court was also authorized to award attorney's fees under section 6-21.2 of the North Carolina General Statutes. Id. ¶ 9.

On appeal, in an opinion by Justice Ervin writing for the majority, the supreme court affirmed the trial court's judgment finding that the seller was entitled to the due diligence fee, the earnest money deposit, and attorney's fees. Id. ¶ 29. Generally, attorney's fees are not recoverable unless authorized by statute. Id. ¶ 20 (citing Stillwell Enters., Inc. v. Interstate Equip. Co., 300 N.C. 286, 289, 266 S.E.2d 812, 814 (1980)). However, and in

accordance with this general rule, section 6-21.2 of the North Carolina General Statutes allows for the recovery of attorney's fees in actions in part:

> If such note, conditional sale contract or other evidence of indebtedness provides for the payment of reasonable attorney's fees by the debtor, without specifying any specific percentage, such provision shall be construed to mean fifteen percent (15%) of the "outstanding balance" owing on said note, contract or other evidence of indebtedness.

Id.

In determining whether the term "evidence of indebtedness" in the statute extended to the Offer to Purchase Contract in this case, the court explained its analysis of the statute in Stillwell Enterprises, Inc. v. Interstate Equipment Co., 300 N.C. 286, 289 (1980). Id. at ¶¶ 21–22. In Stillwell, the court found that a lease agreement for a road scraper that included a provision entitling the lessor to attorney's fees if a dispute arose constituted "evidence of indebtedness" under the statute. Id. ¶ 21. Specifically, the court held:

> [Section 6-21.2] applies not only to notes and conditional sale contracts, but also to such "other evidence of indebtedness" as . . . "any other such security interest agreement which evidences both a monetary obligation and a lease of specific goods." . . . [A]n evidence of indebtedness is a writing which acknowledges a debt or obligation, and which is executed by the party obligated thereby." More specifically, we hold that the term "evidence of indebtedness" as used in N.C.G.S. § 6-21.2 has reference to any printed or written instrument, signed or otherwise executed by the obligor(s), which evidences on its face a legally enforceable obligation to pay money.

Id. ¶ 22.

Here, the Offer to Purchase and Contract was "signed by both parties, and on its face, evidences a legally enforceable obligation that [the buyer] pay the plaintiff both the due diligence fee and the earnest money deposit." Id. ¶ 23. The court clarified that the

statutory language should not narrowly define "evidence of indebtedness," to solely commercial situations. Id. ¶ 24.

Additionally, the majority held that the trial court's award of attorney's fees in the amount of $13,067.70 was proper as the "relevant fees were incurred in the course of defending the judgment that [the seller] initially received [in small claims court]." Id. ¶ 28.

Justice Berger, writing for the dissent, found misplaced the majority's conclusion that North Carolina law allows for the allowance of attorney's fees in a dispute arising out of a contract for the sale of real property. Id. ¶ 31. The dissenting opinion again emphasized the rule that attorney's fees are not recoverable unless expressly allowed by statute. Id. ¶ 33. The dissent asserted that the court's interpretation of section 6-21.2 of the North Carolina General Statutes "would allow collection of attorney's fees for any case in which there is written evidence of a legally enforceable debt." Id. ¶ 35. This interpretation is contrary to "the legislature's purpose in enacting the law and its subsequent determination that the statute's purpose was to supplement laws intended to govern commercial transactions." Id. Further, the dissent contended that the legislative intent that the statute only be applied to commercial transactions is evidenced in how the North Carolina General Statutes reference "evidence of indebtedness." Id. ¶ 36. Under this state's statutory provisions, the term "evidence of indebtedness" has been used to refer to "notes, securities, mortgages, deeds of trust, and similar written documents," which differ significantly from residential real estate contracts. Id. (referencing N.C. Gen. Stat. § 25-9-109(d)(14) (2021); N.C. Gen. Stat. § 45-36.3(a) (2021); N.C. Gen. Stat. § 47-20(d) (2021); N.C. Gen. Stat. § 53-232.10(a) (2021); N.C. Gen. Stat. § 54B-244(b)(3)(h) (2021); N.C. Gen. Stat. § 58-7-

173(1), (6)-(7) (2021); N.C. Gen. Stat. § 78A-2(11) (2021); N.C. Gen. Stat. § 122D-3(4) (2021)).

The dissent argued that even if the statute applied beyond commercial transactions, the amount awarded in this case does not comply with the statute's formulation for attorney's fees. Id. ¶ 38. Section 6-21.2 of the North Carolina General Statutes provides that when "evidence of indebtedness' provides for the payment of reasonable attorneys' fees . . . without specifying any specific percentage, such provision shall be construed to mean fifteen percent (15%) of the 'outstanding balance." Id. Here, the contract provides that a prevailing party may recover attorney's fees in an action to recover the earnest money deposit. Id. ¶ 39. The contract is silent on the means of formulating the fees. Id. The majority should have ascertained the outstanding balance of the contract and awarded fifteen percent of its value. Id. ¶ 42. The dissent contended that under this guidance the proper calculation is: "$ 2,500 (earnest money deposit) x 15% (statutory rate) = $375 (in attorney's fees)." Furthermore, the legislature has never authorized attorney's fees based on an attorney's time spent on a case. Id. ¶ 41. It is for these reasons that Justice Berger dissented.

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

Fayetteville Ambulatory Surgery Center Limited Partnership operates an ambulatory surgery center in Fayetteville, North Carolina ("surgery center"). Id. at ___, 884 S.E.2d at 635. One limited partner filed his initial complaint against the general partner and its owner (collectively "general partner") asserting various causes of action in his individual capacity, all of which related to the ownership and operation of the surgery

center. Id. This same limited partner later filed his first amended complaint, adding an additional claim. Id. In response, the general partner filed a motion to dismiss the amended complaint pursuant to Rule 12(b)(1) or, alternatively, Rule 12(b)(6), arguing that the limited partner lacked individual standing to assert any of the claims he purported to bring. Id.

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

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

to the motion for judgment on the pleadings or in their response brief to the motion for fees. Id. Instead of a special duty owed by the general partner, the limited partners argued that they suffered a "'separate and distinct injury' because they were denied their contractual right to vote under . . . the Partnership Agreement." Id.

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

On appeal, the supreme court held that the unchallenged findings and conclusions sufficed to support the trial court's award of attorneys' fees. Id. The court acknowledged that although attorneys' fees generally are not recoverable under the common law, the North Carolina legislature has enacted provisions allowing for the recovery of attorneys' fees. Id. (citing Sunamerica Fin. Corp. v. Bonham, 328 N.C. 254, 257, 400 S.E.2d 435 (1991). Additionally, section 6-21.5 of the North Carolina General Statutes provides that the court may award a reasonable attorney's fee to the prevailing party if the court finds that there was a complete absence of a justiciable issue of either law or fact raised by the losing party in any pleading. Id. at ___, 884 S.E.2d at 637. A justiciable issue has been defined as an

issue that is real and present as opposed to imagined and fanciful. Id. (citing Sunamerica Fin. Corp., 328 N.C. at 257-58, 400 S.E.2d 435). In order to find complete absence of a justiciable issue, courts must find that such issues conclusively appear absent even after giving the pleadings the indulgent treatment they receive on motions for summary judgment or to dismiss. Id. at ___, 884 S.E.2d at 637. However, it is also possible that a pleading that sets forth a justiciable controversy when read alone, may, when read with a responsive pleading, no longer present a justiciable controversy. Id.

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

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

D. Appeals

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

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

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

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

Justice Morgan dissented from both the determination that discretionary review was improvidently allowed in the present case and the "unpublishing" of the court of appeals

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

Justice Earls joined Justice Morgan's dissent and wrote separately to explicitly address the two procedural issues: (1) the unpublishing of a court of appeals decision, and (2) the holding that discretionary review was improvidently allowed. Id. at ___, 884 S.E.2d at 719–25. Justice Earls criticized the decision to unpublish the court of appeals decision

because the practice of unpublishing was not supported by doctrine or the North Carolina Rules of Appellate Procedure:

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

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

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

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

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

(1) Sanctions

In Shebalin v. Shebalin, 284 N.C. App. 86, 2022-NCCOA-410, the court of appeals considered whether sanctions should be imposed on a party that frivolously seeks an appeal despite underlying circumstances rendering the appeal moot and insistence from opposing counsel that the appeal is an impermissible interlocutory appeal.

Ex-spouses were involved in a "high conflict" parental dispute. Since it was "high conflict" the trial court entered a series of "Consent Orders Appointing Parenting Coordinators." Id. ¶2. These orders lasted each time for a period up to one or two years. Id. Upon the expiration of the last order and as high conflict continued, the ex-wife filed a Motion for Appointment of Parenting Coordinator. Id. ¶ 3. The ex-husband opposed this motion and moved to dismiss. Id. Following a hearing, the trial court sided with the ex-wife and entered an "Order for Appointment of Parenting Coordinator," ("2020 Order") articulating that "a Parenting Coordinator shall be appointed for a one[-]year term," and that the trial court "retain[ed] jurisdiction" on future orders. Id. ¶ 4. However, the 2020 Order failed to establish the individual to serve as the parenting coordinator. Id. Following this order, the ex-husband filed a notice of appeal. Id. While awaiting the appeal, the trial court held a hearing to appoint a parenting coordinator in compliance with the issuing of the court's 2020 Order. Id. ¶ 5. The ex-husband through counsel objected to the hearing on the basis that the 2020 order had been appealed. Id. In response counsel for the ex-wife stated that: "A [parenting coordinator] was not identified. An order appointment was not conducted. No order has been signed, so it's my position . . . that this is a premature appeal; that it's an impermissible interlocutory appeal." Id. ¶ 6. Subsequently, the trial court

postponed appointment until several months later. Id. ¶ 7. At the second hearing, the ex-husband again objected to the proceeding. Id. ¶ 8. The ex-husband's basis for his objection was that "the trial court did not have jurisdiction to proceed . . . by virtue of [his] Notice of Appeal." Id. Again, the ex-wife's counsel argued the appeal was an impermissible interlocutory appeal. Id. After this discourse, the trial court entered an "Order Appointing Parenting Coordinator" ("2021 Order"), which appointed a new parenting coordinator for a year lasting until March 2022. Id. ¶ 9. On appeal, the ex-husband asserted that the 2020 Order was a final order. Id. ¶ 11. In response to the ex-husband's assertions, the ex-wife filed a Motion to Dismiss Appeal on February 17, 2022, contending the 2020 Order was interlocutory; the ex-wife then filed her appellate brief on March 4, 2022, and another Motion to Dismiss Appeal, based on mootness, on May 20, 2022. Id.

On appeal, the court of appeals dismissed the case and imposed sanctions. Id. ¶ 21. The court of appeals found the 2020 Order to be interlocutory, because rather than disposing of the case, the case required further action by the trial court. Id. ¶ 14. Specifically, the 2020 Order set "a framework that the 2021 Order utilized in appointing a specific parenting coordinator for a term of one year." Id. Furthermore, the court concluded that the interlocutory nature of his appeal was apparent in the name of the orders and through the ex-wife's objections at the Order Appointing Parenting Coordinator hearings. Id. ¶¶ 14–15.

Upon determining that the appeal was interlocutory, the court-imposed sanctions on the ex-husband and his counsel. Id. ¶ 20. Specifically, the court taxed the ex-husband in his individual capacity and his counsel for double the appeal costs. Id. Additionally, the court ordered the ex-husband to cover the attorney fees incurred by the ex-wife in defending the appeal. Id. The court awarded these sanctions by finding that the ex-husband's appeal

was frivolous. Id. ¶ 19. Under Rule 34 of the North Carolina Rules of Appellate Procedure, sanctions are justified if:

> (1) the appeal was not well grounded in fact and was not warranted by existing law or good faith argument for the extension, modification, or reversal of existing law;
> (2) the appeal was taken or continued for an improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; [and/or]
> (3) a petition, motion, brief, record, or other item filed in the appeal was grossly lacking in the requirements of proprietary, grossly violated appellate court rules, or grossly disregarded the requirements of a fair presentation of the issues to the appellate court.

Id. ¶ 17 (citing N.C.R. App. P. 34(a)).

If a party succumbs to any of these violations, a court may impose as sanctions: (1) dismissal of the appeal, (2) monetary damages, and (3) any other sanction it deems proper and just. Id. For monetary damages, courts may include "single or double costs," "damages occasioned by delay," and "reasonable expenses, including reasonable attorney fees, incurred because of the frivolous appeal or proceeding." Id.

Here, the court of appeals found that the sanctions were justified because the interlocutory nature of the 2020 Order was easily apparent, ex-wife's counsel explained its interlocutory nature on multiple occasions, and the purpose of the 2020 Order, which was to appoint a parenting coordinator, had already been met. Id. ¶ 18. Based on these circumstances, the court found the ex-husband's appeal was "not well grounded in fact[,]" "was not warranted by existing law[,]" "needless[ly] increase[d] . . . the cost of litigation[,]" and "grossly disregarded the requirements of a fair presentation of the issues." Id. ¶ 19.

Thus, the court of appeals dismissed the appeal and remanded the matter to the trial court for a determination on attorney fees.

(2) Jurisdiction

In State v. Killette, 381 N.C. 686, 2022-NCSC-80, the supreme court considered whether the court of appeals has the discretionary power to issue a writ of certiorari.

A drug dealer petitioned for a writ of certiorari for review of the trial court's order denying a motion to suppress. Id. ¶ 7. On appeal, the court of appeals held against the dealer stating, in part, that "[the court] lacked authority under Rule 21 of the North Carolina Rules of Appellate Procedure to issue the writ." Id. ¶ 8. As a result, the court of appeals denied the dealer's petition for a writ of certiorari. Id. The dealer then sought review in the supreme court. Id. The supreme court instructed the court of appeals to exercise its discretion to deny or allow the dealer's petition. Id. ¶ 9. Applying State v. Ledbetter, 371 N.C. 192, 814 S.E.2d 39 (2018) and State v. Stubbs, 368 N.C. 40, 770 S.E.2d 74 (2015), the court held that Rule 21 does not limit the jurisdiction of the court of appeals or the court's ability to issue a writ of certiorari. Those decisions provided through express language that Rule 21 does not prevent the court of appeals from issuing writs of certiorari, nor can the Rules take away the court's jurisdiction under the state constitution and under acts of the General Assembly. Id. ¶ 9. The issue was remanded back to the court of appeals. Id. On its second review of the issue, the court of appeals again denied the petition. Id. ¶ 10.

The court reasoned in part that the petition must be denied due to the court's decisions in State v. Pimental, 153 N.C. App. 69, 568 S.E.2d 867 (2002) and State v. Harris, 243 N.C. App. 137, 776 S.E.2d 554 (2015). Id. ¶ 11. These cases provide in part that the

court of appeals lacks authority to issue writs of certiorari. Id. Subsequently, the dealer petitioned the supreme court for discretionary review. Id. ¶ 13.

On appeal, the supreme court vacated and remanded the determination by the court of appeals that it lacked the ability to issue a writ of certiorari under the circumstances. Id. ¶ 14. The supreme court clarified that the court of appeals "possess[es] jurisdiction and authority to exercise its discretion in reviewing and deciding to allow or deny defendant's petition." Id. The court stated that this proposition should have been made clear in its decisions from Ledbetter, Stubbs, and State v. Thomsen, 369 N.C. 22, 789 S.E.2d 639 (2016). Id. ¶ 15. Furthermore, the court also stated that those opinions provide "regardless of whether Rule 21 contemplates review of defendant's motion to dismiss . . . if a valid statute gives the Court of Appeals jurisdiction to issue a writ of certiorari, Rule 21 cannot take it away." Id. Accordingly, the supreme court held that "the Court of Appeals has jurisdiction and authority to issue the writ of certiorari here, although it is not compelled to do so, in the exercise of its discretion," and that they were expressly overruling "Pimental, Harris, and any other Court of Appeals decisions that incorrectly hold or imply that the Court of Appeals lacks jurisdiction or authority to issue a writ of certiorari in similar circumstances, or which suggests that Rule 21 limits its jurisdiction or authority to do so." Id. ¶ 16.

Thus, for the foregoing reasons, the supreme court vacated and remanded the court of appeal's determination denying the dealer's writ of certiorari regarding the trial court's order excluding his motion to suppress.

(3) Interlocutory Appeals

In Fore v. Western North Carolina Conference of United Methodist Church, 284 N.C. App. 16, 2022-NCCOA-404, appeal docketed, No. 217A22 (N.C. July 15, 2022), the court of appeals considered whether a party is required to give a notice of hearing to other named parties when seeking an ex parte order for confidential records of a third party.

Plaintiff filed a civil action against a foster home and church conference. Id. ¶¶ 1–2. These claims arose from alleged abuse the victim suffered by her former foster home employee-parents during the 1970s. Id. ¶ 2. Plaintiff filed a motion for production of criminal investigation records pursuant to section 132-1.4 of the North Carolina General Statutes, seeking confidential records of alleged sexual abuse of any of the foster home's employees from "surrounding counties' sheriff's offices, Department of Social Services, and police departments." Id. ¶ 4. The Plaintiff did not provide the foster home and church a notice of hearing for her motion and proposed order. Id. ¶ 5. The trial court entered an order allowing the release of these records ex parte. Id. Subsequently, the foster home and church filed a notice of appeal. Id. ¶ 6.

On appeal, with Judge Tyson writing for the majority, the court of appeals dismissed the foster home and church's interlocutory appeal. Id. ¶ 28. The foster home and church argued that its substantial rights were violated because they were not given prior notice and an opportunity to oppose the victim's motion for production of criminal investigation records. Id. ¶ 9. The court determined that no formal notice was needed, "because the order to produce was related to and made to, and was obtained from, non-joined third parties." Id. Additionally, the court found the foster home and church were barred from raising any "DSS' or non-joined former employees' third parties' purported rights to notice

of records as a jus tertii defense, when neither are parties to this action, [because the foster home and church] cannot collaterally attack the orders and judgments entered in other cases to which they were not a party." Id. ¶ 21.

Similarly, the court of appeals found that the foster home and church did not have standing to challenge the trial court order. Id. ¶ 24. To have standing, the claim must be prosecuted in the name of the real party in interest. Id. ¶ 23. Here, the entity whose records were requested are the "real party in interest" with standing to challenge the motion. Id. ¶ 24. The foster home and church do not fall within this classification as they are not the party investigated in the records request. Id. Thus, the foster home and church do not have standing because they are not the real party in interest. Id.

The court of appeals dismissed the foster home and church's interlocutory appeal.

Chief Judge Stroud, writing for the dissent, found that the foster home and church adequately demonstrated a substantial right sufficient for reversal of the trial court order because the court should not have acted without proper notice of the hearing to all parties. Id. ¶ 29. Chief Judge Stroud would have found that prior notice with opportunity to be heard is fundamental in the concept of due process, and that this due process "extend[s] to the issue at hand where Defendants had no notice of Plaintiff's request to the trial court for entry of an ex parte order requiring disclosure of documents from DSS and several law enforcement agencies to Plaintiff." Id. ¶ 30.

The dissent further discussed that ex parte motions are generally treated as the exception to the general rule and are allowed only in specific circumstances. Id. ¶ 38. Otherwise, under Rule 5 of the North Carolina Rules of Civil Procedure, every motion is required to be served upon the other party. Id. The importance of notice is further defined

in local superior and district court rules and the rules for professional responsibility. Id. Furthermore, the victim failed to identify a statutory basis for having her motion heard ex parte contrary to this notion. Id.

Thus, Chief Judge Stroud dissented from the dismissal of the appeal.

E. Conflicting Opinions

In In re K.N., 381 N.C. 823, 2022-NCSC-88, the supreme court considered whether a Rule 63 substitute judge has the authority to make Rule 52 findings of fact when he or she did not preside over the presentation of evidence.

The Department of Health and Human Services petitioned the court to terminate a biological father's parental rights after the court found the child was neglected and dependent. Id. ¶ 3. An order terminating the biological father's parental rights was entered, including findings of fact and conclusions of law. Id. ¶¶ 3–4. On appeal, the supreme court vacated the termination order after determining the findings of fact were not supported by the evidence and were insufficient to support the determination that the biological father neglected the child. Id. ¶ 5 (citing In re K.N., 373 N.C. 274, 281–85, 837 S.E.2d 861, 867–69 (2020)).

Several months before the supreme court vacated the first termination order and remanded the case for further proceedings, the judge who presided over the presentation of evidence passed away. Id. ¶ 7. Though counsel for the biological father originally objected to a substitute judge revising a vacated order based on evidence she had not heard, all parties ultimately agreed that the matter could be assigned to the chief district court judge pursuant to Rule 63. Id. The chief judge – as the substitute judge – entered an order terminating the biological father's parental rights, including findings of fact that were more robust than the

first termination order. Id. ¶ 9. She based her decision on her review of the record, trial transcripts, and proposed findings of fact submitted by the parties. Id. ¶ 8. She did not reopen evidence or hold additional hearings, though she acknowledged her authority to do so. Id.

On appeal, the supreme court vacated the substitute judge's termination order. Id. ¶ 11. The supreme court concluded that a Rule 63 "substitute judge who did not preside over the matter lacks the power to find facts or state conclusions of law." Id. ¶ 17; see also id. ¶¶ 17–20 (citing In re E.D.H., 381 N.C. 395, 2022-NCSC-70 (finding a substitute judge had the authority to perform the ministerial action of signing an order to be filed after a retired judge who presided over the matter performed the judicial action of making findings of fact and conclusions of law) and In re C.M.C., 373 N.C. 24, 832 S.E.2d 681 (2019) (finding a judge who presided over the presentation of evidence had the authority to enter a subsequent termination order correcting an improperly signed termination order previously entered by a judge who did not preside over the presentation of evidence)).

The supreme court explained that the function of finding facts is specific to the judge presiding because "only that judge has the opportunity to observe the witnesses and weigh the evidence." Id. ¶ 24. Further, the supreme court explained that the 2001 amendment to Rule 63 (omitting the requirement that a verdict be returned or findings of fact and conclusions of law be filed) did not modify the functions that a substitute judge is permitted to perform, but rather expanded the stage of a case during which a substitute judge might have authority to intervene. Id. ¶ 22. Finally, the supreme court held that the biological father did not waive his right to appeal the termination order by agreeing that the chief district court judge could be assigned the matter because Rules 52 and 63 impose statutory mandates,

which are reviewable de novo, and the failure to ensure the finder of fact has personal knowledge of the case prejudiced biological father. Id. ¶ 13.

By making new findings of fact and conclusions of law without having presided over the presentation of evidence, the substitute judge contravened the requirements of Rule 52 and Rule 63 of the North Carolina Rules of Civil Procedure. Id. ¶ 18. Accordingly, the supreme court vacated the termination order and remanded the case for a new hearing. Id. ¶ 24.

F. Arbitration

In R.E.M. Construction, Inc. v. Cleveland Construction, Inc., 285 N.C. App. 851, 2022-NCCOA-557, the court of appeals considered whether an arbitration panel exceeded its authority in determining an equitable award.

A general contractor terminated a subcontractor from a project in Asheville. Id. ¶ 2. The subcontractor filed suit to recover damages. Id. ¶ 4. A panel of arbitrators issued an award, determining the subcontractor was improperly terminated. Id. ¶ 5. After determining the subcontract included insufficient evidence on which to base a calculation of contractual damages, the panel awarded damages it determined "would fashion an equitable remedy" under the American Arbitration Association Rules. Id. ¶ 6.

After the trial court confirmed the award, the general contractor challenged the amount of the award determined by the panel (but not the decision's merits). Id. ¶¶ 10–11.

The court of appeals observed that an award of equitable remedies does not exceed an arbitrator's authority if (1) state law allows for the remedy and (2) the arbitration contract does not unequivocally preclude the remedy. Id. ¶ 15 (citing WMS, Inc. v. Weaver, 166 N.C. App. 352, 357, 602 S.E.2d 706, 709 (2004)). State law unquestionably allows a panel

of arbitrators to fashion equitable remedies. Id. Thus, the court of appeals analyzed whether the subcontract at issue "unequivocally precluded" the panel's award. Id.

Finding the subcontract did not preclude the equitable remedy the panel fashioned, the court of appeals affirmed the trial court's confirmation of the arbitrators' award. Id. ¶ 16. The court of appeals found that the subcontract expressly vested the panel with broad discretion, including the discretion to craft equitable remedies. Id. Accordingly, the panel did not exceed its authority. Id.

In Snipes v. TitleMax of Virginia, Inc., 285 N.C. App. 176, 2022-NCCOA-558, rev. denied, 884 S.E.2d 740 (N.C. 2023), the court of appeals considered whether an arbitrator's failure to apply a choice of law provision that was contrary to the essence of the contract permits a court to vacate an arbitration award under the Federal Arbitration Act.

A borrower and her lender underwent arbitration to remedy the borrower's claim that their loan agreement violated the North Carolina Consumer Finance Act. Id. ¶ 5. The underlying dispute arose from a loan issued by the lender to the borrower for $2,500. Id. ¶ 2. The agreement provided that the borrower's loan was secured by title to her vehicle and had an interest rate of approximately 144%. Id. Pertinent to the underlying dispute in this case are two provisions in the agreement. Id. The first provision at issue stated that the "Loan Agreement shall be governed by the laws of Virginia." Id. The second provision provided an exception to the choice of law provision and stated that "the Waiver of Jury Trial and Arbitration Provision is governed by the Federal Arbitration Act." Id. At arbitration, the arbitrator issued an award in the borrower's favor and awarded her damages. Id. ¶ 6. In coming to this conclusion, the arbitrator stated that he had to choose between applying Virginia law or North Carolina law. Id. He further articulated the differences

between the two laws as the underlying "loan carried an interest rate of nearly 150%, a rate that clearly violates the North Carolina Consumer Finance Act, but that is arguably not illegal in Virginia." Id. Nevertheless, the arbitrator's analysis failed to mention or consider the express Virginia choice of law provision. Id. Rather, the arbitrator focused almost exclusively on the North Carolina Consumer Finance Act in his analysis. Id. Upon receiving her favorable result in arbitration, the borrower sought to have a trial court confirm the award and enter judgment. Id. ¶ 7. In opposition, the lender filed a motion to vacate the award. Id. In doing so, the lender contended, in part, that the arbitrator's award "strayed both away from the interpretation and application of the agreement." Id. The trial court granted the lender's motion and vacated judgment. Id. ¶ 8.

On appeal, the court of appeals affirmed the trial court's judgment vacating the arbitrator's award. Id. ¶ 39. Generally, under the Federal Arbitration Act, a court must affirm an arbitration award "unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11" of the act. Id. ¶ 10. Therefore, an arbitrator's award under the act may only be vacated in the limited circumstances prescribed under section 10(a). Id. ¶ 12. Section 10(a) allows for judgment to be vacated in situations where:

> (1) where the award was procured by corruption, fraud, or undue means; (2) where there was evident partiality or corruption in the arbitrators, or either of them; (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or if any other misbehavior by which the rights of any party have been prejudiced; or (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter was not made.

Id.

The language of the statute indicates that these circumstances for challenging an arbitrator's award are exclusive. Id. However, courts have permissibly read other doctrines into this text. Id. ¶ 13. Amongst those doctrines is the essence of the contract doctrine. Id. This doctrine has been accepted as a proper ground for review of these claims and a challenge under this doctrine falls within the exception in section 10(a) of the Federal Arbitration Act. Id. ¶ 23 (referencing Oxford Health Plans LLC v. Sutter, 569 U.S. 564, 569-70 (2013) (explaining under section 10(4) of the Federal Arbitration Act an arbitrator's award decision may be overruled if decided only his own policy rather than "drawing its essence from the contract"). Under the doctrine, the bar for an arbitrator's award meeting this standard is high. Id. ¶ 26. The doctrine will not provide a basis for vacating an award if the arbitrator "arguably construe[d] or appl[ied] the contract." Id. Therefore, this doctrine allows courts to vacate an award only when the arbitrator "strayed from his delegated task of interpreting a contract, not when he performed that task poorly." Id. ¶ 27. An arbitrator's disregard for an unambiguous contract falls within this classification. Id. ¶ 28. Here, the loan agreement unambiguously asserted that Virginia law applied where it states: "[t]his Loan Agreement shall be governed by the laws of the State of Virginia." Id. ¶ 30. However, the arbitrator's award never considers or mentions the choice of law provision in its analysis. Id. ¶ 32. Because the award "contradicted the plain and unambiguous" terms of the agreement, the award was contrary to the essence of the contract. Id.

Thus, for the foregoing reasons, the court of appeals affirmed the trial court's order vacating the borrower's arbitration award.

In JRM, Inc. v. HJH Cos., Inc., ___ N.C. App. ___, 883 S.E.2d 217 (2023), the court of appeals addressed (1) whether the trial court erred in concluding that there was no

agreement to arbitrate and denying the company's motion to compel, and (2) whether the appeal was interlocutory.

A manufacturer of irrigation equipment sued its chief financial officer ("CFO") and a separate company after the CFO and the company allegedly signed a contract against the manufacturer's wishes, binding the manufacturer. Id. at ___, 883 S.E.2d at 218–19. The purported contract "included a reference to arbitration agreement provisions included on [the company's] website." Id. at ___, 883 S.E.2d at 218.

The company moved to dismiss the manufacturer's complaint, or, in the alternative, to compel arbitration. Id. at ___, 883 S.E.2d at 219. The manufacturer served two affidavits in opposition thereto; the company filed one affidavit in support after the deadline to do so had passed. Id. Following a hearing on the company's motions, the trial court struck the company's affidavit as untimely, concluding that the company had failed to meet its burden of showing that a valid arbitration agreement existed between it and the manufacturer and denied its motion to compel arbitration. Id. The company appealed. Id.

First, the court of appeals noted that, generally, an order denying arbitration is interlocutory yet immediately appealable because it involves "a substantial right" that might be lost if appeal is delayed. Id. (quoting Earl v. CGR Dev. Corp., 242 N.C. App. 20, 22, 773 S.E.2d 551, 553 (2015)).

Next, the court of appeals stated that trial courts should enforce the terms of an arbitration agreement where such an agreement exists; by that same token, trial courts may properly deny motions to compel arbitration where an arbitration agreement does not exist. Id. at ___, 883 S.E.2d at 220. On a motion to compel arbitration, if the opposing party opposes the motion, the trial court should order the parties to arbitrate unless it finds that

there is no valid agreement. Id. (quoting N.C. Gen. Stat. § 1-569.7(a)(2) (2021)). The party seeking to compel arbitration must show that the parties mutually agreed to arbitrate their disputes. Id. (quoting Slaughter v. Swicegood, 162 N.C. App. 457, 461, 591 S.E.2d 577, 580 (2004)). Then, a trial court's findings regarding the existence, or lack thereof, of a valid arbitration agreement are conclusive on appeal if supported by competent evidence, even if the same evidence could support a finding to the contrary. Id. (quoting Slaughter, 162 N.C. App. at 457, 591 S.E.2d at 580). A trial court may deny a motion to compel "if it determines evidence of the very existence of an arbitration agreement is lacking." Id. (alteration omitted) (quotation marks omitted) (quoting Evangelistic Outreach Ctr. V. General Steel Corp., 181 N.C. App. 723, 727, 640 S.E.2d 840, 843 (2007)).

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

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

(1) Motions to Compel

In Canteen v. Charlotte Metro Credit Union, 286 N.C. App. 539, 2022-NCCOA-779, petition for disc. rev. filed (N.C. Jan. 6, 2023), the court of appeals considered whether a bank was permitted to unilaterally add an arbitration provision to an existing membership agreement.

A customer opened an account with the bank and signed a deposit agreement. Id. ¶ 2. The agreement provided a choice of law provision, as well as a provision stating that the bank reserved the right to change the terms, notifying the customer thereof electronically. Id. ¶ 9.

Several years later, the bank amended the agreement to include a provision requiring any dispute between the customer and the bank to be resolved via arbitration and requiring the customer to waive the right to bring a class action. Id. ¶ 4. The bank notified the customer "for three consecutive months" via multiple emails in which the subject line read "Changes to the Membership and Account Agreements." Id. ¶ 11. These emails contained hyperlinks respectively entitled "Information about Arbitration," "Arbitration and Class Action Waiver," and "Membership and Account Agreement Change in Terms." Id. The "Arbitration and Class Action Waiver" hyperlink led to a document that illustrated the amendment requiring arbitration as a means of dispute; the same document also allowed the customer to elect to opt out of this new provision. Id. ¶ 12.

The customer never noticed these emails from the bank. Id. Accordingly, the customer did not notify the bank whether she wanted to opt out of the arbitration provision. Id. ¶ 13. The customer continued using her account with the bank. Id.

The customer filed a class action against the bank, alleging that it had charged her overdraft and non-sufficient fees in violation of the agreement. Id. ¶¶ 1, 3. The bank filed a motion to stay and to compel arbitration. Id. ¶ 5. The trial court entered an order denying the motion. Id. ¶ 6. The bank appealed. Id.

On appeal, a divided panel of the court of appeals reversed and remanded the trial court's order. Id. ¶ 23. The majority, in an opinion authored by Judge Dillon, found that the amendment constituted a binding arbitration agreement because it "was a change to the forum selection procedure," the customer agreed to be notified of any amendments via email, and she failed to opt out of the arbitration requirement. Id. ¶ 15.

The majority distinguished this case from Sears Roebuck & Co. v. Avery, 163 N.C. App. 207, 593 S.E.2d 424 (2004). Id. ¶ 16. In Sears, the court of appeals held that "no valid arbitration agreement existed based on a unilateral amendment because the original contract 'made no reference to arbitration or any other dispute resolution procedures and did not in any manner address the forum in which a customer could have disputes resolved.'" Id. (quoting Sears, 163 N.C. App. at 208, 593 S.E.2d at 426). Conversely, the majority reasoned, the agreement between the customer and the bank contained a choice of law provision, which put the customer on notice that the bank could change this provision to require disputes to be settled in a different forum, such as "before an arbitrator." Id. ¶ 17 (citing Scherk v. Alberto-Culver Co., 417 U.S. 506, 519 (1974)). The majority also observed that other jurisdictions have enforced arbitration provisions "where a bank customer was provided notice of an amendment containing the provision." Id. ¶ 18 (collecting cases).

The majority found the fact that the customer had not read the emails from the bank of no moment because "she agreed to be bound to the amendments when notified of them by email." Id. ¶ 20. Since the customer could read and write, the majority would not relieve her from liability upon the amendment when she could have informed herself thereof but failed to do so. Id. (quoting Weaver v. St. Joseph, 187 N.C. App. 198, 213, 652 S.E.2d 701, 712 (2007)).

For these reasons, the majority reversed and remanded the trial court's order. Id. ¶ 23.

In dissent, Judge Arrowood agreed with the trial court that the bank had no authority to unilaterally amend the agreement and add "entirely new terms." Id. ¶ 27. Specifically, the agreement had only put the customer on notice of the bank's ability to make amendments, not to add "additional, uncontemplated terms." Id.

The dissent observed that, "because arbitration agreements are governed by the principles of contracts, they are also subject to the implied covenants of good faith and fair dealing." Id. ¶ 26 (citing Bicycle Transit Auth., Inc. v. Bell, 314 N.C. 219, 228, 333 S.E.2d 299, 305 (1985)). In the dissent's view, the bank "blatantly breached the covenants of good faith and fair dealing provisions inherent in every contract" by "requiring" customers to navigate through "numerous links and forms to determine that it was attempting to add new terms to the [a]greement." Id. ¶ 29. Moreover, "allowing [the bank] unlimited authority to alter the terms of an established contract renders the contract illusory." Id.

The dissent explained that this view was "consistent with the previous holdings" of the court of appeals, "which the majority [was] required to follow under the holding set forth in In re Civil Penalties." Id. ¶ 30 (citing In re Civil Penalties, 324 N.C. 373 384, 379

S.E.2d 30, 37 (1989)). Particularly, the dissent would have found that Sears controlled because the agreement at issue there, much like the agreement at issue here, "did not contain an arbitration clause," and thus the company was not permitted to unilaterally add a new arbitration provision. Id. ¶¶ 31–32 (citing Sears, 163 N.C. App. at 212, 218–19, 593 S.E.2d at 428, 432); see also id. ¶ 32 (collecting cases).

Accordingly, the dissent opined that the majority violated "previous precedent" of the court of appeals as well as "black letter . . . contract law." Id. ¶ 33.

IV. INSURANCE

A. Coverage

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

A manufacturer filed a declaratory judgment action against multiple insurers "seeking a declaration of the duties and obligations" of each insurer with respect to benzene litigation under policies sold to the manufacturer over several decades. Id. at 391, 881 S.E.2d at 601–02. The manufacturer produced "automotive, hardware, and plumbing products" containing benzene and had accrued "hundreds of personal injury lawsuits" against it "seeking damages for bodily injury" caused by exposure to benzene over time. Id. at 389, 881 S.E.2d at 600.

The manufacturer's action presented a unique personal injury case, as benzene exposure, unlike injuries occurring at a definite point in time, is by its nature an injury

"spanning multiple insurance-policy periods and implicating different providers." Id. at 389, 881 S.E.2d at 601.

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

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

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

The supreme court found that "benzene causes bodily injury upon exposure." Id. For example, although "cancer is a manifestation of the injury that occurs upon benzene exposure," it is not the injury itself. Id. The supreme court concluded that, although it held that "exposure to benzene is synonymous with the coverage-triggering injury, that injury is only compensable if it results in damages." Id. "[I]f a person is exposed to benzene but suffers no consequences," there is "no compensable harm." Id. (emphasis in original).

Borrowing from federal court opinions, the supreme court found that "'[c]umulative disease cases are different from the ordinary accident or disease situation' in part because,

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

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

Next, the supreme court addressed "how to properly allocate [the manufacturer]'s benzene liabilities among the [insurers]." Id. at 406, 881 S.E.2d at 610. The insurers argued that "pro rata allocation [was] appropriate based on the terms of their policies"; the manufacturer "advocate[d] for adopting an all sums approach." Id. at 407, 881 S.E.2d at 611. "Under a pro rata . . . allocation approach, each triggered policy bears a share of the total damages proportionate to the number of years it was on the risk, relative to the total number of years of triggered coverage." Id. at 406–07, 881 S.E.2d at 610–11 (citation and quotation marks omitted). "By contrast, all sums, or joint and several, liability allows recovery in full under any triggered policy of the policyholders' choosing and leaves the selected insurer to pursue cross-claims against other carriers whose policies were also available." Id. (citation and quotation marks omitted) (emphasis omitted). The supreme

court concluded that the policies' "non-cumulation and continuing coverage provisions" supported pro rata allocation. Id. at 417, 881 S.E.2d at 617.

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

Justice Barringer wrote separately, joined by Justice Hudson, dissenting in relevant part. Id. at 423–37, 881 S.E.2d at 621–28. Regarding the issue of when coverage is triggered, the dissent agreed with the majority that "there is no material question of fact that benzene exposure caused 'bodily injury' in the form of alterations to DNA at the time of exposure." Id. at 430, 881 S.E.2d at 624. However, because the "occurrence is benzene exposure," id., the dissent disagreed with the majority's approach, id. at 431, 881 S.E.2d at 625. Specifically, the dissent found that the majority, "without analyzing the policies or citations," concluded "that an 'application of a continuous trigger would be at odds with [the supreme court's] holding that, in benzene cases, the injury that triggers coverage occurs at the time of exposure.'" Id. (emphasis in original). Although "[i]n this case, there is no material question of fact that a bodily injury in fact occurs upon exposure to benzene," the majority's approach would not lend itself to "future cases" in which there is such a material question of fact. Id.

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

In Ha v. Nationwide General Insurance Company, 286 N.C. App. 581, 2022-NCCOA-783, the court of appeals considered whether proof of mailing a cancellation notice of an insured's insurance policy is sufficient to cancel the policy under section 58-44-16 of the North Carolina General Statutes.

Homeowners brought action against an insurer after a house fire destroyed their residence. Id ¶ 2. Prior to the fire, the insurer mailed a cancellation notice of the homeowners' policy. Id. The court of appeals previously considered arguments in this case about the meaning of "furnishing" in section 58-41-15(c) of the North Carolina General Statutes. Id. ¶ 3. The court defined "furnishing" as "actual delivery to and/or receipt of [a notice of cancellation] by the insured." Id. In applying this definition, the court found that merely mailing the cancellation notice was insufficient to cancel the policy. Id. This decision was subsequently vacated by the supreme court, which remanded the matter "to determine whether Article 41, Article 36 or other statutes govern [the] matter." Id. (quoting

Ha v. Nationwide Gen. Ins. Co., 375 N.C. 87, 845 S.E.2d 436 (2020)). On remand, the trial court held that although section 58-41-15 did not apply to the policy, section 58-44-16 did apply. Id. ¶ 4. In applying section 58-44-16 of the North Carolina General Statutes to the underlying facts, the trial court concluded that the insurer complied with the statute by providing proof of the mailed cancellation notice. Id. The homeowners appealed this judgment to the court of appeals. Id.

In Judge Griffin's majority opinion, the court of appeals held that the homeowners' policy was properly cancelled under section 58-44-16 of the North Carolina General Statutes. Id. ¶ 8–9. Section 58-44-16(f)(10) of the North Carolina General Statutes provides that standard fire policies "may be cancelled at any time by th[e] insurer by giving the insured a five days' written notice of cancellation[.]" Id. ¶ 7. Because the word "giving" is not defined under the statute, the court applied the word's plain meaning and concluded that the word "includes the act of mailing notice of cancellation to the insured." Id. ¶ 8. Furthermore, while other statutory provisions in the code expressly require certain insurance policies to issue cancellation notices through certified mail or to be received by the recipients, section 58-44-16 does not contain these requirements. Id. ¶ 9. Thus, the court held that the "legislature intended mailing to constitute 'giving' notice of cancellation." Id.

Judge Arrowood, writing for the dissent, expressed that he would "hold that for an insurance company to effectively cancel a policy [under section 58-44-16], they would need to show proof the notice of cancellation was actually received." Id. ¶ 15. Judge Arrowood maintained that courts are constrained by a reasonableness standard when they read words left undefined by a statute according to their plain meaning. Id. ¶ 16. If the statute is unclear, "courts must resort to statutory construction to determine legislative will and the evil the

legislature intended the statute to suppress." Id. (quoting State v. Jackson, 353 N.C. 495, 501, 546 S.E.2d 570, 574 (2001)). Judge Arrowood explained that our courts have consistently interpreted insurance policy provisions liberally to afford coverage whenever reasonable, irrespective of whether the underlying statute extends or excludes coverage. Id. Lastly, Judge Arrowood highlighted that other jurisdictions interpreting similar statutes have found that proof of mailing is insufficient to cancel an insured's policy. Id. ¶ 18.

B. UIM

In Dean v. Rousseau, 283 N.C. App. 480, 2022-NCCOA-376, rev. denied, 881 S.E.2d 306 (N.C. 2022), the court of appeals considered whether the statute of limitations bars an action against an uninsured motorist carrier where the complaint was filed prior to the statute of limitations, but service occurred after the limitations period expired.

The administrator of the decedent's estate filed a complaint for wrongful death and survivorship against an uninsured motorist following a car crash that resulted in the decedent's death. Id. ¶ 2. This complaint was filed against the individual motorist on November 12, 2020, which was two days before the statute of limitations was to expire. Id. ¶¶ 2, 12. The motorist did not have car insurance, however, the decedent had insurance policies covering uninsured motorists with two of her insurance carriers. Id. ¶ 2. A civil summons was issued on the same day the complaint was filed. Id. ¶ 3. Service of the summons and complaint was made by the Commissioner of Insurance on December 1, 2020, and January 26, 2021. Id. Subsequently, both carriers filed answers and motions to dismiss against the administrator pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. Id. ¶ 4. The carriers argued that the administrator failed to serve them within

the applicable statute of limitations. Id. The trial court granted the uninsured motorist carriers' motions to dismiss, and the administrator appealed. Id.

On appeal, the court of appeals affirmed the trial court's orders on the uninsured motorist carrier's motion to dismiss. Id. ¶ 14. Section 20-279.21(b)(3)(a) of the North Carolina General Statutes establishes claims by uninsured motorists against uninsured motorist carriers. Id. ¶ 7. However, the statute fails to provide a time limitation for service of an insured carrier. Id. ¶ 8. Thus, the court evaluated prior case law. In doing so, the court of appeals affirmed the trial court's decision based on precedent holding in favor of insurance carriers on this issue. Id. ¶ 12 (citing In re Civil Penalty, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) (stating "[w]here a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court.")). These cases articulated that uninsured carriers must be served within the statute of limitations period. See Thomas v. Washington, 136 N.C. App. 750, 754–56, 525 S.E.2d 839, 842–43 (2000) (holding in a suit for personal injuries arising from a car accident that failure to serve an uninsured motorist carrier within the statutory time limit barred the driver's claim despite the timely issuance of alias and pluries summons to named defendants); Davis v. Urquiza, 233 N.C. App. 462, 467, 757 S.E.2d 327, 332 (2014) (holding "[w]here a plaintiff seeks to bind an uninsured motorist carrier to the result in a case, the carrier must be served by the traditional means of service, within the limitations period"); and Powell v. Kent., 257 N.C. App. 488, 492, 810 S.E.2d 241, 245 (2018) (holding that "while we are unable to discern any requirement in N.C. Gen. Stat. § 20-279.21(b)(3)(a) that specifically requires in an uninsured motorist action that service of process also be accomplished before the date the statute of limitation

expires, we are bound by the prior determination in Thomas and Davis."). This approach differs from other articulations of the statutes of limitations that "cases are timely when filed within the statute of limitations, with service of process permitted within the time frames set forth in Rule 4 of the North Carolina Rules of Civil Procedure, even when service is accomplished after the statute of limitations has expired." Id. ¶ 11 (citing Powell, 257 N.C. App. at 492, 810 S.E.2d at 245). The court of appeals affirmed but requested clarification from the general assembly or the supreme court. Id. ¶ 13.

In North Carolina Farm Bureau Mutual Insurance Company, Inc. v. Herring, 284 N.C. App. 334, 2022-NCCOA-456, appeal docketed, No. 227A22 (N.C. July 26, 2022) the court of appeals considered whether a driver under her mother's uninsured motorist insurance policy qualified as a "resident" when she did not reside exclusively at her mother's home.

An insurer filed a complaint against a driver seeking a declaratory judgment of the parties' rights with regards to the insurer's uninsured motorist insurance policy. Id. ¶ 5. The action arose from an automobile accident, in which a driver sustained injuries. Id. ¶ 2. The driver sought to recover compensation for the accident under the UIM policy that the insurer issued to her mother and stepfather. Id. Under the policy, only the mother and stepfather were named insureds, and the policy stated that the insurer would "pay compensatory damages which the Insured is legally entitled to recover from the owner or operator of an uninsured motor vehicle because of . . . bodily injury sustained by an insured and caused by an accident." Id. ¶¶ 2–3. An "insured" was defined under the policy as "you or any family member." Id. "Family member" was further defined as "a person related to you by blood, marriage, or adoption who is a resident of your household." Id. However,

the word "resident" was not defined under the policy. Id. In examining the driver's claim, the insurer conducted an interview with the driver where she testified that she lived with her mother for four months out of the year, with she spent the remaining time spent with her father. Id. ¶ 4. She stated that she "always" maintained this relationship. Id. The driver also testified that her father's address was listed on her driver's license, and she is registered to vote in that county. Id. Based on this testimony, the insurer filed a motion for summary judgment. Id. ¶ 5. The driver also filed a motion for summary judgment. Id. To support her motion, the driver filed several affidavits from family members stating that she maintained a permanent room at her mother's home, she had not maintained her own private residence for at least fifteen years, she routinely accepted mail at her mother's home, and her mother intended to include her under the policy as a member of her mother's household. Id. ¶ 6. The trial court filed an order granting summary judgment to the driver. Id. ¶ 7.

On appeal, with Judge Griffin writing for the majority, the court of appeals affirmed the trial court's judgment finding that there was sufficient evidence to establish that the driver maintained her residence in her mother's household. Id. ¶ 8. When faced with a question of an interpretation of an insurance policy, the court aims to reach the intent of the parties at the time the policy was issued. Id. ¶ 10 (citing Woods v. Nationwide Mut. Ins. Co., 295 N.C. 500, 505, 246 S.E.2d 773, 777 (1978)). "Insurance policies must be given a reasonable interpretation and where there is no ambiguity they are to be construed according to its terms." Id. (quoting Jamestown Mut. Ins. Co. v. Nationwide Mut. Ins. Co., 266 N.C. 430, 435, 146 S.E.2d 410, 414 (1966)). However, when an ambiguity arises and there are two plausible interpretations, "the provision will be construed in favor of coverage and against the company." Id. Here, the word "resident" is ambiguous. Id. ¶ 11. Residency

determinations are individualized and fact specific; one seeking coverage must show that she "actually lived in the same dwelling as the insured for a relatively meaningful period of time." Id. ¶ 13. However, the residency does not have to be exclusive to receive coverage. Id. In evaluating the record, the court concluded that the evidence supported a finding that, at the very least, the driver maintained split residence at her mother and father's home. Id. ¶ 17. The court supported this conclusion with the driver's sworn statement that she had "always" lived in her mother's home for "four months out of the year," that she had a permanent room in her mother's home with clothing and toiletries, and that she was included as a driver on the UIM policy. Id. ¶ 15. Furthermore, while the driver did not consistently reside at her mother's home, for purposes of establishing residence under the policy, the residence does not need to be continuous or without interruption. Id. (citing Davis by Davis v. Md. Cas. Co., 76 N.C. App. 102, 106, 331 S.E.2d 744, 746 (1985)).

Thus, the court of appeals affirmed the trial court's grant of summary judgment to the driver under the UIM policy.

Judge Dillon, writing for the dissent, concluded that the evidence when taken in a light most favorable to the driver shows that the driver was a resident of a household. Id. ¶ 23. However, the judge disagreed that the evidence conclusively established that the driver was a resident of her mother's household at the time of the accident. Id. ¶ 24. He argued summary judgment in this case would be a high bar as the burden rests with the driver to prove her residency. Id. ¶ 26.

The dissent contended that the evidence on which the driver relied is primarily based on self-serving statements in her affidavits, and as an interested party, the credibility of the statements should be considered by a jury. Id. ¶ 28. Secondly, the dissent argued that there

is other evidence present in the record that creates an issue of fact. Id. ¶ 29. Specifically, the dissent looked to the driver's sworn statement that she identified her current address to be her father's address. Id. The driver further testified that prior to living at her father's current address she lived with her father at another address for ten years. Id. Separately, the driver also admitted that her voting registration and car title is registered, and she receives her bank statements and other mail at her father's address. Id. ¶ 30.

Lastly, the dissent indicated that the driver did not cite a decision from the state supreme court that an adult may be a resident of two separate households for the purpose of insurance coverage. Id. ¶ 33. On the contrary, Bruton v. N.C. Farm Bureau Mutual Insurance Company, 127 N.C. App. 496, 490 S.E.2d 600 (1997) closely aligns with the facts in this case. Id. In Bruton, the court held that an adult child was not a resident for purposes of coverage where the child spent "two to three weekends per month and stored some toiletries' at his father's home, but where the evidence also showed that he 'spent a majority of his time at his girlfriend's home" and utilized his girlfriend's address for his mail and other facets of life administration. Id.

Based on this evidence, the dissent would have found that there was an issue of fact concerning whether the driver was a resident of the mother's household.

In North Carolina Farm Bureau Mutual Insurance Company v. Hebert, 285 N.C. App. 159, 2022-NCCOA-556, rev. allowed, 883 S.E.2d 451 (N.C. 2023), the court of appeals considered whether a motorist with bodily injury liability insurance coverage can recover through his own underinsured motorist insurance policy after liability coverage under his own policy was paid out to the motorist and other passengers involved in an accident and after he recovered under his parent's underinsured motorist insurance policy.

An insurer filed a complaint for declaratory judgment of insurance coverage owed to a motorist arising from an accident. Id. ¶ 5. The motorist was a passenger in his own vehicle when it collided with another car. Id. ¶ 2. The driver of the vehicle and another of its passengers died, and the remaining passengers sustained injuries. Id. The motorist's vehicle was covered by a personal automobile policy issued by the insurer. Id. ¶ 3. The policy provided coverage for bodily injury liability of $50,000 per person, but no more than $100,000 per accident. Id. The policy also provided coverage for underinsured motorists for $50,000 per person, but no more than $100,000 per accident. Id. Subsequently, the insurer paid $100,000 under the liability coverage for the accident, which was divided amongst the four passengers in the accident, with the motorist receiving $100. Id. Separately, the motorist also qualified as an insured for the underinsured motorist coverage of a personal automobile policy issued by the insurer to the motorist's parents. Id. ¶ 4. This UIM coverage provided coverage for $100,000 per person, but no more than $300,000 per accident. Id. At trial, the insurer argued that because the motorist's vehicle was not an underinsured motor vehicle under the motorist's policy, the UIM coverage under the motorist's policy was inapplicable. Id. ¶ 5. The insurer further alleged that the "multiple claimant exception" to an underinsured motorist vehicle found in section 20-279.21(b)(4) of the North Carolina General Statutes did not apply to the parent's policy because the motorist's vehicle was not insured under the policy. Id. Accordingly, the insurer contended that the motorist was only entitled to $99,900 – the $100,000 per person policy limit in the UIM coverage minus the $100 the motorist previously received in liability coverage. Id. The insurer moved for judgment on the pleadings. Id. ¶ 7. The trial court denied the insurer's motion and concluded that the motorist's policy provided UIM coverage for the

motorist's claim. Id. The court then entered judgment on the pleadings for the motorist. Id.

On appeal, with Judge Gore writing for the majority, the court of appeals affirmed the judgment holding that because the multiple claimant exception does not apply the trial court properly denied the insurer's motion for judgment on the pleadings. Id. ¶ 17. The insurer contended that section 20-279.21(b)(4) of the North Carolina General Statutes precluded the motorist's recovery because the UIM limits of the motorist's policy are not greater than the bodily injury liability limits of his policy. Id. ¶ 9. The statute provides in part that:

> An "underinsured motor vehicle" . . . includes an "underinsured highway vehicle," which means a highway vehicle with respect to the ownership, maintenance, or use of which, the sum of the limits of liability under all bodily injury liability bonds and insurance policies applicable at the time of the accident is less than the applicable limits of the underinsured motorist coverage for the vehicle involved in the accident and insured under the owner's policy.

Id. ¶ 10.

In 2004, this statute included an amendment with the multiple claimant exception. This statute provides that –

> For the purposes of an underinsured motorist claim asserted by a person injured in an accident where more than one person is injured, a highway vehicle will also be an "underinsured highway vehicle" if the total amount actually paid to that person under all bodily injury liability and insurance policies applicable at the time of the accident is less than the applicable limits of underinsured motorist coverage for the vehicle involved in the accident and insured under the owner's policy. Notwithstanding the immediately preceding sentence, a highway vehicle shall not be an "underinsured motorist vehicle" for purposes of an underinsured motorist claim under an owner's policy insuring that vehicle provides underinsured motorist

> coverage with limits that are greater than that policy's injury liability limits.

Id. This state has interpreted this exception to be limited to circumstances "when the amount paid to an individual claimant is less than the claimant's limits of the UIM coverage after liability payments to multiple claimants." Id. ¶ 13 (quoting Integon Nat'l Ins. Co. v. Maurizzio, 240 N.C. App. 38, 44, 769 S.E.2d 415, 420 (2015)). However, the majority found that state law permits interpolicy stacking to calculate the applicable limits of underinsured motorist coverages, id. ¶ 12, and that the multiple claimant exception did not apply, id. ¶ 17.

Judge Arrowood, writing for the dissent, concluded that the multiple claimant exception applied. Id. ¶ 18. In dissenting, Judge Arrowood reiterated the definitions under section 20-279.21 of the North Carolina General Statutes. Id. ¶¶ 19–20. As previously stated, the first definition of "underinsured motor vehicles," includes highway vehicles where "the sum of the limits of liability under all bodily injury liability bonds and insurance policies applicable at the time of the accident is less than the applicable limits underinsured motorist coverage for that vehicle involved in the accident and insured under the owner's policy." Id. ¶ 21. Here, because the sum of the liability limits is equal to the applicable limits of underinsured motorist coverage, the vehicle does not qualify under this definition. Id.

Likewise, the vehicle did not qualify under the second definition either. Id. ¶ 21. The second definition, under the multiple claimants' exception, provides that in accidents with more than one person injured "if the total amount paid to the person under all bodily injury liability bonds and insurance applicable at the time of the accident is less than the applicable limits of underinsured motorist coverage for the vehicle involved in the accident

and insured under the owner's policy," the vehicle will qualify as an underinsured vehicle. Id. ¶ 20. However, the statute further provides that the vehicle is not included within the definition "unless the owner's policy insuring that vehicle provides underinsured motorist coverage with limits that are greater than that policy's bodily injury liability limits." Id. Again, the dissent Arrowood found this definition not satisfied as the underinsured motorist coverage was equal to the body injury liability. Id. ¶ 21. Further, the dissent contended that since this language centers on the motorist's own policy, interpolicy stacking should not be allowed. Id. ¶ 22. Thus, Judge Arrowood contended that the exception applied and that the trial court was not permitted to stack defendant's policy limits with his parent's policy. Id. ¶ 24.